

Banking and Finance Law Daily Wrap Up, CREDIT, DEBIT AND GIFT CARDS— 2d Cir.: Decision upholding constitutionality of New York’s credit card ‘no surcharge’ law clarified, (Dec. 15, 2015)

By [Thomas G. Wolfe, J.D.](#)

Amending its September 2015 court opinion upholding the constitutionality of New York’s credit card “no surcharge” law, the U.S. Court of Appeals for the Second Circuit has clarified its holding in the case and elaborated on its rationale supporting the decision. Accordingly, the Second Circuit’s Dec. 11, 2015, amended opinion reiterates that New York’s law prohibiting sellers from imposing a surcharge on consumers who elect to use a credit card for payment—instead of cash, check, or similar means—does not violate the U.S. Constitution. At the same time, the court emphasizes that “the application of [the New York law’s] text to surcharges added to single sticker prices violates neither the First Amendment nor the Due Process Clause”; the court declines to address other applications—based on abstention principles enunciated by the U.S. Supreme Court (*Expressions Hair Design v. Schneiderman*, [amended Dec. 11, 2015](#), Livingston, D.).

As previously reported (see *Banking and Finance Law Daily*, [Sept. 30, 2015](#)), the Second Circuit, in its prior September 2015 opinion, observed that there are two kinds of facial challenges that are generally available to plaintiffs in the First Amendment context: (1) contending that the particular law is “unconstitutional in all of its applications”; or (2) contending that “a substantial number of its applications are unconstitutional judged in relation to the statute’s plainly legitimate sweep.”

While the Second Circuit again sets forth this paradigm in its amended opinion, the court now elaborates on its analysis by asserting that overbreadth challenges are not typically available in the context of commercial speech. “Both our precedent and Supreme Court precedent squarely hold that overbreadth challenges predicated on the chilling of commercial speech are not available under the First Amendment,” the court states.

Notably, the Second Circuit’s *Expressions* decision, upholding the constitutionality of New York’s credit card “no surcharge” law, is in juxtaposition to the Eleventh Circuit’s November 2015 decision ([Dana’s Railroad Supply v. Attorney General, State of Florida](#)) striking down Florida’s credit card “no surcharge” law as an unconstitutional abridgement of free speech under the First Amendment.

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