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NINTH CIRCUIT PANEL AFFIRMS DISTRICT COURT ACTION DISPUTING CONSTITUTIONALITY OF CALIFORNIA SURCHARGE LAW

A three-judge panel of the Ninth Circuit Court of Appeals upheld the United States District Court for the Eastern District of California's summary judgment in favor of plaintiff retailers in an action challenging the constitutionality of California Civil Code Section 1748.1(a), a 32- year old law prohibiting retailers from imposing a surcharge on customers who make payments with credit cards while permitting discounts for payments by cash and other means. *Italian Colors Restaurant v. Xavier Becerra*, Case No. 15-15873 (9th Cir. Jan. 3, 2018). This decision builds on the United States Supreme Court *Expressions Hair Design* case (see our prior ALERT dated March 29, 2017), in which the Supreme Court concluded that a New York law restricting surcharges regulated the "communication of prices" rather than the prices themselves and remanded the case to determine whether the New York law is a valid commercial speech regulation or an unconstitutional regulation of speech under the First Amendment to the U.S. Constitution.

The Ninth Circuit panel held that (1) plaintiff retailers had modified their speech and behavior based upon a credible threat of the statute's enforcement, (2) Section 1748.1 regulated speech and (3) Section 1748.1 violated the First Amendment as applied to plaintiffs, as enforcing the statute against the plaintiffs did not advance California's asserted interest in preventing consumer deception and there was no reasonable fit between the broad scope of the statute and the asserted state interest.

Retailers that seek to impose these fees generally do so because the card transactions cost more for the retailers to process. Other states with similar laws may soon see them struck down based on First Amendment grounds; however, merchants may be reluctant to actually impose surcharges broadly based on concerns about competitiveness and consumer backlash. We will continue to follow these cases and provide updates. □

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