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Justices Eye Credit Card Surcharge Laws And Free Speech


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On Sept. 29, 2016, the U.S. Supreme Court agreed to decide whether state bans on credit card surcharges violate retailers' First Amendment rights, granting certiorari in Expressions Hair Design v. Schneiderman, No. 15-1391, ---- S.Ct. ----, 2016 WL 2855230, at *1 (U.S. Sept. 29, 2016).

The Court's decision in Expressions will impact the business of retailers nationwide, who are currently barred from charging such fees in several states, and who could potentially soon be barred from doing so in a number of other states if New York's law is upheld and other states pass similar laws. Ten states currently have laws on their books banning credit surcharges: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma and Texas.

Expressions concerns the constitutionality of New York's anti-surcharge law, which provides: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518.

Background

It has long been thought that presenting credit card customers with a "surcharge" will discourage the use of credit cards. As a result, bans on charging different prices to cash and credit card customers have a lengthy legal history. Originally, credit card companies' contracts with merchants banned the practice. In 1974, Congress amended the Truth in Lending Act to bar card issuers from forbidding the offering of discounts to customers paying in cash in their contracts with merchants.

Two years later, Congress amended the Act again to ban surcharges for credit card customers, but that ban was allowed to lapse in 1984. At that point, several states enacted anti-surcharge laws. Finally, in 2013, a settlement of an antitrust action against several major credit card companies led to the companies dropping their contractual bans on differential pricing, leaving the state statutes as the only barrier to the practice.

The merchants challenging the law in Expressions argued that the statute violates their rights under the First Amendment's Free Speech Clause, because the law allowed retailers to charge separate prices for cash and credit card customers, but only if they described the difference as a "cash discount" rather than a "credit card surcharge."

The district court permanently enjoined enforcement of the law, stating it "burden[ed] speech by drawing the line between prohibited surcharges and permissible discounts based on words and labels, rather than economic realities." The court additionally determined the law was void for vagueness because it "turn[ed] on the labels that sellers use to describe their prices."

The Second Circuit reversed, holding that New York's law was an economic regulation that did not implicate the First Amendment, at least as to retailers who post a single price for goods and services

(as opposed to dual-pricing, where one price is posted for credit-card users and another is posted for those who use cash). According to the Second Circuit, "prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." Expressions Hair Design v. Schneiderman, 808 F.3d 118, 131 (2d Cir. 2015).

The court further clarified: "[The law] does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges; it simply prohibits imposing credit-card surcharges. ... [The law] regulates conduct, not speech."

The Second Circuit also reversed the district court's holding that the law was unconstitutionally vague, ruling it "has a core meaning that can be reasonably understood: sellers who post single-sticker prices for their goods and services may not charge credit card customers an additional amount above the sticker price that is not also charged to cash customers."

The plaintiffs petitioned for certiorari in May. The question presented to the Court was: "Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?"

The petition drew significant amicus support, with briefs urging the Court to grant review being filed by First Amendment scholars, a group of behavioral economists, groups of consumer advocates and merchants, and the Cato Institute. Opponents of the no-surcharge laws argue that the laws prevent the dissemination of useful information by merchants — the true cost to merchants of credit card swipe fees — and serve no legitimate governmental purpose.

Ordinarily, we would expect a petition granted this early in the term to be heard and decided by March of next year. This year may be different given that the Court seems likely to be short-staffed at least through December, but certainly Expressions will be decided by early July 2017.

How Other Courts Have Addressed Anti-Surcharge Laws

The Second Circuit's decision in Expressions is just one of several recent cases to consider the constitutionality of state laws banning credit card surcharges. On March 2, 2016, for example, the Fifth Circuit affirmed the lower court's holding that Texas' surcharge law did not implicate the first amendment. Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016).

The Fifth Circuit cited heavily to Expressions, finding that Texas' law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment. Instead, the law ensures only that merchants do not impose an additional charge above the regular price for customers paying with credit cards." In other words, the court explained, "a 'surcharge' is not the same as a 'discount'. ... While a merchant may have the same ultimate economic result if it applies the same amount in the form of a credit card surcharge that it would otherwise apply as a cash discount, the law does not require that."

In November 2015, the Eleventh Circuit reached the opposite conclusion with respect to Florida's statute, holding that the statute targeted "expression alone," and that "there is no real-world difference between [a surcharge and discount]." Dana's R.R. Supply v. Attorney Gen., Florida, 807 F.3d 1235 (11th Cir. 2015). Thus, the court found, the statute violated retailers' commercial free speech rights by regulating how retailers can describe the price difference between cash and credit purchases.

Similarly, in March 2015, the Eastern District of California struck down California's law based on similar reasoning. Italian Colors Rest. v. Harris, 99 F. Supp. 3d 1199, 1202-03 (E.D. Cal. 2015). That case is currently on appeal and is expected to be decided in the coming months.

Perhaps crucially, both the Florida and California anti-surcharge laws expressly provide that the law "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." Fla. Stat. § 501.0117; Cal. Civ. Code § 1748.1(b). The laws of Texas and New York do not include similar exceptions, a distinction highlighted repeatedly by the Fifth Circuit in Rowell. See, e.g. Rowell, 816 F.3d at 80-81 ("The Texas,

like the New York, law does not define 'surcharge,' nor does it address 'discounts'. ... Therefore, we understand the statutory terms according to their ordinary meaning.").

The Fifth Circuit's decision in Rowell suggests that their discussion of discounts may make the difference between the anti-surcharge law being treated as a restriction on speech (which would implicate the First Amendment) as opposed to conduct. Both Rowell and Dana are currently pending on certiorari, and seem likely to be held until the Court decides Expressions.

Conclusion

Given the Supreme Court's long-standing skepticism of regulations which deny truthful information to consumers, the defenders of the no-surcharge laws will likely face an uphill battle at the Court. If the no-surcharge laws are struck down and dual pricing becomes common among retailers, many economists have suggested that credit card swipe fees are likely to fall, potentially saving retailers millions.

Retailers should thus keep a close eye on this litigation and consult counsel with expertise in this area as to whether or how the Court's decision will impact the enforceability of the laws in their states.

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