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Recommended Citation
Norman I. Silber, *Late Charges, Regular Billing, and Reasonable Consumers: A Rationale for a Late Payment Act*, 83 Chi.-Kent. L. Rev. 855 (2008)
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LATE CHARGES, REGULAR BILLING, AND REASONABLE CONSUMERS: A RATIONALE FOR A LATE PAYMENT ACT

NORMAN I. SILBER*

> It's like my old Rastafarian roommate Miles used to say, usually while grinning from ear-to-ear, "I *love* paying bills." Why do you love paying bills, Miles? "Because I *hate* having my power and phone shut off." Truer words were never spoken.
>
> —Evan Goer[1]

> No excuses ever, for anyone; that's my principle at the outset. I deny the good intention, the respectable mistake, the indiscretion, the extenuating circumstance.
>
> —Camus[2]

INTRODUCTION

American consumers understand from personal experience—and from news stories, government studies, and academic literature—that in spite of good faith efforts to pay their bills on time, more late payment fees are showing up on their account statements—and each of these charges is larger than ever.[3] Unlike Miles, consumers may not all love to pay their bills, but usually they do not object to doing so. In sympathy with Camus, consumers generally do not expect excuses to get them off the hook if they fail to pay their obligations within a reasonable amount of time. Nonetheless, they have discovered that their efforts to meet payment obligations have been undermined ever more frequently by the parties with whom they do business, using the laws ostensibly designed to protect their welfare. Consumers are growing to hate paying bills and to hate asking for excuses for paying them late.

* Presented at the Federal Reserve Bank of New York Symposium, Rethinking Payments Law, Federal Reserve Bank of New York, April, 2007. Thanks to Stephanie Heller; to my research assistants Peter Herger, Charles Klein, and Justin Levy; to Norma Garcia and Gail Hillebrand; and to Toni Aiello, Alafair Burke, and Monroe Freedman, all of whom contributed to the manuscript and none of whom bear responsibility for its faults.

1. Goer.org, http://www.goer.org/ (Apr. 1, 2003, 09:37 PST).
2. ALBERT CAMUS, THE FALL 131 (Justin O'Brien trans., Vintage Int'l 1991) (1956).
3. *See* CHART 1: NEW YORK STATE BILLING CYCLE LATE PAYMENT REGIMES [hereinafter CHART], *infra* Part I.

This essay considers the reasonable behavior of consumers in relation to law and the policies that tolerate the assessment of late payment penalties, fees, and surcharges. Attention is trained principally on the inadequately-regulated cycle of creditor billing and debtor repayment practices, rather than on excessively high fees. The focus here is on the credit card issuers and, to a lesser degree, the wireless telecommunication vendors. Problems associated with late fee billing cycles cut a wide swath of billing for recurring debt repayment, however. A variety of different demands on consumers imposed sector-by-sector interact to magnify the consumers' difficulties.[4]

Part I addresses the multitude of ways that billers can impose late fee charges. This Part also identifies those deficiencies in legal regimes that aid and abet those who send out bills, by acquiescing to strategies that induce late fee revenue. Part II considers some information-processing and other cognitive difficulties that arise from the late payment regime, and contends that unearned redistribution from consumers to billers results from such incoherence and confusion, and also results in general welfare losses. Part III reviews existing statutory and common-law causes of action through which consumers might hope to recover from billers who intentionally or recklessly diminish the likelihood that deadlines will be met. Part IV proposes a Late Payment Act that illustrates the type of approach that could be adopted on a state- or nation-wide basis to address several of the key shortcomings.

I. THE SCOPE OF THE LATE FEE PROBLEM

Responsible consumers have complained for many years about the incidence, as well as the size, of late fee charges connected with recurring payment obligations. Those who study or practice consumer law are familiar with the generally unsuccessful state-level legislative efforts both to force the disclosure of information about the cost of borrowing and to limit the size of various bank fees;[5] they are also familiar with court decisions that have held some bank "bounced check" and other fees subject to invalidation pursuant to unfairness and unconscionability doctrines.[6] Less generally understood are the rules and doctrines across the universe of consumer

4. *See* CHART, *infra* Part I.

5. *See, e.g.*, Greenwood Trust Co. v. Mass., 971 F.2d 818 (1st Cir. 1992) (holding that state statute was preempted by federal law).

6. *See, e.g.*, Perdue v. Crocker Nat'l Bank, 702 P.2d 503 (Cal. 1985).

payments that proscribe minimal periods that must elapse before late payment fees may be assessed.[7]

Across the wide range of bill payments, various rules, regulations, and ordinances seek to regulate the ability to assess a late fee, and then to regulate the timing attached to a charge. State public utility commissions promulgate regulations and provide administrative guidance to address the acceptable period of time that must elapse before a water or electric company,[8] a sewage company,[9] or a gas company[10] can consider the non-

7. The laws establishing reasonable times for payment of bills are all over the map. In Texas, for example, the public utilities laws establish the period bills should cover and the time after which a late fee may be assessed. 16 TEX. ADMIN. CODE § 25.479 (Vernon 2007) (providing that bills must be issued no later than thirty days, or once per month, whichever the utility so chooses, to each consumer, unless the service has been provided for less than one month); 16 TEX. ADMIN. CODE § 25.480 (Vernon 2007) (payment is due no later than sixteen days after issuance; a one-time penalty of 5% is imposed on a delinquent bill, except for customers receiving low-income discounts); 16 TEX. ADMIN. CODE § 25.478 (Vernon 2007) (requiring consumers to establish creditworthiness for certain purposes; consumers cannot have been late more than once in twelve months in paying a bill). In California, different rules apply with respect to energy and public utility billing. Pursuant to the state's Public Utilities and Energy law, for example, the state requires forty-five days before notice of additional charges may be given for a thirty-day billing cycle, and seventy-five days before notice of additional charges may be given for a sixty-day billing cycle. CAL. PUB. UTIL. CODE § 3.2(d) (West 2006). In South Dakota, the billing cycle for credit cards is regulated together with the interest charge in Chapter 54-11 (Credit Cards and Revolving Charge Accounts), in the following language:

> The charge shall be at a rate or amount agreed upon by the parties involved. If the billing cycle is not monthly, the maximum charge is that percentage which bears the same relation to the agreed upon rate as the number of days in the billing cycle bears to thirty. For the purposes of this section, a variation of not more than four days from month to month is approximately the same day of the billing cycle.

S.D. CODIFIED LAWS § 54-11-6.3 (2004). In New York, utility regulations regarding late fees are principally located at N.Y. PUB. SERV. LAW § 609.2(k) (McKinney 2001) (telephone); N.Y. PUB. SERV. LAW §§ 271.1–271.5 (McKinney 2001) (gas, electric, steam, and water); N.Y. PUB. SERV. LAW § 531.3 (McKinney 2001) (water); and N.Y. BANKING LAW § 108 (McKinney 2001 & Supp. 2008) (debit card late fees for overdraft privilege nonpayments).

8. *See, e.g.*, Staff Recommendation on Request for Approval of Tariff Amendment to Include a Late Payment Fee of $5 in Osceola County by O&S Water Company, Inc., Docket No. 060506 (Fla. Pub. Serv. Comm'n Sept. 7, 2006) [hereinafter Fla. Pub. Serv. Comm'n] ("The utility filed a tariff request for approval to implement a late payment charge of $5 . . . accompanied by cost justification pursuant to Section 367.091(6), Florida Statutes. The utility provided the following expenses as cost justification for its request: [$2.25 for office personnel time to search accounts to determine that the bill has not been paid, $2.50 to prepare, print, and sort notices for mailing and to transport the notices to Post Office, $0.39 in postage, and $0.05 per envelope, all which amounted to] a cost of $5.19 per late account. . . . The purpose of a late payment charge is not only to provide an incentive for customers to make timely payments, thereby reducing the number of delinquent accounts, but also to place the cost burden of processing such delinquencies solely upon those who are the cost causers. In the past, late payment fee requests have been handled on a case-by-case basis. Presently, Commission rules provide that late payers may be required by the utility to provide an additional deposit. However, there is no further incentive for either delinquent or late paying customers to pay their bills on time after the additional deposit. . . . [T]he goal of allowing late fees to be charged by a utility is two fold: to encourage current and future customers to pay their bills on time; and if payment is not made on time, to insure that the cost associated with collecting late payments is not passed on to the customers who pay on time. . . .").

9. *See, e.g.*, Order Approving Initial Rates, Docket No. 06-UN-0351 (Miss. Pub. Serv. Comm'n Oct. 26, 2006), *available at* 2006 WL 3312242 (approving of late fees for sewage disposal services, and

receipt of payment to constitute grounds for assessment of a late payment fee. Other laws address the length of time before Internet service providers,[11] land line telephone operators,[12] and other providers can consider payment overdue enough to warrant a late payment charge or eventually to disconnect or terminate services.[13]

In many cases, utility boards render determinations which profess to establish "reasonable" late payment charges, i.e., ones that will "encourage current and future customers to pay their bills on time; and, if payment is not made on time, to ensure that the cost associated with collecting late payments is not passed on to the customers who pay on time."[14] State statutes regulating utilities often provide that the size of late fees needs to be justified by concrete calculations of the expenses caused to the company or to other ratepayers.[15]

stating that "[a]ll bills are due and payable by the 1st of the month which is subsequent to receipt. Bills not paid by the 10th of said month will be assessed a $5.00 late charge").

10. *See, e.g.*, *In re* Peoples Energy Serv. Corp., 235 P.U.R.4th 385, 385, 388 (Ill. Commerce Comm'n 2004) (citing ILL. ADMIN. CODE tit. 83 § 280.90(c)), *available at* 2004 WL 2378100 (ordering an alternative gas retail suppler to "cease and desist from misleading marketing practices," imposing a fine of $40,000 on the gas supplier, and directing the supplier to send a letter to its current customers clarifying its terms and conditions and advising consumers that the supplier's "payment requirements are quite different from those of a regulated utility. [The supplier] requires payment within ten days of the invoice date, instead of 21 days after the date of the postmark on the bill, which is what is required of a delivering utility."). The Citizens Utility Board had argued that "providing customers with such a little amount of time to pay their bills increases the likelihood that customers will incur late charges." *Id.* at 388.

11. *See, e.g.*, Holmes v. United Telephone Co., Docket No. 03-253-TP-CSS (Ohio Pub. Util. Comm'n Nov. 9, 2005) (alleging that a DSL disconnect notice was inadequate).

12. *See, e.g.*, Review of the Commission's Minimum Telephone Service Standards Found in Chapter 4901:1-5 of the Ohio Administrative Code, Docket No. 05-1102-TP-ORD (Ohio Pub. Util. Comm'n Aug. 9, 2006), *available at* 2006 WL 2285778 (approving service standards conforming to the following regime: "(C) Customer's bills and payments shall be due no earlier than fourteen (14) calendar days from the postmark on the bill, and shall be credited upon receipt by the telecommunications provider or its authorized payment agent. If the bill is mailed by means that does not place a postmark on the bill (i.e., such as permit mailing), the bill shall not be due earlier than fourteen days from the date appearing on the actual bill. All bills mailed without postmarks shall be mailed no later than the day listed on the bill. Authorized payment agent fees shall not exceed one and one half % of the payment amount or five dollars, whichever is more. (D) Residential customer late payment fees may be assessed, if approved by the Commission and shall comply with the following: (1) Late fees may only be applied to charges not paid at least nineteen days after the postmark on the bill. If the bill is mailed without a postmark, late fees may only be applied to charges not paid at least nineteen days after the mailing date on the bill. (2) Late payment fees may not be applied to the following: (a) Any portion of the bill that is in bona fide dispute. (b) Any previous late payment fees included in the amount due. (c) Service connection charges for lifeline services.").

13. *See, e.g.*, *In re* Long Butte Water Sys., Inc. UW 110, Order No. 06-027 (Or. Pub. Util. Comm'n Jan. 23, 2006), *available at* 2006 WL 302100 (permitting Long Butte Water System to assess late fees and waiving requirement to file late-payment charge notice in statement of rates, provided that the water system "provide a 15-day disconnect notice instead of a 5-day disconnect notice").

14. *See* Fla. Pub. Serv. Comm'n, *supra* note 8.

15. *See supra* note 7. There is also a state truth in lending law rule on late charges analogous to the federal law. N.Y. GEN. BUS. LAW §§ 511–520(c) (McKinney 1996 & Supp. 2008). Each state's insurance law usually has rules relating to notices of cancellation for nonpayment of premiums, and relating

Determinations of a "reasonable" time period in which to make payments generally declare a minimum number of days that must elapse from the time a statement is sent until a charge has been allowed. In most cases where basic necessities, including heat, water, housing, insurance, and, in some cases, telephone service are concerned, there are proscribed notices to be sent. Where events beyond late charges are involved, statutes and interpreted regulations dictate the wording of notices designed to alarm, on one hand, and to inform consumers of their rights, on the other hand.[16]

Chart 1 on the following page indicates—for a small sample of types of bill issuers and over a few jurisdictions—the confusing variety of rules that govern how long a bill issuer needs to wait before a late payment fee is assessed.

The greatest amount of recent public attention thus far has been paid to the outpouring from consumer pocketbooks of credit card late fees, from the tightening of credit card late fee assessment waiver practices, and from the increased credit costs attached to penalties for late payment. Federal Reserve data for the period from 1986–2000 suggest that more revenues of card-issuing banking institutions came from late fee revenues than from rising interest rates, partially because card interest rates actually declined during that period, but also because fee revenues took off.[17]

to fees that can be charged for late payments of premiums and renewals, and fees for late payments associated with their financing. *See, e.g.*, CAL. INS. CODE §§ 660–669, 674–679.9 (West 2005).

16. *See supra* notes 7–14. The right to appeal and to seek an extension is provided in some jurisdictions.

17. BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 1–3 (2001).

CHART 1: NEW YORK STATE BILLING CYCLE LATE PAYMENT REGIMES

NY Inter-Sectoral Contradictions on Late Fees	State or Federal Regulations Govern?	Wide Berth for Private Agreement?	Minimum Days Prior to Late Fee Imposition?	Limit on Late Fees?	Postmark Used to Measure Delivery?	Statement Date Used to Measure Delivery?	Posting Time Regulated?
Credit Cards	Mostly state regulations	Yes, subject to state usury laws (*Smiley*)	No	No	No	No	No
Wireless Bills	Federal regulations	Yes; must conform to FCC truth-in-billing rules	No	No	No	No	No
Landline Phones	Mostly state regulations	Partially	25 days	No	No	No	No
Gas Utilities	State regulations	No	No	No	No	No	No
Electrical Utilities	State regulations	No	No	No	No	No	No
Cable Television	Mostly state regulations	No	15 days from mailing of bill	No	Yes	No	No

The broad trend toward the capture of larger proportions of revenue through fees and associated modifications to consumer contracts can be traced to a wider regulatory latitude to assess late fees, and to a greater permissiveness regarding late fee disclosure and assessment than to ordinary interest disclosure and assessment. Credit card issuers have not been divulging meaningful comparative information about the late fees they assess, the proportion that these assessments bear to their underlying principal obligations, or the amounts that they are paying in interest.[18] This relaxation of disclosure requirements for bill issuers was accomplished largely by actions taken by the Comptroller of the Currency, which were upheld by the Supreme Court.[19] Coupled with relatively stringent interest rate disclosure rules (imposed principally by the Truth in Lending Act), the environment produced incentives for card-issuing banks to garner revenue through opaque, hard-to-calculate fees, which have made cross-product comparisons difficult, thereby diminishing the value of transparent APRs for consumers who accrue late fees. Based upon a negative relationship between late fees and card interest rates, the inference has been drawn that late fee revenues are serving as a substitute for interest rate revenues.[20]

On a per-capita basis, the number of late fee assessments and the dollar cost to consumers of each assessment is increasing. Late fee revenues have risen to $29 per consumer in 2002, up from $13 per consumer in 1996.[21] From 1996 to 2002, revenue generated by consumer credit card late fees alone skyrocketed from $1.7 billion to $7.3 billion.[22] Fee income in 2006 accounted for 35% of credit card income, which was "more than double the 16[%] posted in 1996."[23] Data suggests that credit card issuers, like other rational business interests, have responded rationally to incentives created by state impotence to regulate late fees in the wake of Supreme Court decisions that first heralded a deregulatory credit card regime more than two decades ago, and have been advanced through case law in recent years.[24]

18. *See* Interview by Terry Gross, host of NPR's Fresh Air, with Elizabeth Warren, Harvard Law Professor, March 27, 2007 [hereinafter Interview] (reading a typical card agreement and explaining the way in which mailing times are maximized to minimize the period between receipt and default).

19. *See infra* note 24 and accompanying text.

20. Nadia Massoud, Anthony Saunders & Barry Scholnick, The Cost of Being Late: The Case of Credit Card Penalty Fees 34 (January 2006) (unpublished paper presented at the Federal Reserve Bank of New York Conference on the Economics of Payments), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890826.

21. TAMARA DRAUT & JAVIER SILVA, DEMOS, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S, at 35 (2003); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 10 (2006) [hereinafter GAO REPORT] (indicating that the average late fee per assessment has almost tripled from $13 to $34 over recent years).

22. DRAUT & SILVA, *supra* note 21, at 35.

23. Robert Dodge, *Big Trouble Lies in the Credit Card Fine Print*, DALLAS MORNING NEWS, July 26, 2004, at 3D (citing a study by R.K. Hammer).

24. Two well-known Supreme Court cases eviscerated state-law supervision of credit card interest rates and late fee rules. In 1978, *Marquette National Bank v. First of Omaha Service Corp.* began the move toward deregulation of the credit card issuing industry. 439 U.S. 299, 313 (1978). In *Marquette*, the Court allowed a bank to charge the highest rate of interest to consumer cardholders permitted in the bank's home state. Almost twenty years later, in the 1996 decision *Smiley v. Citibank, S.D., N.A.*, the Court unanimously upheld the interpretation of the Comptroller of Currency that late payment fees were

In addition to the increase in aggregate credit card late fee penalty amounts, the willingness to waive or forgive late payments has summarily decreased. As of 2005, 35% of all U.S. households have been assessed a late fee at least once.[25] Adding salt to these wounds, as a result of "universal default provisions" and other contractual rights to revise initial rates, late payments are increasingly triggering interest rate hikes of upwards of 29% by card issuers.[26] Since 2000, over two-thirds of card companies

deemed "interest" for the purposes of preempting state regulation of late fee amounts. 517 U.S. 735, 745–47 (1996). Both opinions interpreted the National Bank Act of 1864, 12 U.S.C. § 85 (and both deferred to the Comptroller's analysis of that Civil War statute—ambiguous at best—to block state regulation). Subsequent federal decisions have accepted the principle of deference to the Comptroller's interpretation of the scope of nationalized banking regulation. *See, e.g.*, Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000 (E.D. Cal. 2002) ("[I]n determining the preemptive scope of federal statutes and regulations granting a power to national banks, the Supreme Court has adopted the view that normally Congress would not want states to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. Consistent with general principles of preemption, state attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties. Alternatively, state regulation of banking is permissible when it does not prevent or significantly interfere with the national bank's exercise of its powers.") (citations omitted).

Strong dissents to *Smiley* at lower levels contested the logic of the opinion, and the *Greenwood* opinion on which it was based, for the reason that unlike true interest, late payment fees are not part of the "'compensation for the use of that money.' These charges . . . are in the nature of 'damages' or 'penalties' for breaching the loan contract rather than 'compensation' due as part of the performance of that contract." Smiley v. Citibank, S.D., N.A., 32 Cal. Rptr. 2d 562, 569 (Cal. Ct. App. 1994) (Johnson, J., dissenting). A possibly beneficial effect of the newer legal environment is that it cheapened the cost for national banks to take on millions of higher risk credit borrowers by allowing the banks to comply with only one state's regulations, rather than with fifty states' regulations. *See* Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate* (FDIC, Div. of Ins., Bank Trends Papers, Paper No. 98-05, 1998), *available at* http://www.fdic.gov/bank/analytical/bank/bt_9805.html. *See generally* Samuel Isaacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157 (2006). The value of such a benefit would be subtracted from the cost to all higher risk credit borrowers of having, effectively, no late fee ceilings and fewer other restraints on predatory pricing policies (such as, for example, no regulation of universal default clauses).

25. *In the Matter of Practices of the Credit Card Industry: Testimony to Examine the Billing, Marketing and Disclosure Practices of the Credit Card Industry, and Their Impact on Consumers: Hearing Before the Senate Standing Comm. on Consumer Protection*, 230th Gen. Assem., Reg. Sess. (N.Y. 2007) (statement of Mindy Bockstein, Chairperson and Executive Director of the NYS Consumer Protection Board), *available at* http://www.consumer.state.ny.us/pdf/credit_card_hearing_testimony_apr07.pdf.

26. DRAUT & SILVA, *supra* note 21, at 35.

raised a consumer's rates after *one* late payment.[27] Most major issuers have no grace period whatsoever with respect to late payment fees themselves.[28]

These numbers and trends aggregate millions of individual late fee assessments—and thousands of complaints. Law students at Harvard, at Hofstra, and, no doubt the other co-sponsors of this Conference have used their credit cards to charge everything from Starbucks coffee and groceries to college tuition payments and diamond engagement rings—only to find that their credit card issuers obscured the true cost of their transaction by extracting unanticipated late charges. Victims of Hurricane Katrina used their credit cards to charge the cost of groceries and temporary housing, and then found late fees assessed based on statements mailed to inaccurate addresses.[29] Elderly citizens have found that their statements notified them that a payment was overdue before notice was actually received.[30] As a result of the misinformation they receive all the time—and useful information they receive only too little and too late—many consumers are ill-equipped to pursue their own best financial interests.

27. Patricia Sabatini, *Going for the Jugular: Credit Card Companies Tack on Stiffer Fees and Hidden Penalties to Squeeze More Profits from Customers*, PITTSBURGH POST-GAZETTE, Jan. 9, 2000, at C1, *available at* 2000 WLNR 3305146 ("What many don't realize is that late payments also often trigger so-called 'punitive' interest rates. Slip up even once, and you could see your annual rate booted as high as 30 percent. What's more, even people with perfect payment records can get zapped. That's because card issuers monitor credit reports, and some will jack up your rate if they discover you've been tardy paying other creditors.").

28. COUNCIL OF THE CITY OF N.Y., MAXED OUT: WHAT EVERY CONSUMER SHOULD KNOW ABOUT CREDIT CARDS 12 (2004), *available at* http://www.nyc.gov/html/records/pdf/govpub/1611credit cards.pdf.

29. *See generally* Norman I. Silber, *Thriving on Adversity: Disclosing Corporate Mistreatment of Consumers Caught in Hurricanes Katrina and Rita and Exploring the Consumer Movement's Response to Crisis and Catastrophe* (Hofstra Univ. Sch. of Law, Legal Studies Research Paper Series, Paper No. 06-5, 2006).

30. According to Consumers Union, consumers are, in large numbers, complaining that they are being squeezed by shortened billing cycles. Representative of such sentiments are these messages: "No matter when you mail the payment it always seems to be late. They are now saying you must mail it 14 days ahead of time to make sure it isn't late. Tried that still late! I also believe that they don't always mail out the bills every month so it will get overlooked. We had to put it on a scheduled pay and pay a fee to pay on-line." (from a resident of Lambertville, N.J.); "[T]hey have reduced their time from sending you a bill until you have to have to received by them . . . used to be almost a month, now one company is down to 10 days—this is all terribly unfair . . . if you're out of town they tell you that you should have sent a payment anyway . . . it all works for them and nothing for consumers who are at their mercy now that we are a card carrying society." (from a resident of Alexandria, Va.); "This past year the credit card statements are arriving 9–10 days after they were closed for the month and the due date is within 10 days. So in order not to get a late fee I must mail it out the next day. I've called them and they don't even have a mailing date on the envelope so they claim it went out on the day the period ended and that was impossible. Now the postal service intends to remove the blue, mail containers. What do they expect elderly people to do, walk to the post office? The banks are out of control and their demands are being approved by Congress. The American Citizens need to, clean house, this November. People of this government, our employees - may I add, are violating and disrespecting us and making us true victims." (from a resident of Ramsey, N.J.). Letters from various consumers to Consumers Union (May 26, 2006) (on file at the San Francisco Office of Consumers Union); *see also* Consumers Union, Credit Card Reform, www.creditcardreform.org (last visited Apr. 1, 2008).

Why do so many consumers pay bills too late to avoid fees? Explanations differ, of course, depending on which side of a transaction the explainer occupies. The size and type of bill payment being satisfied appears to affect the probability of an on-time payment; so does the demographic and economic category into which a consumer falls, the actual rules for compliance with the payment obligation, and the extent to which those rules are understood. All these factors play a part in the story.[31]

Undoubtedly there is a class of late payments that deserve to be discouraged through the imposition of late fees. It is not unlikely that some consumers find paying some bills more unpleasant than others and that they delay in paying them because they are psychologically disposed not to reward the party who sent the bill—regardless of the legitimacy of the debt—as a way to reciprocate in the infliction of pain. The payment of some larger bills or bills rendered for less gratifying consumption (dental bills, for example) or for compulsory fees (for example, taxes or dues) involves greater discomfort than others, and one would expect such discomfort to be deferred.[32]

A conventional explanation, and a simple one, is that consumers do not have liquid funds available with which to pay their bills when such payments are due. Especially in the lower segments of the economic spectrum—and for months or even years at a time—consumers may have monthly payment obligations that exceed their current income. But this explanation is inadequate, if only because most consumers other than those on the verge of bankruptcy—at least until the beginning of August, 2007—could access sources of equity with which to pay bills if they are motivated

31. *See* John Leland, *Couple Learn the High Price of Easy Credit*, N.Y. TIMES, May 19, 2007, at A1. For a more intriguing explanation as to how consumers could avoid accumulating credit card late fees, see Press Release, Federal Reserve Bank of Kansas City, Forget to Pay Bills? Still Getting Paid by Check? You're Not Alone. Try the Direct Deposit and Direct Payment Solution (May 12, 2000) (arguing that some consumers may be incurring late fees because of their aversion to using Direct Payment, the payment version of Direct Deposit. Direct Payment affords consumers the expedient option of authorizing creditors to deduct bill payments directly from their accounts, rather than waiting and hoping that a mailed check will reach its intended destination on time).

32. *See, e.g.*, Lee Heerten, *Late Payments Can Mean Lasting Consequences for Tenants*, DAILY NEBRASKAN, Mar. 7, 2007, at 11 ("Most college students are used to being late: late to class, late to work, late turning in papers. Some have even progressed, or digressed, to being late with their bills. And, occasionally, even not paying their bills at all. While the consequences for not turning in homework are fairly obvious, the consequences for not paying bills may be more ambiguous."); Posting of Clarissa to Associated Content, http://www.associatedcontent.com/ (Mar. 15, 2007) (How You Can Pay Your Bills Late Without Hurting Your Credit Score) ("The letters you receive in the mail keep telling you that you must pay a greater amount to your bills than you make per month. How is that possible? Looking at such a ratio could probably throw the average person who cares about their bills into a nervous break down. Do you need to start filling out an application for a third or fourth job? Should you consider bankruptcy? No. You can pay your bills late. Don't despair. 'Late' is not a dirty word. Delinquency is another thing all together. Late is just late.").

to do so; such consumers could also consider refinancing obligations to prevent having to make late payments or incur delinquencies.[33] And for American consumers at the edge of bankruptcy, paying minimum amounts on every account every month to avoid late payments entirely generally would be advisable and not impossible.

Notwithstanding these possibilities, a recent Western Union/Opinion Research Corporation International study found—as had the GAO study—that one-quarter of Americans pay at least one bill late per month.[34] This would appear to be a much larger proportion of late payers than can be accounted for by only those with an absolute inability to pay. We have witnessed a marked rise in late fee earnings by creditors, and yet (at least prior to August of 2007) the fees being collected have not been connected to any decrease in the funds consumers have available with which to pay bills.[35]

Another reason advanced for mounting numbers of late payment charges is that consumers are susceptible to the temptation to spend above their means, and that together with easier access to credit, this susceptibility has fostered a cycle of mounting indebtedness that inevitably leads to default on payment obligations.[36] However accurate this cultural explanation is as a description of contemporary materialism—or as an explanation for the higher incidence of consumer default—this narrative does not contribute a great deal to explaining the phenomenon of late payments and late payment fees. People who have credit resources available, or savings or cash available, do not have financial constraints that would make untimely minimum payments inevitable—but they are missing their payments nonetheless. On a rational calculation of costs and benefits, there are few situa-

33. Refinancing presents different considerations than tapping savings; there are many cases in which it is not economically rational to access one source of credit to pay off another debt. Borrowing at high rates and thereby incurring a high interest expense with an independent risk of late charges in order to avoid a one-time late charge may not be a sensible decision.

34. Press Release, PR Newswire, New Survey Uncovers Eye-Opening Facts About America's Bill-Paying Habits (Oct. 14, 2002), *available at* http://ir.firstdatacorp.com/news/releasedetail.cfm?ReleaseID=92249 (among other interesting findings, stating that mortgage or rent is the one bill that people will most likely not pay late, and households with children are 75% more likely to pay bills late).

35. GAO REPORT, *supra* note 21, at 58 (proportion of households with at least one delinquent payment within the last sixty days was relatively stable between 1995 and 2004).

36. Larry Bates, *Excepting Credit Card Debt from Discharge in Bankruptcy: Why Fraud Can't Mean What the Courts Want It to Mean*, 78 N.D. L. REV. 23, 24–26 (2002). For another interesting thesis explaining why consumers are mounting up late payment charges, see Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1536–37 (2006) (arguing that research has shown consumers are likely to spend more money when using a credit card than when using cash or a check in an otherwise identical situation; this fact makes it more difficult for consumers to satisfy outstanding credit card debts).

tions in which intentionally missing a due date for a minimum payment makes financially rational sense for those who can afford to make a payment.

Lack of financial education about the painful consequences of late payments has been offered as another explanation that tends to place responsibility for the rise on parties other than bill issuers. Empirical studies suggest that at the time young consumers acquire the capacity to contract for goods and services—at the age of their majority—they are, typically, poorly educated about the pain and negative consequences they will suffer as a result of making late payments, and, even worse, on delinquencies. Lower credit scores, higher borrowing costs, mortgage foreclosures, apartment evictions, lost employment opportunities, and other negative experiences may follow delinquencies. Studies suggest that, after novice consumers have endured sufficiently harsh penalties, they learn from their suffering and tend to avoid late payments in the future.[37] "Experienced" account holders do not, according to this line of study, pay as many late charges. By these accounts, late payment fees impose the right amount of discipline necessary for consumers to make payments on time.[38]

There is no reason to believe that the imposition of late fees is indispensable to discouraging untimely payments in most cases. Set aside the harsh distributional impact such a regime imposes on inexperienced parties; set aside whether or not late fees are appropriately calibrated to achieve a deterrent effect without imposing an excessive penalty; and set aside the possibility that inexperienced parties pay more in late fees because they have not learned how properly to read the misleading signals about the imposition of costs attached to late payment. Accept, for the purpose of argument, the unproven proposition that the snare of late fees effectively

37. *See* John Beshears et. al, How Are Preferences Revealed? (Jan. 15, 2007) (unpublished article), *available at* http://www.som.yale.edu/faculty/jjc83/prefsrevealed.pdf.

> Credit card data contain direct and detailed evidence of learning effects. Controlling for person fixed effects and transitory characteristics, new account holders pay fees that are five times greater than the fees paid by experienced account holders. The fees paid by new account holders reflect mistakes that are avoided by more experienced account holders. Each time an account holder pays a fee—for instance, a late payment fee—her likelihood of paying that fee the next month drops by a third.
>
> When new account holders pay fees, most are *not* revealing a high willingness to pay fees in exchange for services (like paying $30 for the service of being able to pay one's bill late). Instead, new account holders are revealing that they have not yet optimized their account management skills. With time and experience, such optimization takes place, and fee payments largely vanish. It is this asymptotic behavior that reflects the true preferences of the account holders.

Id. at 12 (citations omitted); *see* Sumit Agarwal et. al, Two Steps Forward, One Step Back: The Dynamics of Learning and Backsliding in the Consumer Credit Market (July 17, 2006) (unpublished article), *available at* http://www.nber.org/~confer/2006/si2006/le/laibson.pdf.

38. Beshears et. al, *supra* note 37, at 12.

educates consumers about their obligations. The mere fact of "educational" impact cannot justify the ensuing infliction of pain and the transfer of money away from customers to bill issuers as a desirable, efficient, or fair form of market discipline—or a good substitute for other ways to promote financial literacy.

II. COGNITIVE EFFECTS

A more authentic explanation than educational discipline for a significant part of the building problem of late fee charges arises from biller exploitation of the intrinsic cognitive limitations of consumers—by manipulating and testing the limits of the legal rules mentioned earlier. In *Observing Reasonable Consumers*,[39] this author made an initial attempt to consider the impact of cognitive psychology on our thinking about the treatment of reasonable consumer behavior under the law. Drawing on work by the team of Kahneman and Tversky, and other behavioral psychologists who were doing groundbreaking work,[40] it has been argued that courts should acknowledge—through more sophisticated analysis of seller conduct, and more sensitive liability rules—that basic human cognitive limitations and their exploitation play a major role in imperfect consumer choices. Inherent information processing limits that affect all of us, as a notable example, affect our ability to estimate probabilities accurately.[41] Consumers are further limited in their ability to calculate and maximize their expected utilities; the deficiency exists because consumer choices are affected by external manipulative factors, including "framing effects" and "induced disinclinations to maximize utility under particular conditions."[42]

Late fee charges present a case-in-point. Advantages taken by billers include the exploitation of consumers' lack of experience with reading legal terms and of other information "asymmetries,"[43] their susceptibility to

39. *See* Norman Silber, *Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law*, 2 LOY. CONSUMER L. REP. 69 (1990).

40. *See* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

41. Silber, *supra* note 39, at 70–72; *see* JUDGMENT UNDER UNCERTAINTY, *supra* note 40, at 201; Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW & ECONOMICS 13, 13–14 (Cass R. Sunstein ed., 2000).

42. Silber, *supra* note 39, at 70; JUDGMENT UNDER UNCERTAINTY, *supra* note 40.

43. *See* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 901 (2006) (arguing "that sophisticated card issuers have learned to exploit the boilerplate features of their agreements to produce a set of dynamic contracting obligations that even sophisticated cardholders could not understand."); Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 TENN. L. REV. 303, 337–38 (2006) (stating that "credit card borrower behavior remains unsophisticated. Extensive research shows that borrowers do not understand the implications of borrowing on a high interest credit card. Research supported by innumerable anecdotes also shows that bor-

confusion and information overload when large numbers of different rules about the billing cycle are presented to them,[44] the intrinsic weaknesses of memory about varying payment dates, and the tendency to minimize current payoffs from spending and to discount consequences of late payments in the future.[45] Billers' capitalization on these frailties by less-than-accurate advertising, agreements that provide for variations in timing, and porous standards for measurement and disclosure of procedures is furthered by the wide variation in rules—state by state, and sector by sector, and by the private agreements previously mentioned.[46]

There is abundant evidence that customers believe they are paying bills on time when they are not, that they find that they have no reasonable time for payment before their bills are deemed overdue, and that they do not understand—much less consent freely to—for example, universal default terms.[47]

III. EXISTING GROUNDS FOR REDRESS

What action can a consumer currently consider if she believes that a biller has intentionally or recklessly induced her to incur a late fee? Responding to insights emerging from behavioral psychology and particularly

rowers are surprised by the high fees imposed for exceeding credit limits, late payments and similar breaches of the credit card contract. Generally, borrowers do not shop for better deals on terms such as these. Even if they are sophisticated enough to understand the language in their contracts describing these terms, the terms are so standard in the industry that borrowers have neither the option to get credit elsewhere nor the power to bargain them away.").

44. George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 101 PSYCHOL. REV. 343 (1994).

45. *See generally* Marcel Cohen, *Insights into Consumer Confusion*, 9 CONSUMER POL'Y REV. 210, 211–13 (1999).

46. *See supra* Part II; Dyal-Chand, *supra* note 43, at 304–05 (arguing that "mortgage law crafted non-waivable property rules to protect the ignorant borrower from exploitation by the lender, [but] credit card law relies on largely waivable contract rules to afford the enlightened borrower greater access to credit.... This switch in borrower paradigms elicits drastically different results and less favorable treatment of the typical, middle class consumer borrower in courts, Congress, and the market.").

47. *See supra* note 32 and accompanying text; Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1660–61 (2006) ("In addition to using transaction costs to conceal contract terms at the beginning of contractual relationships, merchants also employ transaction costs that cause consumers to overlook changes in the terms of ongoing contractual arrangements. Companies that send periodic bills to consumers, such as credit card issuers,... sometimes include with the bills documents known as 'bill-stuffers' to, for example, change contract terms materially .... Sometimes the bill-stuffer, often in the form of a colorless, uninteresting-looking document that may be mistaken for junk mail, accompanies other items likely to be of greater interest to consumers .... By making it more difficult for the consumer to learn the terms of the transaction, the company increases the likelihood that the consumer will approve the changes or perhaps unknowingly act in a way that signifies approval."); Carolyn Carter, Elizabeth Renuart, Margot Saunders & Chi Chi Wu, *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. BANKING INST. 23 (2006).

to consumer psychology, administrative agencies and courts have, in many areas, come to appreciate limits and errors in the consumer decision-making process, and developed "reasonable consumer standards" in line with cognitive realities.[48] It is, after all, a widely shared premise of modern American legal thought that law should not readily proscribe or punish conduct that is reasonable or unavoidable; toward that end, courts and legislatures usually search for legal standards that correspond to our empirical knowledge of human behavior.[49] Regrettably, law and regulation in the area of late fee assessments has thus far rejected or ignored most claims of cognitive impairment. The principal causes of existing action pertaining to manipulation of a billing cycle are briefly considered below. Each avenue of redress poses difficult evidentiary burdens, practical difficulties, or other problems that thwart efforts to control exploitation of cognitive weaknesses.[50]

Misrepresentation and Deceit. Complaints alleging *intentionality* in inducing another party by misrepresentation to breach a performance obligation in a contract would make out, together with other requisite elements, a sufficient cause of action.[51] Typical credit card agreements indicate billing periods, but not posting periods. Claims based on intentional omission and concealment, viable in other areas of consumer law, have failed to provide an effective remedy. Although claims that assert an unreasonably early posting time by which the date of receipt of a payment is measured might be actionable,[52] allegations claiming companies have shortened billing cycles with the intent to provoke breaches have yet to be sustained.

Impairment of a Contractual Obligation. Even in the presence of explicit language to the contrary, contract law imposes a duty that cannot be waived: to refrain from intentional interference, hindrance, or delay in the performance of any obligation of another party. For example, in *Chicora Construction Co. v. United States*,[53] the federal government delayed a contractor's performance in completing a road that the plaintiff was hired to complete by a certain date.[54] In the circumstance of late payment penalty fees, decreasing the amount of time that consumers have to repay their billing statement before a late fee is imposed can be characterized as un-

48. Sovern, *supra* note 47, at 1691.

49. *See* Silber, *supra* note 39, at 69.

50. *See generally* Gregory G. Sarno, Annotation, *Credit Card Issuer's Liability, Under State Laws, for Wrongful Billing, Cancellation, Dishonor, or Disclosure*, 53 A.L.R.4th 231 (1987).

51. Kley v. Healy, 28 N.E.2d 593 (N.Y. 1891).

52. *See, e.g.*, Discover Bank v. Superior Court of L.A., 113 P.3d 1100, 1103 (Cal. 2005).

53. 252 F. Supp. 910, 913 (E.D.N.C. 1965).

54. *Id.* at 911–12.

warranted interference with contractual obligations. Many card issuers consider a payment late if it is received *by 2:00 PM* on the due date, which consumer organizations believe is unreasonable.[55] The fact that an unreasonable time for repayment was agreed upon by both parties in advance should not *per se* cause reasonable but tardy payment behavior, generated by creditor hindrance, to trigger an enforcement fee.[56] Thus far, however, courts have refrained from interpreting shortened or varied billing cycles as intentional impairments of a contract obligation.

Tortious Interference. Processing services are frequently employed to send invoices and receive payments from consumers. To the extent that they engage in intentional behavior which impedes an effort to pay a bill, for example, by mailing to maximize the time between delivery and receipt, the conduct may be actionable.[57] Upon suit in tort for interference with a contractual obligation, a defendant can, under existing law, assert its conformity with an industry standard or agreed-upon standards for measuring compliance with the obligation to provide a reasonable time for payment.

It might also be possible to consider claims for shortened billing cycles and inadequate notice of procedures as evidence of a defective financial product design.[58]

Unconscionability. Efforts have been made to argue that the insertion of universal default provisions in adhesive standard form agreements without adequate disclosure classify them either substantively or procedurally as unconscionable.[59] Proof that manipulation was so intended and planned, or so purposely fitted to time and circumstances, that such an act could be considered a scheme of oppression and fraud would be essential to a conclusion that an agreement was unconscionable.[60] Thus far, efforts to mount unconscionability claims have not met with success.

Unreasonable Standards for Performance (affirmative defense). Time is not "of the essence" in most routine recurring payment obligations, notwithstanding any language in a standard form agreement. Courts therefore

55. DRAUT & SILVA, *supra* note 21, at 35.

56. *See* Capra v. B.A. Assoc., Ltd., 499 N.E.2d 931, 935 (Ohio Mun. Ct. 1984); *see also* Kinney v. Pocock, 19 Ohio Dec. 354, 364 (C.P. Cuyahoga 1908) (Barker, J., dissenting).

57. *See, e.g.*, Canadian Pac. R.R. Co. v. Williams-Hayward Protective Coatings, Inc., No. 02-C-8800, 2005 WL 782698, at *21–22 (N.D. Ill. Apr. 6, 2005); ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc., 249 F. Supp. 2d 622, 665 (E.D. Pa. 2003).

58. *See* Adam Goldstein, Note, *Why "It Pays" to "Leave Home Without It": Examining the Legal Culpability of Credit Card Issuers Under Tort Principles of Products Liability*, 2006 U. ILL. L. REV. 827.

59. *See, e.g.*, Melso v. Texaco, Inc., 532 F. Supp. 1280, 1297–98 (E.D. Pa. 1982).

60. Rich v. N.Y. Cent. & Hudson River R.R. Co., 87 N.Y. 382, 398 (1881) (holding that a fraudulent scheme designed "to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights" is unconscionable).

interpret consumer payment obligations as due within "a reasonable time," regardless of contractual language.[61] Failure to provide reasonable time to perform will thus prevent a successful claim for the collection of a late fee through a collection action. Claims based on equitable estoppel would require showing that the biller or another party induced the consumer to, for example, believe that payment would be accepted as timely if it was received before the end of that business day. It would be necessary to show that the consumer rightfully relied and acted upon its belief, and would now be prejudiced if the other party were permitted to deny the existence of such facts.[62] Under current law, proof that a biller provided an unreasonably short time *in fact*, notwithstanding a longer time established by an agreement, can as a practical matter normally be established only with great difficulty. A standard measuring reasonableness by a postmark, for example, is unlikely to suit a consumer's needs.

What is a "reasonable" time to perform in the context of bill payments? Outside the context of late charges, *United States v. Hart* described a "reasonable" time frame as definable only in context, and on a case-by-case basis.[63] It might be argued based on statistical evidence of higher incidences of late fees and shrinking payment cycles that the cycles themselves have been set unreasonably. However appealing that argument may be, it has proven unavailing.

Unfairness as defined by state and federal statutory rules. Section 5 of the Federal Trade Commission Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[64] After years of inactivity in enforcing section 5 against banking institutions, the Office of the Comptroller of the Currency began seriously to take up enforcement against banking institutions in 2001, and initiated actions to enjoin fraudulent mass-marketed credit card solicitations and certain other "unfair and deceptive" practices related to the credit card market.[65] The OCC has not taken action to regulate late fees.

61. *See, e.g.*, Bryan v. Moore, 863 A.2d 258, 261 (Del. Ch. 2004).

62. *See* Kansas City, Kansas Fraternal Order of Police v. City of Kansas City, 620 F. Supp. 752, 761 (D. Kan. 1984).

63. 546 F.2d 798, 805 (9th Cir. 1976); *see also* Turner v. Snyder, 123 S.W. 1050, 1051–52 (Mo. Ct. App. 1909).

64. 15 U.S.C. § 45(a)(1) (2000).

65. Julie L. Williams & Michael S. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 BUS. LAW. 1243, 1243 (2003) (contending that there was "an historic shift in thinking by government, banks, and the legal community on the scope of the federal banking agencies' authority to enforce the [the FTC Act] to address unfair and deceptive practices by banks. More than twenty-five years after Congress enacted the Federal Trade Commission Improvement Act of 1975 . . . the federal banking agencies now have a common approach to the issue.").

FCC "Truth in Billing" principles. The Federal Communications Commission took preemptive responsibility for improving billing practices by wireless cellphone companies, and at the same time emphasized its intent to strengthen adherence to principles for sound billing, including:

> 1) that consumer telephone bills be clearly organized, clearly identify the service provider, and highlight any new providers; 2) that bills contain full and non-misleading descriptions of charges that appear therein; and 3) that bills contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges on the bill.[66]

It is remarkable that to the extent the Commission addressed these matters in enforcement activities, it focused on confusing line charges and "slamming," and did not address the question of reasonable late fee periods.[67]

Truth in Lending. The Federal Truth in Lending Act (TILA),[68] as well as its interpretive regulation (known as Regulation Z), speaks to the regulation of billing cycles, and the definition of "finance" charges that would be includable when disclosing interest charged for closed-end and open-end lending. Late charges, however, are not considered "finance" charges for purposes of the Act.[69]

UDAP (Unfair and Deceptive Acts and Practices) statutes. In *Discover Bank v. Superior Court*, plaintiffs sought to certify a California class action aimed at Discover Card, alleging that the card company behaved deceptively in making statements that late fees would not be assessed if the payment was received by a certain date; in point of fact, late fees would be assessed if the payment was received by 1:00 PM of that date.[70] The case was not resolved on its merits, but rather on a procedural basis involving arbitration preemption, choice of laws, and class action certification.[71]

The common law and statutory bases for pursuing remedies are inadequate to address the growing problems with late charge assessment, and it

66. Truth-in-Billing and Billing Format, 20 FCC Rcd. 6448, 6450 (2005).

67. *See* Williams & Bylsma, *supra* note 65; Truth-in-Billing and Billing Format, 20 FCC Rcd. at 6474, 6477–78.

68. 15 U.S.C. §§ 1601–1693r (2006).

69. *See* Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232 (2004) (upholding the Federal Reserve Board's ruling that the definition of a finance charge does not include any over-limit fees); 12 C.F.R. § 226.4(d) (2007); ELIZABETH RENUART ET AL., NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 5.4.3.9 (5th ed. 2003 & Supp. 2005) ("Fees for late payments and exceeding a credit limit are not considered finance charges under TILA. The Supreme Court recently affirmed the FRB's considerable discretion to exclude these types of fees from treatment as finance charges under TILA.") (citations omitted).

70. 113 P.3d 1100, 1103 (Cal. 2005).

71. *Id.*

appears that there is mounting public support for change. A spate of legislative hearings and news accounts,[72] emerging in tune with growing popular discomfort about credit card rates and fees, suggests that the federalized deregulatory scheme is on its way out, driven in no small part by burdens imposed on consumers by ginned-up delinquency fees.

The problem of credit cards, however important, is only part of the more general problem with late fee billing. A legislative proposal that rationalizes predicted due dates across payment sectors and provides a standard, reasonable period for payment should be well received.[73]

IV. CONCLUSION

The analysis above suggests that the justifications offered for the multiplicity of billing cycle and fee imposition rules are outweighed by their social and economic costs.

The proposed Late Payment Act in the Appendix is intended to promote consistency and predictability throughout the consumer bill-paying spectrum. It seeks to alleviate cognitive problems associated with the variety of different billing cycle regimes and discretionary rules by establishing a single set of consumer expectations for all recurring account obligations—regardless of the type of bill being paid and regardless of whether the biller intended to extend credit. As indicated at the outset, it does not address problems related to the *size* of late fees or trench upon areas preempted, for example, by the National Bank Act. It does not seek to provide special rules to govern terminations or disconnections.

The Act would not allow postmark dates to establish delivery to consumers of their bills. Instead, billers seeking to assess late fees would need to establish with reasonable certainty that the customer had at least fourteen

72. *See, e.g.*, Editorial, *Playing Cards: Credit Card Lenders Hold Customers at Their Mercy*, SALT LAKE TRIB., Mar. 9, 2007 (stating that "at the very least, the credit card sharks should be required to disclose, in plain English and in summary form, the rules for interest, fees and penalties, and that the borrower is at the lender's mercy"); Charles Jaffe, *Some Must-Have Features for Credit Cards*, TULSA WORLD, Apr. 4, 2007, at E3, *available at* 2007 WLNR 6544873 ("The ideal credit card would be one that paid itself off."); Joe Ruff, *Card Users and Others Hope Congressional Scrutiny of Billing Will Further Rein in Fees and Charges*, OMAHA WORLD-HERALD, Mar. 16, 2007, at A1, A2, *available at* 2007 WLNR 4969747 (quoting Mark Allen, President of the Financial Planning Association of Nebraska: "The credit card companies have had open season on the consumer for quite a while," and "[t]he credit card companies will most likely sit up and listen at this stage."); Susan Tompor, *Got a Gripe With Your Credit Card Company?; With Fees Under Scrutiny, It's a Good Time to Get Assertive*, THE RECORD (N.J.), Apr. 4, 2007, at B02, *available at* 2007 WLNR 6485155 (stating that "[c]redit card companies cannot afford to ignore consumers at this point"); Interview, *supra* note 18.

73. *Credit Card Industry Gets Senate Warning*, CREDIT UNION J., May 23, 2005, at 20 (expressing Senate exasperation with credit card companies profiting from increasing fees, including late fees).

days from delivery of an account statement containing an overdue date to pay the bill.

It would be unfeasibly expensive to expect all billers to obtain receipts for statements of account. In statistical terms, however, reasonable certainty usually has been understood to require a 95% confidence level, and the Postal Service has the capacity to obtain and does produce data about the number of days that it takes for the overwhelming portion of its mail to arrive to and from destinations. Billers should be able to rely on independent information about delivery periods in order to establish their compliance with the rule. The Act also disallows an unreasonable time for next-day posting (4:00 PM), and provides a minimum period of time to bill for a recurring provision of goods or services (monthly).

There is no panacea to cure the problem of abusive credit card practices, but consumers deserve a payment system that permits them to act as rationally in making their financial decisions as they possibly can.

APPENDIX

LATE PAYMENT ACT

1. **Purpose**

This Act creates fair and predictable rules for determining when a payment on a consumer loan or bill is late. Under this Act, a consumer must be given at least fourteen days from the receipt of a bill before a late fee can be assessed or any other adverse consequence can be caused by a late payment.

2. **Definitions**

(a) The term "overdue date" means a date specified in a statement of an obligated consumer's account, after which a late payment fee may be assessed.

(b) The term "late payment" means nonpayment or a payment received after the overdue date for a payment on a debt or on a recurring bill for goods or services.

(c) The term "late payment fee" means a fee, charge, penalty, adverse change of terms, or other expense imposed on a consumer for, or triggered by, a late payment.

(d) The term "obligated consumer" means a consumer who owes, or is otherwise accountable for payment or performance of an obligation in whole or in part.

(e) The term "statement," for the purposes of this Act, refers to a statement of an obligated consumer's account.

(f) The term "statement receipt date" means the date on which a statement is delivered to a consumer.

3. **Minimum Period Before Assessment**

A late payment fee may not be charged unless at least fourteen days shall have elapsed between a statement receipt date and a delinquency date specified in a statement.

4. **Reasonable Certainty Required**

(a) Any party assessing a late payment fee must establish with reasonable certainty:

(1) that an anticipated communication has conspicuously notified the obligated consumer that the communication contains a statement
(2) that the statement conspicuously stated the overdue date; and
(3) that a transfer of funds satisfying a debt obligation
   (i) occurred subsequent to the overdue date pertaining to the transfer, or
   (ii) did not occur prior to the delinquency date pertaining to the transfer.

5. **Standards for Performance to Be Agreed Upon**

(a) The parties may determine by agreement a standard, reasonable, and common time of day by which to measure the delivery of a statement and the overdue date. However, any payment received by 4:00 PM on the due date shall be considered on time.

(b) To the extent possible under applicable laws, the parties may determine by agreement standard and reasonable billing periods and the frequency and method by which a statement is delivered. However, any agreement establishing billing periods on a basis more frequent than monthly shall be considered unreasonable.

6. **Civil Liability**

(a) Amount of damages

Any party assessing a late payment who fails to comply with any provision of this Act with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;
(2) in the case of any action by an individual, damages of $1000;
(3) in the case of a class action,
   (i) such amount for each named plaintiff as could be recovered under (1), and
   (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery;
(4) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

(b) Factors considered by court in the case of a class action

In determining the amount of liability in any action under subsection (a)(3) of this section, the court shall consider, among other relevant factors—

(1) the frequency and persistence of noncompliance with this Act;
(2) the number of persons adversely affected; and
(3) the extent to which noncompliance was intentional.

7. **Nonwaivability**

An obligated consumer may not waive or vary the rules stated in this Act.

8. **Transition Period**

This Act will have full legal force and effect two years after its signing, and compliance with the provisions of this Act prior to the effective date will not be required until January 1, 20__.