



**House Financial Institutions and Pensions Committee**  
**House Bill 2133 Proponent Testimony**  
**Scott Schneider JD**  
**January 30, 2023**

Chairman Hoheisel & Members of the Committee:

The Kansas Restaurant & Hospitality Association supports HB 2133 because our members would like the flexibility to disclose the amount of the credit card transaction. This disclosure has been held as legal in United States District Court in CardX LLC vs. Derek Schmidt on February 25, 2021. Said another way, K.S.A. 16a-2-403 was held to violate the First Amendment rights of the defendant and is essentially unenforceable. The Kansas Statutes Annotated say this:

“State was unable to show that statute prohibiting credit card surcharges was tailored to an asserted substantial state interest in lowering the amount of credit card debt, encouraging cash payments and preventing fundamental unfairness to consumers. CardX, LLC v. Schmidt, 522 F. Supp. 3d 929 (D. Kan. 2021).”

Credit cards play a useful and meaningful role in the transaction of business. They increase the speed of the transaction and reduce the bad debt. However, the credit marketplace is not balanced. Every store must enter into a take it or leave it contract to access the use of the credit transaction. In addition, the credit companies have successfully lobbied states to regulate even further down to manage this transaction. The Court describe their analysis as the companies are essential acting under the color of state law. The federal district court in CardX used this fact as their standard of review:

"[Section 1983](#) provides a remedy for a plaintiff who is deprived of a federal right by a person acting under color of state law. [42 U.S.C. § 1983](#). Plaintiff alleges that Defendant, under color of Kansas law, is depriving Plaintiff of a First Amendment right to free speech. The First Amendment, which provides in part that "Congress shall make no law ... abridging the freedom of speech," among other things "protects commercial speech from unwarranted governmental regulation." [U.S Const. amend. I](#) ; *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, [447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341](#) (1980).”

**KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION** 3500 N ROCK ROAD BUILDING 1300 WICHITA,  
KANSAS 67226  
TELEPHONE: 800.369.6787 IN WICHITA: 316.267.8383 FACSIMILE: 316.267.8400 E-MAIL: [KSREST@KRHA.ORG](mailto:KSREST@KRHA.ORG) WEB  
SITE: [WWW.KRHA.ORG](http://WWW.KRHA.ORG)

**KRHA MEMBER SERVICES**



**KRHA EDUCATION FOUNDATION  
WORKERS' COMP FUND**



**KRHA INSURANCE SERVICES**



**KRHA**

We would further ask this committee to not add any additional credit industry language. These agreements should be negotiated as business to business contracts and not through statute. Again, this may be the most interesting annotation in the Kansas Statutes because even the revisor's office explains the distinction has no meaningful difference:

#### KANSAS COMMENT, 2010

1. This section, which is not part of the uniform act, prohibits surcharges for the use of credit cards in sales and lease transactions. The concept of a "surcharge" assumes the existence of a regular price, or norm against which the surcharge can be measured. Presumably, any extra charge which increases the regular price to a credit card customer would be a surcharge. This is the definition used in the TILA; the term "regular price" is defined in TILA, 15 U.S.C.A. § 1601(x) as the tag or posted price.

**Under this section, as under the TILA, surcharges are distinguished from discounts and, discounts for using cash are permitted. See TILA, 15 U.S.C.A. § 1666f; Kan. A.G. Op. No. 86-115. As a practical matter, there is no difference between posting a price for gasoline, for example, of \$1.00 per gallon and offering a discount of 4 cents to cash purchasers, and posting a price of 96 cents per gallon and imposing a surcharge of 4 cents to credit card purchasers. Either way, the cash purchaser pays 96 cents and the credit card purchaser pays a dollar. Yet under this section, one practice is legal and the other is not. Abuse or manipulation of this rule might be a deceptive trade practice under the KCPA.**

What adding additional language seeks to do is essentially hire the Kansas Attorney General to defend a private business agreement at taxpayer expense. Below is an example of the existing agreed to requirements between a merchant and a credit card company:

#### **Industry O&A on Surcharging**

- Surcharging is capped at 4% by Card Brands
- Surcharges cannot be levied on debit, prepaid, or gift cards
- Surcharging is not allowed in all states (currently prohibited in CO, CT, KS, MA, ME, OK)
- A surcharge must apply to all credit transactions and card brands
- A surcharge must be shown on the receipt
- Must have signage disclosing the surcharge at the points of entry and acceptance. It is the responsibility of the merchant to post signage disclosing the program

**Q. Can surcharging be done in a CNP (card not present) environment? (For example, phone orders that are key-entered.)**

- Yes. Surcharging can take place on CNP transactions. Any credit card transactions key-entered into a Surcharge-enabled terminal will automatically have the surcharge applied.

**Q. In a restaurant environment with tip adjust, is the Surcharge applied to the total transaction amount, including tip?**

- No. In a restaurant that does Tip Adjusts after the sale, the Surcharge and program fees are based on the original Authorization amount.

**Q. What's the difference between a convenience fee and a surcharge?**

- Convenience fees are charges levied for the privilege of paying for a product or service using an alternative payment channel that is not standard for the merchant. For example, if the merchant primarily accepts payments in person, a convenience fee may apply if a customer pays online or over the phone. A surcharge is a fee charged to customers simply because they are using a credit card.

**Q. Is there any situation in which a debit card transaction can be surcharged? What about prepaid cards?**

- All debit cards and prepaid cards, no matter how transacted, are prohibited by the card brands from being surcharged.

**Q. Where does sales tax come in, before or after the surcharge?**

- Surcharge applies to the entire amount of any credit card transaction, including sales tax.

**KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION** 3500 N ROCK ROAD BUILDING 1300 WICHITA,  
KANSAS 67226  
TELEPHONE: 800.369.6787 IN WICHITA: 316.267.8383 FACSIMILE: 316.267.8400 E-MAIL: [KSREST@KRHA.ORG](mailto:KSREST@KRHA.ORG) WEB  
SITE: [WWW.KRHA.ORG](http://WWW.KRHA.ORG)

**KRHA MEMBER SERVICES**



**KRHA EDUCATION FOUNDATION  
WORKERS' COMP FUND**



**KRHA INSURANCE SERVICES**



**KRHA**