



Mark N. Tschetter
Victor L. Sulzer
Peter E. Muccio
Lindsay E. Jasper
Karen A. Harvey
Rachel L. Griffin
Kory J. Cook
Christopher R. Cunningham
Jonathon G. Carlson

Denver
Tel 303.699.3484
Fax 720.449.0160

Colorado Springs
Tel 719.550.8004
Fax 719.227.1181

Grand Junction
Tel 970.822.7020

Evictions
Tel 303.766.8004
Fax 303.766.1181

3600 S. Yosemite St.
Suite 828
Denver, CO 80237

www.thslawfirm.com

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Posting Fees After 2021

Date: February 2023
To: Tschetter Sulzer Clients
From: Tschetter Sulzer
Re: Impact of 2021 Laws on Posting Fees

Overview and Summary of Recommendations

Theoretically, posting fees were impacted by the 2021 changes in the late fee law as discussed below. For the reasons discussed, we advise our clients as follows:

1. Multifamily landlords should not charge posting fees.
2. Single Family clients should carefully consider whether it makes sense to charge posting fees and whether they are willing to accept the risks of charging posting fees.
3. We strongly recommend not charging a posting fee if you are not using (paying) a third party vendor to serve the notice and if the tenant could otherwise argue that the charge is a profit center for the landlord.
4. Do not charge a posting fee under any circumstances if your lease does not provide for the fee.

Please remember that lease advice or any lease sold by TS complies with current federal and state laws in our opinion. However, any lease and or lease language can be challenged, regardless of the amount of time and expertise spent on creating it. Additionally, judges, as individuals, are not always predictable and may sometimes make rulings that contradict the lease and/or contract law. Accordingly, TS cannot guarantee any lease clause will always be enforced

or never challenged, but our overall goal, to the greatest extent possible, is to provide lease language and advice that can be successfully defended in court if challenged.

Drafting appropriate lease posting fees or revising current posting language is particularly problematic for the reasons discussed below. We will only know over time as courts rule on the issue if and when it is raised.

Colorado Late Fee Law

Late Fee Limitations

Colorado law imposes the following limitations on late fee:

(1) a landlord shall not take any of the following actions or direct any agent to take any of the following actions on the landlord's behalf: (a) charge a tenant or homeowner a late fee unless a rent payment is late by at least seven calendar days; (b) charge a tenant or homeowner a late fee in an amount that exceeds the greater of: (i) fifty dollars; or (ii) five percent of the amount of the past due rent payment. C.R.S. 38-12-105(1)(a)&b(i)(ii)

Definition of a Late Fee

(3) "Late fee" means a monetary sum that a landlord charges a tenant or homeowner as a result of the tenant's or home owner's failure to timely pay rent and that is determined pursuant to a rental agreement between the landlord and the tenant or homeowner. C.R.S. § 38-12-102(3)

Posting Fees and the Late Fee Law

The Potential Problem with Posting Fees

If a posting fee is determined to be a "late fee", the late fee charged in the lease plus the posting fee is likely to put the landlord over the limit (\$50 or 5%). For example, if the rent is \$2,000 a month, the maximum late fee would be \$100 (5% of \$2,000). If the landlord charges a \$100 late fee on the 9th and then charges a \$25 posting fee *AND A COURT RULES THE \$25 POSTING FEE IS A "LATE FEE"*, then the total late fee would be \$125 or 6.25% of the monthly \$2,000 rent but more importantly *GREATER THAN 5% and therefore in violation of the statute.*

So Far So Good

The late fee has been in effect since October 1, 2021, and we have not seen any adverse rulings on this issue. In fact, we haven't seen any rulings at all. However, it should be noted that multifamily communities almost universally dropped posting fees after the enactment of the new

late fee law. This means that by far the largest number of eviction cases no longer had posting fees. Thus, the potential number of cases where the fee could be challenged was drastically decreased and the potential spotlight on the issue was also significantly dimmed.

Rulings Going Forward

If and when the issue is ruled upon in the future, we would anticipate the following likely outcomes. Courts are much more likely to hold that posting fees at apartment communities are an additional late fee. Rent demands are universally served by an onsite team members in a very short period of time without the community incurring any additional costs. In short, because the onsite team is just doing what they normally do without any additional time and effort spent, challenges would likely center on the posting fee being excessive liquidated damages and profit centers.

On the other hand, charging posting fees on geographically widely dispersed sites is more defensible. To serve a rent demand, somebody has to get in the car and often spend significant amounts of time and gas driving to post a demand. These landlords or managers are incurring additional costs to serve eviction notices. These additional costs are directly out of pocket when paid to a third party vendor and determined by market forces and not arbitrary. Further, these costs are not automatically charged “as a result of the tenant's failure to timely pay rent” but only when the landlord incurs costs for having to serve a rent demand. The posting fee justification argument based on geography does lose significant strength when eviction notices are not served by a third party and the manager arbitrarily sets the amount based on the perceived value of the manager’s time.

Single family managers should take note that the late fee argument does not apply to eviction notices served for non-monetary compliances. Specifically, any eviction for any cause other than rent is not being served “as a result of the tenant's failure to timely pay rent”. However, this would require appropriate supporting lease language.

If and when rulings are issued, TS will advise its clients accordingly. Future court rulings will significantly dictate our advice to clients in the future.

Liability and Risks Associated with Charging Posting Fees

As discussed above, a posting fee could result in a landlord or manager violating Colorado late fee law.

Liability for Violating Colorado Late Fee Law

Landlords face significant potential liability for violating limitations on late fees. The statute specifically provides that:

- Any non-complying late fee provision is “void and unenforceable”
- Landlords who violate shall pay tenants a penalty in the amount of fifty dollars for each violation
- In addition to the \$50 penalty, landlords who receive written notice of a violation must cure said violation within seven days
- Landlords who fail to cure violations within seven days may be found liable in a civil action for:
 - compensatory damages for injury or loss suffered
 - a penalty of at least one hundred fifty dollars but not more than one thousand dollars for each violation payable to the tenant
 - costs including reasonable attorney fees
 - any other equitable relief the court finds appropriate
- **A tenant or homeowner may raise an alleged violation of this section as an affirmative defense in a forcible entry and detainer proceeding.**

Risks in Charging Posting Fees

We see two major risks in charging posting fees in particular for single family managers. As noted above, we advise multifamily managers not to charge posting fees.

One, tenants potentially could demand monetary compensation for past violations. If you have served a lot of notices and charged a lot of posting fees over time, this could be a significant amount of money. Given the nature of single family management, this risk doesn't appear to be great over time. However, as with all risks, it is up to the client to determine whether it is a risk they are willing to take.

Two, your eviction case would be dismissed if this issue was successfully raised in an eviction case. This is by far the greater and more likely risk. Specifically, evictions are much more costly, complicated, and time consuming with recent legal changes. Nearly all contested evictions do not go to court until the following month after default. If the rent is \$2,000 per month, this means by the time the case goes to trial, the tenant already owes \$4,000. If the tenant argues that the posting fee is an excessive late fee and the Court agrees, your case will be dismissed and you will have to start over from the start. Meaning you will have to serve another 10-Day Rent Demand (30-Day in Denver and Weld for covered properties). By the time the second case is resolved, the tenant could be behind by four months or \$8,000. Overall, this is not a good risk.

Given the justified costs incurred in serving eviction notices for single family managers, we are not telling them to forego charging posting fees. However, we want to make sure that they are

aware of all of the potential risks. Given the lack of court rulings, one course would be to continue charging the posting fees until if and when adverse rulings start to be issued.