

BANS ON CREDIT CARD SURCHARGES FACE FIRST AMENDMENT CHALLENGES

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State laws that prohibit retailers from charging customers a surcharge for using a credit card are being challenged on First Amendment grounds.

For more than four decades, California's Song-Beverly Credit Card Act of 1971 prohibited retailers from charging credit card customers such a surcharge. In *Italian Colors Restaurant, et al. v. Harris*, 99 F.Supp.3d 1199 (E.D. Cal. 2015), a federal judge ruled that the law unconstitutionally limits retailers' freedom of speech. The California attorney general appealed, and the case is set for oral argument before the Ninth Circuit Court of Appeals on August 17.

The outcome may be influenced by the U.S. Supreme Court's decision in March of this year in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), that a similar New York ban on credit card surcharges implicates the First Amendment. That case has been remanded to the Second Circuit to determine whether the ban is unconstitutional.

In states where the surcharge prohibitions have been invalidated by court action, the statute is likely unenforceable, at least temporarily while appeals are being pursued. Ecommerce retailers seeking to impose surcharges also should take care to determine which state's laws apply to a transaction. It is not safe to assume that the retailer's location would determine the applicable law. More likely than not, the laws of the state where the customer resides would be applied to the transaction.

Eleven states have passed similar laws banning credit card surcharges.

Four of those laws have been challenged on First Amendment grounds: New York, California, Texas and Florida.

- In **Texas**, the Fifth Circuit in *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016) held that the Texas statute did not implicate the First Amendment because it regulates conduct, not speech. Notably, the Fifth Circuit found persuasive the Second Circuit's reasoning in *Expressions*, which has been reversed by the Supreme Court.

- In **Florida**, the Eleventh Circuit in *Dana's Railroad Supply v. Bondi*, 807 F. 3d. 1235 (11th Cir. 2015) held that the Florida statute regulates speech, not conduct, and is unconstitutional under the First Amendment.
- Only one state, **Georgia**, has a law that expressly permits retailers to charge credit card customers a surcharge.
- Five states have statutes that expressly permit retailers to offer cash customers a discount: **Maryland, Nevada, Washington, Wisconsin, and Wyoming**. Those statutes do not address credit card surcharges.

Discussion of credit card fees may bring the federal Durbin Amendment to mind. The Durbin Amendment, however, limits the amount of fees a debit card issuer can charge a merchant (as compared with the state laws above, which prohibit a merchant from charging consumers a fee for using a credit card).

For questions or more information, contact the authors or any member of the Retail team.

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