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Calif. Can't Ban Credit Card Surcharges, 9th Circ. Finds

By **Melissa Daniels**

Law360, Los Angeles (January 3, 2018, 6:46 PM EST) -- A Ninth Circuit panel found Wednesday that California's law banning credit card surcharges violates free speech rights, saying in a published decision that the restriction is "more extensive than necessary" to protect consumers from misleading pricing tactics.

Five businesses, led by Italian Colors Restaurant, had challenged the constitutionality of a state law prohibiting retailers from imposing a surcharge on customers who make payments with credit cards — though the law does allow businesses to offer discounts for other methods of payment, like cash or debit cards.

A California federal judge had found the statute amounted to content-based restriction on commercial speech in violation of the First Amendment and enjoined its enforcement, and the California Attorney General's Office appealed.

In a 29-page published opinion, the Ninth Circuit panel agreed with the lower court, finding that the law doesn't advance the state's asserted interests of promoting effective operation of the free market and protecting consumers.

"The law has the effect of allowing retailers to charge credit card users more for the same goods, but only if this price differential is expressed as a discount to cash users, rather than a surcharge for credit card users," the panel said. "But the higher cost is a result of credit card fees, and referring to the price differential as a discount prevents retailers from accurately conveying that causal relationship."

The law's speech restriction, the panel wrote, "is more extensive than necessary," saying the state could instill more specific ways to prevent consumer deception, like banning deceptive surcharges outright.

"Alternatively, California could require retailers to disclose their surcharges both before and at the point of sale, as Minnesota does," the panel said.

The panel also looked at whether the First Amendment challenge was facial, meaning there are no circumstances where it is valid, or if it was as-applied, meaning the plaintiffs would only have to show the statute unconstitutionally regulates the plaintiffs' own speech. The plaintiffs had urged the panel to find their challenge was as-applied, and the panel agreed — leading it to modify the injunction to only apply to the specific pricing practice with which the plaintiffs had taken issue.

Plaintiffs' attorney Deepak Gupta of Gupta Wessler PLLC told Law360 in an email that the modification of the injunction was their exact request, as it means that their clients and California merchants can disclose the cost of credit cards expressed as a surcharge rather than a discount. He called the decision a First Amendment victory for consumers and merchants alike.

“It means that consumers can’t be kept in the dark about the hidden cost of credit-card swipe fees, which funnel vast amounts of money from consumers to large banks and credit-card companies every day,” he said.

A representative for the attorney general's office said they are “evaluating all our options.”

Legal battles over "swipe fees" and how they are conducted have cropped up in multiple jurisdictions. In **March 2017**, the U.S. Supreme Court in Expressions Hair Design v. Schneiderman asked the Second Circuit to determine whether the New York law that restricts the disclosures that retailers can make to customers about credit card surcharges violates retailers’ First Amendment rights, vacating the lower court ruling that upheld the law.

The Expressions case challenged the New York law prohibiting retailers from disclosing a surcharge on purchases to cover the cost of card processing while allowing them to show customers making a cash purchase that they are not being charged that extra fee. The high court said the lower court did not rule on free speech claims raised by the retailers.

The plaintiffs in the California case are five businesses, four of which charge slightly higher prices to customers who pay with credit cards to compensate for the fees, while one offers discounts to cash or debit card payers. All spend thousands of dollars a year on credit card transaction fees, according to the court's history of the case.

The state enacted the ban, codified in Section 1748.1 of the California Civil Code, after a federal surcharge ban expired in the 1980s, according to the case history. The plaintiffs filed their constitutional challenge in 2014 in a push to be allowed to add credit card surcharges as opposed to cash discounts.

Back in **March 2015**, a decision from U.S. District Judge Morrison England ruled in the plaintiffs’ favor on summary judgment, finding that California's statute violates the First Amendment because it unreasonably restricts the way in which businesses are allowed to discuss the price of their products. Moreover, the court determined the state's law is overly broad and vague.

In **April 2015**, California's attorney general at the time, Kamala Harris, served notice that she would ask the Ninth Circuit to overturn the ruling. Oral arguments were held in June 2017, with discussion turning to the ramifications of **the high court's Expressions ruling**.

In Wednesday's ruling, the Ninth Circuit panel said that high court ruling "forecloses the Attorney General's argument" that Section 1748.1 restricts conduct and not speech.

"Like the plaintiffs in Expressions, plaintiffs in this case want to post a single sticker price and charge an extra fee for credit card use," the panel said. "Section 1748.1 prohibits plaintiffs from expressing their prices in this way, but it does allow retailers to post a single sticker price and offer discounts to customers paying with cash — despite the mathematical equivalency between surcharges and discounts. Thus, Section 1748.1, like New York’s surcharge ban, regulates commercial speech."

A portion of Wednesday’s ruling also addressed Judge England’s finding that the plaintiffs have standing. The panel agreed that the plaintiffs have modified their speech and behavior based on a credible threat of the ban’s enforcement.

“This is an actual injury to a legally protected interest, fairly traceable to Section 1748.1, and it is likely that this injury will be redressed by a favorable decision enjoining the enforcement of the law,” the panel said.

U.S. Circuit Judges Diarmuid F. O’Scannlain and Johnnie B. Rawlinson and U.S. District Judge Sarah S. Vance, sitting by designation, sat on the panel for the Ninth Circuit.

The plaintiffs-appellees are represented by Deepak Gupta and Jonathan E. Taylor of Gupta Wessler PLLC, Mark Wendorf of Reinhardt Wendorf & Blanchfield, and Kevin K. Eng of Markun Zusman Freniere & Compton LLP.

The attorney general office's representation team includes Attorney General Xavier Becerra, Deputy Attorneys General John W. Killeen and Anthony R. Hakl, Supervising Deputy Attorney General Stepan A. Haytayan, and Senior Assistant Attorneys General Douglas J. Woods and Thomas S. Patterson.

The case is Italian Colors Restaurant et al. v. Xavier Becerra, case number 15-15873, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Joyce Hanson. Editing by Breda Lund.
