The FTC Holder Rule Redux in 2022

By Scott J. Hyman*

I. Introduction**

In 1975, the Federal Trade Commission promulgated the "FTC Holder Rule," which 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:
>
> **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.[1]**

This regulation thus subjects the holder of any consumer credit contract to the same claims that a buyer of a good or service could bring against the seller of that good in connection with the purchase. Through its requirement to be included as a contractual term in all consumer credit transactions subject to its regulation, the FTC Holder Rule mandates that "consumers [have] a practical means of redress in their purchase of consumer goods and services and gives[s] creditors an incentive to supervise their sellers to prevent losses."[2]

Despite the FTC Holder Rule's unambiguous language capping a buyer or "debtor's" recovery for claims brought under the regulation to amounts paid under the credit contract, the interpretation and application of this language has varied through "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" such amounts.[3]

In California, multiple courts "had addressed the scope of the FTC Holder Rule's first clause, but"[4] despite having been the subject of multiple decisions across the nation,[5] "the issue of the scope of the second clause and whether it capped attorneys' fees and costs had [only recently] been addressed at the appellate level."[6] Previously, in California, "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capped the buyer's attorneys' fees was relegated to a few scattered trial court level and arbitration rulings, and an unpublished California Court of Appeal decision."[7]

The debate in California finally came to a head in *Lafferty v. Wells Fargo Bank*,[8] where "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 [cap of] the Holder Rule."[9] In short, the FTC Holder Rule capped their attorneys' fees. Notably, the court signaled the matter was better suited for legislative action should it disagree with the court's interpretation.[10] A detailed summary of the regulatory and judicial history regarding the FTC Holder Rule can be found in our previous article.[11]

The backlash after *Lafferty* was immediate and vocal. Amidst pressure from the consumers' bar,[12] the California State Assembly introduced an Assembly Bill 1821 on March 6, 2019,[13] which authorized the award of attorney's fees, costs, and expenses "to the fullest extent permissible" for prevailing plaintiffs in cases brought pursuant to the FTC Holder Rule.[14] The Assembly Committee's analysis justified the legislation on the—some would say false—basis 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. However, a recent California appellate court ruling overturned this longstanding precedent. This bill returns the law to its previous form, allowing the award of attorneys' fees in these consumer protection cases.[15]

On May 2, 2019, after *Lafferty* and while Assembly Bill 1821 was working through the California Legislature, the FTC issued long-awaited guidance affirming the preservation of the FTC Holder Rule without any modifications to its existing language.[16] 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."17 Notably, the commission concluded that the Holder Rule specifically caps attorneys' fees accordingly, "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."[18]

Nevertheless, despite the FTC's statement of its clear intent, the author of Assembly Bill 1821 doubled-down before the Senate Judiciary Committee and on the Senate Floor, reiterating the purported "prevailing rule" in California arguing that the pre-*Lafferty* rule needed to be "restored," relying on an unpublished California case and never mentioning the FTC's May 2, 2019 Guidance.[19] Despite the possibility that the proposed statute

was preempted by federal law, and the clear misrepresentation of the status of the FTC Holder Rule, California's Assembly swiftly pushed the Assembly Bill 1821 through the enactment process. The legislation was unopposed,[20] underwent no revisions,[21] and by July 12, 2019, Assembly Bill 1821 was approved by Governor Gavin Newsom and chaptered by the Secretary of State as California Civil Code section 1459.5.[22]

This Article addresses what happened judicially after *Lafferty,* specifically in *Pulliam v. HNL Automotive Inc.,*[23] and the enactment of Civil Code 1459.5.

II. Pre-emption of Section 1459.5

A. The FTC's Post–*Lafferty* Guidance.

Since its promulgation in 1975, the FTC never really revisited the meaning or purpose of the FTC Holder Rule.[24] In 2012, however, the FTC issued an advisory opinion letter in response to a query from the National Consumer Law Center.[25] 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.[26] The FTC cited a subset of decisions holding that the FTC Holder Rule's liability cap is inclusive of attorneys' fees and costs[27] 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."[28]

The FTC concluded that the Holder Rule caps attorneys' fees, "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."

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,[29] specifically seeking public comment on the overall costs, 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."

The FTC noted that none of the commentators advocated that the Holder Rule should be abrogated, and, therefore, found a continued need for the Rule.[30] 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."[31] Notably attorneys' fees—cannot exceed the amount the consumer paid under the contract. The FTC concluded that the Holder Rule caps attorneys' fees, "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."[32]

The FTC also recognized 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.[33]

B. The California Legislature Responds to *Lafferty* by Passing Civil Code § 1459.5, but Never Mentions the FTC's May 2, 2019 Guidance.

While the FTC was still reviewing comments submitted in its administrative review of the FTC Holder Rule, on March 6, 2019, the California Assembly Committee on Judiciary introduced Assembly Bill 1821.[34] The bill's express intent was to provide that a plaintiff who prevails on a cause of action against a defendant named pursuant to the FTC Holder Rule, "can claim attorney's fees, costs and expenses from that defendant to the fullest extent possible as if the plaintiff had prevailed" on that cause of action against the seller.[35] To that end, the proposed statute stated:

> 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.[36]

The bill was assigned to the Assembly Committee on Judiciary for analysis, which stated its purpose was to "correct" the effect of the court's ruling in *Lafferty* and "restore" the FTC Holder Rule to its original meaning -- "restoration" purportedly meaning to "restore" the law to a reading that purportedly would allow consumers to recover attorney's fees from financial institutions.[37] The Committee explained that the meaning of the FTC Holder Rule's second clause shielded a lender or assignee of a sales contract from liability for punitive and consequential damages stemming from a seller's misconduct.[38]

As a matter of public policy, the Committee opined that the *Lafferty* ruling purportedly had caused "a chilling effect on attorneys' willingness to take on auto fraud and lemon law cases" due to their inability to recover fees and costs beyond the amounts their clients paid under the contract at issue.[39] It purported to draw support from a myriad of public interest law firms and non-profits such as the California Low-Income Consumer Coalition, National Consumer Law Center, and Consumer Attorneys of California, as well as two individual attorneys.[40] Public interest groups predominately cited the "occasional disproportionality between the client's damages and their attorney's fees," the lack of incentive to settle as opposed to wearing down the consumer with protracted litigation, and the impracticality for consumers' attorneys to pursue claims where the dealer employs abusive litigation tactics.[41]

Assembly Bill 1821 passed committee on April 9, and the proposed bill was read a second and third time on the Assembly Floor on April 10 and April 25, 2019.[42] The Assembly's analysis prepared in anticipation of the third reading largely summarized the initial bill analysis and confirmed that no arguments in opposition of the bill had been presented.[43] The bill passed in the Assembly and moved to the Senate for first reading on April 25.[44] This process repeated in the California Senate, moving to the Senate Committee on Judiciary the same day—*with no mention that the FTC had itself*

issued its Guidance on May 2, 2019.[45] The bill was set for hearing on June 11, 2019, where it passed the Senate Committee without opposition, mention of the FTC's new guidance, or correction of the Assembly Analyses' false statement that Assembly Bill 1821 was required to "return" California to what its author claimed was the prior state of the law.[46] Following a second and third reading in the Senate, the bill was approved in both houses and was presented to Governor Gavin Newsom for signing on July 8, 2019.[47] The bill was signed into law on July 12, 2019 and chaptered by the Secretary of State under Chapter 116, Statutes of 2019.[48] The rule was slated to take effect on January 1, 2020.[49]

C. The FTC Holder Rule Preempts Civil Code § 1459.5.

In 2020, *Spikener v. Ally Financial, Inc*.[50] flew into this perfect storm of competing attempts to control the interpretation and application of the FTC Holder Rule, and squarely contemplated whether Civil Code section 1459.5's authorization of uncapped recovery of attorney's fees was pre-empted by the FTC Holder Rule. As in *Lafferty*, the First District Court of Appeal held that to the extent Civil Code section 1459.5 "authorizes a plaintiff to recover attorney[s'] fees on a Holder Rule claim even if that results in a total recovery greater than the amount paid under the contract [at issue], section 1459.5 conflicts with, and is therefore preempted by, the Holder Rule."[51]

Damien Spikener sued Ally Financial, Inc. before the legislature's passage of Civil Code section 1459.5. Spikener had purchased a vehicle from Premier Automotive of Oakland, LLC in 2016, but the seller had not advised him at the time of sale that the vehicle had previously been involved in a major collision.[52] Shortly after the sale, the contract was assigned to Ally for financing.[53] In February 2018,[54] Spikener filed a complaint against Ally for violation of the Consumers Legal Remedies Act due to seller's alleged misrepresentations about the condition of the vehicle.[55] A few months later, the parties settled the matter for $3,500, the approximate amount Spikener had paid to Ally under the contract.[56] The settlement preserved Spikener's claim for attorneys' fees and declared him the prevailing party in that claim, but simultaneously preserved Ally's right to oppose any motions for fees.[57]

As expected, Spikener filed a motion for recovery of his $13,000 in attorney's fees and costs.[58] The Superior Court in Alameda County, pursuant to *Lafferty*, awarded Spikener his costs and expenses but denied his request for attorney's fees.[59] The court specifically stated it was unwilling to apply the then pending Civil Code section 1459.5, partly because it was not slated to take effect until January 1, 2020.[60] Most importantly, the court stated Civil Code section 1459.5 was preempted by the FTC's May 2019 Guidance which clarified its interpretation of the FTC Holder rule to limit recovery of attorney's fees to amounts paid under the relevant contract.[61] Spikener appealed to the First District Court of Appeal.[62]

The court found itself presented with similar issues it contemplated in *Lafferty*, but this time with the benefit of the FTC's Guidance. The court outlined an abridged history of the FTC Holder Rule before discussing the *Lafferty* progeny.[63] It restated its holding under *Lafferty* 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."[64] It also set the stage for its ultimate holding by restating the FTC's Rule Confirmation and conclusion that it did 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."[65]

Spikener argued for the court to challenge *Lafferty*. In responding, the court applied "*Auer* deference," or the Supreme Court's principles of construction in interpreting agencies' reasonable readings of genuinely ambiguous regulations.[66] It assumed, *arguendo*, Plaintiff's interpretation of the FTC Holder rule was also a reasonable one, rendering the regulation ambiguous.[67] But, the court declined to contradict *Lafferty*, citing the Guidance as dispositive as to the Holder Rule's application to attorney fees[68] and deferring to it as the "official position" on the interpretation of the FTC Holder Rule.[69] It also reasoned that the Guidance fell within the FTC's substantive expertise, and was only issued after the FTC solicited and reviewed public comments so it reflected the agency's reasoned judgment.[70] Taking such factors into consideration, the court concluded that the FTC's interpretation of the Holder Rule was subject to deference.[71] The court rejected Spikener's arguments that his claim for attorney's fees under the CLRA arose independent of the car dealer's misconduct, and was therefore not subject to the Holder Rule's cap on recovery.[72] It also dismissed his demands to rule in favor of unspecified policy arguments in a manner that would shift deference from "the agencies that administer the statutes to federal courts."[73] With this reasoning, the court concluded "the Holder Rule's limitation on recovery applies to attorney fees based on a claim asserted pursuant to the Holder Rule, such that a plaintiff's total recovery on a Holder Rule claim—including attorney fees—cannot exceed the amount paid by the plaintiff under the contract."[74]

In the second part of its holding, the court concluded that Civil Code section 1459.5 was preempted by the FTC Holder Rule.[75] The court again relied on the FTC's interpretation of the Rule, and specifically that its limitation on recovery should apply regardless of whether the state claim being asserted contains a fee shifting provision (such as under the CLRA), to reflect a clear intent to prohibit states from circumventing the stated cap.[76] The trial court's judgment was affirmed and Ally was awarded its costs on the appeal.[77]

III. Enter Pulliam, and a Withdrawal Back to Pre-Lafferty and Pre-Spikener

A. Spikener Disagrees With *Lafferty* (and the FTC's Guidance on What the FTC Said the FTC Rule Means).

Those following the *Lafferty* debate assumed the California Supreme Court nailed the coffin on the issue of whether a consumer can seek recovery beyond amounts they paid under the contract when pursuing FTC Holder Rule claims, when it denied review of *Lafferty*[78] and declined to de-publish the Court of Appeal's decision.[79] Not so. Enter the Court of Appeal for the Second District in its decision in *Pulliam v. HNL Automotive Inc.,*[80] where the Court of Appeal disagreed with *Lafferty's* conclusion that the FTC Holder Rule capped attorneys' fees.[81]

Following a trial against both an automobile dealer and the assignee/holder of the retail installment sales contract, the Plaintiff prevailed and was awarded $169,602 in attorney fees jointly against the dealer and the holder.[82] The dealer and holder appealed. The Court of Appeal engaged in a lengthy opinion supporting the attorneys' fee award and costs against the dealer.[83] And therein lies the rub: after noting that "[t]he trial court specifically found defense counsel's litigation tactics complicated the case and made what could have been a 'simple' case into a difficult one[,]" the court turned to—or some may say "on"—the Holder Rule.[84]

As to *Lafferty* and the Holder Rule cap, the court started from the proposition that "[b]oth consumer rights and the rule's purpose would be frustrated if attorney fees were not recoverable from both the seller and the creditor-assignee."[85] The court examined the FTC's May 2, 2019 Guidance and found that the

FTC's statement as to what the FTC meant in the FTC's own rule was not entitled to deference. The Court of Appeal stated 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—we are not convinced that the confirmation truly represented the 'fair and considered judgment' [necessary] to receive . . . deference"—despite the fact that the *Pulliam* court noted earlier in the decision that consumer protection organizations and industry organizations such as the American Financial Services Association had commented on the fee cap of the Rule.[86] Finally, the Court of Appeal stated that:

> although we cannot say the position taken in the Rule Confirmation was 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.[87]

Thus, having concluded that "the Holder Rule cap does not include attorney's fees within its limit on recovery and that the FTC's interpretation to the contrary is not entitled to deference, the Holder Rule is consistent with section 1459.5, and we need not address whether section 1459.5 independently applies."[88]

B. The Floodgates Open, and the FTC Flows Through.

With a split of authority on the FTC Holder Rule cap, trial courts, arbitrators, and other Courts of Appeal could simply choose which decision to follow.[89] And, choose they did.[90] Trial courts generally followed *Lafferty*. The consumers' bar, however, sought a "weak link" to present a different emboldened Court of Appeal with a case to challenge *Lafferty's* conclusion on the FTC Holder Rule cap and *Spikener's* conclusion with regard to preemption of section 1459.5. Still other Courts of Appeal followed *Lafferty* but concluded that section 1459.5 was a game-changer.[91]

At the same time, the FTC gratuitously jumped in, again. On January 18, 2022, the FTC issued an "advisory opinion" on the "Holder Rule, and its impact on consumers' ability to recover costs and attorneys' fees."[92] With no notice of proposed rulemaking, no formal *amicus* brief, and no prompt or legal basis to do so,[93] the FTC Advisory Opinion noted that certain courts have "misinterpret[ed] the Holder Rule as a limitation on the application of state cost-shifting laws to holders"—citing to *Spikener* and *Lafferty,* whereas others have "correctly conclude[d] that the Holder Rule does not limit recovery of attorneys' fees and costs when state law authorizes awards against a holder."[94]

> The FTC Advisory Opinion stated:
> The Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law. Consequently, whether costs and attorneys' fees may be awarded against the holder of the credit contract is determined by the relevant law governing costs and fees. Nothing in the Holder Rule states that application of such laws to holders is inconsistent with Section 5 of the FTC Act or that holders should be wholly or partially exempt from these laws.[95]

The FTC Advisory Opinion further states that where "the applicable law requires or allows costs or attorneys' fee awards against a holder, the Holder Rule does not impose a cap on such an award."[96] Therefore, some courts found that while the FTC's new "advisory opinion" did not change *Lafferty*, it did express the FTC's opinion that state law could act within the space and, therefore, did not preempt section 1459.5.[97] Of course, the theoretical contradiction is patent, where the *Spikener* Court gave deference to a mere letter from the FTC whereas the *Pulliam* court refused to defer to the FTC's 2019 Guidance *after* notice and public comment due to alleged criticism of the FTC's administrative comment process.[98]

C. Pulliam Proceeds to the California Supreme Court.

1. Everyone jumps in.

The Holder appealed *Pulliam* to the California Supreme Court and filed its opening brief on June 28, 2021. Briefing was concluded by December 18, 2021. A panoply of consumer organizations,[99] industry organizations,[100] and specific individuals or entities[101] filed *amicus* briefs with the California Supreme Court.[102] Notably, the FTC did not file an *amicus* brief as to the meaning of its own rule. Instead, as discussed above, the FTC issued its Advisory Opinion on January 18, 2022, criticizing a number of decisions issued by California courts, and seeming to disagree with its own 2020 Guidance.[103] The California Supreme Court understandably required a panoply of new briefing on the meaning of and scope of deference required to the 2022 Advisory Opinion. That briefing concluded on February 7.

The FTC Advisory Opinion further states that where "the applicable law requires or allows costs or attorneys' fee awards against a holder, the Holder Rule does not impose a cap on such an award."

On March 1, 2022, the supreme court heard oral argument on the *Pulliam* matter. Commenters predicted that argument favored the consumer's position, meaning *either* the FTC Holder Rule did not cap fees *or* that it did, but did not preempt section 1459.5.[104]

The court consisted of Chief Justice Tani Cantil-Sakauye, Justice Ronald Robie sitting by designation from the Court of Appeal, Justice Carol Corrigan, Justice Goodwin Liu, Justice Leondra Kruger, Justice Martin Jenkins, and Justice Joshua Groban. Attorney Tanya Green argued the case for appellants; Arlyn Escalante argued the case for the appellees.[105]

The appellant argued that it was held liable for a substantial attorney fee despite the fact that it was merely the holder of the loan.[106] It became immediately clear that the FTC's 2022 Advisory Opinion would frame the argument, as Justice Kruger lead off with the query. Addressing the Advisory Opinion, Appellants argued that no deference was required but, even if it was, the Advisory Opinion stated that recovery "including attorneys' fees" was limited by the Holder Rule. To the extent the FTC criticized judicial decisions, it was not the role of the FTC to do so. Justice Jenkins stated immediately that he disagreed—that disagreement with contrary state decisions was exactly the role of the FTC. Justice Kruger opined that the Advisory Opinion gives more information on what the Holder Rule means. Accordingly, Justice Kruger framed this issue of whether the relevant attorneys'

fee statute imposes obligations "as such" or "derivative" and "through" the Holder Rule. So, Justice Kruger concluded that the "cause of action" is not determinative; what determines whether fees are direct or derivative turns on the attorneys' fee statute, not the liability-imposing cause of action.

Justice Liu posited that no one disputes that the liability on the holder comes from the underlying cause of action; but the fee award comes from the attorneys' fee statute section 1459.5, which is a "direct" claim against the holder. Appellant responded that the Justices are ignoring the second sentence—liability imposed on the holder must be capped by the second sentence of the holder rule. Justice Liu then went back to the 2019 Guidance, and the FTC's language that nothing in the rule protects the holder against independent claims, stating that the "fee award" is not derivative because it exists in its own right and is independent.

The Chief Justice said that the FTC 2019 and 2022 opinions were of no help and were contradictory, which explained why the Justices were pushing back. The Chief Justice thus fell back to the purpose of the FTC Holder Rule, which was to protect consumers, that it applies to "all" claims, and that a limitation on the "all" claims is a "weak read". Justice Kruger asked whether section 1459.5 was preempted, and whether the section fit the exemption for direct state statutes that impose liability under the Holder Rule. Appellants responded that section 1459.5 was neither raised in the trial court nor should it be at issue in this appeal because the statute was not in effect at the time of the trial court's decision. Appellants also argued that section 1459.5 should be preempted anyway by conflict preemption to the extent the statute imposes greater liability on holders than the FTC Holder Rule does. Finally, although the FTC's 2022 Advisory Opinion commented on many states' legislation, it never mentioned section 1459.5.

Appellees argued that the FTC spoke on this issue: state law governs what is imposed on consumers, and the second clause's cap does not apply to states' imposed liability for attorneys' fees. Appellee's argued that the FTC's 2022 Advisory Opinion clarified the Holder Rule and how states, such as California, have applied the Holder Rule incorrectly. Justice Groban asked whether the 2019 Guidance doomed appellees' case, or whether the 2020 Advisory Opinion changed the FTC's position. Appellee argued that they were fighting against the *Spikener* argument until the FTC came out and said that *Spikener* was wrong in 2022. So, as the Justices implied, that was then, and this is now. Appellee argued that the unlimited attorney fee award was necessary because sellers do not stand behind their product or go insolvent after litigating cases for a lengthy period of time. The only way to have consumers be protected would be to have an attorney fee award act as an incentive for consumers' lawyers to take on important consumer protection cases. Appellees argued that section 1459.5 was not preempted because it merely returned the status quo of the law before *Lafferty*. Chief Justice asked whether the holder would always be responsible for attorneys' fees under section 1459.5, and appellees responded affirmatively.

2. The California Supreme Court issues the Pulliam decision, finds the FTC Holder Rule does not cap attorneys' fees.

On May 26, 2022, Justice Liu issued a unanimous opinion for the California Supreme affirming the Court of Appeal's decision in *Pulliam.*[107] The court framed the issue as addressing "whether 'recovery' under the Holder Rule . . . includes attorney's fees and limits the amount of fees plaintiffs can recover from holders to amounts paid under the contract."[108] Noting that the Courts of Appeal were divided on the issue,[109] the court concluded that:

> the Holder Rule does not limit the award of attorney's fees where, as here, a buyer seeks fees from a holder under a state prevailing party statute. The Holder Rule's limitation extends only to "recovery hereunder." This caps fees only where a debtor asserts a claim for fees against a seller and the claim is extended to lie against a holder by virtue of the Holder Rule. Where state law provides for recovery of fees from a holder, the Rule's history and purpose as well as the Federal Trade Commission's repeated commentary make clear that nothing in the Rule limits the application of that law.[110]

The court first went through the legislative history of the Holder Rule. In passing, the court noted that the FTC had requested commentary on the Holder Rule and, following completion of that review, "determined to retain the Rule in its present form".[111] Notably, the California Supreme Court ignored the part of the FTC Commentary stating that, in doing so, the FTC was preserving the Holder Rule's cap on attorneys' fees: "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."[112]

Instead, the court focused on the FTC's January 18, 2022 Advisory Opinion observing that the issue had recurrently appeared "in court cases, with some courts correctly concluding that the Holder Rule does not limit recovery of attorneys' fees and costs when state law authorizes awards against a holder, and others misinterpreting the Holder Rule as a limitation on the application of state cost-shifting laws to holders."[113] In other words, ignoring public and industry comment in connection with the FTC's 2019 Commentary preserving the Holder Rule cap on fees, ignoring its own confirmation in the Commentary that the Holder Rule caps fees, and ignoring the fact that the *Lafferty* decision and multiple other state court decisions in accord preceded the FTC's 2019 Commentary, the FTC's 2022 Letter expressed shock—shock![114]—to learn that cases had followed the plain language of the Rule and the FTC's own interpretation of it.

"The FTC had damages in mind when limiting recovery under the Rule, and there is no indication that attorney's fees were intended to be included within its scope."

The court framed the issue in two ways: (1) that the Holder Rule's use of the term "recovery" applies to attorneys' fees, and not just damages and, (2) if the meaning is ambiguous, the 2019 Commentary is entitled to deference.[115] Ultimately, the court found that, based on the Rule's history and purpose, its most persuasive reading was "that its cap on 'recovery hereunder' does not include attorney's fees for which a holder may be liable under state law, as long as the existence of such liability is not due to the Holder Rule extending the seller's liability for attorney's fees to the holder[,]" so the court need not delve in to the deference issue—on the purported claim that the court's interpretation was consistent with the FTC 2022 letter.[116]

The court first engaged in legal gymnastics to determine whether attorneys' fees constituted "recovery hereunder" under the Holder Rule. The court said attorneys' fees were not "recovery hereunder" because "[t]he fact that attorney's fees may be a type of 'recovery' in some contexts because they are 'collected' or 'obtained' by a judgment does not necessarily mean that such fees constitute 'recovery . . . by the debtor' or 'recovery hereunder' within the meaning of the Holder Rule."[117] The court then determined that the Rule was ambiguous, permitting it to turn to extrinsic sources. The court noted that "attorney's fees are absent from the FTC's discussions of what constitutes recovery under the Rule until its 2019 Rule Confirmation"[118] and so, "the FTC had damages in mind when limiting recovery under the Rule, and there is no indication that attorney's fees were intended to be included within its scope."[119] Thus, the court held that:

> TDAF argues that if attorney's fees were "so central to the Holder Rule's success," the Rule's text or guidance would have "expressly removed attorney's fees from the Rule's use of the otherwise broad term 'recovery.'" But the history of the Rule leaves us no reason to believe that the FTC thought it was addressing attorney's fees at all by reference to "recovery." To the contrary, given the FTC's discussion of the legal costs facing consumers, one would expect the FTC to have expressly stated a limitation on collection of attorney's fees if that is what it had intended the Rule to encompass.[120]

The court concluded:

> In sum, the FTC was cognizant of the challenges facing consumers bringing suit, including high legal costs, and it intended and expected affirmative suits by consumers to help correct the market failures it identified. In light of this history, it would be antithetical to the purpose of the Holder Rule to conclude that the FTC intended to "render . . . uneconomic" one of the two ways it provided to address the concerns it sought to alleviate by implicitly limiting a consumer's ability to obtain attorney's fees. The FTC was focused on consumers' recovery of damages and intended the Rule to provide a minimum, not maximum, liability rule for the nation. In light of the FTC's contemporaneous explanation of the Rule's purposes, we find it unlikely that the FTC intended the Rule's limitation on recovery to apply to attorney's fees sought by a consumer from a holder under state law.[121]

The court rejected TDAF's argument that the court should defer to the FTC's interpretation of its own rule. The court stated it was unnecessary, because its ruling was consistent with the FTC's 2019 Rule Confirmation. The court paid homage to the 2019 Rule Confirmation's statement 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."[122] But, the court again engaged in legal gymnastics by stating:

> The sentence that immediately follows likewise provides: "Claims *against the seller* for attorneys› fees or other recovery may also provide a basis for set off against the holder that reduces or eliminates the consumer›s obligation." In other words, the FTC›s interpretation is that the Holder Rule's cap on recovery applies to attorney's fees where a plaintiff's claim to attorney's fees lies against *a seller* and, by virtue of the Holder Rule, is extended to lie against third party creditors. It does not apply where the claim for fees lies against the third-party creditor in the first instance. If state law authorizes fees against a holder, the FTC agrees that the Holder Rule places no limitation on their recovery. In such circumstances, it is of no moment that the buyer's substantive claims against the holder may be related to the seller's misconduct.[123]

The court concluded—in a holding never made before by any court—that the Song-Beverly Act could be pursued directly against the Holder. Accordingly, because the Song-Beverly Act permitted attorneys' fees, such fees would not be capped by the Holder Rule.

Of course, this analysis fails because if the Song-Beverly Act permits a direct action against the Holder, as posited,

then neither the Holder Rule's "claims and defenses" nor its "recovery hereunder" cap are ever triggered. The Holder Rule has no application to direct actions against a Holder that are not derivative of the claims against the seller. In other words, if the court's analysis is correct with respect to the Song-Beverly Act permitting a non-derivative action against a Holder, then the entire discussion of the Holder Rule is unnecessary and *dicta.* Hinging on the direct claim premise, the court found that the FTC's 2022 Advisory Opinion sealed the deal:

> Neither the Rule itself nor the 2019 Rule Confirmation notice say that the Holder Rule invalidates state law or that there is a federal interest in limiting state remedies. To the contrary, the 2019 Rule Confirmation says that nothing in the Holder Rule limits recovery of attorneys' fees if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct.[124]

Thus, the court concluded:

> It is clear that the FTC contemplated that state law might offer greater protections for consumers and that these protections might be accompanied by recovery in excess of the amounts paid on the contract. We have found no reason to interpret the Rule's limitation on "recovery hereunder" to extend more broadly than its plain language suggests or more broadly than the FTC intended. Where state law provides for attorney's fees against a holder, nothing in the Rule prevents their award to the full extent provided by state law. We disapprove of [*Lafferty*] and [*Spikener*] to the extent they are inconsistent with this opinion.[125]

Commentators universally responded that *Pulliam* has significant implications.[126] At a minimum, the decision jeopardizes the panoply of federal and state decisions across the nation holding the exact opposite of what the court held in *Pulliam*.[127]

IV. Conclusion

Pre-*Lafferty*, almost every state in the Union—subject to several exceptions—had held that the FTC Holder Rule capped attorneys' fees and costs.[128] *Lafferty* put California in that good company and, shortly after *Lafferty*, the FTC's Guidance echoed that opinion. California Courts then decided that the FTC in its own Guidance, following administrative process and public commentary, was not entitled to say what the FTC's own rule meant—instead, California Courts would do so. And just to be sure, California's legislature passed section 1459.5 on faulty legal and factual premises. Then, rather than subject itself to formal scrutiny by filing an *amicus* brief, the FTC in 2022 offered a gratuitous letter that, as Justice Groban pointed out, conflicted with the FTC's Guidance from 2019.

We've seen this before. In 2012, the FTC issued a gratuitous letter purporting to state that the Holder Rule did not cap fees.[129] But, even that letter did not withstand the FTC's own scrutiny when the FTC revisited the Holder Rule after public comment issued its Guidance in 2019. The United States Supreme Court may have to be the ultimate arbiter on whether finance companies who take assignment of retail installment sales contracts will be responsible for unlimited attorneys' fees incurred in cases filed against sellers.[130]

** Scott J. Hyman is a shareholder of Severson & Werson, is a member of the California and Texas State Bars and has dedicated most of his 25-plus year legal career to representing automobile finance companies and other consumer lenders through litigation, compliance, and scholarship. He holds CIPP (U.S./Eur.), CIPM, and CIPT certifications from the International Association of Privacy Professionals and is appointed to a 3-year term to the California Department of Financial Protection and Innovation's Debt Collection Advisory Committee. He is a Vice-President of the Conference on Consumer Finance Law, has authored California practice guides on the FDCPA and TCPA, and authors Severson & Werson's consumer finance weblog https://www.severson.com/consumer-finance/.*

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1 16 C.F.R. § 433.2 (1975).
2 *Comment Letter on Holder Rule Review*, Am. Fin. Servs. Ass'n 2 (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 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 Conf. on Cons. Fin. L. Q. 432, 434 (2019) (quoting AFSA Comment Letter). The author also would like to thank Tara Mohseni, Esq., currently of Ogletree Deakins, for her work on portions of an initial draft of this Article.
4 *See* Music Acceptance Corp. v. Lofing, 32 Cal. App. 4th 610, 617, 626 (Cal. Ct. App. 1995) (noting that often, to make consumers whole, assignees must be liable for the seller's improper actions).
5 Hyman & Mohseni, *supra* note 34, at 440.
6 *Id.* at 435.
7 *Id.*
8 Lafferty v. Wells Fargo Bank, 25 Cal. App. 5th 398 (Cal. Ct. App. 2018).
9 Hyman & Mohseni, *supra* note 3, at 436.
10 *Lafferty*, 25 Cal. App. 5th at 425 ("Given the long-standing validity of the American rule in both federal and California jurisprudence, we decline to invade the prerogative of a legislative body to remove the limit on attorney fees imposed by the Holder Rule.").
11 *See generally* Hyman & Mohseni, *supra* note 3 (summarizing the legislative and judicial history of the FTC Holder Rule).
12 AB 1821 Assembly Judiciary Analysis (April 7, 2019). (file:///C:/Users/shyman/Downloads/201920200AB1821_Senate%20Floor%20Analyses.pdf)
13 Assemb. Wkly. Hist. (Cal. Leg., Sacramento, Cal.), Feb. 6, 2020, at 1139.
14 Assemb. B. 1821, 2019–2020 Leg., Reg. Sess. (Cal. 2019).
15 *Contracts: Hearing on Assemb. B. 1821 Before the S. Comm. on the Judiciary,* 2019–2020 Leg., Reg. Sess. 1 (Cal. 2019) [hereinafter *S. Comm. on the Judiciary Hearing].*
16 Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18711 (May 2, 2019) (to be codified at 16 C.F.R. pt. 433).
17 *Id.* at 18712.
18 *Id.* at 18713.
19 *S. Comm. on the Judiciary Hearing, supra* note 15, at 4 ("As detailed above, the Holder Rule is part of regulations promulgated by the FTC that require consumer credit contracts to include a

provision making any holder of such contracts subject to the same claims and defenses as the original seller. (16 C.F.R. Section 433.2.) This rule ensures that consumers are protected from unscrupulous sellers by holding the financers of these contracts equally liable for consumer claims. The rationale is that the creditors of such contracts, not the consumers, are in a better position to hold the seller accountable or otherwise absorb the cost. The issue relevant here is whether consumers bringing actions against defendants pursuant to the Holder Rule in California are able to claim attorneys' fees uncapped by the amount paid by the consumer on the underlying credit contract. The longstanding interpretation of the rule in California was that such awards were available to consumers and that courts 'should not artificially cap the consumer's recovery of attorney fees' because '[s]uch a rule effectively insulate[s] holders from paying fees and costs, even if they refused to refund payment made or reach reasonable settlements' on consumer claims. *Duran v. Quantum Auto Sales, Inc.,* 2017 Cal. App. Unrep. LEXIS 8476, at *14.").

20 *Third Reading of Assemb. B. 1821 Before the S. Rules Comm., Off. of S. Floor Analyses,* 2019–2020 Leg., Reg. Sess. 6 (Cal. 2019) [hereinafter *S. Rules Comm. Third Reading].*

21 *Id.*

22 Assemb. Wkly. Hist., *supra* note 13, at 1139.

23 Pulliam v. HNL Auto. Inc., 60 Cal. App. 5th 396 (Cal. Ct. App. 2021), *aff'd*, 509 P.3d 998 (Cal. 2022), *petition for cert. filed*, TD Bank, N.A. v. Pulliam, No. 22-288 (U.S. Sept. 23, 2022), denied, https://scholar.google.com/scholar?scidkt=4289259556450009999&as_sdt=2&hl=en.

24 16 C.F.R. § 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).

25 *Opinion Letter on the Holder Rule,* FTC (May 3, 2012), https://www.nclc.org/images/pdf/rulemaking/P124802_Holder.pdf [https://perma.cc/9YD2-MZTG] [hereinafter FTC Opinion Letter].

26 AFSA Comment Letter, *supra* note 2, at 9; *see also id.* at 7 (confirming that the Commission's intent is indicated by the plain language of the Holder Rule).

27 FTC Opinion Letter, *supra* note 25, at 3.

28 *Id.* The three cases the FTC cites 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.

29 Modified Ten-Year Schedule for Review of FTC Rules and Guides, 80 Fed. Reg. 5713, 5714 (Feb. 3, 2015).

30 Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg.at 18712.

31 *Id.*

32 *Id.* at 18713.

33 *Id.*

34 *Contracts: Application of Federal Law: Hearing on Assemb. B. 1821 Before the Assemb. Comm. on Judiciary,* 2019–2020 Leg., Reg. Sess. 1 (Cal. 2019) [hereinafter *Assemb. Comm. on Judiciary Hearing].*

35 *Id.*

36 Assemb. B. 1821.

37 *Assemb. Comm. on Judiciary Hearing*, *supra* note 34, at 2–3.

38 *Id.* at 4.

39 *Id.* at 6.

40 *Id.* at 8.

41 *Id.* at 6.

42 Assemb. Wkly. Hist., *supra* note 13, at 1139.

43 *Third Reading of Assemb. B. 1821 Before the Assemb. Comm. on Judiciary,* 2019–2020 Leg., Reg. Sess. 2 (Cal. 2019) [hereinafter *Assemb. Comm. on Judiciary Third Reading].*

44 Assemb. Wkly. Hist., *supra* note 13, at 1139.

45 *Id.*

46 *S. Comm. on the Judiciary Hearing*, *supra* note 15, at 1, 6.

47 Assemb. Wkly. Hist., *supra* note 13, at 1139.

48 *Id.*

49 Cal. Civ. Code § 1459.5 (West 2022).

50 Spikener v. Ally Fin., Inc., 50 Cal. App. 5th 151 (Cal. Ct. App. 2020).

51 *Id.* at 155.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 Super. Ct. of Cal. Cnty. of Alameda (Nov. 25, 2019), https://www.severson.com/wp-content/uploads/2019/11/Holder.pdf [https://perma.cc/LD6K-J98E].

60 *Id.*

61 *Id.*

62 *Spikener,* 50 Cal. App. 5th at 155.

63 *Id.* at 156–57.

64 *Id.* at 157 (quoting *Lafferty,* 25 Cal. App. 5th at 414).

65 *Id.* at 158 (quoting Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. at 18713).

66 *Id.* at 158–59.

67 *Id.* at 159.

68 *Id.* at 158.

69 *Id.* at 159.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 160 (citation omitted).

74 *Id.*

75 *Id.*

76 *Id.* at 162.

77 *Id.*

78 Hyman & Mohseni, *supra* note 3, at 451.

79 *Id.*

80 *Pulliam*, 60 Cal. App. 5th at 396.

81 *Id.* at 412 ("Not surprisingly, TD would have us follow *Lafferty* and *Spikener.* In our ensuing discussion, we first disagree with *Lafferty's* interpretation of the Holder Rule, and conclude that the Holder Rule's cap itself does not apply to attorney's fees. Then, we disagree with *Spikener's* conclusion regarding the binding nature of the FTC's contrary interpretation in its Rule Confirmation.").

82 *Id.* at 404.

83 *Id.*

84 *Id.* at 409.

85 *Id.* at 416.

86 *Id.* at 418, 420.

87 *Id.*

88 *Id.* at 422.

89 *See* Auto Equity Sales, Inc. v. Super. Ct., 57 Cal. 2d 450, 456 (Cal. 1962) (acknowledging how lower courts presiding over Holder Rule cases must choose which conflicting appellate court decision to follow).

90 *Compare* Jones v. First Choice Auto, No. B306976, 2021 Cal. Super. LEXIS 10001, at *13 (Sac. Co. Sup. Aug. 18, 2021) ("This Court Shall Follow *Spikener.* In light of (1) the respective positions advanced by the parties to the case at bar with respect to the Holder Rule's impact on a plaintiff's ability to recover attorney fees and (2) the California Supreme Court's own statement in granting review of *Pulliam* about trial courts remaining free to exercise discretion to decide which of the conflicting appellate authorities to follow, this court is now essentially compelled to choose between following *Pulliam* or following *Spikener[.]"), with* Flores v. Westlake Servs., LLC, No. B308288, 2021 Cal. App. Unrep. LEXIS 7876, at *1 (Dec. 16, 2021) ("Guided primarily by [*Pulliam*], we conclude that title 16, section 433.2 of the Code of Federal Regulations (CFR) (the Holder Rule) does not cap the attorney fees, costs, expenses, or prejudgment interest that Plaintiff may recover from Westlake, the creditor-assignee, or from Southgate, the seller. Therefore, we reverse and remand for the trial court to redetermine the matter."), *and* Melendez v. Westlake Servs., LLC, 74 Cal. App. 5th 586, 595 (Cal. Ct. App. 2022) ("Accordingly, we conclude the holder-rule limitation on recovery does not preclude recovery of attorney fees, and the FTC's contrary interpretation is not entitled to deference. These conclusions eliminate any need to consider defendant's further contention that Civil Code section 1459.5 is preempted by the holder rule.").

91 *See* Reyes v. Beneficial State Bank, 76 Cal. App. 5th 596, 615–16 (Cal. Ct. App. 2022) (holding that a Holder Rule cause of action does not preempt Civ. Code, § 1459.5 and that plaintiffs were entitled to its benefit).

92 *Commission Statement on the Holder Rule and Attorneys' Fees and Costs*, FTC 1 (Jan. 18, 2022), https://www.ftc.gov/policy/advisory-opinions [https://perma.cc/54G3-2F5Q>] [hereinafter FTC Commission Statement].

93 *See* Competition Advisory Opinions, https://www.ftc.gov/advice-guidance/competition-guidance/competition-advisory-opinions ("The FTC provides guidance in the form of advisory opinions concerning proposed conduct. The process starts with a request for advice from the party proposing the conduct. Many competition advisory opinions are rendered by Bureau staff, and often involve issues in the health care field. Commission advisory opinions are voted on by the Commission and are intended to address substantial or novel questions of fact or law, or subjects of significant interest.").

94 *Id.*

95 *Id.* at 2.

96 *Id.* at 3.

97 *See Reyes,* 76 Cal. App. 5th at 615–16 ("But for the enactment of section 1459.5, we would likely view the Holder Rule provision as limiting a prevailing party's ability to recoup attorney fees from a holder in excess of amounts paid pursuant to a retail installment contract. With the passage of section 1459.5, however, such a prevailing party may now obtain an award of attorney fees even if it exceeds the amount he or she has paid under the contract. We conclude there is no conflict between section 1459.5 and the Holder Rule provision.").

98 *Cf. id. at* 612 ("As discussed above, *Pulliam* concluded the 2019 Rule Confirmation was not entitled to deference on the issue of attorney fee recovery. We agree with Pulliam's deference analysis. Moreover, as we now know, the FTC contends that courts applying the deference doctrine to the 2019 Rule Confirmation to arrive at the conclusion that section 1459.5 is preempted have misconstrued the 2019 Rule Confirmation. The FTC has expressly stated its disagreement with those cases. As a result, we conclude section 1459.5 is not preempted.").

99 UC Berkeley Center for Consumer Law & Economic Justice; Centers for Public Interest Law and the University of San Diego; Consumers for Auto Reliability and Safety; Consumer Federation of California; East Bay Community Law Center; Housing & Economic Rights Advocates; National Consumer Law Center; and Public Law Center.

100 The American Bankers Association; American Financial Services Association; California Financial Services Association; Consumer Bankers Association, and the U.S. Chamber of Commerce. *See generally* John Culhane, Jr., *Banking Trade Groups File Amicus Brief with CA Supreme Court in Case Involving Whether FTC Holder Rule's Recovery Limit Includes Attorney's Fees,* Consumer Fin. Monitor, Dec. 6, 2021.

101 Westlake Financial Services.

102 Pulliam v. HNL Automotive Inc., No. S267576, 2022 Cal. LEXIS 2914, at *1 (May 26, 2022).

103 FTC Commission Statement, *supra* note 92, at 3–4.

104 Brooke Conkle et al., *California Supreme Court Prepares to Weigh In on Holder Rule,* JD Supra (Mar. 4, 2022), https://www.jdsupra.com/legalnews/california-supreme-court-prepares-to-9116562/ [https://perma.cc/3ML3-W6US] ("Several justices pointed to the pro-consumer purpose of the Holder Rule, asking whether the language in the first sentence of the Holder Rule, which subjected a holder to 'all claims and defenses' a consumer could assert against a seller, was broad enough to allow for attorneys' fee awards under state statutes. HNL Automotive argued that the first sentence must be read in light of the second sentence, which limits amounts recovered 'hereunder.' In other words, while the first sentence expands the types of claims and defenses that may be asserted against a holder, the second sentence caps the amount of the recovery for all those claims, including attorneys' fee recovery. HNL Automotive also argued that the FTC weighed the consumer impacts when creating and confirming the Holder Rule, deciding that a limitation on holders' exposure was consumer-friendly because it encouraged lenders to stay in the market. Pulliam, however, argued that the FTC identified holders as better able to bear the costs of the attorneys' fee awards that enabled consumers to litigate.

Overall, the justices' questioning indicated that they may favor Pulliam's position. At least one justice seemed disinclined to give much weight to the 2022 advisory opinion, but several of the justices expressed pro-consumer leanings, and HNL Automotive faced much heavier questioning than Pulliam. Justice Robie from the California Court of Appeals also sits pro tempore on this appeal to fill the current vacancy on the California Supreme Court, but he did not consider the case below, and his stance on this question is untested.").

105 *Pulliam*, 2022 Cal. LEXIS 2914, at *1. A link to the oral argument can be found at https://jcc.granicus.com/player/clip/2671. A transcription of the oral argument is set forth at Appendix A in the original version of this article in the Consumer Finance Law Quarterly Report, Vol. 75, Number 4, at pages 343-399 (2021). It is available at Conference on Consumer Finance Law > Quarterly Report Preview (ccflonline.org).

Although the transcription was performed by a licensed court reporter hired by the author to do so from the foregoing link, the author does so as a courtesy for the readers of this Article and makes no representation or warranty as to the accuracy of the transcription. The comments herein are the author's interpretation of the arguments, having watched the oral argument. Readers are encouraged to watch or read the transcript to form their own conclusions.

106 The appellant used the term "loan" throughout even though automobile RISCs are not "loans". *See* Dep't of Fin. Prot. & Innovation, *About California Financing Law,* CA.gov (May 10,

2021, 11:53 AM), https://dfpi.ca.gov/california-financing-law/california-financing-law-about/ ("There are a number of 'non-loan' transactions, such as bona fide leases, automobile sales finance contracts (Rees-Levering Motor Vehicle Sales and Finance Act) and retail installment sales (Unruh Act), that are not subject to the provisions of the California Financing Law.").
107 *Pulliam,* 2022 Cal. LEXIS 2914, at *44.
108 *Id.* at *3.
109 *Id.*
110 *Id.* at *4.
111 *Id.* at *8.
112 *See* Hyman & Mohseni, *supra* note 3, at 442 (quoting Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. at 18713).
113 *Pulliam,* 2022 Cal. LEXIS 2914, at *9 (quoting FTC Commission Statement, *supra* note 92, at 1).
114 Casablanca (Warner Bros. 1942) ("I'm shocked, shocked, to find that gambling is going on in here!").
115 *Pulliam,* 2022 Cal. LEXIS 2914, at *13.
116 *Id.* at *13–14.
117 *Id.* at *18.
118 *Id.* at *19.
119 *Id.* at *23.
120 *Id.* at *30.
121 *Id.* at *37–38.
122 *Id.* at *38 (quoting Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. at 18713).
123 *Id.* at *39.
124 *Id.* at *42–43. Cf. Alan D. Wingfield et al., *The Holder Rule and Attorneys' Fees,* NALFA (Feb. 24, 2022), https://www.thenalfa.org/blog/article-the-holder-rule-and-attorneys-fees/ [https://perma.cc/4A87-HWNB] ("The FTC previously voted 5-0 to issue a confirmation of the Holder Rule in 2019, which noted that several commenters had asked whether the Holder Rule's limitation on recovery to 'amounts paid by the debtor' allows consumers to recover attorneys' fees above that cap. The rule confirmation stated, '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.' Three of those five commissioners are still serving on the FTC.
Now, in a 180 degree turn, the FTC has voted 4-0 (including aye votes from the three commissioners who were already serving in 2019) to adopt this opinion that if the applicable state or federal law allows an attorneys' fee award against any defendant, whether holder or seller, then the Holder Rule places no limit on the amount of fees and costs the plaintiff may recover from a holder.").
125 *Pulliam,* 2022 Cal. LEXIS 2914, at *44.
126 *See, e.g.*, Alexander Farrell & Regina McClendon, *California Supreme Court Interprets FTC "Holder Rule" to Allow Uncapped Attorneys' Fees Awards*, JD Supra (June 1, 2022), https://www.jdsupra.com/legalnews/california-supreme-court-interprets-ftc-3485105/#:~:text=The%20court%20held%20that%20the,fee%20award%20against%20the%20holder.
("The Pulliam decision has significant implications. It is likely to increase plaintiffs' incentive to aggressively litigate given the probability of a sizable fee award if they prevail. It also increases creditors' liability exposure, because the downside risk is no longer limited to the amount paid under the sales contract, and attorneys' fee awards are often disproportionate to the good's sale price. *Pulliam* means that creditors will have to ensure they have enforceable indemnity agreements with sellers with which they do business and that they thoroughly screen, and regularly re-screen, those sellers.").
127 *See* Hyman & Mohseni, *supra* note 3, at 440 note 30 (compiling cases that contradict *Pulliam).*
128 *Id.*
129 *Id.* at 441.
130 The Court denied an opportunity to do so in Pulliam v. HNL Auto. Inc., 60 Cal. App. 5th 396 (Cal. Ct. App. 2021), *aff'd*, 509 P.3d 998 (Cal. 2022), *petition for cert. filed*, TD Bank, N.A. v. Pulliam, No. 22-288 (U.S. Sept. 23, 2022), denied, https://scholar.google.com/scholar?scidkt=4289259556450009999&as_sdt=2&hl=en.