

Client Alert

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Supreme Court "Expresses" Unanimous View That Credit Card Disclosure Rules Regulate Speech

By **Obrea O. Poindexter, Marc A. Hearron, and Amanda J. Mollo**

On March 29, 2017, the U.S. Supreme Court held that a New York law restricting the way merchants may communicate prices to their customers regulates speech and, thus, is subject to review under the First Amendment. Specifically, the Court held that New York General Business Law § 518 ("Section 518") should not be viewed as regulating prices, which is permissible regulation of conduct, because Section 518 does not require merchants to sell products or services at any particular price. Rather, the Court held that Section 518 places restrictions on the manner in which merchants may communicate prices to customers, which amounts to regulation of speech. The unanimous decision, penned by Chief Justice Roberts, overturned the ruling by the Court of Appeals for the Second Circuit in *Expressions Hair Design v. Schneiderman* and remanded the case for the Second Circuit to decide whether the law violates the First Amendment. Following the decision, questions remain about the meaning of Section 518 and the standard for determining the permissibility of speech regulation under the First Amendment.

SECTION 518'S MEANING

According to the Court, Section 518 restricts the signage merchants may display and other communications to customers by prohibiting merchants from displaying a single price for a given item and then adding a surcharge for the use of a credit card. Under the law, merchants may communicate that there are different prices depending on the form of payment by displaying a single price for an item and providing a discount for customers that pay in cash. In contrast, plaintiff Expressions Hair Design displayed different prices for customers paying with cash and customers paying with credit. The Court, in a footnote, suggested that the Court of Appeals may need to analyze whether Section 518 permits such a "two-sticker" pricing scheme in order to determine whether Section 518 is constitutional—a question that the Court of Appeals stated was "far from clear" in its now-vacated decision in this case.

Justice Breyer also opined in a concurrence that Section 518's operation is unclear, and its interpretation is a matter of state law. Justice Sotomayor's concurring opinion, joined by Justice Alito, noted that the Court of Appeals for the Second Circuit should certify the case to the New York Court of Appeals to clarify the nature of the obligations the statute imposes, stating that the opinion of the Court "addresses only one part of one half" of the First Amendment challenge to Section 518.

PERMISSIBILITY OF SPEECH REGULATION

Although this case is notable for its holding that restrictions on pricing disclosures constitute the regulation of speech in the credit card surcharge context, the Court did not decide whether these restrictions actually violate the First Amendment. The Court of Appeals had not reached the First Amendment issue because it concluded that, in the single-sticker pricing context, Section 518 did not regulate speech, and, in the two-sticker context, the analysis "turn[ed] on an unsettled question of state law." The Supreme Court stated that it declined to answer questions of first instance.

Client Alert

Without providing any guidance regarding the standard of review under the First Amendment, the Court remanded to the Court of Appeals to analyze whether Section 518 is a permissible speech regulation. Justice Breyer's concurrence noted that such an analysis should differ depending on whether the speech regulated by Section 518 affects an interest that the First Amendment affects. That is, courts should use greater care in scrutinizing any regulation of speech that "negatively affects the processes through which political discourse or public opinion is formed or expressed" than they should in analyzing "purely factual and uncontroversial information." Justice Breyer notes that Section 518 appears to be "an ordinary piece of commercial legislation subject to 'rational basis' review," but that it may make sense "to interpret the statute as working like" an expired section of the Truth in Lending Act after which Section 518 was modeled, and thus to use a deferential form of review, per *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985).

Once the Second Circuit takes up the case again, it is likely to ask for briefing on the First Amendment issue. We will continue to follow this case and other developments relevant to credit card pricing disclosures.

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