

## Cash or Credit? The Battle Over How to Define the Credit Card Processing Fee

By Kristin B. Rowell



“  
... If the consumer  
pays with a credit  
card, he or she  
will be charged  
a “surcharge” or  
processing fee.  
”

On Jan. 10, 2017, the United States Supreme Court held oral argument in the case of *Expressions Hair Design, et al. v. Schneiderman, et al.*, No. 15-1391. You may be surprised to hear that this is not a case about hair products, hair styling or furniture; it is a case about credit card processing fees.

Here's the background. Ten of our 50 states, including New York, Florida, California and Massachusetts have enacted laws that allow merchants to charge higher prices to consumers who use a credit card to pay for their merchandise instead of cash, but the laws also essentially require the merchant to communicate to consumers that if the consumer pays with cash, the consumer will receive a “discount” rather than allowing the merchant to communicate to the consumer that if the consumer pays with a credit card, he or she will be charged a surcharge or processing fee. For example, New York's statute, which was the law at issue in *Expressions Hair Design*, states, “[n]o 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.”

The petitioners in *Expressions Hair Design* argued that the problem with this law is that it unconstitutionally regulates speech because it prohibits the merchant from telling its consumers that a portion of a product's listed price contains a credit card fee. As it currently stands, under the New York statute, a merchant would not be allowed to list its price for a cup of coffee as \$2 and then say, “[b]ut we charge an extra 5 cents for credit cards.” Instead, the merchant would have to list the price of the cup of coffee as \$2.05 and tell the customer who pays with cash, “[a]ctually, for you it is only

\$2.00 because we give a cash discount.”

There is a split amongst federal circuit courts around the country about whether this kind of law is appropriate. On the one hand, the Eleventh Circuit has held that these laws unconstitutionally restrict speech conveying price information because they effectively prohibit merchants from telling consumers that they are being charged a surcharge. On the opposite spectrum are the Second and Fifth Circuits, both of which have held that such laws simply regulate economic conduct and are not an unconstitutional restriction on speech.

The petitioners in *Expressions Hair Design* want the Supreme Court to adopt the Eleventh Circuit’s view. They want to be able to charge two different prices for cash and credit and characterize the price difference as a surcharge when the customer uses a credit card. The respondents in *Expressions Hair Design* want the Supreme Court to uphold the Second Circuit’s view. They believe this law is merely a regulation on economic conduct and not an unconstitutional restriction on speech.

The parties’ arguments are interesting, so the justices were active during oral argument. One question by Justice Ruth Bader Ginsburg was more thought-provoking than the others. She asked, “Can you explain to me how it’s a disclosure requirement to suppress the actual cost of the credit card purchase?” *Expressions Hair Design, et al. v. Schneiderman, et al.*, No. 15-1391, Transcript (oral argument), at p. 59, ln. 20-22). Respondents’ counsel wisely stated:

Nothing about the statute prevents a seller from educating consumers about credit card costs, informing them about it, talking about it. Many of the Petitioners here do so. Brooklyn Pharmacy, for instance, has told its customers not to use credit cards because of the additional costs that they impose, and they remain free to do so under this statute. And in an important sense, that speech is actually a better and more direct way of advocating about credit card costs than the mere

imposition of a surcharge. *Expressions Hair Design, et al. v. Schneiderman, et al.*, No. 15-1391, Transcript (oral argument), at p. 59, ln. 20-22).

Are all merchants really going to take the time to educate their consumers about credit card costs? Doubtful. But respondents maintain, “The very narrow thing that [the law] does is to put an imposition of a surcharge in the consumer transaction, and that’s ... classic economic conduct regulation.” *Expressions Hair Design, et al. v. Schneiderman, et al.*, No. 15-1391, Transcript (oral argument), at p. 59, ln. 20-22).

Although the case is not yet decided, *Expressions Hair Design* received more amicus curiae briefs than any before the Supreme Court since October 2016. Twenty-three amicus curiae briefs were received in all, submitted by organizations ranging from credit union associations to behavioral economic institutes to one amicus curiae brief from a conglomerate of Ahold USA Inc., Albertsons LLC, HE Butt Grocery Co, Hy-Vee Inc., The Kroger Co, Safeway Inc., Spirit Airlines Inc., and Walgreen Co. A decision is expected sometime this spring.

Kristin Rowell is a trial lawyer and shareholder of the business litigation boutique law firm of Anthony Ostlund Baer & Louwagie P.A. in Minneapolis. Kristin represents companies and individuals in a variety of complex business disputes, including real estate disputes, shareholder matters, employment and contract disputes. Kristin regularly appears on behalf of her clients in state and federal courts in Minnesota and North Dakota. When she is not helping her clients solve their legal problems, you can usually find her strength training at Discover Strength, running, spending time with family and friends, or volunteering for the University of Minnesota Masonic Children’s Hospital.



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