

# Merchant Suit is Right, Fed Went Rogue on Durbin

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By Eric Grover

The war over interchange between merchants and the payments industry continues. That's not surprising with tens of billions of dollars being allocated by Washington rather than the market in question.

On October 12 Congressmen Jason Chaffetz (R-Utah) and Bill Owens (D-NY) introduced the Consumer Debit Card Protection Act, which would repeal the Durbin Interchange Amendment and restore the debit-network pricing and routing decisions to the free market. However, for the bill to have a fighting chance, the consequences of Durbin's debit price controls need to be painful and visible.

Merchants fired the latest salvo in the ongoing conflict. On November 22 they sued the Federal Reserve Board, charging it didn't faithfully implement the Durbin Interchange Amendment.

They have a reasonable argument.

Senator Durbin's legislation was intended to destroy debit-card interchange and eliminate or significantly reduce debit-network fees paid by merchants.

A literal reading of the law's text suggested: (1) a debit-interchange price cap near zero – certainly not more than a nickel, (2) merchants would choose debit routing between at least two networks for each transaction giving them a powerful tool to ratchet down interchange and network fees, and (3) general-purpose – all, not just open, debit networks would be covered.

The Fed however muted its destructive impact, providing recovery of issuer costs well beyond what Congress intended. Eminent constitutional scholar and former TCF Financial attorney Richard Epstein characterized it thusly: "For the Fed to allow \$.24 cents in the teeth of this language was an act of

calculated mercy." Indeed, but the Fed's job is not to mete out mercy, but rather to implement instructions from Congress — no matter how destructive.

Courts afford regulators latitude implementing legislation, but retailers have a righteous argument the Fed ignored Congress's intent because it, correctly, believed abiding by it would harm banks — banks already battered by the financial crisis and the rest of Dodd-Frank. But, in the long run the danger of regulators eviscerating bad laws is greater than that of implementing them.

If an industry or voters believe a law bad they can pressure Congress to change it. To be motivated to act Congress needs to feel the heat from banks, networks and most importantly from voting consumers.

Bank of America's plan for a \$5 per month debit card fee created a propitious environment for Chaffetz and Owens to introduce their repeal bill. But the new debit fees proposed by B of A, Wells Fargo, Suntrust, Chase, Regions et al. provoked a firestorm and banks beat a swift retreat. While understandable, it lessened pressure on Congress to repair the damage it has done.

The cosponsorship of the bill by representatives including hyper-partisan DNC chairwoman Debbie Wasserman-Schultz (D-Fla.) and right-wing heartthrob Tom McClintock (R-Calif.) highlights the repeal's support across the political spectrum.

Congress has a lot on the plate. The issue needs to stay in the public eye to keep repeal pressure on Washington.

Banks throwing in the towel on new fees and the Fed's gutting the Durbin Interchange Amendment make repeal less likely.

Perversely, if the merchants' suit is successful, Durbin's impact will be much more painful for the payments industry and consumers, which might bolster the prospects of a repeal.

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