



Rakoff Blocks NY Swipe Fee As Atty Vows More Suits To Come

By **Pete Brush**

Law360, New York (October 03, 2013, 3:07 PM ET) -- U.S. District Judge Jed S. Rakoff invoked free speech grounds Thursday to block a state ban on credit card surcharges, handing a victory to merchants who want to charge extra for swipes — and a Washington lawyer who brought the case told Law360 he will soon target other state statutes.

Attorney Deepak Gupta of Gupta Beck PLLC applauded Judge Rakoff, who issued an injunction blocking an Empire State statute, General Business Law Section 518, which says "no 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."

The problem, according to Rakoff, is that the law bans surcharges but doesn't ban merchants from taking the opposite approach — simply offering discounts to customers who pay cash.

"This virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment and renders section 518 unconstitutional," the judge said.

Gupta said Thursday he fully expected the Second Circuit to take a look at the decision but vowed to target nine other states that feature such bans — California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, Oklahoma, Texas — in the very near future.

He declined to say which state specifically might be next, but said the filings would come soon.

"It's a free-speech victory for merchants, but it's also an economic victory for consumers," Gupta said. "These laws protect credit card industry profits by hiding the true costs of credit cards."

[Visa Inc.](#) and [MasterCard Inc.](#) agreed to remove contractual language barring

retailers from describing higher prices for credit card transactions as surcharges as part of a recent national class action swipe-fee settlement.

That brought the state statutes to the front lines, and the New York federal lawsuit was filed soon after.

“If consumers are made aware of swipe fees and determine that they are too high, consumers will use a different payment method, and banks and credit card companies will have to lower their fees to attract more business,” the [June complaint says](#).

The plaintiffs are represented by Deepak Gupta, Gregory A. Beck, Brian Wolfman and Jonathan E. Taylor of Gupta Beck PLLC and by Gary B. Friedman and Tracey Kitzman of Friedman Law Group LLP.

The case is *Expressions Hair Design et al. v. Eric T. Schneiderman et al.*, case number [1:13-cv-03775](#), in the U.S. District Court for the Southern District of New York.

--Additional reporting by Richard Vanderford and Evan Weinberger. Editing by Rebecca Flanagan.

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