

Client Alert

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Ninth Circuit Clears the Way for Surcharges on Credit Card Payments in California

On January 3, 2018, in *Italian Colors Restaurant v. Becerra*, the Ninth Circuit found unconstitutional a California law barring retailers from imposing surcharges on customers using credit cards. The ruling has important implications for retailers operating in California and potentially for retailers operating in several other states with similar bans on credit card surcharges.

Credit card fees are a significant cost to retailers. The typical fee of 2-3% can represent a large portion of the profit margin from a sale. Accordingly, retailers have looked for ways to shift the cost of those fees. One strategy is imposing surcharges on purchases made with credit cards. Another is offering discounts on purchases made with any form of payment *other* than credit cards.

From 1971 to 1984, federal law barred surcharges on credit card purchases. After the federal law expired, several states, including California, enacted their own surcharge bans. Under California Civil Code § 1748.1(a), retailers were not permitted to impose surcharges, but they were allowed to offer discounts for non-credit card payments. Credit card companies also barred surcharges under their agreements, a practice that is the subject of ongoing antitrust litigation.

In 2014, a group of retailers sued the attorney general of California, alleging that the California law violated the Constitution. According to the retailers, the law impermissibly restricted their speech in violation of the First Amendment and was impermissibly vague under the Fourteenth Amendment. The retailers argued that they preferred to impose surcharges rather than offer discounts, because while the two options ostensibly have the same practical effect, customers react to them in different ways. Moreover, using a surcharge rather than a discount allows retailers to display a lower price—i.e., a price that has the “discount” built in, rather than a price reflecting the surcharge.

The district court held, and the Ninth Circuit affirmed, that the California statute regulates speech, not conduct, and cannot survive intermediate scrutiny for evaluating the constitutionality of restrictions on commercial speech. Accordingly, the court struck down the statute and declined to reach the Fourteenth Amendment question.

The Second Circuit, Fifth Circuit, and Eleventh Circuit also have addressed whether a surcharge ban regulates conduct or speech—the Second and Fifth said conduct, and the Eleventh said speech. But the Ninth Circuit is the first to address the question since the Supreme Court’s decision in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), which reversed the Second Circuit’s holding that a surcharge ban regulates conduct, and ordered the Second Circuit to analyze the First Amendment challenge. The Supreme Court has also vacated the Fifth Circuit’s decision, and denied certiorari in the Eleventh Circuit decision. Those are all good omens for retailers’ ability to impose surcharges on credit card purchases across the country.

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