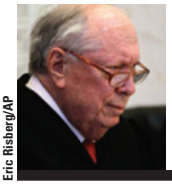
THE RECORDER

At the Podium: When Reinhardt Gets to Play the 'Judicial Activist' Card



Eric Risberg/AP

Judge Stephen Reinhardt, U.S. Court of Appeals for the Ninth Circuit

By Scott Graham

SAN FRANCISCO — Suppose you're a Big Law attorney representing giant banks accused of putting the screws to the little guy. Suppose the theory advanced by your opponent is extremely creative and you have a fairly solid defense in existing law.

Probably the very last thing you want to do is get drawn into a deep philosophical discussion about judicial activism with U.S. Court of Appeals for the Ninth Circuit Judge Stephen Reinhardt.

Wilmer Cutler Pickering Hale and Dorr partner Noah Levine had no choice at a Feb. 11 hearing before the court. But he took the Reinhardt challenge and handled it adroitly, even managing a good-natured joust over the jurist's renowned liberosity. And he probably — probably — emerged with a win.

Pinon v. Bank of America,08-15218, is a putative class action brought by credit card holders in 2007. They argue that the $39 fee charged for late payments are a form of "contractual punitive damages" that have been rendered unconstitutional by the U.S. Supreme Court's 2003 decision, *State Farm v. Campbell*, 538 U.S. 408.

"As that case explained," argued Seana Shiffrin, a UCLA law and philosophy professor representing the plaintiffs, "grossly excessive penalties serve no legitimate purpose and constitute an arbitrary deprivation of property."

Judge Milan Smith Jr., an appointee of President George W. Bush, immediately expressed skepticism. "I've read your law review article and I've read your briefs," he told Shiffrin. "And, while ingenious, you have to assume point after point after point after point to finally get to your main issue."

The Supreme Court cases originate in torts, Smith explained, whereas the credit card holders have signed contracts agreeing to the fees. And Congress has defined the late fees as interest, not penalties.

Judge Dorothy Nelson, like Reinhardt an appointee of President Jimmy Carter, seemed doubtful as well. Suppose I were late in returning a video to a video store and was charged an unreasonable fee, Nelson asked. "Is that a punitive damage?"

"Yes," Shiffrin said, "those penalties or punitive damages would not be permitted."

"Do you have any case to support that argument?" Nelson asked.

Ah, but who really needs cases?

"That's a common law [argument]," Reinhardt interjected. "The issue here is really whether we can turn that into a constitutional argument on the basis that the Supreme Court took tort law several years ago and, for the first time, decided that tort law awards could violate the Constitution." The high court took this step "despite Justice [Antonin] Scalia's view that was not the original intent of the founders and had not been the law of this country for a couple of hundred years.

"So you're asking us to do with contracts what the Supreme Court decided to do after a couple of hundred years with torts," Reinhardt said.

It was a magnanimous offer, but Shiffrin was looking for a bit more. "I

like your explanation," she told him, "but I'd like to refine it, your honor."

"Please do," Reinhardt encouraged.

Before she could get far, Nelson returned to that ol' pet peeve of hers. "You don't have a case saying that, do you?" she asked.

"No, we do not," Shiffrin acknowledged.

When it was his turn at the lectern, Levine, the banks' lawyer, said that ruling for the plaintiffs would require "unprecedented leaps."

Reinhardt happily agreed. But it took a similar great leap for the Supreme Court to apply the Second Amendment to individuals in 2008, he said, and "tort cases were around for hundreds of years" before the high court placed limits on punitive damages. So why not place a similar limit on credit card fees?

"Are you freakin' kidding me?" would have been one possible response. But Levine, who clerked for retired Supreme Court Justice Sandra Day O'Connor and the Fourth Circuit Justice J. Harvie Wilkinson III, didn't say that. Instead he calmly replied, "There's nothing in the words of the due process clause — not even a value in the due process clause — that is offended here by allowing parties to order their financial affairs as they see fit by contract."

Reinhardt hit him with a hypothetical. "If the only way you could get a telephone was to agree to pay a bill, a thousand-dollar fine if you were a day late, would there be no constitutional prohibition?"

"There would be no constitutional prohibition because of the word you used there — 'agree,'" Levine said. "As Judge Nelson says, you don't have to enter into the contract."

"Well, you have to agree if you want a telephone," said Reinhardt.

"If you want a telephone with that company," Levine clarified.

"Assume all telephone companies did that," Reinhardt pressed.

Levine decided to fire all his bullets. "A punitive damage award," he said, "is ordered by a court, in a litigation, against the consent of the party, for the purpose of punishment, and in an instance in which there is a danger of arbitrariness. We don't have any one of those five things in this case."

Reinhardt acknowledged that all made sense. "The only disagreement I would have with that is that the Supreme Court has been remarkably activist lately, and has developed the law as in the examples I gave you," he said, again referencing the gun and punitive damages cases. "The only question ... is whether the courts should do what they did with tort law, and do the same with contract law."

At this point Levine either decided to concede Reinhardt's vote or concluded the judge was just yanking his chain. "I take what you say, and I sense even maybe a bit of pleasure in seeing that your conservative colleagues on the Supreme Court are being activist," he said.

Reinhardt adopted a wide-eyed, innocent look. "I don't take any pleasure in that at all," he said.

"He loves them," Smith quipped.

Until the court issues its ruling, it won't be clear if Reinhardt was merely making a point about his ideological foes on the high court, or setting the table for the next great constitutional battle there.

"With all the contracts of adhesion these days," he told Levine, it's a fair question whether "there is a value there that would be protected."