# Surveying Surcharges: Credit Card Surcharge Laws & Recent Legal Trends

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The credit card brands' rules and the state laws regarding credit card surcharges, cash discounts, and service fees are something that only a lawyer could love.

Credit card brands hate allowing merchants to charge consumers more when they use a credit card. Decades ago, the payment brands began using their rules to place contractual restrictions on retailers that prevented them from charging credit card users higher prices than cash customers. Congress put a partial stop to this practice through the Truth in Lending Act of 1974 and subsequent amendments, which outlawed contractual provisions in credit card merchant agreements preventing the use of cash discounts. As a result, card companies could not prohibit cash discounts, but they could forbid credit card surcharges in their merchant agreements. And they did.

Visa and Mastercard responded with new rules that allowed cash discounts but banned surcharges. Although the definition of what constitutes a cash discount versus a surcharge would be disputed for the next two decades, Visa currently takes the position that a "cash discount" occurs when a merchant posts credit card prices and offers a discount on that price for customers who pay with cash. For instance, when a merchant posts the full price alongside a discounted price for paying for the product in cash, the merchant is utilizing a cash discount. On the other hand, when a merchant adds a fee to the transaction, that constitutes a surcharge. And to complicate matters further, the brands permit "convenience fees" in limited circumstances for fixed amounts for all tickets.

In the next step in this saga, merchants sued the brands, alleging a variety of antitrust claims, including that the brands conspired to prohibit merchants from charging different prices for cash and credit and adding the credit card fees to the transactions. As part of a 2013 settlement to the lawsuit, both Visa and Mastercard agreed to allow surcharging, but set up barriers to strongly discourage the practice. For instance, Visa requires each merchant to do the following:

1. Notify Visa at least 30 days in advance of beginning to surcharge;
2. Limit surcharging to credit cards only (no surcharging debit and prepaid cards);
3. Cap the amount of the surcharge to the merchant's discount rate for the applicable credit card surcharged, and to no more than 4 percent;
4. Disclose the surcharge as a merchant fee and clearly alert consumers to the practice at the point of sale—both in store and online—and on every receipt; and
5. (Most surprising given the nature of the antitrust lawsuit that gave rise to the authorizing surcharging rule) Visa says a merchant can choose to surcharge Visa and not other card brands, but merchants must surcharge Visa on the same terms and conditions as competitors.[1]

[1] Source: https://usa.visa.com/dam/VCOM/download/merchants/surcharging-faq-by-merchants.pdf

It is a rare merchant that finds complying with these rules worth the effort. In many instances, the merchants decide they are better off just continuing to eat the transaction cost.

While the card brands and the merchants fought about surcharging, several states—including California, Florida, Massachusetts, New York, and Texas—enacted laws that make credit card surcharges illegal.[2] Merchants, in turn, began a series of lawsuits challenging these statutes as unconstitutional based upon free speech grounds. In New York, the challenge to the surcharge ban went all the way to the Supreme Court of the United States ("SCOTUS"). The case, *Expressions Hair Design v. Schneiderman*, centered on merchants' arguments that the prohibition on credit card surcharges under New York General Business Law Section 518 ("Section 518") constituted an unlawful restriction of speech in violation of the First Amendment. A group of merchants wanted to use a pricing model with single stickers, *i.e.* one price for each product, compared to stickers that identified a credit card price and a cash discount price. The merchants wanted to put up signs that would indicate a surcharge of either a flat dollar amount or a percentage of the total cost added for the use of credit cards. These merchants filed a lawsuit against state officials, arguing that Section 518 restricted how they communicate their prices and effectively prohibited them from advertising the extra costs imposed on them to accept credit cards. The District Court ruled in favor of the merchants. Then the Second Circuit Court of Appeals reversed, holding that the law required the sticker price of cash and credit card payments to be the same and, therefore, regulated conduct rather than speech.[3] On appeal, SCOTUS held that Section 518 does regulate speech as applied to these specific retailers, and remanded the case to the Court of Appeals to determine whether the regulation survived scrutiny as a speech regulation and whether the statute was as vague as the merchants claimed"?[4]

With the First Amendment now in play, the Second Circuit was then tasked with analyzing whether Section 518 is a valid commercial speech regulation, and whether the law could be upheld as a valid disclosure requirement.[5] The Second Circuit, in turn, kicked the question to the New York Court of Appeals to determine "whether a merchant complies with Section 518 so long as the merchant posts the total dollar-and-cents price charged to credit card users."[6] In a closely divided decision, the New York Court of Appeals held that the surcharge practice is acceptable so long as no arithmetic is involved, and customers need not calculate what the differential is themselves.[7] But merchants may not, as they sought to do, simply list the cash price and then list a surcharge of X percent or X dollars. (Yes, lawyers

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[2] States that have enacted surcharge bans include: California (Cal. Civil Code §1748.1); Colorado (Colo. Rev. Stat. §5-2-212); Connecticut (Conn. Gen. Stat. §42-133ff); Florida (Fla. Stat. §501.0117); Kansas (Kan. Stat. Ann. §16a-2-403); Maine (Me. Rev. Stat. Ann. tit. 9-A, §8-509); Massachusetts (Mass. Gen. Laws Ann. ch. 140D, §28A); New York (N.Y. General Business Law §518); Oklahoma (Okla. Stat. tit. 14A, §2-211); and Texas (Tex. Business & Commerce Code Ann. §604A.001 *et seq*. and Tex. Finance Code Ann. §339.001). Puerto Rico (P.R. Code Ann. tit. 10, §11) also has a surcharge ban. Meanwhile, Minnesota limits the amount of surcharges to 5% and requires both an oral statement and a conspicuously posted sign informing purchases of the surcharge (Minn. Stat. §325G.051) while Georgia explicitly permits convenience fees (Ga. Code §13-1-15).

[3] *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1145 (2017).

[4] *Id.* at 1147.

[5] *Expressions Hair Design v. Schneiderman*, 877 F. 3d 99, 102 (2nd Cir. 2017).

[6] *Id.* at 103.

[7] *Expressions Hair Design v. Schneiderman*, NY Slip Op 07037 (Oct. 23, 2018).

and judges hate math.) Almost immediately, the New York Attorney General settled the lawsuit on terms that allowed these merchants to surcharge when the merchants post total prices for credit card purchases in dollars and cents. The settlement was likely a way for the New York Attorney General to save face and to attempt to keep some portion of its surcharging law.

Surcharging bans on the state level are on their way out. In light of SCOTUS's First Amendment ruling, merchants are challenging other state laws. In *Rowell v. Paxton*, a federal district court declared Texas's surcharge law unenforceable, reversing a previous decision from 2016 that the law was an ordinary business regulation.[8] The court found that under *Expressions*, the law must be evaluated as a regulation on speech, and the state failed to meet the high legal standard required to restrict the speech of these merchants. Meanwhile, the Ninth Circuit recently evaluated California's law and held that "the statute as applied to these plaintiffs violates the First Amendment."[9] Florida's law was found to be an unconstitutional abridgement of free speech even before *Expressions* came down.[10] And as long as the surcharge is clear and conspicuous to the consumer, even to the level of doing the math for the consumer, states will be hard-pressed to say these laws are legitimate limits on speech.

The key takeaway of the current landscape of surcharging is that laws banning surcharging are on the way out due to free speech concerns. Nevertheless, merchants will have to continue to comply with the card brands' draconian rules regarding surcharging that make it unlikely that surcharging will appeal to more than a small segment of merchants.

[8] *Rowell v. Paxton*, Case No. 1:14-CV-00190 (W.D. Texas Aug. 16, 2018).
[9] *Italian Colors Restaurant v. Becerra*, 878 F. 3d 1165, 1167 (9th Cir. 2018).
[10] *Dana's RR Supply v. Attorney General*, 807 F. 3d 1235, 1239 (11th Cir. 2015).