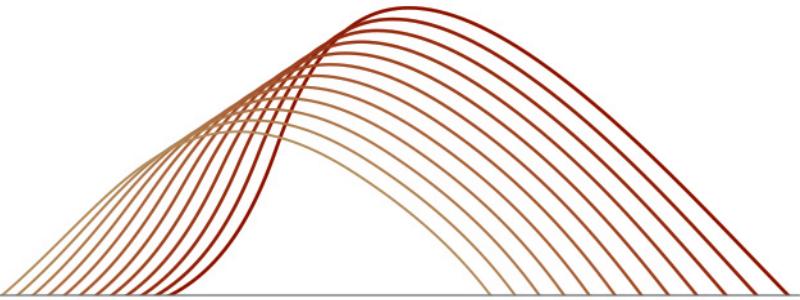


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May 2017

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Supreme Court Determines New York Credit Card Surcharge Ban Regulates Speech

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On March 29, 2017, the United States Supreme Court unanimously held that a New York law prohibiting merchants from imposing surcharges for credit card purchases was a matter of free speech subject to First Amendment scrutiny. The Court's decision in *Expressions Hair Design v. Schneiderman*, 581 U.S. ___ (2017) turned on whether New York's law banning credit card surcharges (N.Y. Gen. Bus. Law § 518) (the "New York Surcharge Ban Law" or the "Law") was a regulation on pricing (as held by Court of Appeals for the Second Circuit Court), or whether the Law regulated merchant communications regarding price. Finding the latter, the Court vacated the judgment issued by the Court of Appeals for the Second Circuit and remanded the case.

Surcharges and Discounts

When a customer uses a debit or credit card to make a payment, the merchant selling the item ultimately receives less than the amount charged to the consumer. The delta between the amount charged to the consumers and the amount received by the merchant is the merchant discount. The merchant discount, typically 2.5% for credit cards and approximately 24 cents for debit cards issued by banks with greater than \$10 billion in assets, is shared by the Issuing Bank, the card network, and various processors. In an attempt to offset the merchant discount, merchants frequently pass such costs on to customers using differential pricing for customers that pay via credit or debit card versus those who pay using cash or other means. In practice, merchants achieve such differential pricing in one of two ways: (i) imposing a surcharge for customers wishing to pay via credit or debit card; or (ii) offering a discount for customers that use cash to pay for the transaction.

The Court explained the distinction between a surcharge and a discount as one that stemmed from the 1976 amendment to the federal Truth in Lending Act ("TILA") which barred merchants from imposing surcharges on customers who pay using credit cards.¹ The amendment defined "*surchARGE*" as "*any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check or similar means,*"² whereas a "*discount*" was defined as "*a reduction made from the regular price.*"³ This delineation was further clarified in the Cash Discount Act of 1981⁴ which, according to the Court, provided that "[i]f no price was tagged or posted, or if a merchant employed a two-tag approach—posting one price for credit and another for cash—the "regular price" was whatever was charged to the credit card user . . . [t]he effect of all this was that a merchant could violate the surcharge ban only by posting a single price and charging credit card users more than that posted price."⁵ While the federal laws banning surcharges expired in 1984 and were not renewed thereafter, several states, including New York, enacted their own surcharge ban laws in that same year. The New

York Surcharge Ban Law⁶ states that “[n]o 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.”⁷

Regulation of Conduct or Communication

The Petitioners in *Expressions Hair Design*, which were comprised of five New York businesses and their owners, sought to employ a “single-sticker regime” whereby the merchants post a cash price and an additional credit card surcharge. The Petitioners challenged the New York Surcharge Ban Law on First Amendment grounds, arguing that its prohibition on their ability to employ the single-sticker regime was an unconstitutional restriction on their ability to communicate their prices to customers.⁸ The merchants also alleged that the law was unconstitutionally vague because it did not properly define or otherwise differentiate between surcharges and discounts.⁹

The question presented to the Court turned on whether the New York Surcharge Ban Law was a regulation on a merchant’s First Amendment right to free speech with respect to displaying of prices, or whether it regulated a merchant’s conduct with respect to pricing, the latter of which would not have First Amendment implications. The Court of Appeals for the Second Circuit interpreted the New York Surcharge Ban Law as a regulation on the merchant’s conduct because, according to the court, its prohibition required that the merchant’s sticker price be the same as the price that the merchant charged to a customer paying with a credit card.¹⁰ The court held that a merchant, therefore, may communicate the price however it chooses to, and the fact that the merchant cannot communicate two different prices is merely incidental to the restriction on a merchant’s conduct with respect to such pricing restriction.

The Supreme Court disagreed with the Second Circuit ruling and ultimately concluded that the New York Surcharge Ban Law does not primarily regulate a merchant’s conduct, but rather, regulates the merchant’s right to free speech.¹¹ Specifically, the Court held that the Law did not impose restrictions upon merchants with respect to the prices they may or may not charge; given that discounts are permitted, merchants are, in effect, permitted to set any prices they wish for customers using various forms of payment, even if such prices are different. Rather, the Court held that the New York Surcharge Ban Law prohibited merchants wishing to offer differential pricing from *communicating* their price in the manner they wish to—the Law effectively required merchants to post as their sticker price, the higher price they wish to charge for customers paying with credit or debit cards, and offer a discount for customers paying with cash or other payment methods. As a result, the New York Surcharge Ban Law, the Court held, restricted the merchants’ right to freely display their pricing, and accordingly, the Law regulated free speech, and was subject to First Amendment scrutiny.¹²

The Court also quickly swept away the Petitioners’ challenge that the Law is unconstitutionally vague. The Law prohibits single-sticker pricing, according to the Court, and “a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim.”¹³

The decision in *Expressions Hair Design* is determinedly narrow. First, the Court decided the case as an as-applied challenge only for an application in which a merchant posts a single-sticker price with an additional credit card surcharge either as a percentage or specific amount. Further, the Court declined to consider whether the Law would survive First Amendment scrutiny as a valid commercial speech regulation or a valid disclosure requirement. The Court in doing so asserted that it is a “court of review, not of first review” and remanded the case to the Court of Appeals to analyze the Law as a form of speech regulation.¹⁴ The Court also noted that the Court of Appeals may need to consider



whether the Law allows a two-sticker pricing scheme, which, if allowed, would support the conclusion that the Law is a valid disclosure requirement.

Other State Surcharge Bans

New York is not the only state with limitations on surcharges. Nine (9) additional states restrict merchants from charging different fees to customers using credit cards for payment compared to other means of payment, such as cash, checks, or ACH transfers.¹⁵

Like the New York Surcharge Ban Law, surcharge ban laws have also been challenged in California, Texas, and Florida. The legality of California's prohibition on surcharges was disputed in *Italian Colors, et al. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015). In *Italian Colors*, the Eastern District of California determined that a California law banning surcharges violated the First Amendment as an unlawful restriction on commercial speech because it dictated how merchants can describe the price differential between purchases made using cash and those made using credit or debit cards.¹⁶ The court ultimately found that the regulation was unconstitutionally vague.¹⁷

The Eleventh Circuit likewise held that a Florida surcharge ban law comprised a regulation on free speech subject to First Amendment scrutiny in *Dana's Railroad Supply v. Attorney General, Florida*, 807 F.3d 1235 (11th Cir. 2015). There, the court held that a surcharge is the same as a negative discount; and therefore, the law, by permitting discounts, regulates the manner in which the merchant communicates the price rather than regulating the conduct of pricing itself.¹⁸

Relying on the same arguments set forth by the Second Circuit in *Expressions Hair Design*, the Fifth Circuit previously upheld a Texas surcharge ban law in *Rowell et al. v. Pettijohn*, 816 F.3d 73, 79 (5th Cir. 2016), cert. granted, judgment vacated, No. 15-1455, 2017 WL 1199453 (U.S. Apr. 3, 2017), stating that the law in question did not regulate speech but rather economic conduct; however, the decision in *Rowell* has been vacated following the Supreme Court's decision in *Expressions Hair Design*.

Conclusion

The Court's decision in *Expressions Hair Design* is helpful in its determination that laws similar to the New York Surcharge Ban Law are, in fact, a regulation on free speech subject to First Amendment scrutiny. Unfortunately, however, the Court's narrow decision does not provide merchants operating in states with similar laws with guidance as to whether such laws constitute valid commercial speech regulations or valid disclosure requirements. While such laws may draw First Amendment scrutiny, it is unclear whether courts may still uphold similar surcharge ban laws as constituting valid regulations on free speech. Accordingly, merchants should continue to adhere to any applicable restrictions set forth in similar surcharge ban laws until a more definite conclusion regarding the unconstitutionality of such laws is reached.



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¹ Act of Feb. 27, 1976, § 3(c)(1), 90 Stat. 197 (1976).

² *Id.*

³ *Id.*

⁴ Cash Discount Act, §102(a), 95 Stat. 144.

⁵ *Expressions Hair Design v. Schneiderman*, 581 U.S. ___, *3 (2017).

⁶ N.Y. Gen. Bus. Law Ann. § 518.

⁷ *Id.*

⁸ *Expressions Hair Design v. Schneiderman*, 581 U.S. ___, *3 (2017).

⁹ *Id.*

¹⁰ *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2nd Cir. 2015).

¹¹ *Expressions Hair Design v. Schneiderman*, 581 U.S. ___, *6 (2017).

¹² *Id.*

¹³ *Id.* at *10 (citations omitted).

¹⁴ *Id.* at *10 (citations omitted).

¹⁵ States that prohibit differential pricing in connection with credit cards include: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas.

¹⁶ *Italian Colors, et al. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015).

¹⁷ *Italian Colors*, 99 F. Supp. 3d 1199 at 1212.

¹⁸ *Dana's Railroad Supply v. Attorney General, Florida*, 807 F.3d 1235, 1245 (11th Cir. 2015).

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