

Businesses Challenge NY's Ban On Swipe Fee Surcharges

By Evan Weinberger

Law360, New York (June 04, 2013, 4:23 PM ET) -- A group of New York businesses on Tuesday sued to overturn a state law barring them from imposing a surcharge for credit card transactions while allowing discounts for cash payments, saying the law hurts consumers by hiding the real costs of credit card payments.

Credit card companies charge retailers a so-called swipe fee for every credit card transaction they process. Typically, those fees are passed along to consumers. New York State law bars retailers from passing along those fees to consumers in the form of surcharges, but they are able to offer discounts for customers that pay with cash, checks or debit cards, and imposes potential criminal sanctions if merchants even describe the price differential as a surcharge rather than a discount, according to a complaint filed in New York federal court.

The five small businesses from around New York challenging the law say that this bar hurts consumers by hiding the true cost of credit card use and gives merchants less power in attempting to negotiate lower swipe fees.

"Merchants should be able to use whatever words are most effective to inform their customers about the high cost of using credit cards," said Deepak Gupta, founding partner of the firm Gupta Beck PLLC representing the small businesses.

New York imposed the law in 1984 after a federal ban on credit card swipe fee surcharges expired.

According to the complaint, businesses across New York have in many cases had to alter their method of describing the difference in prices for credit card versus cash or other payments out of fear of being charged with a criminal offense. That is true even if the cash discount and the swipe-fee surcharge are "mathematically the same," Gupta said.

"We just want to let our customers know about these fees in a way that will make them pay attention. But we can't afford the risk that the state will prosecute us for using the wrong words," Peter Freeman, the co-founder of Brooklyn Pharmacy & Soda Fountain and one of the plaintiffs, said in a statement.

In many instances around the state, retailers have stopped offering even the discounted price for cash transactions for fear of running afoul of the anti-surcharge law while still others are not aware that they can charge dual prices at all, the complaint says.

"The upshot, then, is that merchants end up passing on swipe fees to all consumers by raising the prices of goods and services across the board," the complaint said.

Consumer advocates have long campaigned to remove swipe-fee surcharge bans, and [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 class action swipe fee settlement.

The plaintiffs allege that New York's anti-surcharge law violates federal antitrust statutes by making it more difficult for them to negotiate lower swipe fees.

Because they cannot bring direct evidence that consumers have rejected using credit cards because of the higher fees, rather than choosing a cash discount, credit card companies are less willing to listen to requests for lower fees, the complaint says.

"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 complaint said.

New York is not alone in having a swipe fee surcharge ban in place. California, Colorado, Connecticut, Florida, Kansas, Maine, Maine, Oklahoma and Texas have similar statutes in place, and credit card companies are pushing more states to enact similar bills, according to the plaintiffs.

But consumer advocates plan on challenging the laws in the nine other states as well, the plaintiffs said.

Representatives for New York Attorney General Eric Schneiderman, who is the named defendant in the case in his role as the state's top law enforcement official, could not immediately be reached for comment Tuesday.

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

The case is Expressions Hair Design et al. v. Eric T. Schneiderman in the U.S. District Court for the Southern District of New York. The case number was not immediately available.

--Editing by Lindsay Naylor.