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U.S. Supreme Court Sides with Merchants in Credit Card Surcharge Case, But the Fight Isn't Over Yet

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On March 29, 2017, the U.S. Supreme Court ruled that a New York statute restricting credit card surcharges regulated commercial speech. Yet, *Expressions Hair Design v. Schneiderman* (No. 15-1391) did not decide whether such restrictions violated the First Amendment. Rather, the Court remanded the matter to the Second Circuit to decide that question. Nine other states[1] and Puerto Rico have similar statutes, some of which are also being challenged in court.[2]

Background

The New York statute—N.Y. Gen. Bus. Law § 518—prohibits merchants from imposing a surcharge on customers who pay with a credit card but allows merchants to give discounts to customers who pay with cash or other forms of payment.[3] Section 518 is a verbatim copy of a now-expired portion of the federal Truth in Lending Act ("TILA") and was enacted in response to the expiration of that TILA provision.[4]

Like similar state laws, § 518 went largely unchallenged because credit card companies contractually prohibited merchants from imposing surcharges on customers that paid with credit cards. In 2013, however, several credit card companies dropped their contractual surcharge prohibitions, thus raising the importance of laws like § 518 as a target for merchants that wanted to impose credit card surcharges and how they could do so. (All states permit merchants to charge a higher price for those who pay with a credit card; most laws like § 518, however, are aimed at how a merchant can do so.)

In June 2013, five New York merchants and their principals filed suit to challenge § 518. As the Supreme Court describes it, the merchants wanted to pass along to their customers the credit card fees but also "want[ed] to make clear that they are not the bad guys—that the credit card companies, not the merchants, are responsible for the higher prices." The merchants argued that § 518 permitted them to post a higher sticker price and announce a "discount" for cash sales but prohibited them from calling a higher price a "surcharge." This, the merchants argued, violates the First Amendment because the law regulates identical conduct differently depending on how the merchant describes its conduct. The Southern District of New York agreed, concluding that the law violates the First Amendment because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities."

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[1] These are California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, Oklahoma, and Texas.

[2] Plaintiffs are currently challenging the laws in California, Florida, and Texas.

[3] Section 518 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."

[4] New York, however, did not adopt any definitions from the TILA provision for the terms used in the prohibition or promulgate any definitions of its own.

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In September 2015, the Second Circuit vacated and instructed the District Court to dismiss the plaintiffs' claims. The Second Circuit viewed the prohibition as price regulation—namely, regulating the relationship between the sticker price and the price charged to a credit card by requiring that they be equal. Applying Supreme Court precedent, the court ruled that mere price regulation regulates conduct and not speech. The Second Circuit acknowledged that other pricing schemes could exist that might regulate speech, such as a dual-sticker scheme in which the merchant posts two separate prices, one for cash and one for credit. But the court determined it was "far from clear" that § 518 prohibited such a scheme and abstained from deciding the unsettled state law question.

The Supreme Court's Decision

Chief Justice Roberts delivered the opinion of the Court. Justices Breyer, Sotomayor, and Alito concurred in the judgment. The opinion was narrowly drawn, addressing only the plaintiffs' as-applied challenge to the prohibition on the single-sticker pricing practice—that is, the restriction on "posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a 'dollars-and-cents' additional amount." The decision did not reach how § 518 might apply to a dual-sticker practice in which two actual prices, a cash price and a credit card price, were listed.

The Court concluded that § 518 prohibits the single-sticker pricing regime explained above. In doing so, the Court deferred to the Second Circuit's interpretation of the law—namely that a sign indicating a sticker price of $10 and noting a 3% or $0.30 surcharge applicable to credit card users violates § 518. Given such an interpretation, the Court determined that § 518 regulates speech and not conduct. The Court acknowledged that a true price control regulates conduct and not speech. "But § 518," the Court stated, "is not like a typical price regulation." A typical price regulation "would simply regulate the amount that a store could collect" and would have only an "incidental" affect on speech insofar as the store would have to advertise that price. "Section 518 is different" because it "tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer." Instead, it regulates "how sellers may communicate their prices." A merchant wishing to impose a surcharge could not say "$10, plus $0.30 for credit" because that would identify a single price that is less than would be charged to a credit card user. The merchant could only post a price of "$10.30."The Court remanded the matter for the Second Circuit to consider whether § 518, as a speech regulation, violates the First Amendment. The Court noted that the parties dispute "whether § 518 is a valid commercial speech regulation …, and whether the law can be upheld as a valid disclosure requirement," but the Court's opinion provides no guidance regarding those questions. The Court rejected the merchants' argument that the statute is impermissibly vague, because the only pricing practice they seek to use is clearly proscribed by the statute.

Three Justices Concur in the Judgment

In his concurrence, Justice Breyer argued that the Court should focus less on the distinction between speech or conduct and more on the First Amendment "interest" that is implicated. Because it is unclear whether § 518 requires "purely factual and uncontroversial information" (subject to a permissive standard of review) or restricts the "informational function" of commercial speech (subject to an elevated form of scrutiny), he agreed with Justice Sotomayor, in whose concurrence Justice Alito joined, that the Court should have remanded

"with instructions for the Second Circuit to certify the case to the New York Court of Appeals to allow it to definitively interpret § 518." According to Justice Sotomayor, such instruction would be beneficial—not least to those with an interest in the statute—because the constitutional question could either be avoided altogether or fully answered.

Conclusion

We now know that the First Amendment applies to one application of the New York statute. But the Court's decision does not provide guidance for merchants subject to the statute as to how a merchant may impose a higher price to customers that pay with credit cards. An answer may come from the Second Circuit—or perhaps from a question certified to the New York Court of Appeals. It is also possible that businesses could persuade state legislatures to redraft these types of statutes both clarify their applicability and remedy any potential constitutional infirmities. K&L Gates will continue to monitor the *Expressions Hair Design* matter and other developments involving statutes regulating surcharges on payment by credit cards.

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