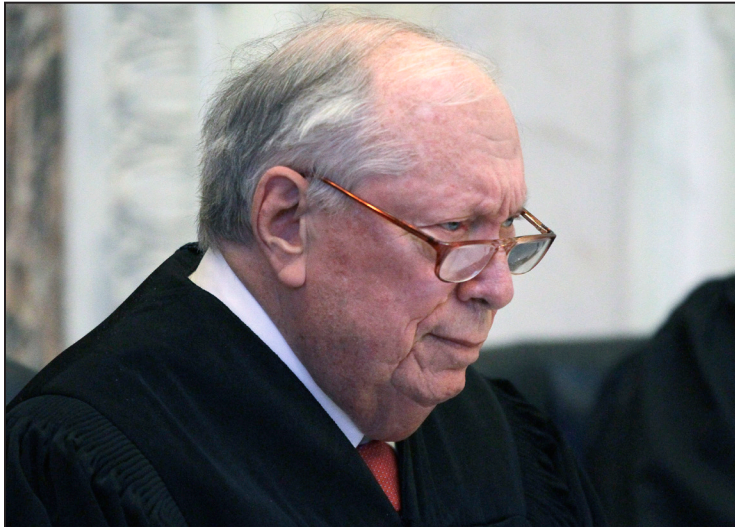


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COVER STORY

## Judge urges protections for credit card payers



Daily Journal Photo

9th U.S. Circuit Court of Appeals Judge Stephen R. Reinhardt listens to oral arguments during a 2010 hearing in San Francisco.

By John Roemer / Daily Journal Staff Writer

In a provocative challenge to the U.S. Supreme Court, Circuit Judge Stephen R. Reinhardt has urged the justices to do for consumers facing credit card late fees what they did for corporations slapped with punitive damage awards. The high court famously held a decade ago that to satisfy due process, few punitive awards should exceed nine times the amount of the actual losses sustained by the plaintiff and should usually be far lower.

Reinhardt contended that the same due process principle should limit the late fees and over-limit fees banks charge their credit card customers even as he conceded that under existing law, the plaintiffs in a potential class action against banks don't have a case.

He was forced to concur in dismissing the matter but went on to say at length why the high court should revise the law. *In re: Late Fee & Over-Limit Fee Litigation*, 2014 DJDAR 712 (Feb. 11, 2014).

The power of his concurrence persuaded the plaintiffs' lawyers, including Patrick J. Coughlin of Coughlin Stoia Geller Rudman & Robbins LLP in San Diego, that a direct petition for review to the U.S. Supreme Court is warranted. Coughlin said he intends to file for

certiorari within about six weeks.

A spokeswoman for the lead defendant, Bank of America NA, declined to comment. In court papers the banks' lawyers argued that late and over-limit fees are contractual payments, not punitive damages subject to the due process clause.

Of course, coming from Reinhardt, a leading liberal at the 9th U.S. Court of Appeals whose opinions have often been shot down by the high court, the idea might not get far. But a leading consumer advocate not involved in the case vouched for its merit.

"This is one of the most brilliant, interesting and novel theories I've seen in years," said Brian S. Kabateck of Kabateck Brown Kellner LLP, a former president of Consumer Attorneys of California.

"Judge Reinhardt took up the plain-

tiffs' argument and wrote a spot-on concurrence saying it's grossly unfair for corporations to get protection while consumers get nickel-and-dimed at will," he added.

Reinhardt stressed the importance of the issue. "This is a constitutional case of first impression," he wrote. "It is an attempt by a group of cardholders to have a new constitutional doctrine applied even-handedly."

And he predicted that will happen. The "principles of fairness and equality will dictate that consumers are entitled to (at least) the same constitutional rights as corporations," he wrote.

Reinhardt put his prophesy in the concurrence after voting with Senior Circuit Judge Dorothy W. Nelson and Circuit Judge Milan D. Smith Jr. to dismiss the potential class action. He and Nelson affirmed U.S. District Judge Sandra B. Armstrong of San Francisco.

As Nelson explained, "The jurisprudence developed to limit punitive damages in the tort context does not apply to contractual penalties, such as the credit card fees at issue in this case."

"I concur, reluctantly," Reinhardt wrote. "The Supreme Court has recently discovered that the Constitution prevents courts from imposing disproportionate punitive damages in tort cases. If the Court continues to adhere to its newfound view, it would be well advised to apply the same rule to prevent disproportionate penalties from being imposed on consumers when they breach contracts of adhesion."

Such contracts are the kind people must sign if they want credit cards from banks. They are considered one-sided, because the bank has all the bargaining power and can write the contract to its advantage.

As Reinhardt put it, "Consumers presented with these contracts must either 'agree' to their harsh terms or live without necessities of modern life, including access to credit, utilities, and the principal means of commu-

nication."

But the terms are unfair, because typical late fees and over-limit fees of \$39 and the doubling of the interest rate on a late balance are penalties far in excess of a bank's actual costs in administering the account, Reinhardt wrote.

"Big businesses are protected against 'excessive' punitive damages awards for their willful misconduct, even as consumers are afforded no constitutional protection against disproportionate damages for breaches of contracts of adhesion — contracts that are not voluntary in any worthwhile sense of the term," Reinhardt wrote.

In 2002, for example, credit card companies collected \$7.3 billion in late fees, according to a 2006 law review article by the UCLA law and philosophy professor who argued the plaintiffs' case before the 9th Circuit, Seana V. Shiffirin.

The article's title encapsulates the question the plaintiffs raise: "Are Credit Card Fees Unconstitutional?"

Shiffirin's theory of a due process parallel between punitives and late fees was born as she perused the Supreme Court's opinion limiting punitives, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

"It was the first thought I had on reading the opinion," she said this week. "I thought we'd see litigation emerge fairly soon, but I was wrong."

Her article caught the attention of class action lawyers at Berkeley's Meade & Schrag LLP who knew Shiffirin through mutual friends. She and they and the Coughlin firm developed the case together, name partner Michael L. Schrag said.

"Judge Reinhardt's concurrence makes a strong case for why the Supreme Court should look at these principles of fairness," Schrag added.

It was a mark of the unusual nature of the case that Nelson, after authoring the opinion affirming dismissal of the plaintiffs' case, penned a separate concurrence to say that she agreed with Reinhardt.