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FIFTH CIRCUIT UPHOLDS TEXAS ANTI-SURCHARGE LAW

The United States Court of Appeals for the Fifth Circuit upheld the Texas Anti-Surcharge Law in the face of a First Amendment challenge. *Rowell v. Pettijohn*, Case No. 15-50168 (5th Cir. March 2, 2016). The Texas law forbids merchants from charging an extra fee to consumers who pay with a credit card. According to the court, the law was enacted to address how the “swipe fee” of two to three percent of the purchase price, which credit-card issuers charge merchants for each transaction paid with a credit card, is passed on from the merchant to the consumer. A group of Texas merchants claimed the law violates free speech rights by penalizing the merchants for characterizing pricing as a “surcharge,” while at the same time not prohibiting a “discount” for non-credit card transactions. The merchants also claimed that the law is unconstitutionally vague. The Texas Office of Consumer Credit Commissioner took the position that the law is a permissible economic pricing regulation that does not implicate the First Amendment. The district court dismissed the merchant’s challenge to the Texas surcharge law for failure to state a claim and this case followed. See *Rowell v. Pettijohn*, No. A-14-CA-190-LY (W.D. Tex. 4 Feb. 2015).

In reaching its decision, the Fifth Circuit acknowledged the split among the circuits on state anti-surcharge laws. The Second Circuit upheld New York’s anti-surcharge law. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir.), *amending and superseding* 803 F.3d 94 (2d Cir. 2015). The Eleventh Circuit held Florida’s anti-surcharge law violated the merchants’ First Amendment free speech rights. *Dana’s Railroad Supply v. Attorney General of Florida*, 807 F.3d 1235 (11th Cir. 2015).

Based on the states’ broad authority to regulate economic conduct, the Fifth Circuit held that Texas’ law regulates conduct, not speech, and, therefore, does not implicate the First Amendment. The Texas law states: “In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment.” Tex. Fin. Code § 339.001(a). The court found that the text of the Texas law indicates that it regulates conduct. The court found that the Texas law is not unconstitutionally vague, as the law

has a “core meaning that can reasonably be understood.”

The case was decided by a three judge panel, with one judge dissenting. The dissenting judge stated that the law is not a regulation of pricing or of other economic activity, but regulation of protected commercial speech.

In a case currently on appeal, the United States District Court for the Eastern District of California held California Civil Code Section 1748.1 to be an unconstitutional restriction on freedom of speech and void for vagueness. *Italian Colors Restaurant v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015). Section 1748.1(a) provides that no retailer in any sales, service or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check or similar means.

We will continue to follow and report on these and similar surcharge cases. □

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