California Court of Appeal Finds that the FTC Holder Rule Limits a Holder's Liability for a Consumer's Attorneys' Fees

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I. Introduction

In 1975, the Federal Trade Commission (FTC) promulgated what became known as the "FTC Holder Rule." The FTC Holder Rule was designed to abrogate the Holder-in-Due-Course doctrine in consumer credit transactions,[1] and to prevent a seller from "separat[ing] the buyer's duty to pay for the goods or services from the seller's reciprocal duty to perform as promised."[2] The FTC Holder Rule states that:

> In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to: (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
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> 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.[3]

Since its promulgation, the FTC Holder Rule has, by its requirement to be included as a contractual term in all consumer credit transactions subject to its regulation, "prevented sellers from separating the buyer's duty to pay for the goods or services from the seller's reciprocal duty to perform as promised."[4] The FTC Holder Rule thus gave (and continues to give)

1. *E.g.*, U.C.C. § 3-302 (Am. Law Inst. & Unif. Law Comm'n (2002)).
2. *See* FTC Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53506, 53507–08, 53522 (Nov. 18, 1975) (to be codified at 16 C.F.R. pt. 433) ("The definition of 'holder in due course' which appears in Article Three of the UCC is a recapitulation of principles which were first articulated in *Miller v. Race*, 97 Eng. Rep. 398 (K.B. 1758). To protect the burgeoning commercial paper market, the court in *Miller* decided that a bona fide purchaser of an instrument which was negotiable on its face should not be required to look behind the face of the obligation."); *see also* American Financial Services Association, Comment Letter on Holder Rule Review (Feb. 12, 2016), https://www.ftc.gov/system/files/documents/public_comments/2016/02/00025-100572.pdf [https://perma.cc/32WM-2U86] [hereinafter AFSA Comment Letter].
3. 16 C.F.R. § 433.2 (1975).
4. AFSA Comment Letter, *supra* note 2.

"consumers a practical means of redress with regard to their purchase of consumer goods and services, and [gave (and continues to give)] creditors an incentive to supervise their sellers to prevent losses."[5]

Although the FTC has emphasized that the language of its Holder Rule is clear, and encouraged courts to apply its plain language,[6] it has found that courts do not always do so.[7] Specifically, linked with the preservation of the claims and defenses which debtors could assert against sellers, however, became a persistent assault upon the "plain language" of the Rule—namely, attempts by courts, commentators, and the consumers' bar to "expand assignee liability well beyond any fair reading of the FTC Holder Rule's purpose and plain limits"—by seeking attorneys' fees and costs far beyond the Holder Rule's cap of "amounts paid by the debtor hereunder."[8] This assault, however, sought to upset the balanced fairness of the FTC Holder Rule; i.e., the Rule's imposition on an innocent holder all of the claims and defenses that could be asserted against the seller but also limiting that holder's liability" to "amounts paid by the debtor hereunder."[9]

Despite the lengthy passage of time since the FTC promulgated its Holder Rule and despite the persistent assault on the Rule's limitation in the intervening years, few cases have addressed whether a consumer can recover attorneys' fees beyond the FTC Holder Rule's "amounts paid by the debtor hereunder" limitation. As to those few courts addressing the issue, a majority found that the plain language of the Holder Rule capped any liability that could be imposed on the Holder, including attorneys' fees.[10] However, a vocal consumers' bar has argued otherwise, typically

5. *Id*.
6. U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012) ("The Commission affirms that the Rule is unambiguous, and its plain language should be applied."); U.S. Fed. Trade Comm'n, Opinion Letter (May 13, 1999).
7. U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012) (contrary to the first clause of the Holder Rule—the so-called "claims and defenses" clause—"some courts continue to bar consumers from affirmative recoveries unless rescission is warranted").
8. AFSA Comment Letter, *supra* note 2.
9. Bureau of Consumer Prot., U.S. Fed. Trade Comm'n, Staff Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (Holder in Due Course Rule) 6–7 (May 4, 1976) [hereinafter FTC Guidelines] ("There is an important limitation on the creditor's liability, however. The wording of the Notice includes the sentence, 'Recovery hereunder by the debtor shall be limited to amounts paid by the debtor hereunder.' This limits the consumer to a refund of moneys paid under the contract, in the event that an affirmative money recovery is sought. In other words, the consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; but the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in.").
10. *See, e.g.*, Houser v. Diamond Corp., 2005 WL 94452, at *6 (Wash. Ct. App. 2005); Alduridi v. Cmty. Tr. Bank, 1999 WL 969644, at *12 (Tenn. Ct. App. 1999);

relying on cases such as *Oxford Finance v. Valez* and *Lozada v. Dale Baker Oldsmobile, Inc*.[11]

In California, a number of decisions had addressed the scope of the FTC Holder Rule's first clause,[12] but the issue of the scope of the FTC Holder Rule's second clause and whether it capped attorneys' fees and costs had never been addressed at the appellate level. Instead, the question of whether the FTC Holder Rule's second clause capped the buyer's attorneys' fees was relegated to a few scattered trial court level and arbitration rulings,[13] and an unpublished California Court of Appeal decision.[14]

Enter Patrick and Mary Lafferty, erstwhile purchasers of an allegedly defective recreational vehicle in 2005. The RV's manufacturer had filed bankruptcy,[15] leaving only the seller/dealer and the buyer's finance com-

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Riggs v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 411, 417 (W.D. La. 1998); Simpson v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 405, 410–11 (W.D. La. 1998); Patton v. McHone, 1993 WL 82405, at *4–5 (Tenn. App. 1993); Reagans v. MountainHigh Coach Works, Inc., 881 N.E.2d 245, 253–54 (Ohio 2008); Scott v. Mayflower Home Improvement Corp., 831 A.2d 564, 576 (N.J. Super. Ct. Law Div. 2001), *overruled by* Psensky v. Am. Honda Fin. Co., 875 A.2d 290, 296 (N.J. Super. Ct. App. Div. 2005).

11. Their reliance is misplaced, as both courts recognize that recovery under the FTC Holder Rule is limited to sums paid under the contract. See *Lozada v. Dale Baker Oldsmobile, Inc.* (W.D. Mich. 2000) 91 F. Supp. 2d 1087, 1096 (finding "the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in.); *Oxford Finance v. Valez* (Tex. App. 1991) 807 S.W.2d 460, 463–64 (affirming the FTC Holder Rule "expressly limits the buyer's recovery from the creditor to the amount the buyer had already paid.").

12. *Music Acceptance Corp. v. Lofing*, 32 Cal. App. 4th 610 (1995), for example, merely noted that if consumers are to be made whole, in many cases, assignees must be held liable for the seller's wrongs. *Id.* at 626. It also reversed an award of attorney's fees to the assignee and remanded for the trial court to award fees to Lofing as the prevailing party. *Id.* at 630. The meaning of the FTC Holder Rule's second sentence was not raised or addressed in *Lofing*.

13. *E.g.*, Gibson v. Benz Boyz, Gateway One Lending & Finance, LLC, (Orange Co. Sup. No. 30 -201 5 -007 84932-CU-CO-CJC (Jan. 23, 2017) (Crandall, J.) ("Accordingly, the Plaintiff may recover her attorney fees as costs if, but only if, plaintiff has an independent legal basis for recovery of the attorney fees. In the instant action, plaintiff's claim for attorney fees against Gateway does not have a legal basis that is both independent of the cost statutes and grounded in a contract, statute or other noncontractual source of law. (See Sadr Reply Decl, Para 2, Ex. 1 ("[t]here are no independent claims lodged against Gateway" and that "Gateway's liability in the Action is limited by the FTC Holder Rule"]).

14. *C.f.* Duran v. Quantum Auto Sales, Inc., No. G053712, 2017 WL 6334220, at *1 (Cal. Ct. App. Dec. 12, 2017) ("We conclude Duran may recover attorney fees and costs from Veros in excess of the amounts paid on the contract, but the amount is limited to those fees/costs that resulted from litigation of claims against it."). *Duran* was issued while *Lafferty III* was on appeal.

15. Lafferty v. Wells Fargo Bank, 213 Cal. App. 4th 545, 556 n.4 (Cal. Ct. App. 2013) ("Fleetwood declared bankruptcy.").

pany (i.e., the "holder") to answer for the RV's alleged defects. Mr. Lafferty reached the California Court of Appeal three times in his efforts to pursue his claim and to get his attorney paid.

In the first decision (*Lafferty I*), the Court of Appeal found that the FTC Holder Rule meant what it said when it said "all claims and defenses"—namely, that all claims and defenses that the plaintiff could assert against the seller could be asserted against the holder.[16] The Court of Appeal remanded the action to allow the consumer to pursue those claims against the holder that the consumer claimed against the seller.

In the interim, and in the second (unpublished) decision (*Lafferty II*), the issue of attorneys' fees first raised its head when the Laffertys' attorney asked the Court of Appeal to make an interim award of attorneys' fees and costs. The Court of Appeal rejected the request.[17]

Following that decision, the parties entered into a stipulated judgment on pending claims against the holder. Based on that stipulated judgment, the trial court granted the Laffertys' motion for prejudgment interest and granted the consumers' trial court costs in part but denied the consumers' motion for post-trial award of attorneys' fees and nonstatutory costs and for attorneys' fees incurred in the appellate court.[18] The Laffertys again appealed.

In *Lafferty v. Wells Fargo Bank* (*Lafferty III*),[19] the Court of Appeal found that the attorneys' fees that the Laffertys incurred to prosecute the case as a whole were not recoverable against the holder, except to the extent such fees fell within the "amount paid by the debtor hereunder" plain language of the Holder Rule. In other words, the FTC Holder Rule capped fees.

This article addresses briefly the history of the FTC Holder Rule, surveys the decisions that existed prior to *Lafferty III* on whether the FTC Holder Rule caps fees, and discusses the *Lafferty III* decision itself.

16. *Id*. at 551 ("We hold that the plain meaning of the Holder Rule allows the Laffertys to assert all claims against Wells Fargo they might otherwise have against Geweke. Under the Holder Rule, however, the Laffertys may recover no more than what they actually paid toward the installment contract.").
17. Lafferty v. Wells Fargo Bank, No. C074843, 2015 WL 1383659, at *6 (Cal. Ct. App. Mar. 26, 2015) ("The order granting costs, in part, and denying the motion for attorney fees is affirmed. Wells Fargo Bank shall recover its costs on appeal.") (citation omitted).
18. Lafferty v. Wells Fargo Bank, N.A., 25 Cal. App. 5th 398 (Cal. Ct. App. 2018), *as modified on denial of reh'g* (Aug. 17, 2018), *review denied* (Oct. 31, 2018), *petition for cert. filed*, 2019 WL 446529 (U.S. Jan. 25, 2019) (No. 18-1012).
19. 25 Cal. App. 5th 398 (Cal. Ct. App. 2018).

II. Background

A. The FTC Holder Rule's Plain Language Strikes a Balance Between Preserving the Buyer's Claims and Limiting the Holder's Liability.

The FTC historically encouraged courts to apply the Holder Rule's plain language.[20] The FTC "affirmed the 'plain language' approach when it opined in 2012 that 'no additional limitations on a consumer's right to an affirmative recovery should be read by and into the Rule, especially since a consumer would not have notice of those limitations because they are not included in the credit contract.'"[21]

What does the FTC Holder Rule do? Specifically, it subjects the holder of a consumer credit contract to all claims and defenses that the consumer may have against the seller. The FTC Holder Rule strikes a balance, however, by also limiting the holder's contract-imposed, derivative liability imposed in the first sentence by stating in the second sentence that: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."

The clarity of the FTC Holder Rule is crucial because of the Rule's mechanism—that it be included in all consumer credit contracts that are subject to the Rule. Thus, the Holder Rule's language serves as a notice to the consumer that must be conspicuously displayed in large, boldface, all-capital type, and serves as a notice to the holder of the liability that it assumes. Because of its conspicuousness, "[i]t would be antithetical to the language and its typographic emphasis to hold that the Holder Rule language does not mean what it says."[22]

Thus, the FTC Holder Rule means what it says in permitting the consumer to assert against the holder all claims and defenses the consumer has against the dealer, whether for affirmative recovery or defensive use.[23] The FTC Holder Rule also means what it says by limiting the holder's liability. "The only limitation included in the Rule is that a consumer's recovery 'shall not exceed amounts paid' by the consumer under the contract."[24]

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20. *See, e.g.*, U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012) ("The Commission affirms that the Rule is unambiguous, and its plain language should be applied.").
21. AFSA Comment Letter, *supra* note 2; *see also* U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012).
22. Lafferty v. Wells Fargo Bank, 213 Cal. App. 4th 545, 560 (Cal. Ct. App. 2013); U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012).
23. U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012).
24. *Id.* ("[T]he Rule places no limits on a consumer's right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract."). As the FTC had earlier explained, the Holder Rule's second sentence "limits the consumer to a refund of monies paid under the contract, in

The FTC wrote the Holder Rule's second sentence to limit a holder's liability on claims that the Holder Rule's first sentence allows a consumer to bring against the holder.

> [The Holder Rule] protect[s] the consumer's right to assert against the creditor any legally sufficient claim or defense against the seller. The creditor stands in the shoes of the seller.[25]

There is an important limitation on the creditor's liability, however. The wording of the Notice includes the sentence "Recovery hereunder by the debtor shall be limited to amounts paid by the debtor hereunder[.]" This limits the consumer to a refund of monies paid under the contract, in the event that an affirmative money recovery is sought.[26] Thus, the FTC Holder Rule's second sentence limits a holder's vicarious liability on the claims against the seller that the FTC Holder Rule's first sentence allows a consumer to bring against the holder. On those claims, the FTC Holder Rule forces the holder to stand in the seller's shoes, but the second sentence limits the holder's liability to a refund of monies paid under the contract.

The first two words of the FTC Holder Rule's second sentence together refer to all judicial awards of money on any claim which the consumer would ordinarily have only against the seller but which the FTC Holder Rule's first sentence permits the consumer to assert against the holder as well. "The debtor cannot 'recover' any additional sum from the Holder, whatever the added sum's label—whether it be damages, interest, costs, attorney fees or otherwise."[27]

The fact that the FTC Holder Rule's mechanism of requiring that the term be included as a contractual clause in consumer credit contract means that the plain language used by the FTC drafters should control over individual, contracting parties' intentions "[W]here, as here, the United States drafts standard-form [terms] and mandates their inclusion in all contracts of a certain type to implement federal regulatory and statutory requirements, such standard mandatory [terms] must be interpreted to achieve the purpose and policy behind the regulatory requirements behind those provisions."[28] Individual parties' intentions are irrelevant in inter-

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the event that affirmative money recovery is sought. . . . [T]he consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in." FTC Guidelines, *supra* note 9, at 6–7.

25. FTC Guidelines, *supra* note 9, at 6–7.

26. *Id*.

27. AFSA Comment Letter, *supra* note 2.

28. Feaz v. Wells Fargo Bank, N.A., 745 F.3d 1098, 1105 (11th Cir. 2014) (citing Ill. Steel Co. v. Baltimore & Ohio R.R. Co., 320 U.S. 508, 511 (1944); Saavedra v. Donovan, 700 F.2d 496, 499 (9th Cir. 1983); Honeywell v. United States, 661 F.2d 182 (Ct. Cl. 1981)); *accord* Galanty v. Paul Revere Life Ins. Co., 23 Cal.4th 368, 374 (2000) (recognizing contractual "[l]anguage required by statute must be

preting government-mandated contract terms because "interpretation of the provision cannot vary from place to place or from contract to contract" and because the "contracting parties neither drafted the standard-form language nor had the authority to alter or omit that language through negotiation."[29] Hence, if interpretation is needed, the FTC's pronouncements about the Holder Rule—its Statement of Basis and Purpose, its Guidelines and its Advisory Opinion—provide guidance, not what the parties to the contact may have thought, read, or discussed in entering into it.

Nor should the laudable purpose of protecting consumers against the harshness of the holder-in-due-course rule be used to disregard the rest of the FTC's lengthy guidance.[30] To be sure, one of the Holder Rule's purposes was to require judicial scrutiny of bona fide disputes between buyer and seller, as the quoted sentence states, but that was far from the FTC's only purpose in promulgating the Holder Rule. The Rule's second sentence promotes a different, and to some extent, conflicting, purpose of protecting creditors against open-ended liability for the seller's misdeeds.[31] For this reason, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration."[32]

By limiting the consumer's "recovery," the FTC Holder Rule reaches farther than merely capping damages or restitution. "Recovery" means "[a]n amount awarded in or collected from a judgment or decree."[33] As an award of interest, costs, or attorney fees constitutes an amount awarded in or collected from a judgment; it is a "recovery" and hence falls with the literal, plain meaning of the Holder Rule's second sentence. Many courts have held that attorney fees are part of a consumer's "recovery" under the Holder Rule, and cannot exceed the amounts the consumer paid under the

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construed to effect not the intent of the parties but the intent of the Legislature").

29. *Feaz*, 745 F.3d at 1105.

30. "The purpose of this rule is to mandate judicial scrutiny of a credit sale transaction, when a bona fide dispute develops between buyer and seller." FTC Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53506, 53527 (Nov. 18, 1975) (to be codified at 16 C.F.R. pt. 433).

31. As the United States Supreme Court has cautioned, "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 525–26 (1987); *see also* Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. App. 4th 163, 176 n.9 (2000).

32. Mertens v. Hewitt Assocs., 508 U.S. 248, 261–62 (1993).

33. *Recovery*, Black's Law Dictionary (9th ed. 2009); *see also* Goodman v. Lozano, 47 Cal. App. 4th 1327, 1333 (2010).

contract.[34] The consumers' bar seeking recovery of attorneys' fees unlimited by the FTC Holder Rule, by contrast, has typically relied on the decisions of *Oxford Finance v. Valez*,[35] and *Lozada v. Dale Baker Oldsmobile, Inc*.[36] A close examination of both decisions, however, shows that neither support recovery of unlimited attorney's fees against the Holder. In *Oxford*, for example, the Texas Court of Appeals recognized the limitation of the FTC Holder Rule:

> Oxford argues that even if Valez may recover against it, she is limited to recovering the amount she paid under the contract. We agree . . . the Court concluded that the FTC did not intend to make commercial paper assignees the guarantor's of a seller's performance. In so holding, the court expressly observed that the sentence contained in the [FTC] notice which reads 'RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER' expressly limits the buyer's recovery from the creditor to the amount the buyer had already paid.

34. Houser v. Diamond Corp., No. 51901-8-I, 2005 WL 94452, at *6 (Wash. Ct. App. Jan. 18, 2005) ("Treble damages and attorney fees which would be available remedies against Designer Homes are available against AHF, subject to the limitation on total recovery contained in 16 C.F.R. § 433.2."); Alduridi v. Cmty. Trust Bank, No. 01A01-9901-CH-00063, 1999 WL 969644, at *12 (Tenn. Ct. App. Oct. 26, 1999) ("The Plaintiffs' claim for attorney's fees against NationsBank is based in part on the Holder Rule. In this case, the attorney's fees are not an amount 'paid by the debtor hereunder' and thus are not recoverable under the Holder Rule. The trial court's denial of the Plaintiffs' claim for attorney's fees is affirmed."); Riggs v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 411, 417 (W.D. La. 1998) ("Accordingly, this court holds that a creditor's derivative liability for seller misconduct under the FTC rule is limited to the amount paid by the consumer under the credit contract. Therefore, with respect to each plaintiff, each lender's liability is limited to the amount paid to it by that plaintiff. In other words, each plaintiff may recover from their lender their actual damages times three or $1,500, whichever is greater, the costs of the action, and their lender's pro rata share of reasonable attorney's fees, provided that the maximum recovery by any plaintiff may not exceed the amount paid the lender by that plaintiff."); Patton v. McHone, No. 01-A-01-9207CH00286, 1993 WL 82405, at *4–5 (Tenn. Ct. App. Mar. 24, 1993) ("The Chancellor wrongfully assessed attorney's fees against FMCC."); *see also* Reagans v. MountainHigh Coachworks, Inc., 881 N.E.2d 245, 253–54 (Ohio 2008) ("We conclude that the bank is not derivatively liable under the FTC rule for treble damages and attorney fees imposed against the seller under the Ohio Consumer Sales Practices Act."); Scott v. Mayflower Home Improvement Corp., 831 A.2d 564, 576 (N.J. Super. Ct. Law Div. 2001) ("The court holds that plaintiffs may not recover from the defendants treble damages or counsel fees if that would result in a recovery in excess of the amount paid by the consumer"), overruled on other grounds, Psensky v. Am, Honda Fin. Co., 875 A.2d 290, 296 (N.J. Super. Ct. App. Div. 2005).

35. 807 S.W.2d 460 (Tex. App. 1991).

36. 91 F. Supp. 2d 1087 (W.D. Wash. 2000).

Similarly, in *Lozada*, the court held that even if affirmative recovery was allowed, Plaintiffs' recovery would be limited to sums paid:

> This limits a consumer to a referral of moneys paid under the contract, in the event that an affirmative money recovery is sought. In other words, the consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; but the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in.

Thus, the overwhelming majority of decisions, if not virtually all of the decisions before *Lafferty*, had held that the FTC Holder Rule caps attorneys' fees.

B. The FTC Takes a Quick Look.

Since 1975, the FTC never really revisited the FTC Holder Rule.[37] In 2012, however, the FTC issued an advisory opinion letter in response to a query from the National Consumer Law Center.[38] "The [FTC's] 2012 letter affirmed the 'plain language' of [the Holder] Rule does not limit the claims and defenses that can be asserted against the Holder under the [FTC] Holder Rule's first clause[,]" and confirmed that the plain language of the FTC Holder Rule limited a consumer's recovery to amounts not to exceed what had been paid by the consumer under the contract.[39] The FTC cited a subset of a number of decisions that had held that the FTC Holder Rule's liability cap is inclusive of attorneys' fees and costs[40] in a footnote appended to this sentence: "It remains the Commission's intent that the plain language of the Rule be applied, which many courts have done."[41]

In February 2015, the FTC gave public notice of its intent to request comments for the first time regarding the continued viability of the FTC Holder Rule,[42] specifically seeking public comments on the overall costs

37. 16 C.F.R. Part 433: Federal Trade Commission Trade Regulation Rule Concerning the Preservation of Consumers' Claims and Defenses (The Holder Rule), F.T.C. Adv. Op. at 2 (May 3, 2012).
38. U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012).
39. AFSA Comment Letter, *supra* note 2; *see also* U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012).
40. U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012); *see* cases cited *infra* note 41.
41. U.S. Fed. Trade Comm'n, Opinion Letter on The Holder Rule (May 3, 2012). The three cases the FTC cites to are *Simpson v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 405, 409 n.10 (W.D. La. 1998), *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411, 416 n.13 (W.D. La. 1998), and *Scott v. Mayflower Home Improvement Corp.*, 831 A.2d 564, 573–74 (N.J. Super. Ct. Law Div. 2001). The FTC also cited *Jaramillo v. Gonzalez*, 50 P.3d 554, 563–64 (N.M. Ct. App. 2002), in which the court affirmed an award of attorneys' fees without considering whether the fee award was limited by the Holder Rule's limit on "recovery" against the Holder.
42. Modified Ten-Year Schedule for Review of FTC Rules and Guides, 80 Fed. Reg. 5713, 5713 (Feb. 3, 2015).

and benefits, and regulatory and economic impact, of its Rules and Regulations under the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, commonly known as the "FTC Holder Rule." As of the date of publication of this article, the FTC has not issued any further guidance or response in connection with the public comments the FTC sought in 2015.

C. The FTC Affirms the Holder Rule Caps Recovery of Attorneys' Fees.

On May 2, 2019, the FTC issued its long-awaited guidance, which synthesized nineteen comments it received in response to its Federal Register Notice in February 2015. In the FTC's guidance, the FTC affirmed the preservation of the FTC Holder Rule without any modifications to its language.[43] First, the FTC found a continued need for the Rule, noting that none of the commentators had advocated that the Holder Rule should be abrogated.[44] Next, as to the first clause of the Holder Rule, the FTC confirmed that the Holder Rule "places no limits on a consumer's right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract."[45] Notably, relevant here and to *Lafferty*, the FTC concluded that the Holder Rule caps attorneys' fees, stating that,

> 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.[46]

The FTC, then, recognized the self-evident: that the Holder Rule would not cap fees where the federal or state law provided a claim against a holder that was independent of the claims or defenses that arose from the seller's conduct.[47]

D. Most Judicial Opinions Had Held that the FTC Holder Rule Capped Attorneys' Fees.

A number of courts had held that a consumer's recovery—including attorneys' fees—under the Holder Rule is limited to the amounts the consumer paid under the contract.[48] For example, in concluding that a buyer's attorneys' fees were included within the second sentence of the FTC Holder Rule, the Ohio Supreme Court explained in *Reagans v. Mountain High Coachworks, Inc.*:[49]

43. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 80 Fed. Reg. 85, 18711 (May 9, 2019) (to be codified at 16 C.F.R. pt. 433).
44. *Id.*
45. *Id.*
46. *Id.* at 18713.
47. *Id.*
48. *See* cases cited *supra* note 41.
49. 881 N.E.2d 245 (Ohio 2008).

> The notice required by the FTC rule also limits the creditor's liability by providing that "[r]ecovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." . . . [I]f the consumer seeks an affirmative monetary recovery from the creditor, the consumer will be limited to "a refund of monies paid under the contract." . . . .
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> The FTC-mandated notice in the buyers' loan contract limited their monetary recovery against the [assignee] bank to the amount paid by the buyers under the contract. The buyers' judgment against the seller for treble damages and attorney fees (i.e., $200,014.64) exceeded the amount that the buyers actually paid under the contract (i.e., $43,105.80) . . . .
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> As one treatise explains, . . . the maximum exposure of the creditor for the buyer's damages under the FTC rule is the amount the buyer already paid under the contract. "[E]ven if the buyer rejects [goods] and proves substantial damages, the maximum exposure of the creditor under the FTC rule is the amount already paid by the debtor. If, for example, the debtor buys an $8,000 car, pays $200 down and suffers $20,000 of damages as a result of breach of warranty, he can recover only $200 from the creditor and must turn to the seller for the additional $19,800."[50]

Other courts addressing the question agreed.[51]

III. The *Lafferty* Decisions

A. *Lafferty I* Preserves Claims and Defenses that Could Be Asserted Against the Holder.

In 2005, Patrick and Mary Lafferty purchased an RV from Geweke Auto & RV Group pursuant to a retail installment sales contract (RISC).[52] Geweke assigned the financing of the RISC to Wells Fargo Bank in accordance with the terms of the dealer agreement between them.[53] Shortly after the pur-

50. *Id*. at 251–52.

51. Nebraska *ex rel*. Stenberg v. Consumer's Choice Foods, Inc. 755 N.W.2d 583, 594 (Neb. 2008) ("The [court] held that attorney fees were not 'claims' that the consumer could assert under the FTC Holder Rule where the assignee was not involved in effecting consumer transactions."); Alduridi v. Cmty. Trust Bank, No. 01A01-9901-CH-00063, 1999 WL 969644, at *12 (Tenn. Ct. App. Oct. 26, 1999) ("[W]here the plaintiff's claim for attorney's fees is based on the seller's misconduct, recovery under the Holder Rule is limited to the amounts paid under the contract."); Riggs v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 405, 410, 417 (W.D. La. 1998) (holding the plaintiff could recover a share of attorney fees, "provided that the maximum recovery by any plaintiff may not exceed the amount paid [the holder] by that plaintiff."); Simpson v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 405, 410–11 (W.D. La. 1998) ("In *Oxford Finance Co. v. Velez*, 807 S.W.2d 460 (Tex. App. 1991), the court allowed the plaintiff to recover attorney's fees from the lender, in excess of the amounts paid in . . . but limited that recovery to only those attorney's fees that resulted from her own attorney's pursuit of claims against the lender . . . . This court disagrees with the conclusion reached in *Oxford*."); Patton v. McHone, No. 01-A-01-9207CH00286, 1993 WL 82405, at *4–5 (Tenn. Ct. App. Mar. 24, 1993).

52. Lafferty v. Wells Fargo Bank, 213 Cal. App. 4th 545, 551 (Cal. Ct. App. 2013).

53. *Id*.

chase, the Laffertys observed mechanical and electrical issues with the RV, and returned the vehicle to Geweke for repairs.[54] Ultimately, the Laffertys refused to make the payments Geweke had requested for the prescribed repairs, and informed Wells Fargo they would stop making payments owed under the RISC until the motor home was repaired.[55] According to the Laffertys, the vehicle was never repaired, and they followed through with their promise of halting payments.[56] Wells Fargo took possession of the vehicle and reported the default to consumer reporting agencies.[57]

In November 2006, the Laffertys sued Geweke, Wells Fargo, and the manufacturer of the RV.[58] As against Wells Fargo, they alleged causes of action for breach of warranty, breach of contract, breach of the covenant of good faith and fair dealing, violation of the Consumer Legal Remedies Act (CLRA), violation of the Song-Beverly Act, violation of the Tanner Consumer Protection Act, violation of the Unfair Competition Law, fraud, negligence, negligent credit defamation, and for declaratory and injunctive relief.[59] As to the first seven causes of action, the claims against Wells Fargo were premised on Wells Fargo's role as "holder" of the RISC under the Holder Rule.[60]

In July 2009, Wells Fargo demurred to the four causes of action for violation of the CLRA, negligence, negligent credit defamation and declaratory and injunctive relief.[61] The trial court sustained the demurrer, without leave to amend, and Wells Fargo filed an answer, generally denying the remaining causes of action.[62] Then it moved for summary adjudication, arguing, among other positions,[63] that summary adjudication was required based on the proper finding of a single issue of law—that Wells Fargo could not be affirmatively sued for Geweke's alleged misconduct simply because the RISC was assigned to Wells Fargo.[64] The trial court agreed, and held the Holder Rule limits a borrower's claims against a lender, that would otherwise be brought against the seller, to instances in which the buyer received little or no value under the RISC.[65] The trial court cited the Holder Rule itself, and specifically its limitation on recovery not to exceed amounts

54. *Id.* at 551–52.
55. *Id.* at 552.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 553.
60. *Id.*
61. *Id.* at 554.
62. *Id.*
63. In addition, Wells Fargo objected to the evidence the Laffertys had offered to create a factual dispute, arguing they relied entirely on their own conclusory interrogatory responses. *Id.* at 555.
64. *Id.*
65. *Id.*

paid by the debtor.[66] Thereafter, the Laffertys proceeded to trial against Geweke and obtained a judgment in their favor in the amount of $210,000.[67] On November 16, 2010, Wells Fargo moved for attorney's fees, and was awarded $45,700.[68] Judgment was entered in Wells Fargo's favor and the Laffertys appealed.[69]

On appeal, the Laffertys took issue with numerous facets of the trial court's holding.[70] As to their issue with the trial court's application of the Holder Rule, the Laffertys argued the Holder Rule should allow them to assert any claims against Wells Fargo they might otherwise have against Geweke, and that Wells Fargo was not entitled to the attorneys' fees it had been awarded.[71] The California Court of Appeal for the Third District agreed with the Laffertys' position that the Holder Rule allowed them to assert the same claims against Wells Fargo as they could otherwise assert against Geweke in connection with the sale of the motor home. The court held that the Holder Rule allows a buyer to assert against the holder of a consumer credit contract "'all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds' of the financing."[72] It cited to fundamental principles of statutory interpretation, and looked directly to the words of the statute, interpreting them as clearly and unambiguously designating any creditor of a contract to be exposed to any claim that could be asserted against the seller of the good being financed.[73] It further explained that the notice required under the statute made no claim that a seller, or creditor/assignee, would be liable for a buyer's damages only in the instance that the buyer received little or no value under the contract.[74] On that basis, it did not matter that the Laffertys had made just nine payments under the contract.[75] Under the Holder Rule, they could still assert any claim or defense against Wells Fargo they could otherwise assert against Geweke.[76]

Nevertheless, the Court of Appeal expressly limited the Laffertys' rights. To the extent the Laffertys could simultaneously assert their claims against Wells Fargo, their recovery would be limited to amounts they had paid under the RISC.[77] Again, the Court of Appeal recited the language of the

66. *Id.*
67. *Id.* at 556.
68. *Id.*
69. *Id.*
70. For purposes of this article we have limited our discussion to the Laffertys' appeal of issues pertinent to interpretation of the Holder Rule.
71. *Id.* at 550.
72. *Id.* at 560 (quoting FTC Holder Rule, 16 C.F.R. § 433.2(2012)(italics & capitalization omitted).
73. *Id.*
74. *Id.*
75. *Id.* at 563.
76. *Id.*
77. *Id.*

statute, stating, "recovery hereunder shall not exceed amounts paid by the debtor hereunder."[78]

Thus, the Court of Appeal reversed the trial court's holding sustaining Well Fargo's demurrer, solely as to the causes of action for negligence and the CLRA, and advised that on remand they could proceed to trial on those claims based on the court's interpretation of the Holder Rule.[79] Also, due to the trial court's erroneous dismissal of two of the Laffertys' causes of action, the Court of Appeal found that Wells Fargo could no longer be considered the prevailing party and, thus, the attorney's fees award must be reversed.[80]

B. *Lafferty II*: The Court of Appeal's Discussion of Interim Attorneys' Fees.

On remand, the Laffertys moved for costs and attorneys' fees.[81] The trial court awarded them $2,495.29 in costs as instructed by the Court of Appeal, but denied their motion for $232,110 in attorneys' fees.[82] Again, the Laffertys appealed, arguing for an interim award of close to a quarter-million dollars in attorneys' fees.

The Laffertys argued that they should be compensated on an interim basis for pursuing an important legal issue in *Lafferty I*, although the Laffertys claimed that the Court of Appeal's ruling constituted a "final judgment."[83] The Court of Appeal, in an unpublished decision, disagreed with the Laffertys on all points, and affirmed the trial court's order awarding costs and denying fees.[84] The Court of Appeal explained that under the California Rules of Court, unless the court specifies otherwise, the award included neither attorneys' fees, nor precludes a party from seeking them under the applicable attorneys' fees statute.[85] The Court of Appeal held that it did not expressly award the Laffertys attorneys' fees in its prior order, and an award of costs was no indication as to who may eventually be the prevailing party.[86] Nor was the disposition in *Lafferty I* a "final judgment" as the Laffertys claimed.[87] The Court of Appeal further reiterated that any award of attorneys' fees would remain premature while there were pending causes of action in the trial court, and that the Laffertys could not

78. *Id*. (quoting FTC Holder Rule, 16 C.F.R. § 433.2 (2012) (capitalization omitted)).
79. *Id*. at 260.
80. *Id*.
81. Lafferty v. Wells Fargo Bank, No. C074843, 2015 WL 1383659, at *1 (Cal. Ct. App. Mar. 26, 2015).
82. *Id*.
83. *Id*.
84. *Id*. at *6.
85. *Id*. at *1 (citing Cal. Rules of Court, R. 8.278).
86. *Id*.
87. *Id*. at *2.

be considered the prevailing party as against Wells Fargo as the Holder simply because they had obtained prior judgment against Geweke.[88]

C. *Lafferty III:* The FTC Holder Rule Limits the Holder's Liability to the Amounts Paid Hereunder, Inclusive of Plaintiff's Attorneys' Fees.

Following the court's holding in *Lafferty II* and issuance of remittitur, the parties returned to the trial court again, as the Laffertys' CLRA and negligence claims against Wells Fargo remained unresolved. In May 2015, the parties stipulated to a judgment in which they agreed that: 1) "[F]or purpose of applying the Holder Rule, the total amount [the Laffertys] actually paid toward [the RISC] . . . [was] the sum of [$68,000]"; 2) that the Laffertys had recovered the same from Wells Fargo "on their causes of action for negligence and under the CLRA (Civ. Code 1770 et seq.) which they would have otherwise have had only against Geweke Auto & RV Group but for the Holder Rule;" and 3) that the Laffertys were the prevailing party.[89]

After the trial court entered the judgment, it awarded the Laffertys $40,596.93 in prejudgment interest and $8,384.33 in costs, but denied their motion for $1,980,070 in post-trial attorneys' fees, $464,220 in post-appeal attorneys' fees, and $16,816.15 in non-statutory costs.[90] Wells Fargo appealed the award of prejudgment interest and costs, and the Laffertys cross-appealed the denial of their motion for attorneys' fees and non-statutory costs.[91]

On appeal, Wells Fargo contended the FTC Holder Rule and the California statute governing the award of costs required the Court of Appeal to reverse the trial court's award of prejudgment interest and costs, as it limited the Laffertys' recovery to the amount paid under the contract.[92] On that basis, it demanded a reversal of the award in excess of the $68,000 awarded to the Laffertys.[93] In contrast, the Laffertys argued they were entitled to recover the attorneys' fees they had demanded under multiple civil and procedural statutes, none of which, they claimed, implicated the Holder Rule.[94] In the alternative, the Laffertys claimed that applying the FTC Holder Rule to cap their attorneys' fees violated the First Amendment.[95] In its final fallback, the Laffertys argued the Holder Rule cap

88. *Id.* at *3.
89. Lafferty v. Wells Fargo Bank, N.A., 25 Cal. App. 5th 398 (Cal. Ct. App. 2018), *as modified on denial of reh'g* (Aug. 17, 2018), *review denied* (Oct. 31, 2018), *petition for cert. filed*, 2019 WL 446529 (U.S. Jan. 25, 2019) (No. 18-1012).
90. *Id.* at 404.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 405.
95. *Id.*

amounted to $279,406.87, not the $68,000 in payments that the Laffertys made on the RISC.[96]

To decide how to determine Wells Fargo's liability under the Holder Rule, the Court of Appeal returned to the same principles of statutory interpretation it had employed in *Lafferty I*. It reemphasized the purpose of the Holder Rule was to reallocate the cost of seller misconduct to the creditor financing the purchase contracts, as they were the mightier party, by providing consumers with a new cause of action against their creditors.[97] In interpreting the limiting portion of the Holder Rule's notice ("RECOVERY HEREUNDER SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER") the Court of Appeal considered the plain meaning of the statute.[98] Specifically, it employed Black's Law Dictionary definition of "recovery" to find it to mean, "an amount awarded in or collected from a judgment or decree."[99] In construing the meaning of "shall not exceed amounts paid by the debtor" the Court of Appeal examined relevant guidance by the FTC. In its own explanation, the FTC claimed the statement was meant to limit a consumer's ability to recover from the creditor an affirmative recovery that exceeds the amount she has paid.[100] Lastly, the Court of Appeal asserted the FTC's interpretation of "hereunder" which was meant to dictate the amount and type of recovery a consumer can assert specifically under the Holder Rule, further indicated that the aforementioned limitation did not apply to independent causes of action accruing under other state and local laws.[101] In other words, "[i]f a larger affirmative recovery is available against a creditor as a matter of state law, the consumer would retain this right."[102] To summarize, the Court of Appeal interpreted the Holder Rule to allow for recovery of more than just compensatory damages, but limited to amounts actually paid by the debtor under the contract.[103] In addition, the Court of Appeal found that the Holder Rule's constraints on recovery did not apply to separate causes of action that existed independent of the Holder Rule, under state or local law.[104]

Having clarified the proper interpretation of the Holder Rule, the Third District applied it to reach its disposition on the Laffertys and Wells Fargo's respective appeals. The Court of Appeal found that the Code of Civil Procedure section 1032, subdivision (b) governed the Laffertys' costs award.[105]

96. *Id.*
97. *Id.* at 411 (citation omitted).
98. *Id.* at 412.
99. *Id.* (citation & internal quotations omitted).
100. *Id.* at 413 (citing FTC Guidelines, *supra* note 9, at 6).
101. *Id.*
102. *Id.* (citation & internal quotations omitted).
103. *Id.*
104. *Id.*
105. *Id.* at 414.

The statute explicitly provides, "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."[106] The court concluded that the language of the statute made clear that the Laffertys were awarded costs as the prevailing party in the action overall, rather than pursuant to the causes of action provided by the Holder Rule.[107] As such, it held the Laffertys could be awarded costs irrespective of the Holder Rule, and affirmed the trial court's award of costs.[108]

Under similar reasoning, the Court of Appeal affirmed the Laffertys' award for prejudgment interest. Under Civil Code section 3278, "a person who is entitled to recover damages certain . . . is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt."[109] As the statute applies to every person, the Court of Appeal held that this rule also focused on the action and person overall, rather than a specific cause of action (brought under the Holder Rule).[110] For this reason, the Laffertys were entitled to prejudgment interest as awarded by trial court, and the Holder Rule's limitations on recovery were of no consideration.[111]

Turning to the Laffertys' appeal, the Court of Appeal considered each of their alleged statutory claims for entitlement to attorneys' fees. First, the Laffertys relied on the fee shifting provision as provided in Civil Code section 1717. Thereunder, "in any action on a contract, where the contract specifically provides that the attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then party who is determined to be the party prevailing on the contract, whether he or she is the party in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."[112] As stated, the statute applies to causes of action for breach of contract. The Court of Appeal distinguished the statute as inapplicable to the Laffertys' case, as per the parties' stipulation, the Laffertys had prevailed as to their causes of action for negligence and the CLRA.[113] Having previously forfeited their right breach of contract claim, the court found the Laffertys could not avail themselves of the statute.[114]

The Court of Appeal also rejected the Laffertys' claim that Wells Fargo owed them attorneys' fees under California Civil Code section 1780 of the CLRA, for claims the Laffertys had brought against Geweke.[115] That statute

106. *Id.* (citing Cal. Civ. Proc. Code § 1032 (2018) (internal quotations omitted)).
107. *Id.*
108. *Id.*
109. *Id.* at 415–16 (Cal. Civ. Code § 3287 (2014)).
110. *Id.* at 416.
111. *Id.*
112. *Id.* at 417 (citing Cal. Civ. Code § 1717 (1987)).
113. *Id.* at 418.
114. *Id.*
115. *Id.* at 419.

allows the court to "award costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to [the CLRA]."[116] Because the Laffertys had effectively "borrowed" their cause of action against Geweke for its misconduct under the CLRA, and asserted it against Wells Fargo pursuant to the Holder Rule, its claim against Wells Fargo was not actually "filed pursuant to" the CLRA, as required by the statute's attorney's fees provision.[117] Without a direct claim under the CLRA against Wells Fargo, the Laffertys were precluded from recovering attorneys' fees under the statute.[118]

The Laffertys also claimed they were entitled to attorneys' fees under the Code of Civil Procedure section 1021.5, which provides for private attorney general fees.[119] Reviewing the trial court's denial under an abuse of discretion standard, the Court of Appeal affirmed that the record supported that the Laffertys were not entitled to attorneys' fees on this additional basis. Specifically, it held the trial court did not abuse its discretion in finding that Wells Fargo did not engage in any behavior at odds with the greater public interest, and that the Laffertys' victory did not confer a significant benefit to the greater public or a group of class members, at large.[120] It dismissed the Laffertys' assertion that under this finding, no attorney would accept contingency Holder Rule cases if the attorney could not obtain attorney's fees.[121] After all, the American Rule is that the prevailing party does not become entitled to attorney's fees.[122] As such, it affirmed the trial court's order denying the Laffertys' motion for attorneys' fees.

The Laffertys also attacked factually what the actual "cap" was under the Holder Rule, arguing that the Holder Rule cap should derive from the entire balance on the RISC ($279,406.87) rather than the amount that they actually paid, despite that they had stipulated for purposes of the Holder Rule, their total award was $68,000.[123] They further explained that they were entitled to the amount of proceeds for the sale of the motor home, after it was repossessed, and for the deficiency balance on the note to which the Laffertys had to pay taxes on debt forgiveness.[124] The Court of Appeal rejected the argument, finding that it contradicted the language of the Holder Rule and the guidance from the FTC.[125] In the FTC's own words, a "consumer [could] assert, by way of claim or defense, a right not to pay

116. *Id.* (citing Cal. Civ. Code § 1780 (2010) (internal quotations & emphasis omitted)).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 420–21.
121. *Id.*
122. *Id.*
123. *Id.* at 422.
124. *Id.*
125. *Id.* at 422–23.

all or part of the outstanding balance owed the creditor under the contract; but the consumer [could] not be entitled to receive from the creditor an affirmative recovery which exceeds the amount of money the consumer has paid in."[126] Thus, the Court of Appeal reiterated that "the maximum exposure of the creditor under the FTC rule is the amount already paid by the debtor" and affirmed the trial court's denial.[127]

Finally, the Laffertys claimed the trial court's denial of their motion for attorneys' fees violated their First Amendment right of petition, right to due process of law, and to equal protection.[128] The Court of Appeal paid short shrift to these arguments, for reasons outside of the scope of its interpretation of the Holder Rule, itself.[129]

D. Petition for Review . . . Denied.

The Laffertys and a host of consumer lawyers sought to have the Court of Appeal's opinion de-published and/or to have the California Supreme Court review the Court of Appeal's decision.[130] The Laffertys invited the Court to consider 1) Whether a prevailing consumer's right to recover attorney fees under Civil Code section 1717 can be waived; 2) whether rights under the CLRA can be waived; 3) Whether prevailing parties should recover attorney's fees under Code of Civil Procedure section 1021.5; 4) Whether the Holder Rule as defined by the Third District creates a new cause of action in California; 5) Whether the Holder Rule caps to "amounts paid," and not as declared by the Court of Appeal, to amounts "actually paid"; and 6) whether the "Holder Rule" as applied by the Court of Appeal impaired their First Amendment rights.

The commenters from the consumers' bar, however, attempted to foreshadow an apocalyptic end of consumer litigation because defrauded car buyers would not be able to find attorneys to represent them without the ability to obtain unlimited and uncapped awards of attorneys' fees from assignees of RISCs.[131] Wells Fargo responded that similar lamentations were heard in virtually every request made to the California Supreme Court and that the Court of Appeal did not err in its interpretation of the FTC Holder Rule.[132]

On October 31, 2018, the California Supreme Court declined review of the Court of Appeal's decision,[133] rendering *Lafferty III* binding on all sub-

126. *Id.* at 423 (citing FTC Guidelines, *supra* note 9, at 7).
127. *Id.* (citing Reagans v. MountainHigh Coachworks, Inc., 881 N.E.2d 245 (Ohio 2008) (internal quotations omitted)).
128. *Id.* at 424.
129. *See id.* at 424–27.
130. Petition for Review, *Lafferty*, 2018 WL 4194582 (No. S250794).
131. *Id.* at *35–47.
132. Answer to Petition for Review, *Lafferty*, 2018 WL 4384137, at *6–7 (No. S250794).
133. Lafferty v. Wells Fargo Bank, N.A., 25 Cal. App. 5th 398 (Cal. Ct. App.

ordinate California courts.[134] On January 25, 2019, the Laffertys filed a Petition for a Writ of Certiorari with the United States Supreme Court, requesting that the Supreme Court address two purported questions of constitutional importance: (1) Whether the "Holder Rule" as discerned by the California Third District Court of Appeal implies a new private cause of action? (2) Whether the "Holder Rule" cap as applied by the Third District Court of Appeal preempts the California Consumers Legal Remedies Act (Civil Code section 1780(e)) that awards reasonable attorney fees to a prevailing plaintiff?[135] On April 1, 2019, the Supreme Court denied the Petition.[136]

IV. Conclusion

The Court of Appeal's decision in *Lafferty* is now binding in California trial courts and represents a decision that finally brings California in line with the overwhelming majority of out-of-state and federal decisions interpreting the FTC Holder Rule. *Lafferty* should rightfully reign in the efforts to expand liability for innocent assignees based on the delicate bargain that the FTC Holder Rule strikes between providing a consumer with an entity to answer for the sale of a non-conforming product and the imposition of limited liability on an innocent holder of a consumer credit contract.

2018), *as modified on denial of reh'g* (Aug. 17, 2018), *review denied* (Oct. 31, 2018), *petition for cert. filed*, 2019 WL 446529 (U.S. Jan. 25, 2019) (No. 18-1012).

134. Auto Equity Sales, Inc. v. Superior Court of Santa Clara Cty., 57 Cal.2d 450, 455–56 (1962) ("Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.").

135. Petition for Writ of Certiorari, *Lafferty*, 2019 WL 446529 (No. 18-1012).

136. Lafferty v. Wells Fargo Bank, N.A., __ S.Ct. __ (2019), 2019 WL 4297606 (2019).