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First Amendment Helps Topple Florida Card-Surcharge Ban

By Chris Cumming

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Merchants continue to chip away at rules against credit card surcharges, and they won their latest victory with the help of the First Amendment.

On Wednesday a Florida court struck down a state law against credit card surcharges on the grounds that it violates merchants' freedom of speech. The ruling by the U.S. Court of Appeals for the 11th Circuit reversed a district court's decision and opened the door — in theory, at least — for Florida merchants to pass on to their customers the cost of accepting credit cards.

Florida law prohibits merchants from charging fees to customers using cards, but it permits them to offer discounts on cash purchases, even if the discount and the charge result in the same cost for the customer. A group of small businesses argued that distinction controlled not their conduct but their speech, and therefore violated the Constitution.

The appeals court agreed, writing that under the surcharge ban, a merchant "runs the risk of being fined and imprisoned" over "a simple slip of the tongue" — calling a price difference a surcharge rather than a discount.

"The First Amendment prevents staking citizens' liberty on such distinctions in search of a difference," the court wrote.

Laws banning surcharges became a contentious issue following the 2012 antitrust settlements between merchants and major card networks. State surcharge laws were passed in the 1980s but for decades were more or less irrelevant, because all merchant contracts with the card companies also forbid surcharges. But the card settlements got rid of surcharge bans in merchant contracts, making the state laws relevant again.

The legal strategy of invoking the First Amendment was devised by Deepak Gupta of the law firm Gupta Wessler in Washington, D.C., who has used it to challenge bans in four of the ten states with surcharge laws on the books.

Gupta, whose background is in consumer advocacy, calls interchange fees a "massive wealth transfer" that hurts both merchants and consumers. Shortly after the card settlements were reached, he started looking at state surcharge bans and realized that they are based on "the difference between 'glass half full' and 'glass half empty.'"

The Florida appeals court echoed this language in its decision siding with him.

"If the same copy of Plato's *Republic* can be had for \$30 in cash or \$32 by credit card, absent any communication from the seller, does the customer incur a \$2 *surcharge* or does he receive a \$2 *discount*?" the opinion read. "Questions of metaphysics aside, there is no real-world difference between the two formulations."

Despite the success in Florida, Gupta's strategy has had mixed results. In New York, the first state where it was tried, it won in 2013 but later lost on appeal. This year, it won in California but failed in Texas. Those three cases have been or are expected to be appealed.

Some lawyers who work on swipe fees consider Gupta's challenges to state laws a minor issue compared to the ongoing fight over the settlements, but Gupta believes that his suits and the settlements are interconnected.

When the settlements took effect, "it made state laws spring back to life. They were the only thing standing in the way of surcharging," he said. "The settlements won important benefits for merchants, and this litigation helps protect that relief."

Merchants still rarely, if ever, apply card surcharges. The settlements reached in 2012 permitted the practice but imposed so many restrictions and conditions that few, if any, have found it practical to do so.

Gupta thinks that state surcharge bans are another big barrier.

"Even if the settlement allows surcharging, what big merchant is going to do it if it's illegal in Texas and California? We have a national consumer economy," he said.

Surcharging rules could be in for even more flux, depending on whether the 2012 settlements survive merchants' latest challenges to them. That is anybody's guess, after revelations in July that attorneys for the card companies and the merchants exchanged huge amounts of confidential information while the deals were being negotiated.

Merchant attorneys argued that the lawyers' misconduct tainted the settlements and have asked them to be tossed out. The U.S. District Court for New York's Eastern District quickly complied, nixing the settlement between American Express and merchants in August, but a judge has not yet ruled on whether to throw out the Visa-MasterCard settlement. Merchants have appealed that settlement, and a decision is expected soon.



