OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 02-007

JUDICIAL SYSTEM:
Circuit Clerks - Imposition
of Service Fees Upon Persons
Tendering Payment By Credit Card

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The Honorable Ronald G. Matekaitis
State's Attorney, DeKalb County
133 West State Street
Sycamore, Illinois 60178

Dear Mr. Matekaitis:

I have your letter wherein you inquire: (1) whether the clerks of the circuit courts are required to collect a service fee from persons who tender payment of court-imposed fines and costs by credit card; and (2) whether MasterCard® may impose a "fine" upon a circuit clerk who, pursuant to statute, assesses a service fee against persons making payment of fines and costs by credit card, allegedly in contravention of the terms of the agreement between the clerk and the credit card issuer. For the reasons hereinafter stated, it is my opinion that, pursuant to the provisions of section 27.3b of the Clerks of Courts Act (705 ILCS 105/27.3b (West 2000)), circuit clerks are required to

collect a service charge from persons who desire to make payment of court imposed fines, fees and costs by credit card. With respect to your second question, although it would be permissible for MasterCard® to impose a "fine" against a circuit clerk if the terms of the contract that exists between the two parties so provides and a breach of the contract occurs, in these circumstances, no such fine would be warranted.

In 1986, the General Assembly enacted legislation authorizing clerks of the circuit courts to accept the payment of fines and costs by credit card. The General Assembly further provided that a clerk "* * * shall also be entitled to a service fee equal to $3 or the amount charged to the clerk for use of its services by the credit card issuer, whichever is greater." (See Public Act 84-613, effective January 1, 1986; Ill. Rev. Stat. 1987, ch. 25, par. 27.3b.) Subsequently, the General Assembly amended the pertinent statutory provisions to permit the clerks of the circuit courts to accept payment of statutory fees and qualifying bail bond fees by credit card. In addition, the clerks were "* * * authorized to enter into contracts with credit card companies approved by the clerk and to pay those companies fees normally charged by those companies for allowing the clerk of the circuit court to accept their credit cards in payment as authorized herein. * * *" (See Public Act 87-1230, effective

July 1, 1993.) Collection of "* * * a service fee equal to $3 in counties of fewer than 3,000,000 inhabitants and $5 in counties of 3,000,000 or more inhabitants, or the amount charged to the clerk * * * by the credit card issuer, whichever is greater * * *", was also authorized. (See Public Act 87-669, effective January 1, 1992.)

According to the information with which I have been furnished, on July 18, 1994, the DeKalb County Circuit Clerk entered into a "Charge•It Card Plan Correspondent Merchant Agreement" (hereinafter referred to as "the Merchant Agreement") with the National Bank and Trust Company of Sycamore, Illinois. Under the terms of the Merchant Agreement, the DeKalb County Circuit Clerk agreed, inter alia, to honor without discrimination any valid MasterCard®, Visa® or Visa® International Service Association Card "* * * properly presented as payment by a customer in connection with a bona fide, legitimate business transaction with * * *" the DeKalb County Circuit Clerk. (See Merchant Agreement § 1.) In return, the National Bank and Trust Company of Sycamore agreed, inter alia, to accept sales and credit items presented by the DeKalb County Circuit Clerk. (See Merchant Agreement § 2.) By accepting the sales and credit items, the Bank is required to pay the DeKalb County Circuit Clerk "* * * the total face amount of all sales items presented

by * * *" the DeKalb County Circuit Clerk in accordance with the provisions of the Merchant Agreement. (See Merchant Agreement § 14.) For the Bank's services under the Merchant Agreement, the DeKalb County Circuit Clerk consented to the payment of a monthly merchant discount fee "* * * equal to a percentage of the net dollar amount of all Sales Drafts * * * accepted * * * from * * *" the DeKalb County Circuit Clerk. (See Merchant Agreement § 14.) An initial merchant discount fee rate of 2.40% was negotiated. (See Merchant Agreement § 24.)

Subsequent to entering into the Merchant Agreement, the DeKalb County Circuit Clerk began accepting credit cards for the payment of various fines, court costs and fees. Although it cannot be determined from the information at my disposal precisely when the DeKalb County Circuit Clerk began to impose a service fee upon persons tendering payment by credit card, it is evident that by January, 2001, the DeKalb County Circuit Clerk was imposing a 2.5% service fee upon such transactions. In a letter dated January 10, 2001, the National Bank and Trust Company of Sycamore was notified by MasterCard® that by imposing a surcharge, the DeKalb County Circuit Clerk was in violation of section 9.04(b) of MasterCard®'s International Bylaws and Rules. Attempts by the DeKalb County Circuit Clerk to recharacterize the service fee as a convenience fee were not acceptable to

MasterCard®. As a result, the Bank was assessed a $2,000 "fine" by MasterCard®. The Bank has attempted to collect the amount of the "fine" from the DeKalb County Circuit Clerk. Against this background, you have inquired, firstly, whether, pursuant to the provisions of section 27.3b of the Clerks of Courts Act, the clerks of the circuit courts are required to collect a service fee from persons who tender payment of fines, costs and fees by credit card.

Initially, I note that section 25 of the Local Governmental Acceptance of Credit Cards Act (50 ILCS 345/25 (West 2000), as amended by Public Act 92-114, effective January 1, 2002) generally authorizes the governing body of a unit of local government or of a community college district that has elected to accept the payment of funds by credit card to impose a convenience fee or surcharge upon a cardholder making payment by credit card. Section 25 further provides that: "* * * [t]his convenience fee or surcharge[, however,] may be applied only when allowed under the operating rules and regulations of the credit card involved. * * *" (50 ILCS 345/25(a) (West 2000), as amended by Public Act 92-114, effective January 1, 2002.) It is well established that clerks of the circuit courts are nonjudicial officers of the judicial branch of State government, not officers of a unit of local government. (Pucinski v. County of Cook

(2000), 192 Ill. 2d 540, 545; County of Kane v. Carlson (1987), 116 Ill. 2d 186, 200.) Moreover, subsection 15(d) of the Local Governmental Acceptance of Credit Cards Act expressly provides that the "* * * Act does not limit the authority of clerks of court to accept payment by credit card pursuant to the Clerks of Court [sic] Act * * *." (50 ILCS 345/15(d) (West 2000).) Consequently, because clerks of the circuit courts are not subject to the provisions of the Local Governmental Acceptance of Credit Cards Act, the provisions of that Act which would address the problem you have encountered are not dispositive thereof, and it is therefore necessary to examine the statutory provisions governing circuit clerks, as well as the terms of the Merchant Agreement, to determine the rights of the parties.

With respect to the provisions of the Merchant Agreement, section 10 thereof provides:

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> * * *
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> PROHIBITED CARD TRANSACTIONS.
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> Unless expressly authorized in writing by Charge•It on behalf of Bank, Merchant shall not: (a) effect a Card transaction to advance any cash to a Cardholder, either directly or by deposit to the Cardholder's account; (b) receive monies from a Cardholder and subsequently prepare and deposit a Credit Item for the purpose of effecting a deposit thereof to the Cardholder's account; (c) require, through an increase in price or otherwise, any Cardholder to pay either any

> surcharge at the time of sale (cash discounts are permissible, however) or any part of any charge imposed by Bank on Merchant; (d) establish a minimum or maximum amount for any Card transaction; (e) sell, purchase, provide or exchange Cardholder account number information obtained by reason of a Card transaction to any third party, other than to Bank or Charge•It, to MC or Visa or pursuant to a government request; (f) present to Bank, directly or indirectly, any Item that it knows or should have known to be fraudulent or not authorized by the Cardholder, or that results from a transaction outside of Merchant's normal course of business or that which was not a direct result of a valid transaction between the Merchant and a bona fide cardholder; or (g) present to Bank any Item containing the account number of a Card issued to Merchant.
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> * * * "
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> (Emphasis added.)

As used in the Merchant Agreement, the term "Merchant" refers to the DeKalb County Circuit Clerk.

It is generally recognized that the terms of an agreement, if not ambiguous, should be enforced as written. (Dowd & Dowd, Ltd. v. Gleason (1998), 181 Ill. 2d 460, 479; Amalgamated Bank of Chicago v. Kalmus and Associates, Inc. (2000), 318 Ill. App. 3d 648, 656.) Under section 10 of the Merchant Agreement, the DeKalb County Circuit Clerk is prohibited from collecting a surcharge from a credit card user, unless the collection of a surcharge is expressly authorized in writing in accordance with the terms of the Merchant Agreement. Nothing in the information

I have been provided indicates that written authorization to collect a surcharge under section 10 of the Merchant Agreement was either requested or obtained from MasterCard® or that any attempt to negotiate the prohibition out of the Merchant Agreement was ever undertaken. Therefore, it appears that the imposition of a surcharge or service fee upon MasterCard® customers is not permitted under the terms of the Merchant Agreement originally entered into by and between the DeKalb County Circuit Clerk and the National Bank and Trust Company of Sycamore.

In response to this allegation of a possible breach of the terms of the contract, the DeKalb County Circuit Clerk has referred to the language of subsection 21(b) of the Merchant Agreement, which provides that a "* * * Merchant shall comply with all Laws in connection with Card transactions, originating and submitting items to Bank, performing its obligations under this Agreement, and otherwise conducting business. * * *" (Merchant Agreement § 21(b).) As used in the Merchant Agreement, the term "Laws" is defined to include "* * * the Federal Consumer Credit Protection Act, and all regulations promulgated thereunder, and any other laws, judicial decisions, rules or regulations of the United States or any state or local government or agency, or of any foreign country if that law is deemed to apply. * * *" (Merchant Agreement §22(f).) Specifically, it has been suggested

that section 27.3b of the Clerks of Courts Act (705 ILCS 105/27.3b (West 2000)), which authorizes the clerks of the circuit courts to impose a fee upon persons who tender the payment of fines, penalties and costs by credit card or debit card, excuses any potential breach.

Amended on several occasions since its original enactment, section 27.3b of the Clerks of Courts Act currently provides:

> "The clerk of court may accept payment of fines, penalties, or costs by credit card or debit card approved by the clerk from an offender who has been convicted of or placed on court supervision for a traffic offense, petty offense, ordinance offense, or misdemeanor or who has been convicted of a felony offense. The clerk of the court may also accept payment of statutory fees by a credit card or debit card. The clerk of the court may also accept the credit card or debit card for the cash deposit of bail bond fees up to $300.
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> The Clerk of the circuit court is authorized to enter into contracts with credit card or debit card companies approved by the clerk and to pay those companies fees normally charged by those companies for allowing the clerk of the circuit court to accept their credit cards or debit cards in payment as authorized herein. Where the offender pays fines, penalties, or costs by credit card or debit card, or anyone paying statutory fees of the circuit court clerk or the posting of cash bail, the clerk shall collect a service fee of up to $5 or the amount charged to the clerk for use of its services by the credit card or debit card issuer.

> This service fee shall be in addition to any other fines, penalties, or costs." (Emphasis added.)

Conspicuously absent from section 27.3b is any clause making the collection of the service fee contingent upon the terms of the underlying credit card agreement, such as is contained in section 25 of the Local Governmental Acceptance of Credit Cards Act. Based upon the emphasized language of section 27.3b, it is clear that the General Assembly has authorized the clerks of the circuit courts to institute a credit card acceptance program, and to collect a service fee related to any credit card program so implemented. Whether the collection of the service fee is mandatory or merely directory, however, depends upon the intention of the General Assembly. While the use of the word "shall" in a statute is generally regarded as indicating a mandatory rather than directory intent, "shall" may nonetheless be interpreted as permissive, depending upon the contents of the provision and the intention of the drafters. (People v. Woodard (1997), 175 Ill. 2d 435, 445; Chicago School Reform Board of Trustees v. Martin (1999), 309 Ill. App. 3d 924, 933.) Therefore, it must be determined whether the General Assembly intended for the collection of a service fee under section 27.3b of the Clerks of Courts Act to be mandatory.

Where the intention of a statute is ambiguous, it is proper to examine its history, the reasons for its enactment, the circumstances of its adoption and the end to be achieved. (In re Marriage of Logston (1984), 103 Ill. 2d 266, 279.) Moreover, it is appropriate to examine other legislation on the same topic, as well as statutes addressing related subjects. In re Marriage of Logston (1984), 103 Ill. 2d 266, 283.

In 1974, Congress added several new sections to the Truth in Lending Act (15 U.S.C. §§ 1601-1665) to address credit card billing issues. (See Public Law 93-495, effective October 28, 1975; 15 U.S.C. §§ 1666-1666j.) Subsequently, one of the new sections, section 167 of the Truth in Lending Act (15 U.S.C. § 1666f), was amended to provide, in pertinent part:

> " * * *
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> (2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.
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> * * * "
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> (See Public Law 94-222, effective February 27, 1976.)

Subsection 167(2) of the Truth in Lending Act, as amended, clearly proscribed the imposition of a surcharge by a seller in any credit card transaction. The term "surcharge" as used in the Truth in Lending Act would appear to have included

the service fee referred to in section 27.3b of the Clerks of Courts Act. (See generally 15 U.S.C. § 1602.) This prohibition upon credit card surcharges, however, was allowed to expire by Congress on February 27, 1984. (See Public Law 97-25, effective July 27, 1981.)

Although a number of States have continued to ban surcharges for credit card use by enactment of their own statutory prohibitions (see, e.g., N.Y. Gen. Bus. Law § 518 (Consol. 2001); Fla. Stat. ch. 501.0117 (2000); and Mass. Ann. Laws ch. 140D, § 28A (Law. Co-op. 2001)), to date, the Illinois General Assembly has not done so. To the contrary, the Illinois General Assembly has amended previously existing statutory provisions or enacted new legislation expressly authorizing the imposition and collection of surcharges or service fees.

As noted above, in 1986 the General Assembly amended section 27.3b to provide that "[w]here the offender pays fines and costs by credit card, the clerk shall also be entitled to a service fee equal to $3 or the amount charged to the clerk for use of its services by the credit card issuer, whichever is greater * * *." A review of the debates concerning House Bill 1565 (which, as Public Act 84-613, effective January 1, 1986, originally enacted the provisions in question) provides little guidance on the issue of whether the collection of a service fee

was intended to be mandatory or permissive. (See May 14, 1985, House Debate on House Bill No. 1565, at 124; May 24, 1985, House Debate on House Bill No. 1565, at 392-94; June 18, 1985, Senate Debate on House Bill No. 1565, at 148; and June 24, 1985, Senate Debate on House Bill No. 1565, at 18.) Similarly, neither the provisions of Public Act 87-669, effective January 1, 1992, which simply inserted separate fee provisions for counties of less than 3,000,000 in population and for counties of 3,000,000 or more in population, nor those of Public Act 87-1230, effective July 1, 1993, which contained amendments not pertinent to your inquiry, clarify the General Assembly's intention with respect to the collection of credit card service fees.

The second paragraph of section 27.3b of the Clerks of Courts Act, however, was rewritten by Public Act 89-334, effective January 1, 1996, into a form virtually identical to that of current section 27.3b of the Act. The comments of Representative Pankau, the House sponsor, made during the House debate on House Bill 760 (which, as Public Act 89-334, effective January 1, 1996, rewrote the second paragraph of section 27.3b and enacted the language which is the focus of your inquiry), strongly suggest that the General Assembly intended for clerks of the circuit courts to be required, rather than merely permitted, to collect the service fee under section 27.3b:

" * * *

> [Representative] Pankau: 'These Amendments deal with the use of credit cards by the Clerk of the Circuit Court and the first Amendment [to House Bill 760] allows that the fee for the credit cards be added on to the other fines and penalties and costs which a judge might assess to a person who is standing before them. The reason. . . This was suggested by the Clerk of the Circuit Court of Cook County, Aurelia Pucinski, and her point was that when a judge delivers the fines and fees and pronounces what they are, they should be equal among all people who are standing before that particular judge. So the method by which a person pays that particular fee or fine, they should in essence not be given a benefit because they put it on a credit card and the credit card company takes a fee off of the top of that. So this way the fee is added on top of all the other fees and fines that the credit card company might charge. I guess it is the credit cards. . .the credit card companies practice not to allow such a thing, that you have to. . .Like when you go out in the retail business you. . .and if you charge $10 to one person, you have to charge $10 to the next person and you could not tack on an extra dollar because they use a credit card. So, we need a change in the legislation, and this is [Cook County Circuit Clerk] Aurelia Pucinski's suggestion as to how to make everything all fair and equal. * * *'
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> * * * "
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> (Emphasis added.) (Remarks of Rep. Pankau, May 24, 1995, House Debate on House Bill No. 760, at 317-18.)

These comments indicate that the collection of a service fee by the clerks of the circuit courts was not consid-

ered to have been mandated by the original provisions of section 27.3b of the Act, but that the 1996 amendment was intended to require the clerks of the circuit courts to collect the fee.

Based upon the history of the pertinent statutory provisions, it must be concluded that at the time that the original Merchant Agreement between the DeKalb County Circuit Clerk and MasterCard® was entered into in 1994, there was no obligation on the part of the clerks of the circuit courts to collect a service fee. Moreover, as noted above, the terms of the original Merchant Agreement expressly prohibited the imposition and collection of such a charge. Consequently, it is my opinion that in 1994, when the original Merchant Agreement was executed, the DeKalb County Circuit Clerk was not permitted under the contract to collect a service fee from persons who tendered payment of fines, fees and costs by credit card. Subsequent changes in the law ordinarily do not affect the terms of a contract which were otherwise lawful when the contract was entered into.

This conclusion necessarily requires a determination of the length of the original Merchant Agreement. The Merchant Agreement itself does not appear to contain a specified term or an expiration date. It has long been recognized, however, that it is contrary to the effective administration of government to

allow elected officials to tie the hands of their successors with respect to decisions regarding the efficiency or operations of the office. (Millikin v. County of Edgar (1892), 142 Ill. 528, 533; Grassini v. DuPage Township (1996), 279 Ill. App. 3d 614, 620, cert. denied, 529 U.S. 1109, 120 S. Ct. 1962 (2000); Cannizzo v. Berwyn Township 708 Community Mental Health Board (2000), 318 Ill. App. 3d 478, 484; American Federation of State, County and Municipal Employees v. Turner, No. W2000-00166-COA-R3-CV, 2001 Tenn. App. LEXIS 759, at *9-10 (Tenn. Ct. App. Oct. 10, 2001).) The term of office of the clerks of the circuit courts is four years. (See 10 ILCS 5/2A-15 (West 2000).) Nothing in the provisions of the Clerks of Courts Act (705 ILCS 105/0.01 et seq. (West 2000)) or the pertinent administrative orders and rules of the Illinois Supreme Court grants to the clerks of the circuit courts the authority to enter into credit card acceptance contracts extending beyond their terms of office.

It appears that new terms of office for circuit clerks commenced in December, 1996, and again in December, 2000. Consequently, the original Merchant Agreement executed with MasterCard® in 1994 necessarily expired in December, 1996. Subsequent to that time, if a new Merchant Agreement was not executed but all parties continued to perform as if the original contract was still binding, then there was at most an implied

contract between the parties based upon the language and terms of the original Merchant Agreement.

It is a well established principle of contract law that statutes and laws in existence at the time a contract is executed are considered part of the contract. (Liccardi v. Stolt Terminals, Inc. (1997), 178 Ill. 2d 540, 549; Brandt v. Time Insurance Co. (1998), 302 Ill. App. 3d 159, 170.) It is equally well recognized that where public officers derive their powers from and their duties by statute all persons dealing with them in reference to public affairs are bound to take notice of the law relative to such officers. (Duck Island Hunting & Fishing Club v. Edward Gillen Dock, Dredge & Construction Co. (1928), 330 Ill. 121, 132; Ayers v. City of Jacksonville (1912), 171 Ill. App. 129, 136; People of the State of Illinois ex rel. Lord v. Shrout (1924), 235 Ill. App. 509, 516; Folkers v. Butzer (1938), 294 Ill. App. 1, 6-7; City of Belleville v. Illinois Fraternal Order of Police Labor Council (2000), 312 Ill. App. 3d 561, 564; Cannizzo v. Berwyn Township 708 Community Mental Health Board (2000), 318 Ill. App. 3d 478, 487.) Therefore, it is my opinion that, beginning in December, 1996, the clerk of the circuit court was statutorily required to collect a service fee from persons tendering payment of their fines, fees and costs by credit card. Further, it is my opinion that at that time, MasterCard® must be

deemed to have had at least constructive notice of Illinois' laws pertaining to the length of any credit card acceptance contract entered into with the clerks of the circuit courts, as well as the law of this State with respect to the imposition of surcharges upon credit card users. Nothing in the information I have been provided indicates that MasterCard® ever attempted to terminate its relationship with the DeKalb County Circuit Clerk subsequent to the change in Illinois law requiring the clerks of the circuit courts to collect a service fee. To the contrary, all information leads to the conclusion that the Bank and MasterCard® have continued to accept sales and credit items presented by the DeKalb County Circuit Clerk for more than five years after the change in Illinois law and have benefitted financially from this arrangement. Therefore, it is my opinion that MasterCard® cannot now complain regarding the collection of a service fee by the DeKalb County Circuit Clerk.

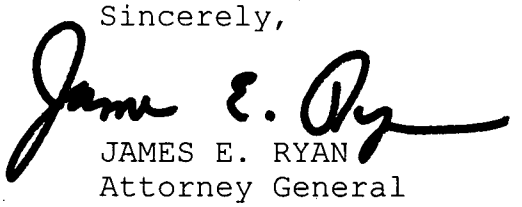
Moreover, even the renegotiation of the contract subsequent to December, 1996, would not result in a different conclusion. Effective January 1, 1996, circuit clerks in Illinois were required to collect the statutory service fee upon credit card transactions. The law as it existed in December, 1996, would have become part of any new contract between the parties. The parties could not avoid compliance with the re-

quirements of the law through the medium of a contract. Therefore, any attempt to preclude the circuit clerk by the terms of the contract from imposing the statutory service fee upon persons tendering payment of fines, fees and costs by credit card would have been void ab initio.

You have also inquired whether MasterCard® through its agent bank may impose a "fine" against the DeKalb County Circuit Clerk for assessing a service fee against persons making payment of fines and costs by credit card allegedly in violation of MasterCard®'s Bylaws and Rules. The 1994 Merchant Agreement entered into by the DeKalb County Circuit Clerk with the National Bank and Trust Company does not appear to contain a specific provision authorizing the assessment of a fine or penalty against the DeKalb County Circuit Clerk for violating the terms of the Merchant Agreement. A number of the Merchant Agreement's provisions, however, indicate that the DeKalb County Circuit Clerk agreed to comply with the terms of any applicable "operating regulations" (see, e.g., Merchant Agreement §§ 4(b), 11(c)(iii), 13, 16 and 17). The phrase "operating regulations" is defined in the Merchant Agreement to include, inter alia, "* * * the MC Rules, the MC Operations Manual, and any other operations or procedures manual published by MC, as any such manual is amended from time to time * * *." (See Merchant Agreement § 22.) A

review of the correspondence submitted with your opinion request indicates that MasterCard® International contends that the DeKalb County Circuit Clerk has violated MasterCard® Rule 9.04(b)(14), and that the assessment of a fine or penalty in the amount of $2,000 is authorized by section 9.04(d) of MasterCard®'s International Bylaws and Rules. To the extent that a merchant who has contracted with MasterCard® violates either the Merchant Agreement or MasterCard®'s International Bylaws and Rules, and the assessment of a fine or other penalty is a part of the agreement with MasterCard®, it appears that MasterCard® would be entitled to enforce the terms of its agreement and collect the fine. In light of my conclusion that only an implied contract exists between MasterCard® and the circuit clerk, and that MasterCard® is deemed to have consented to the collection of a service fee, however, it is my opinion that the assessment of a fine by MasterCard® would not be warranted in these circumstances.

Sincerely,



JAMES E. RYAN
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