

Supreme Court Holds Credit Card Surcharge Law is a Speech-Based Regulation

For nearly four years we have been tracking the ongoing legal battle over a merchant's right in New York to charge a surcharge to customers who use a credit card as a method of payment. This saga came to a head on March 29, 2017 when the Supreme Court of the United States issued a decision potentially impacting the constitutionality of laws which prohibit merchants from charging an extra fee for a purchase made by credit card.¹ The Supreme Court found that these laws "regulate speech" and are subject to scrutiny under the First Amendment of the Constitution. In other words, the Supreme Court opened up the possibility that banning a merchant's ability to pass along credit card fees to the consumer by way of a credit card surcharge is a violation on the merchant's right to free speech under the U.S. Constitution. However, the matter is not over yet.

As we have previously reported² the case, *Expressions Hair Design, et al. v. Schneiderman*, involved a challenge by a hair salon which was notified that its practice of charging a 3% surcharge for all credit card sales was unlawful under the Section 518 of New York General Business Law.

Section 518 currently states: "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." While credit card surcharges are illegal under this rule, the common practice of offering a cash discount is not. For example, under Section 518, as interpreted by the Supreme Court, petitioner, Expressions Hair could not post a sign that stated "Haircuts \$10.00 (we add a 3% surcharge if you pay by credit card)" but could state "Haircuts \$10.30 (we offer a 3% discount if you pay by cash)." For this reason, the hair salon and other merchants initiated the case in 2013 in the Southern District of New York claiming Section 518 imposed restrictions on their ability to express pricing language (surcharge versus discount). The Southern District agreed and granted a preliminary injunction in favor of the merchants. However, the Second Circuit Court of Appeals reversed this decision holding that Section 518 does not regulate speech and as such cannot be an unconstitutional restriction on the merchant's free speech rights. Rather, the Second Circuit Court of Appeals found Section 518 to be a content-based regulation or commerce-based resolution and was not subject to the higher level of First Amendment scrutiny. The case was argued in front of the Supreme Court in January 2017.

In a unanimous decision authored by Chief Justice Roberts with concurring opinions, the Supreme Court concluded that Section 518 does regulate speech and remanded the decision to the Second Circuit Court of Appeals to determine the constitutionality of the law. The Court found that the limitation on whether a merchant could require a surcharge "regulates a relationship between a sticker price and the price charged to credit card users." Since this practice involved the *communication* of prices, the Court found that it regulates speech and is therefore subject to First Amendment review.

¹ *Expressions Hair Design et al. v. Schneiderman*, 2017 U.S. LEXIS 2186 (2017) available at https://www.supremecourt.gov/opinions/16pdf/15-1391_g31i.pdf.

² See [New York Judge Grants Preliminary Injunction of Credit Card Surcharge Law, The Distinction of Six of One, Half a Dozen of the Other, Second Circuit Upholds New York's Prohibition on Credit-Card Surcharges, and New York Credit Card Surcharges - The Saga Continues.](#)

Based on the decision, the saga will continue as the Second Circuit Court of Appeals performs its review of Section 518 as a regulation on speech. This requires the court to impose a greater level of scrutiny in its analysis. New York's only chance at defending Section 518 will be to prove that the regulation of speech is justified. The Supreme Court's decision will most likely lead to legal challenges in other states that have similar restrictions on surcharges such as Connecticut, Florida and California.

No date has been set for the Second Circuit Court of Appeals review. However, as we have opined before, a decision in favor of the hair salon and other merchants means that New York businesses could lawfully charge a set percentage surcharge on credit card purchases to help offset the transaction fee charged by credit card companies.

We will continue to monitor the matter and report on updates to the status of the constitutionality of Section 518. In the meantime, business should continue to operate under the confines of Section 518 as only time will tell whether the Second Circuit Court of Appeals will strike Section 518 down as unconstitutional.

If you have any questions about this Information Memo, please contact [Elizabeth A. D'Agostino](#), or 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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