



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 14, 2019

Ms. Shelly Atteberry
Cooke County Auditor
Cooke County Courthouse
101 South Dixon Street
Gainesville, Texas 76240

Opinion No. KP-0257

Re: Whether a private attorney or collection agency that contracts with a county to collect delinquent amounts owed to county courts may charge defendants a fee for the use of credit cards (RQ-0261-KP)

Dear Ms. Atteberry:

A commissioners court of a county “may enter into a contract with a private attorney or a public or private vendor for the provision of collection services for . . . debts and accounts receivable such as unpaid fines, fees, court costs, forfeited bonds, and restitution ordered paid,” among other items. TEX. CODE CRIM. PROC. art. 103.0031(a)(1). You ask whether a private attorney or a collection agency entering into such a contract may charge a fee for the use of credit cards to pay those debts.¹ You raise section 604A.0021 of the Business and Commerce Code in particular and ask whether that statute prohibits charging such a fee. Request Letter at 1.

Section 604A.0021, with limited exceptions, prohibits imposing a surcharge for the use of a credit card in certain circumstances: “In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment.” TEX. BUS. & COM. CODE § 604A.0021(a). Before addressing your specific question, it is first necessary to address the validity of section 604A.0021 generally.

A federal district court addressing section 604A.0021 recently held that, as applied to certain merchants, the statute violates commercial free-speech rights under the First Amendment. *See Rowell v. Paxton*, 336 F. Supp. 3d 724, 732 (W.D. Tex. 2018). The district court relied on the U.S. Supreme Court decision in *Expressions Hair Design v. Schneiderman* to reach its decision.² *Id.* In *Expressions Hair Design*, the Court addressed a statute similar to section 604A.0021 that prohibited a seller from imposing “a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.” 137 S. Ct. 1144, 1147 (2017). Concluding that the

¹See Letter from Ms. Shelly Atteberry, Cooke Cty. Auditor, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 18, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²The district court initially found the state statute constitutional; however, the U.S. Supreme Court granted certiorari, vacated the district court’s judgment, and remanded the action for further proceedings in light of its decision in *Expressions Hair Design v. Schneiderman*. *See Rowell v. Pettijohn*, No. A-14-CA-190-LY, 2015 WL 10818660 (W.D. Tex. Feb. 4, 2015); *Rowell v. Pettijohn*, 137 S. Ct. 1431 (2017).

statute regulated “how sellers may communicate their prices,” the Court held that it regulated speech and required evaluation under a First Amendment analysis. *Id.* at 1151. Performing that analysis with regard to the Texas statute, the district court in *Rowell v. Paxton* concluded that section 604A.0021 did not withstand constitutional scrutiny as applied to the facts in that case. *Rowell*, 336 F. Supp. 3d at 732.

When a court determines that a statute is unconstitutional as applied, it normally invalidates the statute only as applied to the litigant in question and does not render the statute unenforceable with regard to other litigants or different factual circumstances. *See Fed. Elec. Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001). In holding section 604A.0021 unconstitutional as applied, the district court noted that the merchants in question did not seek “to extract additional profits by imposing surcharges in excess of the cost of accepting each credit card.” *Rowell*, 336 F. Supp. 3d at 730. Thus, the court concluded that the speech at issue was not deceptive or misleading. *Id.* However, the court acknowledged that the State is “free to prevent the dissemination of commercial speech that is false, deceptive, or misleading,” and suggested that the First Amendment analysis would be different if the merchants sought to impose higher surcharges than the swipe fees charged to the merchants by credit card companies. *Id.* Thus, circumstances may still exist where, as applied, section 604A.0021 operates to prohibit a credit card surcharge fee.

Even where section 604A.0021 remains valid, however, it is unlikely a court would find it applicable to the specific circumstances you describe. Section 604A.0021 does not apply to a “county . . . that accepts a credit card for the payment of fees, taxes, or other charges.” TEX. BUS. & COM. CODE § 604A.0021(b)(1). Thus, section 604A.0021 does not prohibit a county from imposing a surcharge on a payee using a credit card for the payment of fees, taxes, or other charges owed to the county. *Id.* You question whether that exception would also allow a private entity contracting with the county to charge a credit card fee. Request Letter at 2. The exemption in subsection (b)(1) expressly applies only to governmental entities and would not generally exempt a private attorney or collections agency. TEX. BUS. & COM. CODE § 604A.0021(b)(1). However, section 103.0031 authorizes a county to contract with “a private attorney or a public or private vendor for the provision of collection services for . . . fees.” TEX. CODE CRIM. PROC. art. 103.0031(a)(1). Reading these provisions together, if a county is entitled to impose a surcharge fee for credit card use, a court would likely conclude that a private attorney or collections agency acting as an agent for the county could collect that surcharge on behalf of the county when collecting other fees, taxes, or other charges. *See McKaughan v. Baldwin*, 153 S.W. 660, 661 (Tex. Civ. App.—Austin 1913, no writ) (explaining that an agent, acting “within the scope of the business for which such agency is created, stands in the shoes of the principal and may do anything in reference to such business that the principal could have done”).³

³Whether a county’s contract with a private attorney or debt collection agency creates an agency relationship will require evaluating the specific contract at issue and is not a determination appropriate for the opinion process.

S U M M A R Y

Section 604A.0021 of the Business and Commerce Code prohibits imposing a surcharge for the use of a credit card in certain instances. Although a recent judicial decision held section 604A.0021 unconstitutional as applied to specific facts, it remains enforceable in some contexts. But it does not apply to a county imposing a surcharge on a payee using a credit card for the payment of money owed to the county.

Section 103.0031 of the Code of Criminal Procedure authorizes a county to contract with a private attorney or a public or private vendor for the provision of collection services for fees. If a county is entitled to impose a surcharge fee for credit card use, a court would likely conclude that a private attorney or collections agency acting as agent for the county could collect that surcharge on behalf of the county when collecting other fees, taxes, or other charges.

Very truly yours,



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