Can't Get Money for Nothing: An Analysis of ATM Surcharge Ban Demand

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“Can’t Get Money for Nothing”: An Analysis of ATM Surcharge Ban Demand

I. INTRODUCTION

Five years ago, MasterCard-owned Cirrus and Visa U.S.A.-owned Plus began allowing banks to charge noncustomers for use of their automatic teller machines (ATM). This fee, called a “surcharge” or “convenience fee,” has been a hot topic among bankers and consumers. Consumer Public Interest Research Groups (PIRG) contend that the surcharge is an “extra ATM fee,” is excessive, and charges consumers twice. Banking institutions, however, contend that using another bank’s ATM is the consumer’s choice, and surcharges are fees consumers pay for the ability to use another bank’s ATM at a more convenient location.

This Note argues that future state or local attempts to ban or limit ATM surcharges will not succeed. Part II examines claims by states and localities justifying the enactment of ATM surcharge limits or bans in the context of Bank of America v. City and County of San Francisco. Part III discusses banks’ various counter claims of federal preemption of those reasons in the context of Bank of America. Part IV analyzes the future of Bank of America, currently on appeal in the Ninth Circuit, in terms of outcome, its practical effects on cities and banks, and the Office of the Comptroller of the Currency’s role in the litigation. Part V argues that based on prior litigation, future state or local attempts

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5. See infra notes 22-67 and accompanying text.
6. See infra notes 68-82 and accompanying text.
Part VI reasons that Congress, based on prior proposed bills and current legislation, will not pass surcharge limits or bans. Part VII expands on a congressional analysis by determining whether the public desires ATM surcharge bans or limitations. Based on a combination of surcharge free ATM locations, ATM alliances, advertising at ATMs, and an increase of value-added services at ATMs, this Note argues that consumer demand for surcharge regulation will decrease. This Note concludes that considering court, congressional, and consumer attitude, future local or state attempts to limit or ban surcharges will be unsuccessful.

II. STATE AND MUNICIPAL ORDINANCE JUSTIFICATION

In response to ATM surcharges, some cities and states hoped to pass ordinances or laws that either ban or limit the surcharge that may be charged by a noncustomer bank. For example, on October 12, 1999, the Santa Monica city council passed section 4.32.040 to its Municipal Code, which prohibited financial institutions operating ATMs to charge non-accountholders for machine use. Similarly, on November 2, 1999, voters in San Francisco City and County approved Proposition F, passing the same requirements into section 648.1 of San Francisco’s Municipal Code.

Santa Monica and San Francisco’s justification for its authority to pass the ordinances came from the Electronic Funds Transfer Act (EFTA), which regulates electronic transfers. According to the EFTA, an electronic fund transfer includes ATM

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7. See infra notes 83-90 and accompanying text.
8. See infra notes 91-97 and accompanying text.
9. See infra notes 98-126 and accompanying text.
10. See infra notes 98-126 and accompanying text.
11. See infra notes 127-32 and accompanying text.
14. Id.
transactions. Specifically, the cities relied on the EFTA's provision that "[t]his subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency." Furthermore, the EFTA states that "[a] State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." Santa Monica and San Francisco claimed its provisions were passed to protect consumers from unwarranted fees and to promote competition among smaller banks and credit unions. Santa Monica and San Francisco argued that their authority to ban surcharges fit squarely within the realm of these two provisions and was therefore permitted.

III. PREEMPTION

The U.S. District Court for the Northern District of California, however, did not agree. On November 3, 1999, Bank of America, Wells Fargo, and the California Bankers Association filed an action seeking to enjoin the enactment of both Santa Monica's Municipal Code section 4.32.040 and San Francisco's Municipal Code section 648.1. On November 15, 1999, a preliminary injunction was granted and was affirmed by the Ninth Circuit Court of Appeals on March 31, 2000. On June 30, 2000, the U.S. District Court for the Northern District of California ordered defendants Santa Monica and San Francisco permanently

19. Id.
21. Id. at *2.
22. Id. at *5.
23. Id. at *1.
24. Id. California Federal Bank's motion to intervene as a plaintiff was granted on January 20, 2000. Id. California Federal Bank intervened to assure that the interests of the whole industry were represented while maintaining streamlined litigation. Chris Chenoweth, California Banker, ATM Access Fee Litigation, Where Do We Stand, http://www.calbankers.com/media/calbrc/ winter00.htm (last visited Jan. 22, 2002). Amicus curiae briefs were filed by the Office of the Comptroller of the Currency and by the Office of Thrift Supervision. Bank of America, 2000 WL 33376673, at *1.
enjoined from enforcing its ordinances. At the time of printing, Santa Monica and San Francisco are appealing the decision in the Ninth Circuit Court of Appeals.

What is notable about Bank of America v. City and County of San Francisco is its thoroughness in discussing the extent to which federal laws preempt local attempts to ban surcharges. Not only does the court in Bank of America hold that the National Bank Act preempts bans, but it also lists other federal laws and agency field occupations as well. The following is a discussion of the acts and regulations the court in Bank of America found persuasive in its determination.

A. National Bank Act

The Bank of America court found that the cities' ordinances directly preclude national banks from exercising a power authorized by the National Bank Act (NBA). The NBA establishes the structure for national bank's "creation, regulation, and operation." According to the NBA, a national bank may "exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking." The court in Bank of America noted that part of this exercise includes the Officer of the Comptroller of Currency (OCC)'s authority to regulate banks. The court commented that the OCC explicitly allows a national bank to collect non-interest charges and fees from customers. Specifically, the OCC allows banks to use their

28. Id. at *2-*4.
29. Id. at *4.
30. Id.
31. Id.
34. Id. at *2. The court relied on the regulatory language in 12 C.F.R. § 7.4002(a). Bank of America, 2000 WL 33376673, at *4 (citing 12 C.F.R. § 7.4002(a)). When the court decided Bank of America, 12 C.F.R. § 7.4002(a) provided:
discretion in assessing non-interest charges and lists several considerations to be made in determining whether a non-interest charge or fee is reasonable. The court held that by prohibiting

Customer charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account services charges. For example, a national bank may impose deposit account service charges that its board of directors determine to be reasonable on dormant accounts. A national bank may also charge a borrower reasonable fees for credit reports or investigations with respect to a borrower's credit. All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

12 C.F.R. § 7.4002(a). However, as will be discussed later in the Note, 12 C.F.R. § 7.4002 was revised after the Bank of America case. See infra notes 73-80 and accompanying text; 12 C.F.R. § 7.4002(a) (2001). This new language became effective on August 1, 2001. National Bank Charges, 66 Fed. Reg. 34,791 (July 2, 2001) (to be codified at 12 C.F.R. § 7.4002). The revised 12 C.F.R. § 7.4002(a) was shortened significantly, providing that "[a] national bank may charge its customers non-interest charges and fees, including deposit account service charges." Id.

35. Bank of America, 2000 WL 33376673, at *2. The court also relied on the regulatory language in 12 C.F.R. § 7.4002(b). Id. at *4 (citing 12 C.F.R. § 7.4002(b)). When the court decided Bank of America, 12 C.F.R. § 7.4002(b) provided:

Considerations. The establishment of non-interest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others: (1) The cost incurred by the bank, plus a profit margin, in providing the service; (2) The deterrence of misuse by customers of banking services; (3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; (4) The maintenance of the safety and soundness of the institution.

12 C.F.R. § 7.4002(b). As will be discussed later in the Note, 12 C.F.R. § 7.4002 was revised after the Bank of America case. See infra notes 73-80 and accompanying text; 12 C.F.R. § 7.4002(b) (2001). This new language became effective on August 1, 2001. National Bank Charges, 66 Fed. Reg. 34,791 (July 2, 2001) (to be codified at 12 C.F.R. § 7.4002). The revised 12 C.F.R. § 7.4002(b) provides:

Considerations. (1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to
these fees, surcharge bans conflict with NBA authority and are therefore preempted.\textsuperscript{36}

The notion that local regulations of ATMs are preempted by the NBA has previous case law support.\textsuperscript{37} This proposition was expressed in detail in \textit{Bank One, Utah v. Guttau}.\textsuperscript{38} In \textit{Bank One}, an Iowa EFTA statute put, among other things, three restrictions on the placement and operation of ATMs: (1) in state office requirement—required banks to have a business office location within the state to operate an ATM in Iowa; (2) approval requirements—required banks to file and keep current an informational statement with an Iowa administrator; and (3) advertising requirements—required bank's satellite terminals to display signage or a label bearing the name of the institution operating it.\textsuperscript{39} Bank One contended that section thirty-six of the NBA preempted the Iowa statute.\textsuperscript{40} The Eighth Circuit Court of Appeals in \textit{Bank One} expressed that the Supreme Court clearly directs courts to give the OCC's interpretation of the NBA great weight.\textsuperscript{41} By considering the OCC's amicus brief supporting Bank

safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others: (i) The cost incurred by the bank in providing the service; (ii) The deterrence of misuse by customers of banking services; (iii) The enhancement of the competitive position of the bank in accordance with the bank’s business plan and marketing strategy; and (iv) The maintenance of the safety and soundness of the institution.

12 C.F.R. § 7.4002(b).

37. \textit{Bank One v. Guttau}, 190 F.3d 844 (8th Cir. 1999).
40. \textit{Bank One}, 190 F.3d at 858; Althoff, \textit{supra} note 39, at 856-57; Doule, \textit{supra} note 38, at 513-14.
41. \textit{Bank One}, 190 F.3d at 849-50 (citing Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987)) (holding that the Comptroller of the Currency did not exceed his authority in
One, its regulations in the field, and its Interpretative Letter (contending section thirty-six preempts state geographic limits on ATMs), the court held that the NBA preempted the three Iowa requirements. However, the ruling did not address the Iowa EFTA’s provisions regarding ATM surcharges, so those provisions stand.

B. Home Owners Loan Act

In addition to the NBA, the court in Bank of America held that regulations issued by the Office of Thrift Supervision (OTS) pursuant to the Home Owners Loan Act (HOLA) preempt the cities’ ordinances when applied to federal savings banks. HOLA governs federal savings banks, such as the plaintiff-intervenor, California Federal, in Bank of America. The OTS implements HOLA and regulates federal savings institutions. The court in

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42. Bank One, 190 F.3d at 849-850 ("[a] national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver" (quoting 12 C.F.R. § 7.1019 (1998); citing OCC Views as to National Bank Authority to Charge ATM Fees, [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,271 (OCC Interpretive Letter No. 821, February 17, 1998))).

43. See Bank One, 190 F.3d at 849; NATIONAL ASSOCIATION OF STATE PIRGS, STATUS OF ATM SURCHARGE BANS—REGULATIONS/LAWS/ORDINANCES, at http://www.stopatmfees.com/statusof.htm (last visited Jan. 22, 2002).


45. Id.


(1) In general. The Director shall provide for the examination, safe and sound operation, and regulation of savings associations.

(2) Regulations. The Director may issue such regulations as the Director determines to be appropriate to carry out the responsibilities of the Director or the Office.

(3) Safe and sound housing credit to be encouraged. The Director shall exercise all powers granted to the Director under this Act so as to encourage savings associations to provide credit for housing safely and soundly.


Bank of America emphasized that Congress' intent was for the OTS to have exclusive authority via the HOLA over federal savings associations.\textsuperscript{49} Thus, attempts by localities to regulate in the federal savings associations area are preempted.\textsuperscript{50} The court noted that the OTS was given the power to authorize "remote service units."\textsuperscript{51} The OTS used this power to issue the Electronics Operations Rules.\textsuperscript{52} The court explained that these rules provide that federal savings associations may use electronic means to perform services.\textsuperscript{53} The OTS refined this idea by authorizing a federal savings association to transfer customer funds, with or without a physical presence, by electronic means.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{49} Bank of America, 2000 WL 33376673, at *3.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id. Specifically, the court explained, by enacting 12 U.S.C. §§ 1463(a), 1464(a), and 1464(b)(1)(F), Congress gave OTS power to "regulate all aspects of federal savings associations." \textit{Id.} The "Federal Saving Associations" provision states:

\textit{In general.} In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director is authorized, under such regulations as the Director may prescribe—

(1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks) and

(2) to issue charters therefore, giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit for housing safely and soundly.


\item \textsuperscript{52} Bank of America, 2000 WL 33376673, at *3; 12 C.F.R. § 555 (2001).
\item \textsuperscript{53} Bank of America, 2000 WL 33376673, at *3. The Electronics Operations Rules promulgated by the OTS provides:

\textit{General.} A Federal savings association ("you") may use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automatic teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.

\end{itemize}
without fee, from his or her account to a third party or other accounts of the customer.\textsuperscript{54} Furthermore, the OTS has interpreted its regulations to expressly preempt state laws affecting "service charges and fees."\textsuperscript{55} Considering the extent of regulation, the court held that HOLA "occup[ies] the field of ATM fee regulation."\textsuperscript{56}

C. \textit{EFTA's 1999 Amendment}

Although the court did not address the banks' contention that the EFTA's 1999 amendment undermines the city's reliance on it, the argument is persuasive.\textsuperscript{57} On November 12, 1999, Congress amended the Electronic Funds Transfer Act\textsuperscript{53} in order to comply with the Gramm-Leach-Bliley Act (GLBA).\textsuperscript{59} The amendment establishes the requirement that ATM operators give

\begin{itemize}
\item[54.] \textit{Bank of America}, 2000 WL 33376673, at \textsuperscript{*3}. The "Funds Transfer Services" provision states:

\begin{quote}
A Federal savings association is authorized to transfer, with or without fee, its customers' funds from any account (including a line of credit) of the customer at the Federal savings association or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization by any mechanism or device, including cashier's checks, conforming with applicable laws and established commercial practices.
\end{quote}

12 C.F.R. \S 545.17 (2001).
\item[55.] \textit{Bank of America}, 2000 WL 33376673, at \textsuperscript{*3}. 12 C.F.R. \S 557.12 provides:

\begin{quote}
The OTS preempts state laws that purport to impose requirements governing the following:
(a) Abandoned and dormant accounts;
(b) Checking accounts;
(c) Disclosure requirements;
(d) Funds availability;
(e) Savings account orders of withdrawal;
(f) \textit{Service charges and fees};
(g) State licensing or registration requirements; and
(h) Special purpose savings services.
\end{quote}

\item[56.] \textit{Bank of America}, 2000 WL 33376673, at \textsuperscript{*3}.
\item[57.] \textit{Id.}
\item[58.] 15 U.S.C. \S 1693b (2000).
notice of surcharges to non-customers. ATM operators that charge electronic funds transfer fees to consumers must prominently and conspicuously post notice on or around the ATM that a fee will be imposed. Before the consumer is bound by the transaction, the ATM operator must give notice of the amount of the fee imposed. This may be done on the ATM screen or on a paper notice.

Because these provisions explicitly state the regulations regarding ATM fee disclosure, the banks argued in Bank of America that implicit in the regulation is a congressional approval of banks' authority to charge the fees. In fact, a January 19, 2001 interpretive letter from the OCC expressed this very opinion to

60. The "Fee Disclosures At Automated Teller Machines" provision states:

(A) In general. The regulations prescribed under paragraph (1) shall require any automated teller machine operator who imposes a fee on any consumer for providing host transfer services to such consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of—

(i) the fact that a fee is imposed by such operator for providing the service; and

(ii) the amount of any such fee.

(B) Notice requirements

(i) On the machine. The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen. The notice required under clauses (i) and (ii) of subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction, except that during the period beginning on November 12, 1999, and ending on December 31, 2004, this clause shall not apply to any automated teller machine that lacks the technical capability to disclose the notice on the screen or to issue a paper notice after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.


61. Id.
62. Id.
63. Id.
64. Bank of America, 2000 WL 33376673, at *3.
the New York City Council Committee on Finance.\(^6\) The OCC noted that the ATM fee reform pertained to *procedures* for charging fees but was silent in regard to the *power* to charge fees.\(^5\) By outlining *the way* in which such fees may be charged, Congress reflected that charging the fees is legitimate.\(^6\)

### IV. Future of Bank of America v. City and County of San Francisco

In early November 2000, San Francisco and Santa Monica appealed Judge Walker’s decision.\(^6\) On November 6, 2000, California Public Interest Research Groups, joined by the California Reinvestment Committee, Consumer Action, Foundation for Consumer and Taxpayer Rights, Consumer Federation of America, Consumers Union, and the U.S. Public Interest Research Group (PIRG), filed an amicus brief in support of the appeal.\(^6\) Oral argument for the case began January 17,

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66. *Id.*

67. *Id.*


69. *Id.*; Motion of CALPIRG for Leave to File Amicus Curiae Brief, City & County of San Francisco v. Bank of America (9th Cir.) (No. 00-16355), at http://www.stopatmfees.com/9th.htm (last visited Jan. 22, 2002). These groups argue:

The groups have a significant interest in this case because the District Court ruling found that consumer protection Ordinances banning unconscionable surcharge fees for non-customer ATM transactions are preempted by federal law. Consumers will be harmed if the ruling is upheld because 1) consumers will be forced to pay excessive surcharges as non-customers for ATM transactions and 2) the traditional authority of states to regulate in the area of banking and consumer protection will be undermined. The groups have an interest in helping to preserve the ability of states to enact consumer safeguards in the area of banking. Consumer protection and banking are areas in which states have traditionally had authority to regulate. The broad interpretation by the District Court of the National Bank Act places all current and future state consumer laws that deal with deposit service fees
At least one group opposing the appeal is confident that Judge Walker's order will be upheld. The California Banker's Association observed that the appeal is taking place in the Ninth Circuit, the circuit that upheld an earlier temporary injunction ruling.

Furthermore, the OCC recently amended 12 C.F.R. § 7.4002(d) by removing its case-by-case evaluation language. The OCC maintains that the amendment's purpose is to simplify bank

The OCC evaluates on a case-by-case basis whether a national bank may establish non-interest charges or fees pursuant to paragraphs (a) and (b) of this section notwithstanding a contrary state law that purports to limit or prohibit such charges or fees. In issuing an opinion on whether such state laws are preempted, the OCC applies preemption principles derived from the Supremacy Clause of the United States Constitution and applicable judicial precedent.

Former 12 C.F.R. § 7.4002. The “National Bank Charges” provision was amended to state: “State law. The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.” National Bank Changes, 66 Fed. Reg. at 34,791.
regulations. The State PIRGs believe this is actually a backdoor attempt to strengthen the banks' position in the Bank of America appeal to the Ninth Circuit Court of Appeals and that this will have a "chilling effect on state and local efforts" to limit or ban surcharges. This sentiment was further articulated in a letter to Comptroller of the Currency Hawke from San Francisco City Attorney Louise H. Renne. Ms. Renne expressed her concern that the OCC's amendment erased Congress' intent to assure that the National Bank Act gave states the ability to protect its consumers against excessive fees. Ms. Renne noted that this provision disrespects not only state and local rights, but also the judicial system. In its section-by-section description of the final rule, the OCC addressed these concerns by maintaining that the revision did not alter the way the OCC determines whether state laws limiting or prohibiting bank fees are preempted by the National Bank Act. Furthermore, the OCC noted that the Supreme Court held that the OCC may revise a rule during litigation over issues governed by the rule.

The outcome of the Bank of America litigation will be significant not only in terms of precedent, but also in its effects on the decision of other cities to ban or limit ATM surcharges and banks' willingness to challenge the ordinances. For example, both Los Angeles and San Diego County are waiting for a final outcome before moving ahead on ATM surcharge regulation

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77. Id.

78. Id.


proposals. Cities may decide it is not worth their time and effort to create a regulation that will likely be overturned. Even the U.S. Public Interest Research Group admits that "the district court action in the California case has had a chilling effect on enactment of other surcharge bans." Furthermore, Bank of America offers a good plan for challenging local ordinances, thereby making contests to surcharge regulation more salient.

V. FUTURE OF ATM ORDINANCE SUCCESS

If precedent is followed, then local attempts to limit or ban surcharges will not succeed. After heated litigation in Bank One, Utah v. Guttau, the Eighth Circuit held that the National Bank Act preempted Iowa EFTA placement and operation requirements; however, the opinion was silent as to the ATM surcharge provision, so that provision remained in effect. On February 2, 2000, the Iowa Attorney General sought Supreme Court review of the Eight Circuit's decision, but the Court denied review. After the Supreme Court denial, Iowa remained the only state where surcharge bans were in place. Perhaps fueled by Bank of America, five national banks—Wells Fargo, Bank of America, Bank One, Firstar, and Metro Bank—filed suit on April 15, 2001 to challenge Iowa's administrative regulations that prohibit surcharges.

In fact, according to the Pulse EFT Association, a not-for-profit, member-owned and directed network, seventeen states


83. See infra notes 84-85.


85. Foster, 529 U.S. 1087 (2000); STATUS OF ATM SURCHARGE BANS, supra note 81.

86. Id.

have enacted laws approving ATM surcharge fees.\textsuperscript{58} Most of these state laws require banks to give notice of the surcharge to the consumer and to provide the option to terminate the transaction.\textsuperscript{59} By the approval of disclosure requirements, states are \textit{implicitly} approving surcharges, as was the banks' argument in \textit{Bank of America} with the EFTA's 1999 Amendment.\textsuperscript{60}

\textbf{VI. CONGRESS STEPS IN—OR DOES IT?}

With the recent swirl surrounding judicial responses to local ordinances, Congress has entered the conflict—a place it has seen before in regard to surcharge bans.\textsuperscript{91} Past Congressional surcharge ban proposals have failed.\textsuperscript{92} Will current or future attempts be any different?

In the 107th Congress, Representative Robert E. Andrews (D-NJ) introduced the Access to Money (ATM) Act of 2001.\textsuperscript{93} This act proposes to amend the EFTA to prohibit operators of ATMs that display any paid advertising from charging any fee to consumers for the use of that machine.\textsuperscript{94} The bill was referred to


\textbf{89. Id.}

\textbf{90. See id.; see also Bank of America v. City & County of San Francisco, No. C-99-4817 VRW, 2000 WL 33376673 (N.D. Cal. June 30, 2000).}


\textbf{92. Id.}


The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

“(1) by redesigning sections 918, 919, 920, and 921 as sections 918, 920, 921, and 922 respectively; and

(2) by inserting after section 917 the following new section:
the House Subcommittee on Financial Institutions and Consumer Credit on March 26, 2001.  

Congress established provisions relating to ATM fee disclosure.  If Congress did pass a bill banning ATM surcharges, it would have to amend the 1999 EFTA amendment.  There would be no need for disclosure requirements of a fee if such fee is banned. If congressional attempts to ban surcharges in the past failed before an amendment implicitly authorizing surcharge use, then the case is stronger that current attempts will fail.

VII. PUBLIC OPINION—DOES THE PUBLIC DEMAND A LIMITATION?

One of the major factors as to whether local or congressional attempts to limit or ban surcharges will pass is public opinion. Cindy Ballard, executive vice president of the Pulse EFT Association, stated that consumers know about ATM surcharges and know how to avoid incurring them.  A March 2001 study

SEC. 918. FEES.
(a) IN GENERAL—If an automated teller machine or other cash dispensing machine at which a consumer may initiate an electronic fund transfer displays any advertising on the screen of such machine, whether in the form of a banner or trailer or in any other format, for which the operator of such machine has received any payment or other financial benefit, no fee may be imposed on the consumer with respect to such transaction by the operator of such machine, whether or not the consumer maintains an account with the operator.

(b) EXCEPTION FOR DIRECT ADVERTISING BY THE OPERATOR AND PUBLIC SERVICE ANNOUNCEMENTS—Subsection (a) shall not apply with respect to—

(1) advertising relating to products or services provided by the operator of an automated teller machine or cash dispensing machine referred to in such subsection or by any affiliate of such operator; or

(2) any public service announcement."

Id.


97. Because the EFTA contains provisions for disclosure, surcharges are impliedly allowed under the Act. See 15 U.S.C. § 1693(b); see also infra notes 57-67.

conducted by the American Bankers Association reveals that fifty-seven percent of Americans do not pay surcharge fees. According to an April 2000 study, commissioned by Pulse EFT, eighty-six percent of consumers believe they are adequately informed about ATM fees. An overwhelming number of consumers—eighty-two percent—believe they have adequate access to money without having to pay a surcharge. Furthermore, consumers have countered ATM surcharging by using their debit and credit cards more frequently and obtaining money from other sources more often. To get cash back, consumers used grocery stores most often, followed by gas stations and drug stores. In fact, the study found that although most


Phone interviews were conducted with 700 consumers in seven states that are considered 'mature' surcharging environments (Texas, New Mexico, Oklahoma, Arkansas, Louisiana, Mississippi, Tennessee). A 'mature' surcharging environment refers to a state where surcharging has been permitted since before April 1996, when surcharging began to spread nationwide.

Interviews were conducted during February and March of 2000. Participants were screened to ensure that they are ATM card users (a requirement for inclusion in the study was having used an ATM card at least once in the last two months) and are not employed in the advertising, public relations, market research, or financial industries. Participants range in age from under 18 to over 75 and are spread across all income levels. 49% are male, 51% are female. This is a population of frequent ATM users: on average participants reported having used an ATM 1.9 times in the previous 14 days.

Id. at 2.

101. Id.

102. Id.

103. Id. at 4. Eight retail stores were specifically named as offering cash back—Wal-Mart, Sam's Club, Albertsons, K-Mart, HEB, Kroger, Target and Walgreens. Id. at 5.
consumers changed their behavior due to ATM surcharge growth, only 5.7% of consumers have halted using ATMs that impose surcharges. 104

Changing the face of the ATM debate are “no surcharge alliances” and bank mergers. 105 Both enlarge the network of ATMs that consumers may visit without a surcharge. Before Bank of America and Nations Bank merged in 1998, Bank of America owned the nation’s largest ATM network, with Nations Bank owning the second largest. 106 In a more current example, the First Union and Wachovia merger directly impacted customers of both financial institutions. 107 At the approximately 5,000 First Union and Wachovia ATMs along the East Coast, ATM surcharges are waived for customers of both banks. 108 More ATM access means less need for customers to go to ATMs owned by another institution.

Surcharge alliances between banks allow customers who belong to one alliance participant bank to go to another alliance participant bank’s ATM without incurring a surcharge fee. 109 Traditionally, surcharge alliances have been between smaller banks in a regional setting in order to compete with larger banks. 110 However, at least internationally, the trend is currently toward larger banks establishing those alliances. 111 For example, Bank of America, Barclays, BNP Paribas, Deutsche Bank/Deutsche Bank 24, Scotiabank, and Westpac joined to form

104. DOVE CONSULTING AND ANALYTICA, INC., supra note 100, at 5. This figure includes consumers that have stopped using ATMs completely as a result of ATM surcharging. Id.

105. See infra notes 106-108.


107. See First Union and Wachovia Waive ATM Fees for Customers at Nearly 5,000 ATM Locations, PR NEWSWIRE, WL 9/4/01 PRWIRE 09:55:00.

108. Id.


110. See id. Mark Ferrulo of PIRG commented that the “community banks, credit unions and independent banks are retaliating against ATM monopoly networks being set up by the huge mega-banks, especially in light of recent mergers.” Id. Mr. Ferrulo saw the alliances as “natural evolution.” Id.

This global alliance gives their customers who travel internationally fee-free access to more than 23,000 ATMs on three continents. With the increasing availability of alliances, consumers opposed to ATM surcharges will choose a bank in an alliance. Therefore, their demand for local or federal attempts to ban surcharges will decrease because their "no surcharge need" is being met.

One innovative solution proposed to end the surcharge debate is ATM advertising. Revenue from advertising could decrease the costs of operating ATMs and thereby reduce or eliminate surcharge fees. Consumers may soon see "heads-up" advertising when going to an ATM, whereby a television screen that runs ads continuously is positioned above the machine at eye level. Another alternative is ATM couponing, where the consumer receives bar-coded coupons after a transaction. For at least one company, ATM couponing has been successful. Half.com, an Internet site that allows consumers to buy and sell used games, music, movies, and books, experienced a coupon redemption rate far greater than grocery store or direct mail couponing mediums. If these advertising outlets are profitable

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112. Id. At the outset, the access fee waiver will occur at the following ATM locations:

- Bank of America—more than 12,000 ATMs throughout the United States
- Barclays—more than 3,000 ATMs throughout the United Kingdom
- BNP Paribas—2,700 ATMs throughout France
- Deutsche Bank—24—1,800 ATMs throughout Germany
- Scotiabank—more than 2,100 ATMs throughout Canada
- Westpac—1,500 ATMs throughout Australia.

113. Id.

114. Mark Smith, Screen Savings, at http://www.banktech.com/story/BNK20010418S0016 (Jan. 10, 2001). Mr. Smith is a sales manager at Triton, a provider of cash-dispensing ATMs and ATM management software in the United States. Id.

115. Id.

116. Id.

117. Id.

118. Id.

for other advertisers as well, then their advertisements may reduce or eliminate ATM surcharges.\textsuperscript{120} If ATM surcharges are reduced or eliminated, consumers will not call for bans.\textsuperscript{121}

The addition of value-added services at ATMs will also change consumer attitudes toward surcharge fees by giving them more incentive to pay them. According to a study conducted by an electronic funds transfer network, some consumers want more options at ATM machines.\textsuperscript{122} Consumers responded that they would be enthusiastic about buying postage stamps, paying bills, and buying event tickets at ATMs.\textsuperscript{123} Companies are already starting to capitalize on this consumer attitude. A pilot program made by an alliance in early 2000 between American Express and 7-Eleven outfitted 200 Dallas-Fort Worth area 7-Eleven stores with financial services kiosks (V.com\textsuperscript{TM}), complete with video-enabled ATMs.\textsuperscript{124} These ATMs currently offer financial services including money orders and money transfers powered by Western Union and check cashing powered by Certegy.\textsuperscript{125} 7-Eleven hopes

\textit{Id.} To half.com's happy surprise, the actual conversion rate was more than 20\%. \textit{Id.} Grocery store or direct-mail couponing conversion rates are typically no more than 1\%. \textit{CARD FORUM, supra} note 119.

\textsuperscript{120} Smith, \textit{supra} note 114.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} See Press Release, STAR Systems, Inc., ATMs Are Standard Tool, Some Consumers Want More Options, STAR Finds (July 17, 2001), at http://www.star-systems.com/cfm/news-press.cfm?id=56 (last visited Mar. 1, 2002). This telephone survey was conducted for STAR by the Applied Management Planning Group and has an error rate of +/-1\% confidence level. \textit{Id.} When consumers were asked which among a list of ATM-based services would be "extremely appealing" to them, 37\% chose the "ability to conduct balance inquiries," 31\% selected the "ability to make transfers among accounts and obtain statements on their most recent banking transactions." \textit{Id.} Although some of the percentages were down from the previous year, STAR notes that the favorable mean scores still show significant support for more ATM options. \textit{Id.}

\textsuperscript{123} \textit{Id.} Twenty-eight percent of consumers responded they would like to obtain postage stamps, twenty-three percent of consumers responded they wanted to pay bills at their ATM, and twenty-three percent of consumers responded they would be interested in buying event tickets at ATMs. \textit{Id.}

\textsuperscript{124} Mark Smith, \textit{supra} note 114.

\textsuperscript{125} Matthew Depaula, \textit{Bank Services Roll at 7-Eleven, FUTURE BANKER,} Sept. 2001, at 10; Press Release, 7-Eleven Inc., 7-Eleven, Inc. Signs National ATM Agreement With American Express to be Primary Provider of ATM Services for V.Com\textsuperscript{TM} Kiosks (Mar. 8, 2001) [hereinafter 7-Eleven, Inc.], at http://www.7-eleven.com/about/news/AMEXATM.html (last visited Mar. 3, 2002).
to expand its services to include bill payment, deposit capability, event ticketing, and road maps.\footnote{126}

VIII. CONCLUSION

Cases like \textit{Bank of America} show the trend of recent judicial decisions opposing local ATM legislation.\footnote{127} The federal interests outweighing surcharge bans are very strong on many levels and potentially affect several regulatory agencies. Furthermore, analysis of express law makes a compelling case for preemption over surcharge bans based on a provision of the EFTA that was itself amended to require notice of any surcharge fees.\footnote{123} Consequently, any current local attempts to ban surcharges that actually pass will more than likely be overturned by the courts.\footnote{129} Moreover, congressional attempts to regulate surcharges failed at a time when consumers did not have as many choices for ATM access.\footnote{130} Today, consumers have several options available to them to avoid ATM surcharge fees.\footnote{131} Combined with the addition of value-added services, consumer demand for ATM surcharge regulation will decrease.\footnote{132} Therefore, considering court, congressional, and consumer attitude, local or state attempts to limit or ban surcharges will fail.

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\footnote{126} 7-Eleven, Inc., \textit{supra} note 125.\footnote{127} Bank of America v. City & County of San Francisco, No. C-99-4817 VRW, 2000 WL 33376673 (N.D. Cal. June 30, 2000).\footnote{128} \textit{See supra} notes 22-67 and accompanying text.\footnote{129} \textit{See supra} notes 68-90 and accompanying text.\footnote{130} \textit{See supra} notes 91-97 and accompanying text.\footnote{131} \textit{See supra} notes 98-126 and accompanying text.\footnote{132} \textit{See supra} notes 98-126 and accompanying text.