THE COURT SAYS YES

Is the credit card surcharge law unconstitutional?

WHAT DO CREDIT card surcharges have in common with protest marches? The First Amendment right to freedom of speech. Really? Yes, says the United States Supreme Court.

For several years, the apartment industry has been prohibited under Texas law from charging a surcharge when rent is paid by a credit card. It has been a struggle to find a way to allow residents to pay rent as conveniently as possible while still recovering the fees a transaction might cost.

The history on the Texas credit card anti-surcharge law is interesting. The Texas Legislature, a couple of state agencies and the federal courts have all weighed in on the interpretation and validity of the law.

The saga continues. On Aug. 16, the United States District Court for the Western District of Texas (Austin Division) issued a Permanent Injunction and Final Judgment in a case styled ***Lynn Rowell et al v. Ken Paxton, in his official capacity as Attorney General of the State of Texas*** determining that the Texas Anti-Surcharge Law violates the First Amendment to the United States Constitution. The rationale used by the court that concluded the law is unconstitutional, together with a prior attorney general's interpretation of the law, can be instructive to property owners and managers when determining how to set up a program to recover swipe fees charged by credit card companies.

The Texas Anti-Surcharge Law

Section 604A. 0021 of the Texas Business and Commerce Code provides that in a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check or a similar means of payment.

Section 604A. 0021 of the Texas Business and Commerce Code was recodified as Section 339.001 of the Texas Finance Code. The switch occurred in 2017 and changed the Texas agency responsible for enforcement of this section. The attorney general is the agency that now is responsible for enforcement.

Attorney General's Interpretation of the Anti-Surcharge Law.

On June 16, 2016, the attorney general issued an opinion regarding Section 339.001 of the Texas Finance Code. Although the change to Section 604A.0021 of the Texas Business and Commerce Code did not occur yet, the attorney general gave an opinion based upon a legislator's request.

In this opinion, the attorney general reiterated some ways in which the credit card surcharge would not be prohibited by the anti-surcharge law. The attorney general stated that, although credit transactions could not be more than the "regular price" for the transaction, the law did not prohibit cash discounts from the "regular price." In other words, you could have one rent amount that would be the amount a resident would pay if paying by credit card, but a discounted amount if the resident pays by some other means. Of course, the problem with this approach would be to prove that one price is your "regular price" and the other is your "discounted price."

The attorney general also stated the plain language of the statute prohibits a "seller" or "merchant" from imposing a surcharge on a buyer paying by credit card. The statute defines a "merchant" as "a person in the business of selling or leasing goods or services." The attorney general stated it would not be a violation of the law if the charge was imposed by a third-party processor instead of by the property owner or operator (who is arguably the seller or lessor of goods or services). However, the attorney general stated this approach would only be acceptable if there was a truly arms-length arrangement that would not involve the property owner imposing an additional fee.

> On Aug. 16, the United States District Court determined the Texas Anti-Surcharge Law (§ 604A.0021 Tex. Bus. & Com. Code) **violates the First Amendment to the United States Constitution** and enjoined the attorney general from enforcing this section against the merchants who were the plaintiffs in the case.

The attorney general also indicated if a resident could pay with a credit card in person without a surcharge, an online surcharge for credit card payment would be acceptable (since the surcharge was not because of a credit card payment, but because of an online payment). The attorney general also indicated a surcharge would be acceptable if assessed against all types of payments (since, again, the "surcharge" would not be solely related to a credit card transaction).

The Rowell Case

On Aug. 16, the United States District Court determined the Texas Anti-Surcharge Law (§ 604A.0021 Tex. Bus. & Com. Code) violates the First Amendment to the United States Constitution and enjoined the attorney general from enforcing this section against the merchants who were the plaintiffs in the case.

In making this decision, the court followed the instructions of the United States Supreme Court in a New York case construing a similar New York anti-surcharge law in finding that the law should be analyzed as restricting a merchant's rights to free speech, since the law regulates the communication of prices, not the prices charged. The Texas court found no substantive difference between the New York anti-surcharge law and the Texas law. Further, the court found the

anti-surcharge law restricts only commercial speech, which is an expression related solely to the economic interest of the speaker and its audience.

The court reasoned that a state seeking to uphold a commercial restriction on speech carries the burden of justifying its law. Courts evaluate four questions to determine whether a state has met its burden to justify commercial speech regulation; (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interests justifying the regulation is substantial; (3) whether the regulation directly advances the governmental interests asserted; and (4) whether the regulation is more extensive than necessary to serve that interest.

The state contends that each of the merchants in the case intended to impose a blanket surcharge on all credit card purchases. The blanket-surcharge system would thereby provide the merchants with additional profit on certain credit card purchasers when the fee actually paid to the credit card issuer is not as large as the surcharge imposed for a particular transaction. Further, the state argued that the customer would not be truthfully informed on what is actually occurring. The customer would be led to believe the merchants are merely passing along swipe fees when, in reality, they would be pocketing the additional money collected in excess of the swipe fee charged.

The court did not agree with the state's argument since the merchants made it clear that the amount of the surcharge would not exceed the amount of the fees. The merchants argued that they only desired to prominently and conspicuously display the exact amount of the surcharge expressed as a percentage of the total price and to limit the amount of surcharge to swipe fees incurred. The court found no deceptive or misleading speech at issue. The court also concluded that the state failed to demonstrate that protecting consumer welfare and promoting commerce were actual interests served by promoting the restriction.

The court concluded the anti-surcharge law unduly restricted a commercial merchant's right to free speech because it restricted the merchant's ability to communicate with its customers. ***However, what was important in the court's decision was the analysis that relied on a merchant limiting the amount of the surcharge to the swipe fees associated with the particular transaction.***

Since the state was unable to establish that the anti-surcharge law advanced a substantial governmental interest and was not more extensive than necessary to serve that interest, the court concluded the anti-surcharge law in Texas, as applied in this case, **violated the merchant's commercial rights to free speech under the First Amendment.**

Since the state was unable to establish that the anti-surcharge law advanced a substantial governmental interest and was not more extensive than necessary to serve that interest, the court concluded the anti-surcharge law in Texas, as applied in this case, violated the merchant's commercial rights to free speech under the First Amendment.

What can you do?

Although this district court case is still subject to being appealed, and consequently subject to further interpretation, the United States

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According to the United States District Court in Texas, the Texas anti-surcharge law is unconstitutional, at least as far as it is currently written. However, even before the law was declared unconstitutional by the Texas federal court, the attorney general (the state agency that now enforces the law) already indicated a third-party payment processor could impose the additional fee without running afoul of the law because the third-party processor was not a person in the business of selling or leasing goods or services.

However, both the attorney general and the Texas federal court based their interpretations on the assumption that the amount of any surcharge would not be more than the swipe fee of the particular transaction in which the surcharge is assessed. Also note that there is a similar anti-surcharge law on debit card charges, which was not the subject of the Rowell case. However, since the debit card anti-surcharge law is similar to the credit card anti-surcharge law, the same interpretation might be applied.

As always keep abreast of this ever-changing area of the law. Hopefully by the time this article is published, we'll know whether the case has been appealed or is the final word from the court.

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