Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 8/27/2021 at 5:44:33 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/27/2021 by Celia Wong, Deputy Clerk

S267576

IN THE SUPREME COURT OF CALIFORNIA

TANIA PULLIAM,
Respondent,

v.

TD AUTO FINANCE, LLC
Petitioner.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B293435

ANSWERING BRIEF ON THE MERITS

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner (SBN 109740)
hal@rbblawgroup.com
*Arlyn L. Escalante (SBN 272645)
arlyn@rbblawgroup.com
Michael A. Klitzke (SBN 299765)
michael@rbblawgroup.com
10085 Carroll Canyon Road, Suite 100
San Diego, California 92131
(858) 348-1005 / Fax: (858) 348-1150

ATTORNEYS FOR PLAINTIFF AND RESPONDENT
Tania Pulliam

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 5

INTRODUCTION 9

STATEMENT OF THE CASE 13

A. In 1975, the Federal Trade Commission promulgated the Holder Rule. 13

B. In 1976, the FTC issued guidelines clarifying the Rule. 16

C. For decades, courts in California and in other states applied the Rule together with their states' consumer protection statutes. 16

D. In 2012, the FTC issued an advisory letter on the Rule without addressing attorneys' fees, and in 2016, consumer groups sought further clarification on the Rule.................... 20

E. In 2018, the Third Appellate District publishes *Lafferty II* – finding Holders liable for costs and prejudgment interest, but not attorneys' fees. 21

F. To counter *Lafferty II,* the California Assembly Introduced AB 1821. 22

G. After remaining silent for 44 years, the FTC issued comments on the Rule's effect on attorneys' fees. 22

H. On January 1, 2020, Civil Code section 1459.5 went into effect in. 23

I. Six months later, the First District published *Spikener* agreeing with *Lafferty II* and finding section 1459.5 preempted by the FTC's 2019 comments. 23

J. Pulliam's case against HNL Automotive and TD Auto Finance. 24

1. Pulliam bought a car from HNL

Automotive and her contract is assigned to TDAF...........23

2. After learning HNL misrepresented the vehicle to her, Pulliam filed a lawsuit against HNL and TDAF..23

3. Pulliam's Motion for Attorney's Fees...... 24

4. Litigation to enforce the judgment............... 24

K. The *Pulliam* Opinion. 26

ARGUMENT 26

I. Under California consumer protection statutes, prevailing consumers are entitled to mandatory attorneys' fees and costs found to be reasonably incurred. 26

II. The Court of Appeal correctly held that the Rule's limitation on "recovery" cannot include attorneys' fees and costs of suit if the Rule's main purpose is to be fulfilled. 30

A. *Pulliam* correctly interpreted the Rule's language and focused on its purpose. 32

1. The Rule's limitation on "recovery" does not encompass attorneys' fees or costs...............................32

2. Because the language of the Rule has resulted in differing interpretations, Pulliam correctly turned to the Rule's regulatory history..34

B. If the limit on "recovery" foreclosed awards of reasonable attorneys' fees and costs, then the Rule's objective of allowing consumers to affirmatively sue holders would be gutted. 38

III. *Pulliam* correctly found the FTC's 2019 comments were not owed deference. 42

A. The FTC's 2019 position barring attorney's fees from a holder is not definitively within the FTC's substantive expertise. 43

B. The comments are not within the bounds of reasonable interpretation of the Rule and are not based on the FTC's "fair and considered judgment." 46

C. The comments resulted in unfair surprise. 49

IV. The FTC exceeded its authority by attempting to bar states from passing laws on the availability of attorneys' fees under their own statutes. 50

V. Because the FTC's comments exceed its authority and are not owed deference, this Court should find that section 1459.5 is not preempted. 54

VI. Practical considerations not considered by TDAF. 57

A. The fallacy of the blameless creditor. 58

B. Use of the Rule in a defensive position. 59

CONCLUSION 62

CERTIFICATE OF WORD COUNT 63

CERTIFICATE OF SERVICE 64

TABLE OF AUTHORITIES

Cases

American Financial Services v. FTC
(D.C.Cir.1985) 767 F.2d 957..53

Barnhart v. Walton
(2002) 535 U.S. 212 46

Briercroft Serv. Corp. v. Perez
(Tex. App. 1990) 820 S.W.2d 813.....................................18

California State Bd. of Optometry v. F.T.C.
(D.C. Cir. 1990) 910 F.2d 976... 51

Cisneros v. U.D. Registry, Inc.
(1995) 39 Cal.App.4th 548...52

City of Arlington, Tex. v. FCC
(2013) 569 U.S. 290 45

Crews v. Altavista Motors, Inc.
(W.D. Va. 1999) 65 F.Supp.2d 388...................................58

Diamond Multimedia Sys., Inc. v. Superior Court
(1999) 19 Cal.4th 1036 43

Diaz v. Paragon Motors of Woodside, Inc.
(E.D.N.Y. May 7, 2008) 2008 WL 2004001..........................19

Double Eagle Lubricants, Inc. v. State of Texas
(N.D.Tex.1965) 248 F.Supp 515.......................................53

Elton v. Anheuser–Busch Beverage Group, Inc.
(1996) 50 Cal.App.4th 1301..33

Flannery v. Prentice
(2001) 26 Cal.4th 572...33

Folsom v. Butte County Assn. of Gov'ts
(1982) 32 Cal.3d 671... 33

Hymes v. Bank of America, N.A.
(E.D.N.Y. 2019) 408 F.Supp.3d 171 45

Graciano v. Robinson Ford Sales, Inc.
(2006) 144 Cal.App.4th 140..26

Goodman v. Lozano
(2010) 47 Cal.4th 1327..31

Green Tree Acceptance, Inc. v. Pierce
(Tex. App. 1989) 768 S.W.2d 416......................................18

Home Sav. Ass'n v. Guerra
(Tex. 1987) 733 S.W.2d 134...17

In re Stewart
(Bankr. E.D. Pa. 1988) 93 B.R. 878..................................17

Jaramillo v. Gonzales
(N.M. Ct. App. 2002) 132 N.M. 459...................................18

Jankey v. Lee
(2012) 55 Cal.4th 1038.............................. 43, 50, 51, 54, 55

Karton v. Ari Design & Construction, Inc.
(2021) 61 Cal.App.5th 734...18, 28

Ketchum v. Moses
(2001) 24 Cal.4th 1122..27

Kish v. Van Note
(Tex. 1985) 692 S.W.2d 463...18

Kisor v. Wilkie
(2019) –U.S. –, 139 S.Ct. 2400..42

Lafferty v. Wells Fargo Bank, N.A.
(2018) 25 Cal.App.5th 398...*passim*

Jaramillo v. Gonzales
(N.M. Ct. App. 2002) 132 N.M. 459...................................17

Medina v. South Coast Car Co., Inc.
(2017) 15 Cal.App.5th 671...27

Music Acceptance Corp. v. Lofing
(1995) 32 Cal.App.4th 610..18

National Lifeline Association v. Federal Communications Commission
(D.C. Cir. 2020) 983 F.3d 498 45

New York v. Shalala
(2d Cir. 1997) 119 F.3d 175 45

Olszewski v. Scripps Health
(2003) 30 Cal.4th 798 54

Oxford Fin. Cos. v. Velez
(Tex. App. 1991) 807 S.W.2d 460.......................................18

Pierce v. Western Sur. Co.
(2012) 207 Cal.App.4th 83...18

Pulliam v. HNL Automotive, Inc.
(2021) 60 Cal.App.5th 396...*passim*

Reliance Mortg. Co. v. Hill-Shields
(Tex. App., Jan. 10, 2001, No. 05-99-01615-CV) 2001 WL 21510, at *3..19

Riggs v. Anthony Auto Sales, Inc.
(W.D. La. 1998) 32 F.Supp.2d 411....................................40

Robertson v. Fleetwood Travel Trailers of California, Inc.
(2006) 144 Cal.App.4th 785...27

Spikener v. Ally Financial Inc.
(June 9, 2020, A157301) __ Cal.App.5th__ 11, 14, 23

Spikener v. Ally Financial, Inc.
(2020) 50 Cal.App.5th 151 ....*passim*

Thomas Jefferson Univ. v. Shalala
(1994) 512 U.S. 504 45

Vazquez v. Superior Court
(1971) 4 Cal.3d 800.. 13

Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.
(2007) 41 Cal.4th 929 .... 54, 55

W. Va. Highlands Conservancy, Inc. v. Norton
(4th Cir. 2003) 343 F.3d 239 47

Wohlgemuth v. Caterpillar, Inc.,
(2012) 207 Cal.App.4th 1252...26

Statutes

Civil Code § 1717..59

Civil Code § 1459.5 48

Civil Code § 1780..26

Civil Code § 1794(d)...26

Code of Civil Procedure § 1033.5(A)(10)(B) 33, 34

Other Authorities

40 Federal Register 53521 50
41 Federal Register 20024 .... 37, 49, 50
2019 California Assembly Bill No. 1821 21
Greenfield & Ross, *Limits on a Consumer's Ability to Assert Claims and Defenses under the FTC's Holder in Due Course Rule* (1991) 46 Business Lawyer 1135 36
http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1821 53
https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf 30
Opinion Letter, Federal Trade Commission, May 3, 2012, p. 3 at n. 9 30
Recovery Definition, Black's Law Dict. (11th ed. 2019) 33
Comments to the FTC Holder Rule Review, File No. P164800 (February 12, 2016 20

Regulations

16 C.F.R § 433.2 12
40 Fed.Reg. 53506 12
40 Fed.Reg. 53507 .... 12, 13
40 Fed.Reg. 53509 .... 13, 14
40 Fed.Reg. 53521 .... 14, 44, 47
41 Fed.Reg. 20023 15
41 Fed.Reg. 20024 ....passim
80 Fed.Reg. 75018 42
80 Fed.Reg. 75019 43
84 Fed.Reg. 18713 22

INTRODUCTION

Consumer transactions take place on a staggeringly uneven playing field. This playing field routinely involves adhesion contracts, forced arbitration, and terms designed to limit commercial parties' exposure to liability as far as the law allows. With the issues presented here, Petitioner TD Auto Finance's goal is to continue the trend of diminishing consumer protections by making it impossible for consumers to sue the holders of their consumer credit contracts when they have been cheated by fraudulent sellers.

This Court should reject these anti-consumer arguments and find that the purpose behind the Federal Trade Commission's Holder Rule is only accomplished if consumers can affirmatively sue holders and recover their costs, including statutory attorneys' fees, in doing so. This Court should further find that it is California's prerogative to pass laws in furtherance of protecting consumers within the state, especially if these laws are meant to enforce the rights conferred to consumers under federal regulations.

In California, our Legislature has passed several consumer protection statutes to help tilt the playing field in consumers' favor. California has been at the forefront of consumer protection, most notably with hallmark statutes such as the Consumers Legal Remedies Act (CLRA), the Automobile Sales Finance Act (ASFA) and the Song-Beverly Consumer Warranty Act (Song-Beverly). It comes as no surprise then, that commercial parties – those with greater means and legal clout than any consumer – do everything in their power to limit *any* law, statute, or rule that may impact their market share and rebalance the playing field.

When the Federal Trade Commission (FTC) drafted the Holder Rule (the Rule) it plainly stated it was attempting to equalize this long-unbalanced, even punitive, playing field by stripping away traditional protections from the commercial side and bestowing greater protections on the consumer side. This was a one-way deal, and it wasn't a half-measure. The FTC did not craft a rule allowing consumers to affirmatively sue holder-creditors of their purchase contracts only to, in the same breath, bar a consumer from recovering what it costs to bring these actions. The FTC also explicitly *encouraged* states to develop their own laws in furtherance of the purpose behind the Rule and as to how it would be applied in each jurisdiction.

Petitioner TD Auto Finance (TDAF) asserts that the FTC meant to strike a delicate balance with the Rule, as if this balance was between two equally situated parties. Petitioner's argument is based on an easily refuted fallacy where each side, standing on the same footing, gives a little and gets a little. But there is no such parity here.

The story woven by TDAF, one where, if this Court affirms, holders would be exposed to unlimited liability far exceeding what a consumer paid, is a grossly exaggerated one. In this case, TDAF's exposure was high because it aligned itself with the seller's defense of the case and refused to settle its part early on by returning Tania Pulliam's money. This refusal to pay has continued even after judgment was entered – TDAF and the seller of Pulliam's car, HNL Automotive, refused to pay even the uncontested portion of the judgment (Pulliam's payments under the contract) for 21 months, leading to further post-judgment litigation, attorneys' fees, and costs which are the subject of a second appeal now stayed pending this Court's decision. TDAF's exposure to liability for attorneys' fees and costs is commensurate with the time it refused to return Pulliam's money and its overwrought defense of the case, nothing else.

Under California consumer protection statutes, what it costs a consumer to bring an action under the Rule – attorneys' fees and costs of suit – are in no way "unlimited" or "uncapped." Any statutory attorneys' fees and cost award is dependent on a showing that these fees and costs were reasonable and necessary to the litigation.

With *Pulliam v. HNL Automotive, Inc.* (2021) 60 Cal.App.5th 396 (*Pulliam*), the Second District Court of Appeal, Division Five, got it right. The FTC's Holder Rule is clear – it is clearly meant to allow consumers to affirmatively sue holders to recover all amounts they paid under the contract, without exposing the holder to additional liability for incidental, consequential, or punitive damages. However, by allowing consumers to affirmatively sue holders, without mentioning the availability of attorneys' fees or costs of suit for over 40 years, the FTC explicitly left it up to the states to craft their own laws as to whether attorneys' fees and costs of suit are recoverable when the Rule is used in conjunction with consumer protection laws in each jurisdiction.

For years, California consumers were able to recover their attorneys' fees and costs of suit from a holder if a fraudulent seller went under or became insolvent. This changed in 2018, when the Third District Court of Appeal published *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398 (*Lafferty II*). Then, in 2019, after over 40 years of silence, the FTC issued comments adopting *Lafferty II's* narrow view that attorneys' fees were necessarily unavailable given the limitation language of in the holder notice. In 2019, our Legislature abrogated *Lafferty II*, by passing AB 1821 later codified in Civil Code section 1459.5. However, just months after section 1459.5 came into effect, another published opinion, *Spikener v. Ally Financial* (2020) 50 Cal.App.5th 151 (*Spikener*), agreed with *Lafferty II's* interpretation of the Rule and further held that the FTC's new comments on attorneys' fees preempted section 1459.5.

The *Pulliam* court disagreed with *Lafferty* and *Spikener* and found that the FTC's comments on attorneys' fees were not owed deference. The *Pulliam* court affirmed the trial court's order awarding Pulliam her attorneys' fees and costs jointly and severally against TDAF and the selling dealership. The *Pulliam* court understood the correct application of the Rule and its import to consumers. *Pulliam* should be affirmed, this Court should disagree with *Lafferty* and *Spikener*, and further find that section 1459.5 is not preempted.

STATEMENT OF THE CASE

A. In 1975, the Federal Trade Commission promulgated the Holder Rule.

The Holder Rule (the Rule) requires certain credit contracts to include a notice that lenders who buy the contracts are subject to the same claims and defenses consumers may assert against sellers. (16 C.F.R § 433.2.) The notice must read (in all-caps):

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The FTC promulgated the Rule because unethical merchants and affiliated financers were taking advantage of the holder in due course doctrine to victimize innocent consumers. The background and purpose of the Rule is set out at 40 Fed.Reg. 53506 *et seq*. Specifically, the Rule was promulgated to address widespread evidence of abuse and injury in the retail distribution of consumer goods and services and an anomaly where the creditor could assert his right to be paid by the consumer despite misrepresentation, breach of warranty or fraud on the part of the seller, but the consumer could not assert defenses against the holder. (40 Fed.Reg. 53507 (Nov. 18, 1975).)

In promulgating the Rule, the FTC found that:

- It is often impossible for a consumer to prove the creditor had actual knowledge of seller misconduct. (*Id.* at 53508.)
- Although some states had done away with the holder in due course rule and allowed consumers to assert against the holder the same claims and defenses it had against a seller, these rules did not allow consumers to bring *affirmative* claims against the holder. (*Id.*; see *Vazquez v. Superior Court* (1971) 4 Cal.3d 800, 823.)
- Creditors are in a better position to protect themselves against unreliable sellers based on the endorsement of the instrument and agreements with the sellers to withhold payments. (40 Fed.Reg. 53509.) Plus, they can choose the retailers with whom they will do business (*id.*), and they can set-up "reserve" accounts to protect themselves from seller misconduct. (*Id.* at 53518.)
- Consumers without resources or business sophistication are frequently unable to press their claims effectively against dishonest sellers; moreover, the seller may be beyond the reach of an effective remedy. (*Id.* at 53509.)
- Affirmative suits by consumers against sellers were not an adequate remedy because the worst sellers are likely to be the most volatile entities, difficult to locate and serve, making collection of a judgment difficult or impossible. (*Id.* at 53512.)

- Proponents of the Rule stressed that it would help restore confidence in the law and in the legal system, including the courts. (*Id.* at 53511.)
- The volume of consumer finance transactions is such that creditors have the opportunity to detect and predict the incidence of consumer sales abuse on a statistically reliable scale. (*Id.* 53518.)
- California's Rees-Levering Act, enacted in 1961 [which allows reciprocal attorneys' fees from the seller, holder or consumer] did not persuade any banks to get out of the automobile financing business. (*Id.* at 53519.)

After this thorough analysis, the FTC concluded "that this Rule will serve as a model *for further state legislation* and give states which lack legislation the impetus to act." (40 Fed.Reg. 53521 (emphasis added).)

The FTC also identified that redress via the legal system is seldom a viable alternative for consumers when problems occur. (*Id.* at 53523.) Delays combined with unpredictable results produced by the legal system too often result in increased harm for the consumer litigant. (*Id.*)

The FTC found that a rule which compels creditors to either absorb seller misconduct costs or return it to sellers would discourage many predatory practices and schemes. (*Id.* at 53523.) In allowing consumers to maintain *affirmative* actions against creditors who have received their payments for a return of monies paid on account, sellers and creditors would become responsible for seller misconduct. (*Id.* at 53524.)

B. In 1976, the FTC issued guidelines clarifying the Rule.

The same day the Rule was to become effective, May 14, 1976, the FTC issued Staff Guidelines further explaining the Rule. (41 Fed.Reg. 20023.) The FTC again emphasized that the Rule made lenders liable for sellers' conduct and gave them an incentive to work with reputable sellers less they face liability for buying contracts from shady ones. Creditors and assignees would stand in the shoes of the seller, for better or worse. (*Id.*)

In explaining the limitation in the Rule, "recovery hereunder by the debtor shall be limited to amounts paid by the debtor hereunder," the guidelines explain that a consumer may not assert against "the creditor any rights he might have against the seller for additional consequential damages and the like." (*Id.*) The guidelines further specify that the limitation does not eliminate a larger affirmative recovery against a creditor *as a matter of state law*. (*Id.*) The FTC emphasized that "appropriate statutes, decisions, and rules in each jurisdiction control." (41 Fed.Reg. 20024.) The Rule did not create a federal cause of action, it allowed state law claims to be applied against a Holder as available under each states' laws.

C. For decades, courts in California and in other states applied the Rule together with their states' consumer protection statutes.

TDAF's assertion that an "overwhelming majority" of courts have found attorneys' fees unavailable under the Rule is misleading.[1] (Opening Brief on the Merits (OB), at 16.) TDAF cites cases from Ohio, Nebraska, Tennessee, and Louisiana. (OB at 15.) However, cases from Pennsylvania, New Mexico, Texas, and New York show there is no consensus on this issue. The difference in results stems from each state or federal court's interpretation of the specific consumer protection statutes being applied, or the courts' reasonable conclusion that attorneys' fees are separate from the holder's limited liability on damages.

Some cases that have found the holder liable for attorneys' fees under consumer protection statutes regardless of the holder clause limitation include:

- *In re Stewart* (Bankr. E.D. Pa. 1988) 93 B.R. 878, 889 [Holder liable for costs and attorneys' fees under TILA and UDAP statutes regardless of holder rule limitation.]
- *Jaramillo v. Gonzales* (N.M. Ct. App. 2002) 132 N.M. 459, 461 [Plaintiffs awarded attorney fees against lien holder of their mobile home based on their Unfair Practices Act claim.]
- *Home Sav. Ass'n v. Guerra* (Tex. 1987) 733 S.W.2d 134 [Affirming holder and seller's joint and several liability for attorneys' fees as a separate issue from the holder's liability on damages.]

[1] Throughout its Opening Brief, TDAF cites to Scott J. Hyman & Tara Mohseni, *California Court of Appeal Finds that the FTC Holder Rule Limits a Holder's Liability for a Consumer's Attorneys' Fees,* 72 Consumer Fin.L.Q. Rep. 432 (2018), this article was written by attorneys at Severson & Werson, the firm that represented Wells Fargo in *Lafferty I* and *Lafferty II,* and represented Ally Financial in *Spikener.*

- *Kish v. Van Note* (Tex. 1985) 692 S.W.2d 463 [Finding holder jointly and severally liable for attorney's fees on appeal, after finding holder's liability on damages was limited to the payments made under the contract.]
- *Green Tree Acceptance, Inc. v. Pierce* (Tex. App. 1989) 768 S.W.2d 416 [Affirming attorneys' fees awarded jointly and severally against holder, seller and manufacturer under Texas' Deceptive Practices Act.]
- *Oxford Fin. Cos. v. Velez* (Tex. App. 1991) 807 S.W.2d 460 [Awarding attorneys' fees above amounts paid on contract but limited to the jury's determination of what reasonable fees were incurred in litigating against the holder.]
- *Briercroft Serv. Corp. v. Perez* (Tex. App. 1990) 820 S.W.2d 813, aff'd in relevant part, rev'd in part on other grounds, (Tex. 1991) 809 S.W.2d 216 [Attorney's fees awarded above amounts paid under the contract after finding recoverable damages were limited to what plaintiff paid under the contract.]
- *Reliance Mortg. Co. v. Hill-Shields* (Tex. App., Jan. 10, 2001, No. 05-99-01615-CV) 2001 WL 21510, at *3 [Recovery from the creditor is "limited to the amount paid under the contract *plus attorneys' fees*." (emphasis in original).]
- *Diaz v. Paragon Motors of Woodside, Inc.* (E.D.N.Y. May 7, 2008) 2008 WL 2004001 [awarding attorney fees jointly and severally against seller and holder under New York statutes.]

In California, for decades, consumers were awarded statutory attorneys fees from a holder for prevailing under

California's consumer protection statutes. Consumers routinely cited *Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610 (*Music Acceptance*), and *Lafferty v. Wells Fargo* (2013) 213 Cal.App.4th 545 (*Lafferty I*), to argue that attorneys' fees were available from the holder, and that the Rule's limit on recovery only applied to incidental, consequential and punitive damages, not attorneys' fees and costs. (See *Music Acceptance,* at p. 630 "As the judgment…must be reversed, Lofing is clearly the prevailing party [under Song-Beverly] and is entitled to attorney fees [against the holder]."]; *Lafferty I,* at pp. 563, 572 [specifically denying incidental and consequential damages not paid under the installment contract, and reversing the fees awarded to the holder as it was no longer the prevailing party.].) Citing to *Lafferty I,* consumers routinely argued that because Wells Fargo had been awarded attorneys' fees as the prevailing party in the underlying litigation, it only made sense that the consumers were equally entitled to attorneys' fees upon reversal of that order. Consumers also successfully cited to *Pierce v. Western Sur. Co.* (2012) 207 Cal.App.4th 83, that speaks to an analogous situation. There, the surety argued that its liability was limited to the amount of the surety bond, and that its liability for attorneys' fees could not exceed the bond's limit. The court of appeal disagreed and held that "if the principal would have been liable for attorney fees based on conduct secured by the bond, the surety is liable for such fees," regardless of the limits set by the bond amount. (*Id.* at p. 93; see also *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 752, *review denied*

(June 23, 2021) [finding surety liable for reasonable attorney fees of $90,000, over its $12,500 bond amount, as a cost item.].)

When challenged, trial court orders on attorney's fees from holders were even upheld in unpublished opinions. (See Sen. Rules Com. Rep. on Assem. Bill No. 1821, (2019-2020 Reg. Sess.) June 12, 2019,[2] [citing unpublished decision, and finding that: "The prevailing rule in California for many years was that consumers exercising the rights afforded by the Holder Rule were eligible to receive attorneys' fees in excess of the amounts paid on the underlying contract."].)

D. In 2012, the FTC issued an advisory letter on the Rule without addressing attorneys' fees, and in 2016, consumer groups sought further clarification on the Rule.

In 2012, the FTC issued an advisory letter that focused on a consumer's ability to maintain an affirmative action against a holder even when the consumer was not entitled to rescission. (Opinion Letter, Federal Trade Commission, May 3, 2012.)[3] The letter did not address anything about a holder's liability for attorneys' fees. (*Id.*) However, the opinion letter reaffirmed the FTC's position that the Rule's paramount purpose was to protect

[2] Available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1821#

[3] Available at: https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf

consumers and it rejected the positions some courts had taken that limited the Rule's application and made it more difficult for consumers to benefit from the Rule's protections. (*Id.*)

In February 2016, in response to the FTC's request for comments on the continued utility of the Rule, several national consumer groups sent letters asking the FTC to clarify that attorneys' fees and costs are available above the clause's limit on "recovery hereunder." (Comments to the FTC Holder Rule Review, File No. P164800 (February 12, 2016).)[4] The FTC did not respond to these requests until it was under a new administration.

E. In 2018, the Third Appellate District publishes *Lafferty II* – finding Holders liable for costs and prejudgment interest, but not attorneys' fees.

California consumers' ability to be made whole by affirmatively suing a holder and being awarded attorneys' fees ended on July 19, 2018. On that day, *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398 (*Lafferty II*), became the first published California opinion to interpret the Rule's limitation as encompassing any attorneys' fees incurred by a consumer in pursing litigation against a holder. Confusingly, *Lafferty II* did find holders liable for costs and prejudgment interest above the amounts the consumer paid on the contract

[4] Available at: https://www.ftc.gov/system/files/documents/public_comments/2016/02/00015-100535.pdf.)

because these were incidental to the litigation. (*Lafferty II,* at pp. 414-416.)

F. To counter *Lafferty II,* the California Assembly Introduced AB 1821.

On March 6, 2019, the California Assembly's Committee on the Judiciary introduced Assembly Bill 1821. The bill summary states:

> This bill would provide that a plaintiff who prevails on a cause of action against a defendant named pursuant to [the Holder Rule or the holder clause], may claim attorney's fees, costs, and expenses from that defendant to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller.

(2019 California Assembly Bill No. 1821.)[5] The Legislature made clear that "this bill would legislatively correct Lafferty by restoring California's original interpretation of the 'Holder Rule,' ensuring fairness and legal recourse to defrauded consumers." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1821 (2019-2020 Reg. Sess.) June 12, 2019.)

G. After remaining silent for 44 years, the FTC issued comments on the Rule's effect on attorneys' fees.

On May 2, 2019, the FTC confirmed the continued utility of the Rule and for the first time, addressed the effect the Rule's limitation has on consumer's attorneys' fees:

[5] Available at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1821

> We conclude that if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder—including any recovery based on attorneys' fees—cannot exceed the amount the consumer paid under the contract.

(84 Fed.Reg. 18713.)

H. On January 1, 2020, Civil Code section 1459.5 went into effect in.

Our Legislature adopted Assembly Bill 1821 to be codified as Civil Code section 1459.5 (section 1459.5.). The statute went into effect on January 1, 2020. Section 1459.5 reads:

> A plaintiff who prevails on a cause of action against a defendant named pursuant to Title 16, Part 433 of the Code of Federal Regulations or any successor thereto, or pursuant to the contractual language required by that part or any successor thereto, may claim attorney's fees, costs, and expenses from that defendant to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller.

I. Six months later, the First District published *Spikener* agreeing with *Lafferty II* and finding section 1459.5 preempted by the FTC's 2019 comments.

On June 9, 2020, the First Appellate District affirmed the trial court's denial of a consumer's motion for attorneys' fees under the CLRA and the Rule. (*Spikener v. Ally Financial* (2020)

50 Cal.App.5th 151 (*Spikener*).) The *Spikener* court also found that the FTC's 2019 comments were owed deference, and that section 1459.5 was therefore preempted by the FTC's new position on attorneys' fees.

J. Pulliam's case against HNL Automotive and TD Auto Finance.

1. Pulliam bought a car from HNL Automotive and her contract is assigned to TDAF.

In July 2016, Pulliam purchased a 2015 "certified pre-owned" Nissan from HNL Automotive, Inc., pursuant to a retail installment sales contract. (*Pulliam, supra,* at p. 402.) The contract included the Holder notice language. HNL Automotive assigned Pulliam's vehicle purchase contract to TDAF who became the holder. (*Id.*)

After purchase, Pulliam learned HNL Automotive had falsely advertised the vehicle as being an "S" model and had misrepresented the vehicle as having certain features that it did not have. (*Id.*)

2. After learning HNL misrepresented the vehicle to her, Pulliam filed a lawsuit against HNL and TDAF.

In September 2016, Pulliam filed a lawsuit against the dealership and TDAF. Her complaint alleged various violations including misrepresentation in violation of the CLRA and breach of the implied warranty under Song-Beverly. (*Id.* at p. 403.)

Pulliam alleged that under the Rule, TDAF was liable for the dealership's misconduct in the sale of the vehicle. (*Id.*)

TDAF and the dealership elected to defend the case instead of repurchasing the falsely advertised vehicle. The case went to trial in April 2018, and the jury found for Pulliam on her implied warranty of merchantability cause of action under the Song-Beverly Act. (*Id.*) The trial court entered judgment against the dealership and TDAF, jointly and severally, in the amount of $21,957.25 – the amount to rescind the purchase contract and refund Pulliam's money. (*Id.*)

3. Pulliam's Motion for Attorney's Fees

Pulliam then filed a motion for attorneys' fees. (*Id.*) Pulliam sought $169,602, consisting of a lodestar figure of $141,335 and a .2 multiplier. (*Id.*) In their opposition, HNL and TDAF argued that pursuant to the Rule, TDAF was not liable for attorneys' fees because its liability could not exceed the amount Pulliam paid to TDAF. (*Id.* at p. 404.) In an eleven-page minute order, the trial court awarded Pulliam $169,602 in attorney's fees jointly and severally against HNL and TDAF. (*Id.*)

4. Litigation to enforce the judgment.

Both HNL and TDAF appealed the order on attorneys' fees and refused to pay the judgment. HNL then sold the dealership where Pulliam had bought her car, and Pulliam was forced to start collection proceedings against HNL and TDAF while also defending the appeal. (Motion for Judicial Notice, Exhibits 1-5.) Pulliam incurred another $48,000 in attorneys' fees and costs until *partial* judgment was paid by TDAF in February 2020. (*Id.* Exhibits 4-5.) This was 21 months after entry of judgment, and only happened *after* the trial court issued a bench warrant for TDAF's President and CEO, Andrew Stuart, for failing to appear at the scheduled debtor's exams. (*Id.*, Exhibits 1-2.)

TDAF has appealed the award of post-judgment costs, and that appeal is currently stayed pending this Court's decision. (See *Pulliam v. HNL Automotive, Inc., et al,* Second Appellate District, Appeal No. B309224.)

K. The *Pulliam* Opinion.

On January 29, 2021, the Second Appellate District, Division 5 issued its *Pulliam* opinion affirming the trial court's order on attorneys' fees, specifically disagreeing with *Lafferty II* and *Spikener* and finding that the FTC's 2019 comments on the availability of attorneys' fees were not owed deference. (*Pulliam,* at pp. 409-422.)

There are currently at least 8 other pending appeals on this same issue in our Courts of Appeal.

ARGUMENT

I. Under California consumer protection statutes, prevailing consumers are entitled to mandatory attorneys' fees and costs found to be reasonably incurred.

The trial court awarded Pulliam attorneys' fees costs and expenses under the Song-Beverly Act. Under Song-Beverly, if the buyer prevails in the action against the seller, "the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code § 1794, subd. (d).) These fees are mandatory. (See also Civ. Code § 1780, subd. (e) [mandatory attorneys' fees under the CLRA].) "The provision for recovery of costs and attorney fees in section 1794(d) is an important aspect of this consumer protection, and without it many would not be financially able to pursue a remedy." (See *Wohlgemuth v. Caterpillar, Inc.,* (2012) 207 Cal.App.4th 1252, 1262.)

The same is true under other consumer protection statutes passed by our Legislature:

> The legislative policy to allow prevailing plaintiffs reasonable attorney's fees [in actions under the CLRA] is clear. Section 1780 provides remedies for consumers who have been victims of unfair or deceptive business practices. [Citations.] The provision for recovery of attorney's fees allows consumers to pursue remedies in cases as here, where the compensatory damages are relatively modest. To limit the fee award to an amount less than that reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying section 1780. [Citations.]

(*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150.) The Automobile Sales Finance Act ("ASFA," also known as the Rees-Levering Act) is also "part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail." (*Id.*, internal citations omitted.) "The Legislature's primary purpose in enacting [ASFA] was to enable consumers with good claims or defenses to find attorneys willing to represent them in court, and also prevent the abusive practice of inserting into form contracts under the ASFA an unenforceable, one-sided attorney fee provision." (*Id.*, see also *Medina v. South Coast Car Co., Inc.* (2017) 15 Cal.App.5th 671, 685 n.1 [Under ASFA, "an award of [attorneys'] fees and costs against a holder…is not limited to the amounts paid by the debtor…under a retail installment sales contract."].)

The consumer protections embodied in these statutes become unenforceable if consumers cannot seek attorneys' fees from the holders who have their money and who may be the only solvent party in these actions.

The trial court here found TDAF jointly and severally liable for Pulliam's damages and her attorneys' fees and costs by interpreting Song-Beverly in conjunction with the holder clause. The trial court then went through the requisite lodestar analysis to find that the requested fees and costs were reasonably incurred in the action. (*Pulliam, supra*, at p. 406 citing *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 818-819; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135.)

Pulliam had the burden to justify through evidence that the fees and costs requested were reasonable in nature and reasonable in amount. (*Id.*) This analysis is a far cry from a blank check for attorneys' fees that TDAF tries to conjure with its argument.

While TDAF does not challenge Pulliam's entitlement to attorneys' fees and costs as the prevailing party under the Song-Beverly Act, it is important to note how these fees are awarded to counter TDAF's claim that, if the Court of Appeal's opinion is affirmed, holders will be exposed to "unlimited" attorneys' fees. This argument is wrong for at least two reasons.

First, as described above, a prevailing consumer under California's consumer protections statutes has the burden to demonstrate the fees and costs requested are reasonable in nature and reasonable in amount, that they were actually incurred, and the trial court must perform the requisite lodestar analysis. Fees are hardly unlimited.

Second, it is up to the holder whether it wants to continue litigating through trial (where a consumers' attorneys' fees can reach six-figures), as TDAF did, or whether it would rather return the consumer's money early in the litigation, and only pay fees up to that point. Early settlement would completely shield holders from further exposure.[6] The holder then would have the

[6] See *Karton v. Ari Design & Construction, Inc., supra,* 61 Cal.App.5th at p. 753: "Wesco could have negotiated settlement of its own liability or used interpleader procedures to deposit the amount of its bond in court. [Citation] Instead, Wesco elected to gamble that it and Ari could avoid liability altogether on the merits. 'Having lost that gamble, [Wesco] is not in a position to complain about liability for court costs ....'"

contractual or legal means to pursue the seller for anything the holder had to pay the consumer because of the seller's misconduct. (See 40 Fed.Reg. 53509 ["The financer may have recourse against the seller based on the seller's endorsement of the instrument, or it may have a full recourse agreement with the seller and withhold paying-off payments to the seller as a reserve.].)

The trial court witnessed first-hand the fraught litigation between the parties and awarded Pulliam the fees and costs it found were actually incurred and reasonable. The trial court did not err, and neither did the Court of Appeal when it affirmed the trial court's order finding TDAF jointly and severally liable for fees and costs under the holder clause.

Only by guaranteeing consumers like Pulliam an award of attorneys' fees and costs will consumers be able to enforce the Rule and effectuate its purpose.

II. The Court of Appeal correctly held that the Rule's limitation on "recovery" cannot include attorneys' fees and costs of suit if the Rule's main purpose is to be fulfilled.

In its 2012 advisory letter, the FTC emphasized that any reading of the Rule must comport with its plain language together with the Rule's Statement of Basis and Purpose ("SBP"). (2012 Opinion Letter, at pp. 3-4.) "Thus, to give full effect to the Commission's original intent to shift seller misconduct costs away from consumers, consumers must have the right to recover funds already paid under the contract if such recovery is necessary to fully compensate the consumer for the misconduct…" (*Id.* at 4.) [7]

The Rule allows the dominant market participants— in this case car dealers and auto finance companies—to police themselves while also protecting consumers who have no ability to negotiate industry standard contracts. (2012 Opinion Letter at p. 3, n. 9.) The FTC stated: "We believe that a rule which compels creditors to either *absorb seller misconduct costs* or return them to sellers…will discourage many of the predatory practices and schemes…The market will be policed in this fashion and all parties will benefit accordingly." (*Ibid.*) Consequently, any interpretation of the Rule must be approached with this intent in mind. The Rule is meant to protect consumers' rights, not deter consumers from pursuing those rights. Consumers will be deterred if the protections established by our Legislature (e.g. the CLRA, Song-Beverly Act) are not be enforceable against the companies that accepted their money. Consumers like Pulliam will be deterred if they cannot recover the attorneys' fees and costs that it takes to litigate these cases through trial and any additional fees and costs in judgment enforcement costs incurred to finally get a refund.

[7] Available at: https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf

A. ***Pulliam* correctly interpreted the Rule's language and focused on its purpose.**

The *Pulliam* court applied the correct statutory interpretation analysis: the "first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.'" (*Pulliam, supra,* at p. 412, citing (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 (*Goodman*).) "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Ibid.*) "However, the 'plain meaning' rule does not prohibit a court from *determining whether the literal meaning of a statute comports with its purpose* or whether such a construction of one provision is consistent with other provisions of the statute." (*Ibid.,* emphasis added.) "To determine the most reasonable interpretation of a statute, we look to its legislative history and background." (*Ibid.*)

In its review of the Rule, *Pulliam* analyzed the plain meaning of the words of the holder clause, other state courts' application of the Rule, the history of the Rule, letters submitted prior to the 2019 confirmation of the Rule, and the basis for the FTC's comments on the supposed "cap" on attorney's fees. (*Id.* at pp. 409-416.) Each of these steps lead the Court of Appeal to the correct conclusion – the purpose of the Rule is to allow consumers to enforce their rights and to transfer the risk and cost of doing business with shady sellers from the consumer to the holder who is inherently in a better market position.

1. The Rule's limitation on "recovery" does not encompass attorneys' fees or costs.

In its analysis, the Court of Appeal first disagreed with the Third Appellate District's opinion in *Lafferty II,* and its interpretation of the word "recovery" as used in the holder clause: "…recovery by the debtor shall not exceed amounts paid by the debtor hereunder…" (*Id.* at pp. 412-415.) *Lafferty II*'s analysis relied primarily on out-of-state decisions and a superficial reading of the term "recovery." (*Lafferty II, supra,* 25 Cal.App.5th at p. 411-413.) *Lafferty II* concluded that "a consumer cannot recover more *under the Holder Rule cause of action* than what has been paid on the debt regardless of what kind of a component of the recovery it might be—whether compensatory damages, punitive damages, or attorney fees." (*Id.* at 414, emphasis in original.)[8]

The Court of Appeal did not find *Lafferty II's* conclusions persuasive. (*Pulliam,* at p. 413.) The *Pulliam* court found that a consumer's limited "recovery" under the Rule, does not include attorneys' fees: "The dictionary definition of recovery focuses on damages, i.e. restoring money that was taken away from the

[8] *Lafferty II* confuses the issue further by trying to differentiate between a "Holder Rule cause of action," and the statutory causes of action against the seller. (*Lafferty II,* at pp. 413-414.) There is no "Holder Rule cause of action." The holder clause is merely a contractual term that allows the holder to be sued for any cause of action a consumer may have against a seller.

plaintiff, and does not expressly address attorney's fees." (*Ibid.* citing Recovery Definition, Black's Law Dict. (11th ed. 2019).)

Pulliam's differentiation of the recovery of damages from any award of statutory attorneys' fees makes sense. Code of Civil Procedure section 1033.5(A)(10)(B) identifies statutory attorneys' fees as recoverable costs. Statuary attorney fees and costs are both incidental to the litigation, and not part of the recovery owed to a plaintiff at the inception of the lawsuit. "It is established that the right to costs is statutory and that costs 'are allowed *solely as an incident of the judgment* given upon the issues in the action...They constitute no part of a judgment at the moment of its rendition.'" (See *Folsom v. Butte County Assn. of Gov'ts* (1982) 32 Cal.3d 671, 677 (emphasis added).) Recovery of litigation costs, including statutory attorney fees, is *not* considered part of an award of *damages*. "When authorized by statute, awards of attorney's fees are expressly defined as costs, not damages. (*Elton v. Anheuser–Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301, 1308.)

This Court has also clarified that: "Statutory attorney fees are not of course intended to compensate the 'prevailing party' for damages suffered." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 586.) An award to a party's attorney of statutory attorney fees cannot be considered punitive damages against the defendant because they are not part of the damages awarded to the plaintiff. (*Ibid.*) Statutory attorneys' fees are not part of the consumers "recovery" and not limited under the Rule.

Lafferty II seemingly agreed there is a difference between a plaintiff's recovery of damages and her to entitlement to litigation costs and prejudgment interest as the prevailing party. "The Holder Rule itself is silent about cost awards under state law to a prevailing party in an action. Consequently, the trial court did not err in awarding costs." (*Lafferty II,* at p. 415.) Following *Lafferty II*'s reasoning on costs, the Rule is also silent about attorneys' fee awards under state law to a prevailing party in an action. If statutory costs are available and not expressly barred by the Rule, so too are statutory attorneys' fees. The court simply did not consider statutory attorneys' fees as recoverable costs under Code of Civil Procedure section 1033.5(A)(10)(B), this was error.

Pulliam correctly noted that the Rule and its use of the word "recovery" does not expressly address attorneys' fees. (*Pulliam,* at p. 413.) Nowhere in the Rule, in its Statement of Basis and Purpose, or in the FTC's comments before 2019, did the FTC ever mention anything about attorneys' fees in conjunction with the Rule. As discussed below in section IV, the FTC explicitly left this an open issue that could only be decided by the states, and rightfully so.

2. Because the language of the Rule has resulted in differing interpretations, *Pulliam* correctly turned to the Rule's regulatory history.

Pulliam's analysis correctly did not stop with its interpretation of the word "recovery." Because the words in the holder clause have been given different interpretations, *Pulliam* next looked at the purpose and intent of the Rule to find the interpretation that most aligned with the FTC's Statement and Basis of Purpose. (*Pulliam,* pp. 414-416.) The rules of statutory interpretation call for an analysis of the regulatory history of the Rule to come to its reasonable interpretation. (See *Goodman, supra,* 47 Cal.4th at p. 1332.)

As the Court of Appeal explained, if the Rule's limit on "recovery" were to include attorneys' fees and costs, this interpretation would vitiate the main purpose of the Rule – to allow consumers to affirmatively sue holders and to compel "creditors to either absorb seller misconduct costs or return them to sellers," thereby discouraging "predatory practices and schemes." (*Pulliam,* at p. 414.) *Pulliam* cites extensively to the FTC's own language in the regulatory history and purpose of the Holder Rule specifically:

- Aggrieved consumers are often not in a position to take advantage of the legal system. (*Id.* citing 40 Fed. Reg. 53512.)
- Consumer damages are rarely enough to attract competent representation. The sheer costs of recourse to the legal system to vindicate a small claim render recourse to the legal system uneconomic. (*Ibid.*)
- The worst sellers prove difficult to locate and serve, and the marginal liquidity which characterizes their operations makes collection of a judgment difficult or

impossible even if they are successfully served. Bankruptcy or insolvency becomes a final barrier to recovery. (*Ibid.*)

Pulliam acknowledges that the Rule was the FTC's way of ensuring that consumers could affirmatively sue holders. (Pulliam, at p. 414.) The efficacy of the Rule depends wholly on consumers' ability to enforce it in court. Barring a consumer from being awarded attorney fees as the prevailing party in litigation against the holder reverts consumers to the uneconomic position the FTC sought to remedy. The definition of "recovery" espoused by *Lafferty II* accomplishes the *opposite* of the Rule's intent – it doesn't limit the Rule, it hobbles it by leaving consumers unable to litigate against holders unless they are willing to incur significant amounts of unrecoverable attorneys' fees.

Pulliam also cites to the FTC director's comments at the time of the promulgation of the Rule, and law review articles that have examined the history of the Rule, all of which confirm *Pulliam*'s interpretation and refute the interpretation of the Rule as advanced by *Lafferty II.* (*Pulliam,* at pp. 414-416.) The *Pulliam* court found that to include attorney's fees in the Holder Rule's limitation on recovery would be out of sync with its objective of reallocating the costs of the seller's misconduct from the consumer back to the seller and creditor. (*Pulliam, supra,* at p. 415, citing Greenfield & Ross, *Limits on a Consumer's Ability to Assert Claims and Defenses under the FTC's Holder in Due Course Rule* (1991) 46 Business Lawyer 1135, 1148.) Attorney's fees are "a form of compensation that, along with an award of actual damages, permits the consumer to be made whole.... [O]ne of the objectives of the Holder Rule is to internalize the costs of a seller's misconduct. Those costs include the expense of obtaining compensation for injury caused by the seller's misconduct." (*Ibid.*)

The stated purpose of the Rule's limitation was meant to limit a consumer's recovery in terms of incidental, consequential or punitive damages solely to the amounts paid under the contract. Then, the attorney's fees and costs necessary to effectuate a consumer's rights under the Rule were left open by the FTC to be applied under each states' laws. (41 Fed.Reg. 20024, ["Appropriate statutes, decisions, and rules in each jurisdiction control."].)

B. If the limit on "recovery" foreclosed awards of reasonable attorneys' fees and costs, then the Rule's objective of allowing consumers to affirmatively sue holders would be gutted.

TDAF argues that the Rule's goal is to "efficiently reallocat[e] the risks of seller misconduct without making creditors the guarantors of sellers' performance." (OB at 26.) Nothing in the Rule's regulatory history supports this holder-first interpretation. TDAF's interpretation leads to only one outcome – if consumers are to sue the holder for a seller's misconduct, they may get their money back eventually, but they will also owe far more in attorneys' fees and costs incurred in that litigation. Consumers better not sue.

TDAF raises a point specifically rejected by the FTC – that liability for so-called "uncapped" attorneys' fees would "make creditors leery of financing consumer contracts in the first place."

(OB at 29.) The FTC rejected this line of reasoning back in 1975 by pointing to California's Rees-Levering Act (ASFA), enacted in 1961, which allows reciprocal attorneys' fees from the seller, holder or consumer. Liability for attorneys' fees under ASFA did *not* persuade any banks to get out of the automobile financing business then, and still hasn't. (See 40 Fed.Reg 53519.) Financing companies have a lot more to gain in the automobile financing market in California than they have to lose in attorneys' fees and costs from individual consumer claims, especially if they settle early.

TDAF also asserts the Rule takes a "balanced approach" and that the FTC reached a "careful balance" by promulgating the Rule. However, the regulatory history shows the opposite – the FTC rejected many if not all the concerns it heard from financing institutions. Nothing in the regulatory history evidences that the Rule was meant to protect both consumers and financing companies – the FTC was focused on protecting consumers and rectifying a situation which heavily disfavored consumers. The Rule was formulated first and foremost as a regulation for the benefit of consumers, consumers who were routinely cheated by businesses and ignored by financing companies, and still made to pay for misrepresented or valueless goods. TDAF says the Rule leaves consumers better off because they can recover the amounts paid on their contracts something they were not entitled to before the Rule was promulgated. But, is Pulliam better off having to pay the over $200,000 in attorneys' fees and costs it took to recover her $21,000 from TDAF? As long as holders can litigate to the bitter end or drag their feet on settlement with zero liability above a simple refund of what the consumer paid, no consumer benefits from the Rule.

The purpose of attorney fees is to encourage settlement, make it economically feasible for consumers to bring small claims, and discourage sellers and creditors from using their superior legal resources to wear down the consumer. (David A. Szwak, *The FTC "Holder" Rule* (2006) 60 Consumer Fin. L.Q. Rep. 361, 364–365.) This purpose is thwarted if attorney's fees are lumped in with the recovery on the merits and capped at the amount of the creditor's maximum liability. (*Ibid.*)

Instead of focusing on the incentives holders have to refund a consumer's money and get out of the litigation as quickly as possible, TDAF focuses on the disincentives holders have if they are held liable for any amount of attorney's fees, especially if they have to pay thousands or hundreds of thousands in attorneys' fees over the amounts paid by the consumer. (OB at 29.) TDAF feigns ignorance of its ability to settle the case early on, and then go after the seller for any money it spent. This ignorance is convenient because if its argument prevails, holders will have carte blanche to litigate as much as they want and then walk away owing nothing to the consumer for attorneys' fees and costs. This in turn will discourage *any* litigation against holders.

Another argument advanced by TDAF, and other states' courts, is that consumers *are* able to seek attorneys' fees from holders as long as those fees are "capped" at the amounts the consumer paid on the contract. (OB at 32, *Riggs v. Anthony Auto*

Sales, Inc. (W.D. La. 1998) 32 F.Supp.2d 411, 417 [holding plaintiff could recover actual damages, the costs of the action, and reasonable attorney's fees, provided that the maximum recovery did not exceed the amount paid by plaintiff.].) This is perplexing. What this means is that if the consumer paid $5,000 to the holder under the contract, the consumer can sue the holder and recover $5,000, then it is up to the consumer whether it wants to keep this refund or pay it towards the $10,000, $20,000 or more that it cost her attorneys to litigate against the holder to recover the $5,000. What a great deal. This is an absurd result, and an absurd argument that has been repeated one too many times. Under TDAF's interpretation of the Rule, attorneys' fees are not "capped" they are *unavailable.*

Finally, TDAF argues consumers should be grateful to get anything under the Rule because they were much worse off before the Rule was promulgated. (OB at 34.) According to TDAF, the Rule protects consumers sufficiently without allowing them to recover attorneys' fees and costs. Again, TDAF completely side-steps holders' responsibility in forcing consumers to litigate in the first place, and the attorneys' fees and costs that are incurred because consumers are forced to litigate for months or years before getting any refund of the money they paid to the "innocent" or "blameless" holder.

The *Pulliam* court saw beyond the self-serving arguments of financial institutions and applied the Rule in the only way that ensures its intent and purpose is fulfilled. *Pulliam* should be affirmed.

III. *Pulliam* correctly found the FTC's 2019 comments were not owed deference.

Next, the Court of Appeal addressed the problematic comments issued by the FTC in its 2019 confirmation of the Rule, and whether those comments were owed the deference the *Spikener* opinion conferred. Ultimately, the *Pulliam* court found that the FTC's 2019 comments, issued after 44 years of silence, are not owed deference and that the *Spikener* court was wrong to find preemption of Civil Code section 1459.5, our Legislature's attempt to abrogate *Lafferty II.* (*Pulliam, supra* at pp. 563-567.)

As described above, in its 2019 confirmation of the Rule, the FTC responded to questions it had received from consumer groups as to whether the Rule's limitation on a consumer's "recovery" also applied to any recovery of attorneys' fees. (84 Fed.Reg at 18713.) The FTC then adopted *Lafferty II's* reasoning and stated that attorneys' fees are not recoverable above the amounts paid on the contract if the holder's liability stems from the seller's misconduct. (*Id.*) *Spikener* found these comments were owed deference and found section 1459.5 was in conflict with the FTC's interpretation of its own regulation and therefore preempted. The *Pulliam* court engaged in a thorough deference analysis and it disagreed with *Spikener* – the FTC's 2019 comments on attorneys' fees are not owed deference. *Pulliam*'s conclusions are correct.

The key decision on the deference owed to an agency's interpretation of its own regulations is *Kisor v. Wilkie* (2019) – U.S. –, 139 S.Ct. 2400, 2408. The four deference factors identified in that case are: (1) the regulatory interpretation must be the agency's authoritative or official position; (2) the agency's interpretation must implicate its substantive expertise; (3) an agency's reading of a rule must reflect its fair and considered judgment; and (4) a court should not defer to a new interpretation that creates unfair surprise to regulated parties. (*Kisor,* at pp. 2416-2418.)

Spikener's deference analysis is limited to three sentences: the first, stating that the FTC's comments are reasonable because they follow *Lafferty II*'s reasoning; second, stating that the FTC's comments are published in the Federal Register and are, therefore, official; and third, that the FTC asked for comments prior to confirming the Rule and thus this is evidence that the comments were well-reasoned. (*Spikener, supra,* at p. 159.) The *Pulliam* court was not so persuaded. (*Pulliam, supra,* at p. 421.)

A. The FTC's 2019 position barring attorney's fees from a holder is not definitively within the FTC's substantive expertise.

The *Pulliam* court reviewed the history of the FTC's rule confirmation and the comments the agency received for and against the confirmation of the Rule. (*Pulliam*, at p. 416-420.) In December 2015, the FTC requested public comment on "the overall costs and benefits, and regular and economic impact" of the Holder Rule "as part of the agency's regular review of all its regulations and guides." (80 Fed.Reg. 75018.) The request for comment identified 15 questions on which the FTC sought comment, including whether the Holder Rule should be modified in any way, but asked no questions specifically about attorney's fees. (80 Fed.Reg. 75019.) Only 6 of the 19 comments the FTC received mentioned attorney's fees. (*Pulliam*, at p. 417.) After reviewing these comments, the FTC's Rule confirmation states: "The Commission does not believe that the record supports modifying the Rule to authorize recovery of attorneys' fees from the holder, based on the seller's conduct, if that recovery exceeds the amount paid by the consumer." (*Id.*)

Pulliam concluded that the FTC's finding that holders cannot be liable for attorney's fees regardless of state law, if that liability stems from the seller's conduct, does not fall within the FTC's substantive expertise for two reasons.

First, *Pulliam* found that "[r]esolution of the issue may turn on the particular state statute providing for attorney's fee recovery at issue, and whether that statute is intended to be punitive against the payor or simply to make the payee whole." (*Pulliam*, at p. 420.) This makes sense. California "has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices." (*Diamond Multimedia Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1064; see also *Jankey v. Lee* (2012) 55 Cal.4th 1038, 1054 ["Absent congressional intervention, California has every right to adopt whatever fee regime it deems appropriate upon invocation of state law remedies."].)

The Rule's own regulatory history confirms that the FTC wanted to *encourage* states to expand their consumer protections based on the Rule. (40 Fed.Reg. 53521 ["this rule will serve as a model for further state legislation and give states which lack legislation the impetus to act."] and 41 Fed.Reg. 20024 ["Appropriate statutes, decisions, and rules in each jurisdiction will control."].) This is exactly what California has done – it has built on the Rule by interpreting it in conjunction with its consumer protection statutes, and it has made the holder liable for statutory attorneys' fees even if the causes of action the consumer sues under only relate to the seller's misconduct. The holder stands in the shoes of the seller, just as the FTC intended. The FTC's 2019 position barring any state law that allows for holder liability on attorneys' fees if that liability stems from the seller's misconduct is the diametric opposite of what the Rule's regulatory history specifically *encouraged*.

Second, *Pulliam* found that "[a]s illustrated by the FTC's request for comments which led to the Rule confirmation, the FTC sought to exercise its judgment *based on data* regarding the effect of the rule (or any proposed rule change) on consumers and businesses." (*Ibid.,* emphasis added.) However, the FTC then specified that no commenter provided data on the costs and benefits to consumers or businesses in different jurisdictions based on the availability of attorney's fees or any limitations placed on them. (*Ibid.*) This lack of evidence does not add up to a well-reasoned position.

One of the letters the FTC considered, specifically addressed the *Lafferty II* opinion, and the FTC's position on attorneys' fees mirrors the holding in *Lafferty II*. But, analysis of case law, as a general rule, falls squarely outside the expertise of agencies. (*Hymes v. Bank of America, N.A.* (E.D.N.Y. 2019) 408 F.Supp.3d 171, 192, citing *New York v. Shalala* (2d Cir. 1997) 119 F.3d 175, 180 ["[A]n agency has no special competence or role in interpreting a judicial decision."].) Thus, if the FTC took the holding of *Lafferty II* as the only evidence of how the Rule should be applied, it did so wrongly.

The FTC's statement regarding attorney's fees in its Rule confirmation was not an exercise of its substantive expertise, but simply a position taken after limited arguments were made on each side without the necessary evidence of costs and benefits that a rule modification would require. The FTC's comments barring attorney's fees incurred in litigation against a holder, regardless of state law, are not owed deference.

B. The comments are not within the bounds of reasonable interpretation of the Rule and are not based on the FTC's "fair and considered judgment."

"[An] agency's reading must fall 'within the bounds of reasonable interpretation.' And let there be no mistake: That is a requirement an agency can fail." (*National Lifeline Association v. Federal Communications Commission* (D.C. Cir. 2020) 983 F.3d 498, 507 quoting *City of Arlington, Tex. v. FCC* (2013) 569 U.S. 290, 296.) The Supreme Court has also cautioned that deference should only "rarely" be given when an agency's new interpretation conflicts with a prior one. (*Thomas Jefferson Univ. v. Shalala* (1994) 512 U.S. 504.)

Pulliam found that “given the informal nature of the FTC’s consideration of the issue– one that followed a request for comments that did not mention attorneys’ fees,” the confirmation did not “truly represent the FTC’s “ ‘fair and considered judgment’ [necessary] to receive ... deference.” (*Pulliam,* at p. 566, citing *Kisor,* at p. 2416.)

The *Pulliam* court found it significant that the FTC had not previously spoken on the issue of attorney’s fees and chose to express its opinion without seeking formal input. Had the FTC issued a modification based on an analysis of submitted data, or after consideration of arguments submitted in response to an express notice, it would have made a stronger case for deference. Instead, the FTC, based on no data and limited argument, spoke on an issue on which it had previously remained silent for decades, and had not given notice of an intent to speak.

This falls short of the type of considered analysis entitled to dispositive deference. “[W]hether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue.” (*Barnhart v. Walton* (2002) 535 U.S. 212, 221-222.) This is particularly so when the issue involved is not exclusively one of federal law, but rather an issue of the intersection of federal law and state law of remedies. (Cf. *Kisor, supra,* 139 S.Ct. at p. 2417 [“Some interpretive issues may fall more naturally into a judge’s bailiwick. Take one requiring the elucidation of a simple common-law property term [citation], or one concerning the award of an *attorney's fee*, see *W. Va. Highlands Conservancy, Inc. v. Norton* (4th Cir. 2003) 343 F.3d 239."] emphasis added.)

Although the agency that promulgated a rule is *presumed* to be in a better position to reconstruct its original meaning, *Kisor* specifies that same presumption "works less well when lots of time has passed between the rule's issuance and its interpretation." (*Kisor,* 139 S.Ct at 2412.) A court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. (*Id.* at 2416.)

Here, we have a 44-year gap between the Rule's promulgation and the comments limiting its consumer protections. The comments should not be presumed to be the FTC's original intent. Further, the comments, adopting *Lafferty II*'s reasoning from a year earlier, are also not within the bounds of reasonable interpretation for two other reason: (1) they effectively nullify the Rule's original intent to allow consumers to bring affirmative suits against creditors by barring consumers from any award of attorneys' fees and costs from a holder; and (2) they specifically limit state laws that intend to build on the Rule's protections – this is the opposite of the Rule's regulatory history which, as mentioned above, specifically *encouraged* states to build on the Rule and develop their own laws in furtherance of the Rule's purpose. (40 Fed.Reg. 53521 ["this rule will serve as a model for further state legislation and give states which lack legislation the impetus to act."] and 41 Fed.Reg. 20024

["Appropriate statutes, decisions, and rules in each jurisdiction will control."].)

C. The comments resulted in unfair surprise.

Pulliam correctly found that although the FTC's position taken in the Rule confirmation was not exactly a change in interpretation – as the FTC had not previously interpreted the rule *at all* – it did "in fact, address an issue never previously addressed, and undermined the existing practice in those jurisdictions in which attorney fees in excess of the cap had been, and were being, imposed as a matter of course." (*Pulliam,* at p. 420.)

The holder clause is a notice to creditors, sellers and consumers that all three parties will be regulated according to the Rule – it is not just a notice to consumers as TDAF posits. The new interpretation of the holder clause's second sentence thus came as a significant surprise to consumers and anyone involved in the sales transactions governed by the Rule. So much so, that our Legislature was compelled to act. As the legislative history of Civil Code section 1459.5 makes clear, prior to the *Lafferty II* opinion in 2018, California lower courts and courts of appeal (in unpublished decisions) interpreted the Rule the same way the *Pulliam* court interpreted it. (See Sen. Rules Com. Rep. on Assem. Bill No. 1821, (2019-2020 Reg. Sess.) June 12, 2019, pp. 4-5 [citing unpublished opinion from Fourth Appellate District].)

The FTC's 2019 interpretation, mirroring *Lafferty II*, is an about-face of the Rule's application in California and other jurisdictions. The FTC's comments are not based on the reasoned analysis necessary for the reinterpretation of a longstanding rule.

Ultimately, *Pulliam* found that because the FTC's comments are not entitled to deference, and because *Lafferty II's* interpretation of the Rule was wrong, Civil Code section 1459.5 was consistent with the Rule. (*Pulliam*, at p. 422.) The *Pulliam* court's interpretation of the Rule is consistent with our Legislature's desire and responsibility to protect California consumers. (See Civ. Code § 1459.5.) *Pulliam* should be affirmed, and as further discussed below, this Court may find additional reasons to disregard the FTC's conflicting position on the Rule's application to attorneys' fees.

IV. The FTC exceeded its authority by attempting to bar states from passing laws on the availability of attorneys' fees under their own statutes.

California has the absolute power to pass Section 1459.5 to protect consumers by allowing them to sue holders and recover attorneys' fees and costs under state law. The Rule and its contemporaneous comments specifically provide that nothing in the Rule is meant to supplant state law: "Appropriate statutes, decisions, and rules in each jurisdiction control." (41 Fed.Reg. 20024.) In contrast, the FTC's 2019 comments do just that – they supplant state law.

California "has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices." (*Diamond Multimedia Sys., Inc., supra,* 19 Cal.4th at p. 1064.) With the Rule, the FTC established a baseline for consumer protection – to discourage unfair and deceptive practices and allow consumers to recover what they paid under the contract from the holder through affirmative litigation. By its own regulatory history, states were then free to expand consumer protections as they saw fit. (40 Fed.Reg. 53521 ["this rule will serve as a model for further state legislation and give states which lack legislation the impetus to act."] and 41 Fed.Reg. 20024 ["Appropriate statutes, decisions, and rules in each jurisdiction will control."].) California has every right to allow the recovery of attorneys' fees when consumers bring state law claims, based on the seller's misconduct, against a holder to recover what they are owed under the contract. (See *Jankey v. Lee* (2012) 55 Cal.4th 1038 1038, 1054 (*Jankey*) ["Absent congressional intervention, California has every right to adopt whatever [attorney] fee regime it deems appropriate upon invocation of state law remedies."].)

Contrary to the Rule, the 2019 comments seek to block states from passing further protections, such as the award of statutory attorneys' fees from a holder, if they stem from the seller's misconduct. (84 Fed.Reg., *supra,* at p. 18713. ["We conclude that if a federal or state law separately provides for recovery of attorneys' fees *independent of claims or defenses arising from the seller's misconduct*, nothing in the Rule limits such recovery."], emphasis added.)

But the FTC is not authorized by Congress to block state law, while California *can* enact its own consumer protection statutes as our Legislature did with section 1459.5. (See

California State Bd. of Optometry v. F.T.C. (D.C. Cir. 1990) 910 F.2d 976, 980 ["There is nothing in the language of [the FTC Act] to indicate that Congress intended to authorize the FTC to reach the 'acts or practices' of States acting in their sovereign capacities… We can find nothing in the language or history of subsequently adopted amendments to support a finding that Congress has expanded the FTC's jurisdiction to embrace state action."].)

The FTC cannot block California from enacting greater protections for its consumers. (See *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 577 [California's decision to offer greater protection to the consumer in a statute that provides for attorney's fees to whichever side prevails does not conflict with federal law.].) State law could be preempted by a federal agency's regulations only when compliance with inconsistent state law would result in a *violation* of the regulation. (*Id.* at p. 578 [California's law was not preempted because it was not in violation of the Fair Credit Reporting Act.].)

The FTC's 2019 comments overstep the FTC's authority by attempting to limit state law without the rightful authorization from Congress. These comments cannot preempt state law, much less state law which does not violate the Rule, and indeed seeks to further the purpose behind the Rule.

The FTC Act was not intended to exclusively occupy the consumer protection field or override parallel state efforts to protect consumers:

> [The Act] is not intended to occupy the field or in any way to preempt State or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission.
>
> Where cases of consumer fraud of a local nature which affect commerce are being effectively dealt with by State or local government agencies, it is the Committee's intent that the Federal Trade Commission should not intrude.

(*The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act* (1976) 89 Harv. L. Rev. 715, 751, citing H.R. REP. NO. 1107, 93d Cong., 2d Sess. 49-50 (1974).) This indicates that states are not to be prevented from carrying on parallel efforts to protect consumers.

Courts that have looked to the FTC Act have agreed with this analysis. "It is clear that Section 5 of the Federal Trade Commission Act does not preempt state laws dealing with deceptive trade practices." (*Double Eagle Lubricants, Inc. v. State of Texas* (N.D.Tex.1965) 248 F.Supp 515, 517, *appeal dismissed*, (1966) 384 U.S. 434.) Rather, the regulation of business activity by the FTC and the states has a history of co-existence. (See, *American Financial Services v. FTC* (D.C.Cir.1985) 767 F.2d 957, *cert. denied* (1986) 475 U.S. 1011.)

As pointed out above, in its Statement and Basis of Purpose for the Rule, the FTC *encouraged* the adoption of state consumer protection laws and specifically commented that state legislation and decisional law controls interpretation of the Rule. (41 Fed.Reg. 20024.) This is because problems in the marketplace go beyond the enforcement capabilities of the federal government. (See Dee Pridgen, Consumer Protection and the Law, § 3.02[1] (1986).) As such, the FTC's comments blocking state laws on attorneys' fees were beyond the FTC's authorization, contrary to the FTC's stated goals, and cannot be used to preempt section 1459.5. *Spikener* should be overruled.

V. Because the FTC's comments exceed its authority and are not owed deference, this Court should find that section 1459.5 is not preempted.

The legislative record of Civil Code section 1459.5 clarifies it was intended to ensure "fairness and legal recourse to defrauded consumers."[9] As explained by our Legislature, from 1975 until *Lafferty II*'s publication in 2018, courts in California routinely found holders liable for consumers' attorneys' fees and costs under California's fee-shifting consumer protection statutes, as fees and costs are not considered part of the consumer's "recovery." Section 1459.5 aligns with the history, purpose, and intent of the Rule, and reflects California's interest in protecting its consumers and deterring fraud.

Section 1459.5 is not preempted because the FTC is not authorized to bar state law, much less through comments that did not go through rulemaking procedures, and section 1459.5 is also not preempted through conflict or obstacle preemption. In 1975, the FTC explicitly left it up to the states to craft their own

[9] Assembly Floor Analysis, available at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1821

statutes that support the intent of the Rule, and that is exactly what Section 1459.5 does. This Court should affirm *Pulliam* and disagree with the *Spikener* to find section 1459.5 is not preempted.

Spikener did not analyze whether the FTC had the authority to block state law. In finding that section 1459.5 was preempted, the holding in *Spikener,* mainly relying on *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, erroneously found Section 1459.5 could not be reconciled with the FTC's 2019 comments and was thus conflict-preempted. (*Spikener,* at pp. 161-163.) *Olszewski* is the wrong case to focus on because there, as a condition for accepting federal funds, California had agreed to abide by requirements imposed by federal law. (*Olszewski, supra,* 30 Cal.4th at p. 817.) This Court found the California law did not abide by the explicit conditions set by Congress for Medicare funding and thus was in direct conflict with the federal law. (*Id.* at pp. 822-824.) *Olszewski* does not apply to our facts.

There is no physical impossibility in complying with the FTC's *minimum* protections and California's more robust ones. In both *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* 41 Cal.4th 929 (*Viva*) and *Jankey, supra,* this Court turned to legislative history to determine whether the federal law intended to preempt state law or whether the laws contemplated that states would expand on those protections and thus insulated state law from preemption. (*Viva, supra,* 41 Cal.4th at p. 941; *Jankey, supra,* 55 Cal.4th at p. 1050.) *Viva* found no conflict or obstacle preemption, as it was not physically impossible to simultaneously comply with both federal law, which as a floor matter, in its Endangered Species Act allowed kangaroo trade, and state law, which imposed a higher standard and prohibited the trade. (*Viva, supra,* at p. 944.) *Viva* found that although there was no current federal regulation of kangaroo, that did not preempt further state efforts to protect endangered species. (*Id.* at p. 950.)

In *Jankey,* this Court found no conflict or obstacle preemption of a state law that allows reciprocal attorneys' fees for suits brought to enforce disability rights, even though similar statutes under the Americans with Disabilities Act (ADA) only allow attorneys' fees for prevailing plaintiffs. (*Jankey*, *supra*, at pp. 1053-1056.) The court found that the ADA insulated further state action, and that the state law did not conflict with or pose a barrier to congressional objectives even though the state law allowed defendants to recover attorney fees and that was not in furtherance of disability rights – plaintiffs had the option of proceeding with only the federal claim, or adding the state claim which exposed them to reciprocal fees. (*Id.*)

In *Viva,* this Court also found that "every action falls within one of three possible federal categories: an action may be prohibited, it may be authorized, or it may be neither prohibited nor authorized." (*Viva, supra*, at p. 952.) Here, the Rule itself simply does not prohibit or authorize the recovery of attorneys' fees when a consumer must sue a holder under state law to recover what the consumer paid under the contract. As discussed above, this would have been an overstep of the FTC's authority.

The *Spikener* court was wrong in concluding that the comments' "clear intent to prohibit states from authorizing a recovery that exceeds" the amounts paid on the contract must be followed by state law. (*Spikener*, at p. 162.) As discussed above, there is no congressional authorization to support that conclusion.

Even if this Court were to give some deference to the FTC's contradictory 2019 comments, section 1459.5 would not be preempted because it does not conflict with the purpose and policy behind the Rule itself – the protection of consumers against deceptive and unfair business practices, and California's equally legitimate and compelling interest to protect its consumers. For all the above reasons this Court should affirm *Pulliam*, and further find section 1459.5 is not preempted by the FTC's 2019 comments.

VI. Practical considerations not considered by TDAF.

The cases that have found attorneys' fees unavailable under the Rule's limit on recovery have a couple of things in common – they do not consider any practical implications of having a Rule that confers a right to consumers but makes consumers liable for all costs necessary to enforce that right, and they harp on the "innocent" and "blameless" holders who should not face any liability for another party's misconduct. A look at the policy implications and real-world outcomes of having a Rule that is all but unenforceable is necessary, and these considerations support affirming *Pulliam*.

A. The fallacy of the blameless creditor.

Throughout its Opening Brief, TDAF describes holder-creditors as "innocent" and "blameless" parties. This same language has been used by courts who have found no liability for attorneys' fees under the Rule. (See *Crews v. Altavista Motors, Inc.* (W.D. Va. 1999) 65 F.Supp.2d 388, 391.)

A look at procedural history here helps elucidate why holders *do* hold some blame, not always through the seller's misconduct, but through their own conduct in forcing a consumer to litigate for years before agreeing to return the consumer's money. In this case, Pulliam sought rescission of her contract by sending a CLRA demand letter and filing suit in September 2016. (*Pulliam,* at p. 402.) Defendants refused to settle the case and instead made Pulliam fight every step of the way. (See 2 CT 288-289.) This obstinacy did not end at trial. Even though judgment was entered for Pulliam in May 2018, it was only after collection proceedings, debtor's exams, further litigation, and a bench warrant for its President and CEO that TDAF finally sent a check for Pulliam's damages in February 2020, almost two years after judgment was entered. (See Motion for Judicial Notice, Exhibits 1-5.) The collection proceedings against HNL are still ongoing. (*Id.*) TDAF has now also appealed the trial court's order awarding $48,000 in post-judgment enforcement costs that were needed to get TDAF to refund the $21,000 Pulliam had paid under the contract – the exact remedy that TDAF argued in the appeal and here that Pulliam *was* entitled to recover under the Rule.

As the FTC's stated purpose of the Rule and its official guidelines issued contemporaneously with the Rule make clear, holders' attempts to absolve themselves from any liability owed to consumers are completely misguided. These attempts, successful in *Lafferty* and *Spikener*, have transformed the Rule from a consumer protection shield to a sword being used by holders *against* consumers – forcing consumers to litigate to obtain a recovery and then barring them from obtaining *any* attorney's fees for this litigation. Worse yet, inversely, if TDAF had to sue Pulliam for her failure to pay under the contract, TDAF *would* be entitled to an award of its attorney's fees under the contract's terms. This result is the antithesis of what the Rule's drafters envisioned. The *Pulliam* court arrived at the correct conclusion.

B. Use of the Rule in a defensive position.

If consumers cannot recover statutorily available attorneys' fees and costs from the holder when the holder decides to litigate the case, what good is the right conveyed to them by the Rule? As this Court has said: "It would be ironic indeed if a provision in an act intended to benefit consumers could be invoked to their detriment to such an extent that they would stand in a less advantageous position than others in the commercial arena." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 824.)

In the automobile financing sphere, with no risk of paying consumers' attorneys' fees and costs, the holder has more incentive to fight, or let the (soon to disappear) dealership fight the case on their behalf as long as possible forcing the consumer to bleed unrecoverable attorneys' and costs. This situation gives holders less incentive to settle.

Holders are protected. They include indemnity clauses in their agreements with dealers, which forces the dealers to defend the holders. Because of this, holders let dealers defend them and decide whether to settle or fight the case. When the dealer is still in business at the time of the lawsuit, they often defend the case until right before trial or arbitration, and then close shop, leaving the consumer with thousands in attorneys' fees and costs that are now unrecoverable against the holder. This is not what the FTC envisioned when it passed the Rule, but this is the reality, especially after *Lafferty II*.

Being liable for attorneys' fees and costs in addition to the amounts paid under the contract incentivizes holders to be actively involved in the case and encourages them to settle early. In addition, holders enjoy many more rights to enforce the contract against a consumer. This includes the right to collect attorneys' fees from the consumer in an action to enforce the contract. The widely used Retail Installment Sales Contract used in car sales includes a term stating: "you will pay our reasonable costs to collect what you owe, including attorney fees, court costs, and collection agency fees, and fees paid for other reasonable collection efforts." (2CT 333.)[10] Logically, consumers *should* be

[10] Under Civil Code section 1717, this term makes the fees provision reciprocal. While this argument was not advanced below, this is another way to think about the holder clause – as a term being enforced under the contract, which then would allow a consumer to seek fees under section 1717 itself. A similar

equally entitled to recover their attorneys' fees and costs when they sue to enforce the holder clause against the holder and get out of the contract.

If a vehicle buyer stops making payments under her vehicle purchase contract, awaiting to bring up the seller's conduct as a *defense* in a creditor's suit, the vehicle will likely be quickly repossessed, and the consumer's credit will be harmed. The holder can continue reporting negative information on the consumer's credit—negatively impacting a myriad of unrelated aspects of life—to coerce the consumer to continue paying the holder. In this way, the holder can completely avoid a creditor's suit and avoid the consumer's defense under the Rule.

A consumer can end up without vital transportation and with a destroyed credit score, but according to TDAF, she would still be in a favorable position because she could use the Rule as a defense against the holder and not have to pay the remaining payments under the contract. That is *if* the holder ever files a lawsuit and proceeds to trial so that the consumer can obtain a defense judgment. What a deal.

TDAF's reasoning plainly does not work, or better yet, only works to harm consumers. Consumers like Pulliam *must* sue the holder affirmatively to get relief, to not have their credit damaged, and to not risk ending up without transportation. The costs of this litigation, including attorneys' fees, should be the

argument was rejected by the *Lafferty II* court, but that court's reasoning is questionable.

holder's burden, just as much as it is the seller's, if justice is to be served.

CONCLUSION

The Court of Appeal correctly ruled that the FTC's Holder Rule should be interpreted to effectuate its purpose as a consumer protection measure, one that was specifically designed to rebalance a vastly uneven playing field. The Court of Appeal correctly found that the FTC's late-to-the-game comments were not owed deference. Beyond the Court of Appeal's reasoning, the FTC also overstepped its authority with those comments by attempting to bar state law. The Court should affirm, disagree with *Lafferty* and *Spikener,* and find that Civil Code section 1459.5 is not preempted.

August 27, 2021

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner
Arlyn L. Escalante
Michael A. Klitzke

By: /s/ *Arlyn L. Escalante*
Arlyn L. Escalante

Attorneys for Plaintiff and Respondent
TANIA PULLIAM

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the foregoing **ANSWER BRIEF ON THE MERITS** is produced using 13-point Century Schoolbook and contains approximately 13,036 words, which is less than the 14,000 words permitted by rule. Counsel relies on the word count of the computer program used to prepare this Brief.

August 27, 2021

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner
Arlyn L. Escalante
Michael A. Klitzke

By: /s/ *Arlyn L. Escalante*
Arlyn L. Escalante

Attorneys for Plaintiff and Respondent
TANIA PULLIAM

CERTIFICATE OF SERVICE

Tania Pulliam v. HNL Automotive, Inc. et al.
Supreme Court Case No. S267576

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131.

On August 27, 2021, I served the following document(s):

ANSWERING BRIEF ON THE MERITS

on the interested parties in this action addressed as follows:

Tanya L. Greene, Esq. Jamie D. Wells, Esq. Anthony Q. Le, Esq. MCGUIREWOODS LLP 1800 Century Park East, 8th Floor Los Angeles, California 90067 (310) 315-8200 / F: (310) 315-8210 *tgreene@mcguirewoods.com* *jwells@mcguirewoods.com* *ale@mcguirewoods.com* Attorneys for Petitioner TD AUTO FINANCE, LLC **[VIA TRUEFILING]**	Duncan J. McCreary, Esq. MCCREARY PC 11601 Wilshire Boulevard, 5th Floor Los Angeles, California 90025 (310) 575-1800 *djm@mccrearypc.com* Attorneys for Defendants/Appellants HNL AUTOMOTIVE, INC. *dba* HOOMAN NISSAN OF LONG BEACH and TD AUTO FINANCE, LLC **[VIA TRUEFILING]**
John A. Taylor HORVITZ & LEVY LLP Business Arts Plaza 3601 W. Olive Ave., 8th Floor Burbank, CA 91505 818.995.0800 jtaylor@horvitzlevy.com Pub/Depublication Requestor **[VIA TRUEFILING]**	Jan T. Chilton SEVERSON & WERSON One Embarcadero Center. Suite 2600 San Francisco, CA 94111 415.398.3344 / Fax 415.956.0439 jtc@severson.com Pub/Depublication Requestor AMERICAN FINANCIAL SERVICES ASSOCIATION **[VIA TRUEFILING]**

William N. Elder, Jr. Foell & Elder 3818 E. La Palma Ave. Anaheim, CA 92807 714.999.1100 / Fax 714.630.3300 bill@foellandelder.com Pub/Depublication Requestor CALIFORNIA FINANCIAL SERVICES ASSOCIATION **[VIA TRUEFILING]**	Hon. Barbara M. Scheper Attn: Appeals Department LOS ANGELES SUPERIOR COURT 111 North Hill Street Los Angeles, California 90012 **[By U.S. Mail]**
CALIFORNIA COURT OF APPEAL **[Electronic Service under Rule 8.212(c)(2)]**	Office of the Attorney General 1300 "I" Street Sacramento, CA 95814-2912 916.445.9555 **[VIA UPLOAD TO AG WEBSITE]**

[X] **(BY TRUEFILING ELECTRONIC E-FILING/ SERVICE):**
I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by court rules.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 27, 2021, at San Diego, California.

Leslie Rivera Mason

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PULLIAM v. HNL AUTOMOTIVE**
Case Number: **S267576**
Lower Court Case Number: **B293435**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **leslie@rbblawgroup.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Answering Brief on the Merits v.4 210827 - FNL
MOTION	Motion for Judicial Notice 210827 - Final

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jan Chilton Severson & Werson 47582	jtc@severson.com	e-Serve	8/27/2021 5:44:32 PM
William Elder Foell & Elder 110463	bill@foellandelder.com	e-Serve	8/27/2021 5:44:32 PM
Hallen Rosner Rosner Barry & Babbitt LLP 109740	richard@rbblawgroup.com	e-Serve	8/27/2021 5:44:32 PM
Leslie Mason Rosner, Barry & Babbitt, LLP	leslie@rbblawgroup.com	e-Serve	8/27/2021 5:44:32 PM
Hallen Rosner Rosner, Barry & Babbitt, LLP 109740	hal@rbblawgroup.com	e-Serve	8/27/2021 5:44:32 PM
Lisa Perrochet Horvitz & Levy LLP 132858	lperrochet@horvitzlevy.com	e-Serve	8/27/2021 5:44:32 PM
Tanya Greene McGuireWoods LLP 267975	tgreene@mcguirewoods.com	e-Serve	8/27/2021 5:44:32 PM
John Taylor Horvitz & Levy 129333	jtaylor@horvitzlevy.com	e-Serve	8/27/2021 5:44:32 PM
Michelle Cook Rosner, Barry & Babbitt, LLP 319340	michelle@rbblawgroup.com	e-Serve	8/27/2021 5:44:32 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with

TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/27/2021
Date

/s/Leslie Mason
Signature

Mason, Leslie (Other)
Last Name, First Name (PNum)

Rosner, Barry & Babbitt, LLP
Law Firm