

LEGAL ISSUES INVOLVING CREDIT CARD SURCHARGING FOLLOWING THE U.S. SUPREME COURT DECISIONS

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THE ORIGINAL ANTITRUST LAWSUIT SURROUNDING THE TOPIC OF SURCHARGES

- Many antitrust lawsuits commencing 2005
- Defendants included:
 - Visa Defendants [Visa U.S.A, Inc., Visa International Service Association, Visa Inc.]
 - Mastercard Defendants [MasterCard International Incorporated and MasterCard Incorporated]
 - Bank Defendants [Bank of America, Capital One, Chase, Citibank, HSBC and numerous others]

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ANTITRUST ALLEGATIONS

- **Combination and conspiracy among the co-defendants**
 - **Raised, fixed, stabilized and maintained at artificially high levels and non-competitive levels the interchange fees and merchant discount fees**
 - **Merchants were deprived of the benefits of free and open competition in the market for credit card network services**
 - **Price competition in the provision of credit card network services to merchants was restrained, suppressed and eliminated.**

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NO SURCHARGE RULE

- **Main Issue was the “No Surcharge Rule” which forbade merchants from charging cardholders a surcharge on their cards to reflect cost differences among various payment methods.**

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SETTLEMENT AGREEMENTS

- Visa and Master Card entered into a Settlement Agreement which was approved on December 13, 2013
- American Express Preliminary Settlement Order and Supplement Preliminary Settlement Order signed February 11, 2014 – **approval denied**

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Antitrust Settlements Left Ten States with anti-surcharge statutes

- In **2013** Ten states plus Puerto Rico still prohibited surcharging credit card use
 - California Civil Code: Section 1748.1
 - Colorado Revised Statutes: Title 5, Article 2, Section 212
 - Connecticut General Statutes: Volume 11, Title 42, Chapter 739
 - Florida Statute: §501-0117
 - Kansas Statutes: Chapter 16a, Article 2, Section 403
 - Maine Revised Statutes: Title 9-A, Article 8A, Section 509
 - Massachusetts General Laws: Title XX, Chapter 140D, §28A.(a)(2)
 - New York General Business Law: §518
 - Oklahoma States: Title 14-A, Section 2-417.A
 - Texas Finance Code Annotated: 339-001(a)
 - Puerto Rico Laws: Title Ten, Subtitle 1, Chapter 2, Section 11

Most of these State Laws Focus upon Consumer Transactions

- Colorado, Kansas and Maine have adopted the Uniform Consumer Credit Code and the prohibition is contained in that statute.
- California's statute specifically uses the word consumer
- Massachusetts's statute is included under "Consumer Credit Cost Disclosure"
- Oklahoma's statute is under the title "Consumer Credit Code"
- Texas' prohibitions regarding surcharge is specifically enforced only by the Consumer Credit Commissioner
- Puerto Rico's statute specifically uses the word "consumer"
- New York and Florida statutes WERE unclear if they applied to commercial as well as consumer
- Connecticut applies to commercial and consumer

NEW YORK LAWSUIT COMMENCED TO CHALLENGE THE CONSTITUTIONALITY OF ANTI-SURCHARGE LAWS

- *Expressions Hair Design et al v. Schneiderman, Attorney General of New York, et al.*
 - Commenced in the U.S. District Court for the Southern District of New York
- Federal Judge Rakoff found the NY statute **unconstitutional**
- 2ND Circuit Court Of Appeals reversed Judge Rakoff and found the New York statute to be **constitutional**

FLORIDA LAWSUIT COMMENCED TO CHALLENGE THE CONSTITUTIONALITY OF ANTI-SURCHARGE LAW

- *Pamela Jo Bondi, Attorney General of the State of Florida v Dana's Railroad Supply et al* – U.S. District Court for the Northern District of Florida
- Action originally commenced in 2014 by the merchants against Bondi for a determination that Florida Statute § 501.0117 is unconstitutional and seeking an injunction preventing the State of Florida from enforcing the law. Federal Judge Hinkle found the Florida statute to be **constitutional**
- 11th Circuit Court of Appeals disagreed on November 4, 2015 and said
 - “We, ...strike down § 501.0117 as an **unconstitutional** abridgment of free speech”

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TEXAS LAWSUIT COMMENCED TO CHALLENGE THE CONSTITUTIONALITY OF ANTI-SURCHARGE LAW

- *Lynn Rowell et al v. Leslie L. Pettijohn*, in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas – U.S. District Court for the Western District of Texas
- Virtually identical to the *Expressions Hair* case
- Federal Judge Yeakel dismissed the Complaint finding “that the Texas Anti-Surcharge law regulates only prices charged, an economic activity that is within the state's police power, and does not implicate First Amendment speech rights.” and upheld the Texas statute as **constitutional**
- The 5th Circuit Court of Appeals decision on March 2, 2016 affirmed the District Court and held that the Texas statute did not violate the First Amendment right to freedom of speech and thus, the Texas statute was deemed to be **constitutional**

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Background/Refresher on the U.S. Supreme Court Credit Card Surcharge Decisions

- As Florida, New York and Texas became embroiled in litigation concerning their anti-surcharge statutes, those lawsuits progressed up to the United States Supreme Court (SCOTUS).
- Over two years ago SCOTUS ruled on the New York credit card surcharge case *Expressions Hair Design et al v. Schneiderman, Attorney General of New York, et al.* vacating the 2nd Circuit decision and leaving intact Judge Rakoff's decision ruling that the NYS General Obligations Law §518 prohibiting credit card surcharging was unconstitutional.
- At the same time, SCOTUS referred that case back to the lower courts for further "proceedings consistent with" its decision.

Background/Refresher on the U.S. Supreme Court Credit Card Surcharge Decisions

- With respect to the Texas case *Lynn Rowell, et al v. Ken Paxton, as Attorney General of the State of Texas*, SCOTUS sent this case back to the lower courts (remanded) "for further consideration in light of Expressions Hair Design v. Schneiderman".
- With respect to the Florida case of *Dana's Railroad Supply et al v Pamela Jo Bondi, Attorney General of the State of Florida*, SCOTUS decided not to hear that case at all.

CURRENT STATUS OF THE FOUR REMAINING STATES - FLORIDA

- A petition to be heard by SCOTUS was submitted on June 6, 2016 but held in abeyance by the court pending a decision in the New York *Expressions Hair Design* case. On April 3, 2017, it denied the petition for a writ of certiorari which had been filed in the Florida case.
- Following that denial by SCOTUS, U.S. District Court Judge Hinkle acknowledged the 11th Circuit reversal of his earlier decision, declared the Florida Statute to be unconstitutional and directed that *the defendant Pamela Jo Bondi, in her capacity as Attorney General of Florida, must not take any action to enforce Florida Statutes § 501.0117 (2016). This injunction binds the defendant and her officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.*
- There is no ban on surcharging in Florida

CURRENT STATUS OF THE FOUR REMAINING STATES – NEW YORK

- *Expressions Hair Design et al v. Schneiderman, Attorney General of New York, et al.*
- Judge Rakoff found the New York statute to be unconstitutional
- The 2nd Circuit Court of Appeals disagreed with Judge Rakoff and said “New York’s law is neither unconstitutional nor does it violate a merchant’s freedom of speech.”
- On appeal to the U.S. Supreme Court, the question presented was whether §518 regulates merchants’ speech and—if so—whether the statute violates the First Amendment. SCOTUS rendered its decision on March 29, 2017, concluding that §518 does regulate speech and vacated the 2nd Circuit Court of Appeals decision and leaving Judge Rakoff’s decision permitting merchants to surcharge.

CURRENT STATUS OF THE FOUR REMAINING STATES – NEW YORK

- SCOTUS also remanded the case back to the 2nd Circuit Court of Appeals to determine “in the first instance whether that regulation is unconstitutional”.
- Upon remand, the Second Circuit determined that certification of this issue was appropriate and sent the case to the New York State Court of Appeals to answer one question: “*Does a merchant comply with New York’s General Business Law § 518 so long as the merchant posts the total dollars-and-cents price charged to credit-card users?*”
- The New York Court of Appeals concluded “*that a merchant complies with GBL § 518 if and only if the merchant posts the total dollars-and-cents price charged to credit card users.*”

CURRENT STATUS OF THE FOUR REMAINING STATES – TEXAS

- The Texas case titled *Lynn Rowell, et al v. Ken Paxton, as Attorney General of the State of Texas* was commenced by nine merchants seeking a declaration that the Texas no-surcharge law, Texas Finance Code §339.001, is unconstitutional and seeking an injunction preventing the State of Texas from enforcing the law against them.
- The United States District Court for the Western District of Texas, in 2015 determined that the Texas statute prohibiting surcharging on credit cards was constitutional and in 2016 the U.S. Court of Appeals for the 5th Circuit, affirmed that decision. Following that decision, a petition to be heard by SCOTUS was filed. Following the New York *Expressions* case, SCOTUS granted Texas’ petition to be heard, vacated the 5th Circuit decision and remanded the case to the lower courts for consideration in light of the *Expressions* case.

CURRENT STATUS OF THE FOUR REMAINING STATES – TEXAS

- In May 2018, upon remand from SCOTUS the United States District Court in Austin, Texas rendered its decision. The Court noted that *"The undisputed facts are that each merchant would like to tell their customers, without fear of the State enforcing the Anti-Surcharge law, that there is a "surcharge" if a customer pays for a purchase with a credit card and that there is "no additional charge" if the customer pays with cash or a check. More to the point, the merchants want to say why the surcharge is assessed because of credit-card swipe fees. Further, the merchants will charge a surcharge that does not exceed the amount of the credit-card swipe fee the merchant pays to a credit-card company."*
- The Court decided that the *"Texas Anti-Surcharge law as applied violates the merchants' commercial free speech rights under the First Amendment. The court will grant the merchants' motion for summary judgment and will permanently enjoin the State of Texas from enforcing the Anti-Surcharge law against the merchants."*

CURRENT STATUS OF THE FOUR REMAINING STATES – CALIFORNIA

- *Italian Colors Restaurant et al v. Kamala Harris, as Attorney General of the State of California*
- In 2015, the United States District Court for the Eastern District of California declared the California Civil Code section 1748.1 unconstitutional and permanently enjoined its enforcement.
- In January 2018, the 9th Circuit Court of Appeals affirmed the decision of the lower court.
- However, it narrowed the scope of its findings only to the five (5) plaintiffs in that particular case.

CURRENT STATUS OF THE FOUR REMAINING STATES - CALIFORNIA

- There is no ban on commercial transactions in California
- With respect to consumer transactions, the *Italian Colors* decision did not strike down the surcharge ban statute.
- A merchant who chooses to surcharge a consumer transaction must be sure to show the surcharge – and thus the total cost to a consumer – in **clearly visible, conspicuous and plain language**.

SUMMARY OF THE FOUR CHALLENGED STATES

- **California:**
 1. In the **commercial business-to-business** context, there is no prohibition on surcharging.
 2. In the **consumer** context, a merchant may pass the surcharge on to its customers as long as merchant make the surcharge – and thus the total cost to a consumer – **clearly visible, in conspicuous and plain language** before the consumer pays or seeks to pay for an item.
- **Florida:**
 - It is completely permissible for a merchant to pass surcharges on to any customer (consumer and commercial business-to-business). **The anti-surcharge law is unconstitutional and unenforceable.**

SUMMARY OF THE FOUR CHALLENGED STATES

- **New York:**
- It is permissible for a merchant to pass surcharges on to any customer (consumer and commercial business-to-business) provided the merchant posts the **total dollars-and-cents price charged to credit card users**.
- **Texas:**
- It is completely permissible for a merchant to pass surcharges on to any customer (consumer and commercial business-to-business). **The anti-surcharge law is unenforceable.**

Contracting Around The Anti-surcharge Statutes

Contractual Agreement as to Place of Transaction

It is agreed that all credit card transactions between *[Merchant/Trade Credit Grantor]* and *[Customer]* shall be deemed to take place in the State of [] and shall be governed by the statutes of the State of [].

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Contracting Around The Anti-surcharge Statutes

Jurisdiction and Venue Provision

All credit card commerce between *[Merchant/Trade Credit Grantor]* and *[Customer]* shall be governed by and interpreted in accordance with the laws of the State of *[]* without regard to conflict of law provisions thereof, and all actions, disputes, and proceedings arising from, relating to or in connection with credit card commerce between *[Merchant/Trade Credit Grantor]* and *[Customer]* shall be commenced, at the sole discretion of Trade Credit Grantor, in any federal, state or local court within the state of *[]* or in any federal state or local court within any state where *Trade Credit Grantor* maintains a place of business

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