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New York Credit Card Surcharges – The Saga Continues

On September 29, 2016, the Supreme Court of the United Stated announced that it would hear the appeal to the highly anticipated credit card surcharge case, of which we have been tracking. [*See* New York Judge Grants Preliminary Injunction of Credit Card Surcharge Law and The Distinction of Six of One, Half a Dozen of the Other. Second Circuit Upholds New York's Prohibition on Credit-Card Surcharges]. This case, *Expressions Hair Design et al. v. Schneiderman*, involves the constitutionality of New York General Business Law §518 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." Specifically, the Supreme Court will address whether it is constitutional for a State to prohibit retailers from telling customers that there will be an added surcharge for purchases made with a credit card while at the same time allowing them to tell customers that they can receive a discount by paying in cash. This seemingly arbitrary distinction between "discounts" and "surcharges" has been a hot topic of debate among the circuit courts for the past few years with newsworthy challenges in New York, Florida, Texas and California.

As we reported in 2013, and again in 2015, *Expressions Hair Design, et. al. v. Schneiderman* involved a hair salon which posted a notice informing customers of a 3% surcharge for all credit card sales. While it has become a common practice for retailers to offer discounts to those customers paying in cash as a means of defraying the increasing credit card company fees, in New York a retailer is not allowed to add a surcharge for credit card payments. After being informed of the illegality of the surcharge notice, the salon and four other merchants brought a lawsuit in the Southern District of New York challenging the surcharge restriction under the First Amendment of the Federal Constitution and sought a preliminary injunction freezing the enforcement of Section 518.

The road to the Supreme Court first involved the decision by the Southern District in which the court granted the preliminary injunction in favor of the merchants and held that Section 518 was likely an unconstitutional restriction of free speech because it banned certain expression of language (surcharge over discount) without meaningful regulation of conduct. Two years later, the Second Circuit Court of Appeals reversed the lower court and upheld the constitutionality of the law, finding that Section 518 does not regulate speech, but rather it regulates *commercial conduct* and therefore is beyond the scope of the First Amendment. Specifically, the Second Circuit noted "all that [Section 518] regulates – is the different between a seller's sticker price and the ultimate price that it charges to credit-card customers." Obviously unsatisfied with this result, the group of merchants successfully appealed to the Supreme Court who will have the final say with regard to surcharge restrictions, including Section 518, nationwide.

The Supreme Court has yet to set a date for argument on this matter, meaning, it could be late spring before the Court renders a decision. In the meantime, business should continue to operate under the confines of Section 518 as it was upheld by the Second Circuit. Notably, judges in Florida and Texas have upheld similar state surcharge laws. On the other hand, a U.S. District Court in California ruled in 2015 that a similar surcharge statute violated the First Amendment due to the unreasonable restriction on a merchant's ability to communicate the price of their products. Shortly after the ruling in California, the California AG sought to restore the credit card surcharge ban and overturn the District Court's decision, however, this action has not progressed for over a year.

Going forward, a decision in favor of the salon and other merchants means that businesses across the country could lawfully charge surcharges for credit card purchases to help recover the 1-3% fee charged of them by the credit card companies. As we have opined on before, in theory, this should benefit cash purchasers because the cost of the credit card swipe fees would only be incurred by credit card purchasers, rather than being distributed equally among all consumers. Considering the expansive use of credit cards today, as opposed to when Section 518 was first written and credit cards were a novel and unfamiliar concept, Section 518 may be ripe for overturning. Only time will tell whether the Supreme Court will agree with the District Court in California, business owners across the country, and the salon and merchants in Expressions by holding that credit card surcharge restrictions are unconstitutional and a thing of the past.

If you have any questions about this Information Memo, please contact Philip I. Frankel, any of the attorneys in our Business Law Practice, or the attorney in the firm with whom you are regularly in contact.

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