

# Banking and Finance Law Daily Wrap Up, CREDIT, DEBIT AND GIFT CARDS— 5th Cir.: Constitutionality of Texas law prohibiting credit card surcharges upheld, (Mar. 17, 2016)

By [Thomas G. Wolfe, J.D.](#)

Although a group of Texas merchants challenged Texas' Anti-Surcharge Law as an unconstitutional restriction on their free-speech rights under the First Amendment to the U.S. Constitution, the U.S. Court of Appeals for the Fifth Circuit has upheld the state law. Rejecting the merchants' arguments that the Texas law is unconstitutionally vague and penalizes them for characterizing credit-card pricing as a "surcharge" while not prohibiting a "discount" for non-credit-card transactions, the Fifth Circuit determined that the Texas law is a "a permissible economic-pricing regulation that does not implicate the First Amendment" ([Rowell v. Pettijohn](#), March 2, 2016, Barksdale, R.).

Notably, the Fifth Circuit's recent ruling is now aligned with the Second Circuit's 2015 decision in *Expressions Hair Design v. Schneiderman*, which upheld the constitutionality of New York's law prohibiting credit card surcharges (see *Banking and Finance Law Daily*, [Dec. 15, 2015](#)). In contrast, the Eleventh Circuit, in *Dana's Railroad Supply v. Attorney General, State of Florida*, struck down Florida's no-surcharge law as an unconstitutional abridgement of free speech (see *Banking and Finance Law Daily*, [Nov. 5, 2015](#)).

**Swipe fee treatment.** The applicable Texas law (Texas Financial Code §339.001) forbids merchants from charging an extra fee to those consumers who elect to pay with a credit card. According to the court's opinion, the state law was "enacted to address how the 'swipe fee' of two to three percent of the purchase price, which credit-card issuers charge merchants for each transaction paid with a credit card, is passed on from the merchant to the consumer."

**Standing established.** The Fifth Circuit observed that a violation of the Texas no-surcharge law could result in a civil penalty. Although no civil penalty had been imposed on any of the merchants who brought the action challenging the Texas law, the Fifth Circuit determined that the merchants had standing to bring their constitutional challenge because the merchants adequately established that they "were presently chilled from implementing their preferred pricing scheme," based on a "credible fear" that the Texas law would be enforced against them.

**Conduct v. speech.** The Fifth Circuit underscored that the Texas no-surcharge law "allows a merchant to discount and dual-price as it wishes" and that the amounts are not *required* to be the amount of the 'swipe fees' the merchants maintained were at issue. Viewing the Texas statute as one of "price regulation," the court maintained that "the merchants' assertion [that] Texas' law

regulates what they say, rather than what they do, is unavailing.” In the Fifth Circuit’s view, “simply speaking about the prices regulated by Texas’ law does not transform it into a content-based speech restriction; the speech is merely incidental to the regulated economic conduct.”

**Dual pricing scheme.** The Fifth Circuit emphasized that the merchants did not contend that the Texas no-surcharge law prohibited a dual-pricing scheme. Moreover, unlike the Florida no-surcharge law struck down by the Eleventh Circuit, the Texas no-surcharge law did not expressly exclude cash “discounts” and was “silent regarding pricing schemes other than applying surcharges,” the court stated.

**Dissent.** Circuit Judge James Dennis wrote a dissenting opinion. In his estimation, by “permitting merchants from describing the difference between cash and credit prices as a ‘discount’ while prohibiting them from describing it as a ‘surcharge,’ the Texas Anti-Surcharge Law makes the legality of a price differential turn on the language used to describe it. This is not a regulation of pricing or of other economic activity, but regulation of protected commercial speech, and one that I believe cannot survive First Amendment scrutiny.”

The case is [No. 15-50168](#).