Banking and Finance Law Daily Wrap Up,TOP STORY—11th Cir.: Florida's credit card 'no surcharge' law unconstitutionally abridges free speech,(Nov. 5, 2015)

By Thomas G. Wolfe, J.D.

In reviewing Florida's credit card "no surcharge" law, the U.S. Court of Appeals for the Eleventh Circuit struck down the state law as an unconstitutional abridgement of free speech under the First Amendment to the U.S. Constitution. The court determined that, under the Florida law, a merchant who offers the same product at a lower price for customers paying cash and at a higher price for customers using a credit card "is allowed to offer a *discount* for cash while a simple slip of the tongue calling the same price difference a *surcharge* runs the risk of being fined and imprisoned" (*Dana's Railroad Supply v. Attorney General, State of Florida*, Nov. 4, 2015, Tjoflat, G.).

Analyzing the Florida no-surcharge law under the "more forgiving standard of intermediate scrutiny" and applying a four-part test for commercial speech set forth by the U.S. Supreme Court, the Eleventh Circuit determined that "holding out discounts as more equal than surcharges, Florida's no-surcharge law overreaches to police speech well beyond the State's constitutionally prescribed bailiwick."

As noted by a dissenting opinion written by Chief Judge Ed Carnes, the majority's decision now places the Eleventh Circuit in conflict with the Second Circuit's decision in *Expressions Hair Design v. Schneiderman*—upholding the constitutionality of New York's credit card "no surcharge" law (see *Banking and Finance Law Daily*, Sept. 30, 2015).

Background. Four small businesses in Florida—Dana's Railroad Supply, TM Jewelry LLC, Tallahassee Discount Furniture, and Cook's Sportland Inc.—charged their customers lower prices for using cash and higher prices for using a credit card. According to the court's opinion, after each of the businesses communicated the price difference to their customers as an additional amount for credit-card use rather than as a lesser amount for paying in cash, the Florida Attorney General sent them "cease-and-desist letters."

Although the businesses believed that it was "more effective, transparent, and accurate" to call the price difference a credit-card surcharge rather than a cash discount, the Florida AG demanded that the businesses refrain from running afoul of Florida's credit card no-surcharge law.

Complaint. In March 2014, the four businesses and their principals filed a lawsuit against the Florida AG. They alleged that Florida's no-surcharge law constituted an unjustified restriction on speech in violation of the First Amendment. The businesses further alleged that because the

Florida law provided "insufficient guidance on how to comply with its mandates," it was void for vagueness as well.

Procedural context. The federal trial court granted the Florida AG's request to dismiss the lawsuit brought by the businesses. Among other things, the lower court determined that Florida's no-surcharge law essentially was a restriction on pricing that fell within the broad discretion of the Florida Legislature to regulate economic affairs. Conducting a "rational-basis" review of the Florida statute, the trial court upheld its constitutionality and entered a summary judgment in favor of the Florida AG.

The four businesses appealed that decision to the Eleventh Circuit.

Florida law. The statutory language of Florida's credit card no-surcharge law (Fla. Stat. §501.0117) provides: "(1) A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card. A surcharge is any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make payment … This section does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers."

The statute (Fla. Stat. §501.0117(2)) further provides that a violator of Florida's no-surcharge law "is guilty of a misdemeanor of the second degree." As a result, a violator could face the possibility of a $500 fine and 60 days of imprisonment.

Issue on appeal. After establishing its jurisdiction to hear the case, the Eleventh Circuit stated, "This appeal presents a pure question of law: the facial validity of Florida's no-surcharge law under the First Amendment to the United States Constitution."

First Amendment analysis. In contrast to the federal trial court, which construed Florida's no-surcharge law as primarily regulating "economic conduct" and, accordingly, calling for a "rational-basis" review of the law, the Eleventh Circuit determined that Florida's no-surcharge law "is a restriction on speech, not a regulation of conduct," thus "triggering First Amendment scrutiny."

Although the Eleventh Circuit recognized that "Florida's no-surcharge law proves difficult to categorize, skirting the line between targeting commercial speech and restricting speech writ large," the court determined that the statute "ultimately falls because it collapses under any level of heightened scrutiny." While conducting an "intermediate scrutiny" level of analysis, the Eleventh Circuit noted that "were the no-surcharge law subject to strict scrutiny, it would likewise fail."

Employing the four-part *Central-Hudson* test set forth by the U.S. Supreme Court for commercial speech, the Eleventh Circuit: (i) rejected "any notion that merely because some modicum of economic conduct is implicated therefore a law cannot also unconstitutionally

restrict speech"; (ii) maintained that the Florida no-surcharge law did not regulate false or misleading speech; (iii) struggled to identify "a plausible governmental interest that would be served" by the law; and (iv) asserted that the law "neither directly advances any potentially substantial state interest nor is it narrowly tailored."

Final disposition. In striking down Florida's credit card no-surcharge law as an unconstitutional abridgment of free speech under the First Amendment, the Eleventh Circuit reversed the federal trial court's grant of summary judgment to the Florida AG and remanded the matter for any further proceedings.

Dissenting opinion. In his dissenting opinion, Chief Judge Carnes emphasized the "narrower definition" of surcharge contained in the Florida statute that, in his view, survives free-speech and vagueness challenges. The dissent also advocated a "saving interpretation" of the Florida no-surcharge statute—not only as "fairly possible" but also as "the most natural one."

The case is No. 14-14426.