

Unfair Competition Defense Podcast
Greenberg Traurig, LLP
Episode 16

Speaker 1 ([00:00](#)):

This podcast episode reflects the opinions of the hosts and guests and not of Greenberg Traurig, LLP. This episode is presented for informational purposes only, and it is not intended to be construed or used as general legal advice nor a solicitation of any type.

Greg Nysten ([00:19](#)):

Hello and welcome to the Unfair Competition Podcast. My name is Greg Nyland and my co-host Adil Khan is welcoming a new addition to the family. So he won't be participating today for this wonderful reason, and I want to congratulate Adil and his wife on the birth of their daughter. So that means you are stuck with me as a host today. And for our guest, we are bringing back the venerable Ed Chansky, fellow GT shareholder and advertising trade regulation and sales pricing lawyer extraordinaire, as well as many other areas of practice and skills. He also plays the trombone. Welcome back, Ed. I think we will need to come up with some sort of award for you as our most frequent guest on the program. We asked Ed to come back to talk today about a hot area of the law popping up today in unfair competition cases and general litigation, and that involves credit card surcharges in the United States. Ed, could you give us some background on the development of law in this area?

Ed Chansky ([01:17](#)):

Sure, Greg, thanks for having me back, always a pleasure. My congratulations to Adil as well. What a wonderful event for him and his family. So, credit card surcharges, years ago, they were completely prohibited in the United States. There was even a federal law on it that law lapsed, I believe it was back in the 1980s. In any event, long ago in response, maybe there was overlap in time, many states also enacted statutes that prohibited surcharges. In the early 2000s, a coalition of national retailers and trade associations then filed lawsuits against the credit card companies, and this was tied up with the arguments about collusion alleged and antitrust for imposing what the merchants viewed as artificially high fees to process credit card transactions.

([02:14](#)):

These cases raged on for a while. Ultimately, they were consolidated and there was an industry-wide settlement in 2013, under which among other things, merchants subject to any applicable law could impose surcharges. So in other words, for the last decade, we've been in a new era where as far as the industry is concerned, as far as federal law is concerned, surcharges with some limitations are allowable. That's the background.

Greg Nysten ([02:47](#)):

Thanks, Ed. Is there an increased interest in surcharges currently, and if so, why? And could you give us an idea of the current legal landscape in this space?

Ed Chansky ([02:57](#)):

Yes. I think there's been a tremendous increase of interest among merchants for a variety of reasons. The cost to accept a credit card, if you charge somebody a dollar in cash, you get the full dollar into your cash register, that's your revenue as the merchant. If you sell the same item for a dollar to someone using a credit card, there's some percentage of that purchase and it will vary depending on which card the customer uses, which company they're with as a credit card company, whether it's a premium card that provides lots of miles and other rewards. But you may be talking anywhere in the range, 2, 3, 4, 5, that kind of percentage. Well, right off the top, that's a loss to the merchant. Years ago, credit cards, yes, they were used but not as much as today, particularly with purchases having moved online, you can't buy online with cash and you can't write a check as quaint as that sounds.

[\(04:00\)](#):

And so, the greater number of transactions being done on credit cards with inflation and other costs going up for merchants, they're looking for every place where they can squeeze a few more percent out of each sale. And one thing they look at and say is, why are we giving up 2, 3, 4, 5, whatever it is, percent on every transaction? And I think those are a combination of reasons driving the very great interest now among merchants to pass along some or all of that cost. Okay, so that's the background pressure on prices, wanting to get all of the revenue. The general legal landscape. Remember federal law went away, the credit card companies generally allow surcharges will talk about some of their contractual limits. But what's the legal landscape right now? It's state regulation and in the vast majority of states, it's legal, it's permissible, it is now allowed to impose a surcharge for use of a credit card. We'll talk about some details of that as we go further.

[\(05:10\)](#):

The exceptions at the moment are Massachusetts, Connecticut, Maine, and Puerto Rico. Though even in those states, enforcement is lax and there's even some reason perhaps to question the enforceability of those laws. Do remember this is only credit cards, not ACH wire transfer or debit card. That's just reaching into someone's bank account. That's not allowed. Don't try that at home folks. But for credit card transactions, they're generally permissible now. As I said, small handful of states where there's a question where those charges are allowed. Of course, general background law on truthful and non-deceptive trade practices means you have to disclose very clearly and conspicuously prior to someone making a purchase, not just delayed at checkout, but you should be very clear, "Hey, there will be a surcharge if you use a credit card."

[\(06:04\)](#):

So, for example, if you're in a physical store, there may be a clear sign at the cash register or if you're in a takeout restaurant on the menu board information saying, "Hey, add 3%," whatever, "if you're using a credit card," as we'll talk about as we go on further. However, if a credit card surcharge is mandatory and unavoidable. For example, if you're buying something on a website, you can't pay cash, you don't have any other means of payment, you have to use a credit card in that circumstance. There are some new laws, not the necessarily surcharge laws, but generally laws about advertising all in pricing, avoiding drip pricing, sometimes referred to as junk fees. There you may have to include and bundle into the list price of the product, the amount of the surcharge and not say, "Hey, product is a dollar plus 3%." You have to say, "It's a dollar and 3 cents." So that's a little more detail I'm getting ahead of myself at the moment.

Greg Nylén [\(07:09\)](#):

That's interesting. So, what about credit card terms and conditions or credit card company rules or agreements? How do those come into play here?

Ed Chansky [\(07:18\)](#):

Well, that's a great question and it's not only in this area, for example, I digress for just a moment. Even under the telephone Consumer Protection Act, I'm sure something near and dear to your heart, Greg, you've seen all of those cases. When you get consent there, not only do you have to comply with what the federal or applicable state law says, there are requirements from the telecom carriers to make additional disclosures. Well, same thing here that even if you're complying with a state law that says, yeah, you can impose a credit card surcharge, the credit card companies as part of that industry-wide settlement back in 2013 have adopted as their own terms, their own agreements with merchants, several limits on what can be charged. Now this isn't the law, but it's a contractual obligation and limitation on what you can do. And without getting overly granular, two basic principles apply under these agreements.

[\(08:22\)](#):

First, the merchant cannot charge the consumer more than what the merchant pays for processing the transaction. Okay? If you're incurring 2%, 3%, you can't say, oh, credit card surcharge and make it 10%. You can't turn it into a profit center. You can recoup, but you cannot profit. Second principle is most favored nation, you can't charge more to accept my credit card than you do for my competitor's credit card. That would lead to all kinds of problems among the credit card companies as each one feels disfavored and they just don't want that. So the most favored nation concept and the no profiting just pass through concept. Okay, so if anyone out there is representing a merchant and that merchant is considering imposing charges, review the terms of your agreement with your credit card company or companies carefully to decide how to proceed. And there are also of course then some quirks under the various state laws.

Greg Nylén [\(09:26\)](#):

Let's talk about those quirks for a minute. Are there any particular nuances you want to highlight?

Ed Chansky [\(09:30\)](#):

They sort of fall into a couple of different categories, and the first category is, I mentioned before Massachusetts, Connecticut, and Maine still have on their books and Puerto Rico still have laws technically prohibiting surcharges. Now, this was true in a number of states. I think there were at least a dozen or so, maybe more than that at one point. Very interesting history on them. A number within the last decade or so have been struck down as unconstitutional. And on a very interesting theory, the typical structure of the law was to say, "Thou shalt not impose a surcharge for use of a credit card, but you are allowed to advertise that there's a discount for paying in cash." And the attack on those laws was that because the economic reality is identical in each situation, base price a dollar, I'll either give you a surcharge up to a dollar three if you use a credit card or base price, a dollar three, I'll give you a discount of 3 cents, 3% if you pay cash.

[\(10:40\)](#):

Because the economic reality was the same. The challenge in the court was that these laws did not regulate commerce. Instead, they regulated speech First Amendment. Under that theory, the laws in Texas and California were struck down and there many of the laws around the country are worded similarly. New York's law also was found to be a restraint on speech by the United States Supreme Court went all the way up to the Supreme Court, but the court remanded the case for various reasons. It was a very complicated and kind of tortured litigation history and New York's highest court, their court of Appeals saved the law by interpreting it in a rather quirky way to allow surcharges, even though it said surcharges are prohibited to allow them, as long as the merchant did the math for the consumer.

[\(11:31\)](#):

In other words, you listed the price as a dollar three. If you use a credit card, it's a dollar three. If you don't use a credit card, it's a dollar. Whether that made sense or not under the wording of the statute doesn't really matter because effective last year in 2024, the New York legislature amended and updated the statute to take away the prohibition and to allow surcharges as long as the merchant does the math for the customer. And we'll come back to that again when we talk about disclosure requirements. So first thing, prohibitions, they're technically on the books in many states they've been struck down on constitutional grounds in most of those states. There has not been a challenge in Connecticut, Maine, Massachusetts or Puerto Rico. So be careful in those states. Consider maybe avoiding them though if a challenge were to come up, they might suffer the same fate as Texas and California.

Greg Nysten [\(12:29\)](#):

Thanks. How do the states treat limits on the amount of surcharges?

Ed Chansky [\(12:33\)](#):

Okay, so we have the prohibition altogether that we talked about. Now, if they're allowed, and remember that the credit card companies have their own limits that you're not supposed to what the merchant are charged to process the transaction. So what do the laws say on that? Well, in general, you're not supposed to charge more than what you incur as a cost, but there are at least two states with some interesting quirks that potentially go beyond that, Colorado and New York. In Colorado, their statute which was enacted within the last two to three years, I forget exactly when, but it's pretty recent. It says that you can impose a surcharge, it's legal, not to exceed the actual cost the company incurs to process the transaction or 2%. It doesn't say the greater of or the lesser of it just says the amount you incur or 2%. What does that mean? No one knows the conservative approach is in Colorado, not to go over 2%, but it's completely unclear.

[\(13:47\)](#):

And to my knowledge, and I'll confess, I haven't done a recent look to see if there's been any litigation or regulatory pronouncement. It's still unclear. In New York, and as I mentioned, their law came in 2024. It's very recent, just a year old. The limitation is expressed as the amount charged by the credit card company. Now that's very important wording, amount charged by the credit card company. Now, this limit is potentially problematic if the merchant, like many merchants uses a middleman payment processing company causing the cost to the merchant, the overall cost. In other words, the wording used in Colorado to be higher than the amount that's charged by the credit card company.

[\(14:36\)](#):

So maybe the credit card company charges you 2%, but you have a middleman payment processor like Stripe or whoever and they charge an additional percent. So you as merchant incur 3%, only 2% of which was charged by the credit card company. Can you charge two or can you charge three? It's really not clear, but absent some clarification, again, I think the safer course as in Colorado is to say, "Don't charge more than what the credit card company is charging to you." Go figure.

Greg Nysten [\(15:09\)](#):

What about disclosure obligations? How do the states handle those?

Ed Chansky [\(15:12\)](#):

So, this is the third area, outright prohibitions, questionable, very few states, limitations. You got to remember, generally speaking, don't exceed the amount you are incurring as a cost. But Colorado and New York, quirky disclosure, where do you disclose this and are there any special other things to keep in mind? Well here, we're now going to start mostly not entirely to bump into a separate set of laws, the so-called junk fee laws. I don't really like that term. It's a collective term for a broad set of practices. For our purposes, think of it as drip pricing of hiding the ball of saying you're going to charge X amount for something, whether it's a hotel room, a concert ticket, a widget online in a purchase, and then only later in the transaction springing on the customer, "Oh yes, there's this extra add-on charge. There's this resort fee, there's this ticket delivery fee, there's this fee, fee," whatever it is.

[\(16:11\)](#):

The disclosure things and the key items here are we start with California as is so often the case and how appropriate, Greg, for your podcast here on California, Unfair and Deceptive trade practices. Effective July one of last year, in 2024, California's law took effect saying that all price listings, there are a few exceptions, but generally speaking, all price listings for all goods and services with a few exceptions should be inclusive of all fees and charges the merchant will impose. Now sales tax, government-imposed fees, variable items like shipping, maybe at the end if you pick overnight or this or that, that can come later. But if there's a mandatory charge such as we're going to add 3% for use of a credit card and there's no way to avoid that when you're shopping online, then the price should be listed as \$1 and 3 cents. You cannot say it's \$1 plus 3% surcharge. You have to actually list the full all-in price. And as I said, sales tax shipping can be left out.

[\(17:19\)](#):

This law obviously impacts the ability to impose on across the board surcharge on all customers unless the surcharge is voluntary and the consumer has a choice and a way to avoid it. So think for example in a physical store, you might still just post that sign saying, Hey, if you choose to pay with a credit card not cash, then we're going to add 3% or three and a half percent or whatever it is they're going to do for online. That may not work where a credit card is mandatory. Okay, that's the California law and Minnesota has adopted something very similar and there are laws and regulations that are being proposed and kind of bubbling up around the country. The FTC adopted this in their so-called junk fee regulation, which originally also would've applied across the board, but is narrowed now to hospitality and event ticket industries. So again, nationwide, California basically on everything with a few exceptions, FTC for hospitality and event tickets, the all-in pricing. Minnesota, yes. Like California, probably more to come.

[\(18:36\)](#):

New York's law is the quirky one because this idea of the all-in pricing is not triggered by the mandatory nature of the charge. New York is literally saying if you're going to impose a surcharge on use of a credit card, even where it's voluntary, you have to do the math for the customer and you have to show them. And they have examples posted on the, I think it's the Secretary of State's Office in New York on their website showing how to do this. And it's a little bit like what many of us have seen, at least in the past at gas stations where there are two prices posted over the pump. The gallon is like \$3 and 25 cents cash, \$3 and 39 cents credit. And you actually have to show them both if you're going to do it this way. You can't just say \$3 and 29 cents, whatever my example was 3.25 plus 3%. If you use a credit card, you actually have to show both prices, and that's whether it's voluntary or not, which is different from the California and FTC situation.

[\(19:49\)](#):

To summarize it, if the customer has an option to use a different payment method, a realistic option, that will not trigger the charge, then the price generally can be advertised as the base price, a dollar plus 3%. Remember, don't violate the credit card company terms and watch out for the limits in Colorado and New York, accompanied by clear disclosure, the surcharge will apply for use of the credit card except New York where you have to do the math. And don't forget about Connecticut, Maine, and Massachusetts where maybe possibly the prohibitions still are valid. So that's the summary on the quirks of the disclosure laws.

Greg Nysten ([20:32](#)):

Well thanks, Ed. That was great as usual, very helpful, very enlightening and really appreciate it and we hope to have you back again soon.

Ed Chansky ([20:39](#)):

I'd love to come back again. It's always fun. You ask great questions and these are interesting topics I hope of interest to your listeners and maybe of help to them in guiding their own clients.

Greg Nysten ([20:53](#)):

Absolutely. And I'll take a minute now instead of a film review, because I've been watching Severance like so many people and loving the second season, the fact that Michael Chernus is in Severance playing Ricken, the self-help guru, I wanted to recommend a show called Patriot, which is not what it sounds like from Amazon Prime from back in 2015 to 2018. It's two seasons and it's about a character named John Tavner, played by Michael Dorman, whose father played by Terry O'Quinn, the bald guy of Lost Fame, who plays a CIA operative and sends his son into these insane operations on behalf of the CIA, but he does not have official cover. Meaning if he gets caught, no one's going to come to bail him out on behalf of US sends him in to get a job as an engineer at a pipe company because it's connected to funding for Iran's nuclear program. And the humor is so quirky and hilarious and unusual.

([21:51](#)):

I think it's highly worth watching if you are at all into the show Severance for different reasons. But you'll see some of the same people or at least one of the main characters, and I can't recommend it enough. It's worth digging up. Got great reviews at that time. I think they just promoted a whole lot, so it only lasted two seasons, but they're well worth watching. And on that note, I want to thank Ed again as well as our production team and our listeners and wish everybody a fantastic day and stay tuned for our next episode.