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The FTC Holder Rule Redux in 2022

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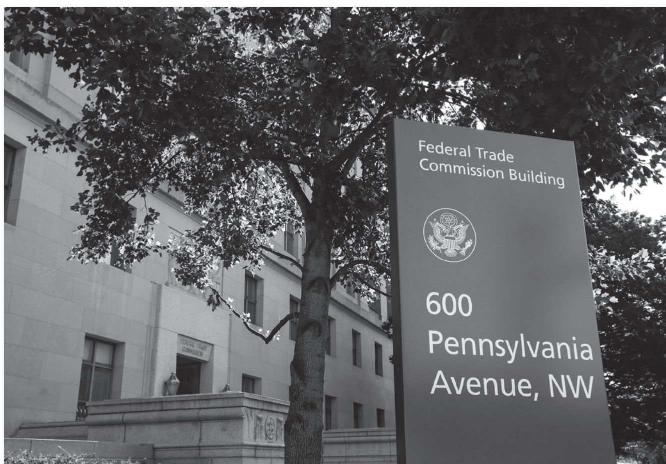

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The FTC Holder Rule Redux in 2022

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]

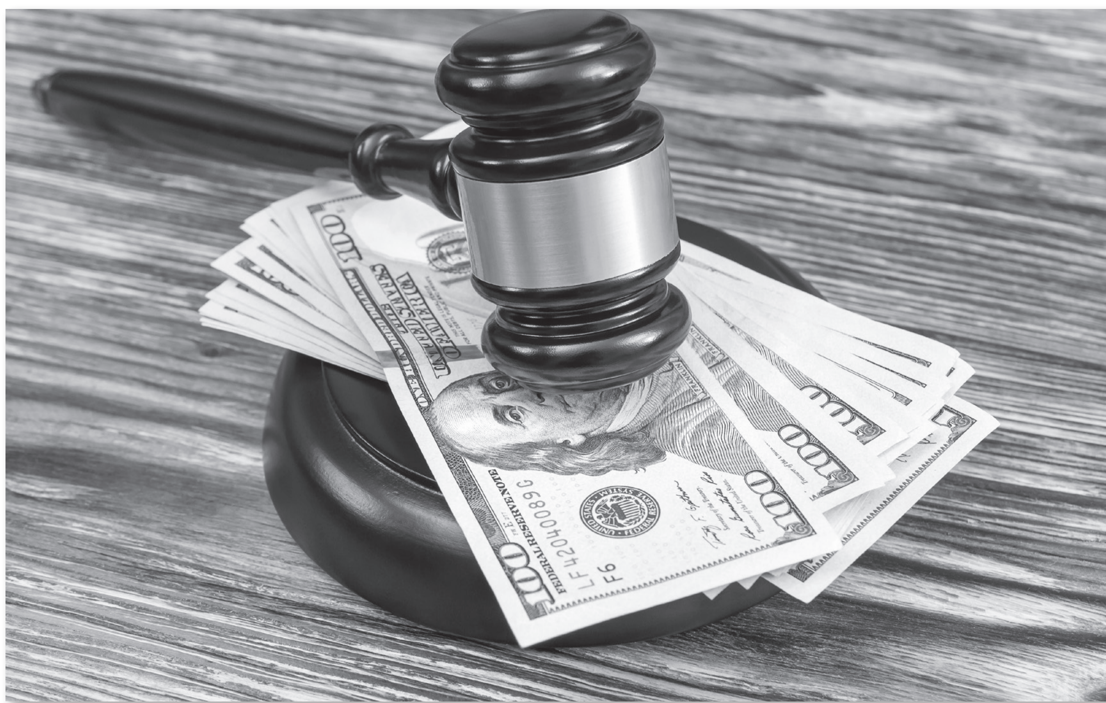
The appellant argued that it was held liable for a substantial attorney fee despite the fact that it was merely the holder of the loan.[106] It became immediately clear that the FTC's 2022 Advisory Opinion would frame the argument, as Justice Kruger lead off with the query. Addressing the Advisory Opinion, 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]

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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.

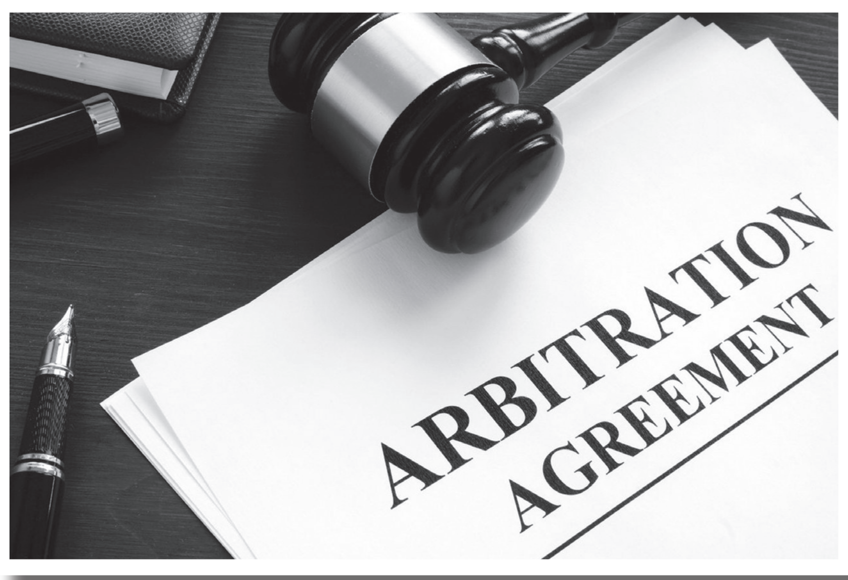
EDITORIAL

The Op-Ed *The New York Times* Doesn't Want You to See

By Paul Bland for Public Justice*

The following op-ed was originally submitted for publication in The New York Times, *but was not accepted by the paper's editors, despite the Times' insistence that it maintains a strong wall between its editorial and business affairs. Were editors afraid to rankle the paper's business executives? Were they embarrassed by the company's hypocritical decision regarding its recently enacted forced arbitration clause? Or have they changed their own editorial stance on the use of forced arbitration clauses, especially in consumer contracts?*

We may never know, but one thing remains clear: the Times *is refusing to listen to the deeply researched evidence its own journalists and editorial board members have uncovered over the past decade.*


ARBITRATION
AGREEMENT

On November 7, 2015 *The New York Times* editorial board wrote that forced arbitration "has become vast and more entrenched as companies increasingly require customers, employees, investors, patients and other consumers to agree in advance to arbitrate any disputes that arise in their dealings with a company," adding that, "corporations effectively control the arbitration process, including the selection of an arbitrator and the rules of evidence, a stacked deck if ever there was one."

The editorial board's strong stance against such practices followed a searching*, in-depth series* in the paper earlier that year that exposed the very real harms of forced arbitration clauses. That series found that, in the prior four years, "corporations prevailed in four out of five cases" when forced into arbitration, and that those who were bound by clauses prohibiting class action lawsuits "usually dropped their claims entirely." Noting that "nursing homes, obstetrics practices and private schools" were increasingly utilizing such clauses to keep the public out of court, the *Times* editorial board went on, in subsequent years, to publish no fewer than *eight* editorials decrying the practice in some way, in addition to giving space to more than *thirty* op-eds that also slammed the use of arbitration clauses to block the courthouse doors.

The Times has now bound users of its own app and other materials and services to an arbitration clause of the company's own.

Fast forward a few years, though, and the *Times* has now bound users of its own app and other materials and services to an arbitration clause of the company's own. Last month, the company updated its terms of service to note that, "Your agreement to arbitration means that for all covered claims, you are giving up your right to file a lawsuit in court and the right to a trial by jury."

It stinks of all the hypocrisy that's fit to print – in fine print clauses that the paper itself has acknowledged few people read, understand, or have any power to oppose.

Indeed, the original 2015 series in the *Times*, and the subsequent, excellent journalism focused on the topic by *Times* reporters in the nearly eight years since, has helped to usher in a sea change in how the public – and, increasingly, policymakers – view arbitration. Prior to 2015, few people understood just what "forced arbitration" meant, or that they were bound by it when buying a cell phone, using websites, or taking part in any of the other countless everyday activities now governed by such clauses.

But in the years since, a growing chorus in Congress has advocated change. For example, the House passed *The FAIR Act,* a bill to end arbitration in consumer and employment cases. And both houses *passed legislation,* signed last year by President Biden, to prohibit forced arbitration in cases of sexual harassment and misconduct. Support for these measures has even resulted in unexpected political alliances. For example, representatives Katie Porter (D-CA) and Matt Gaetz (R-NC), for example, are both strong opponents of the use of forced arbitration clauses. Public support also *crosses political and ideological lines,* with a majority of both Republicans and Democrats supporting the end of forced arbitration. That shift in public opinion was strongly aided by the reporting in the *Times* and the call from its editorial board for "public outcry loud and long enough to stir the White House and Congress to action."

Until last month, that "loud and long" outcry included the formidable voice of the *Times* itself. So, what happened?

The *Times* can't think that things have gotten better. On the contrary, more and more people are being subjected to forced arbitration in more and more areas of their lives. During a recent Senate hearing, Public Justice Board Member Myriam Gilles *noted that*, if the trend continues in its current direction, roughly 8 out of 10 Americans will be forced to agree to arbitration *in order to be hired for a job.* And an enormous number of consumer products and services now come along with an arbitration clause. This leaves only one inescapable conclusion: The business side of the *Times* has decided that profit trumps principle and that it will not, in light of that, put its money where its mouth *was*, and where its reporters clearly landed at the end of their own investigations into the matter.

That's not just a shame but puts the *Times* – which in its best moments has helped lead the way on progressive thinking about civil rights, political extremism, and other important issues – on the wrong side of history when it comes to one of the most significant consumer and workers' rights issues of our day. It also aligns this paper of national significance with the likes of *former President Donald Trump*, former FOX News Chairman *Roger Ailes* and serial sexual predator *Charlie Sheen* – all of whom used forced arbitration clauses to hide abuse, corruption and other shocking wrongdoing – and against everyday workers, consumers and other Americans who are being locked out of our country's judicial system by a process the *Times* journalistic staff have led the way in exposing.

It's time for the Times to retract its arbitration clause and live up to the paper's own ideals and reporting.

"But" as the *Times* said in its November 17, 2015, editorial on the subject, "it is happening, and it needs to stop."

When the national paper of record ignores the lauded research of its own respected reporters and preaches a chorus of "do as we say, not as we do," its readers should – and will – take note. Hypocrisy, hyperbole, and hidden agendas might be the norm in some newsrooms today, but America expects better of *The New York Times.*

Perhaps *Times* executives should re-read their own team's coverage and re-think this ill-advised move. It's time for the *Times* to retract its arbitration clause and live up to the paper's own ideals and reporting.

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NOTE

SECOND CIRCUIT COURT UPHOLDS CONSTITUTIONALITY OF CFPB FUNDING

CFPB v. Law Offs. of Crystal Moroney, ___ F.4th ___ (2d Cir. 2023).
https://law.justia.com/cases/federal/appellate-courts/ca2/20-3471/20-3471-2023-03-23.html

The Consumer Financial Protection Bureau ("CFPB") was created under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act to regulate consumer financial products and services.[1] This Act granted the CFPB the authority to draw funds from the Federal Reserve System's earnings and exempted it from relying on annual spending bills from Congress for its budget.[2] In 2017 and 2019, the CFPB issued administrative subpoenas in the form of civil investigative demands ("CIDs") to Moroney, a legal services provider, pursuant to an investigation into its debt collection practices. While the 2017 CID was later withdrawn, the 2019 CID sought similar documents and information.

The CFPB ratified the 2019 CID and petitioned to enforce it against Moroney in district court, following the Supreme Court's ruling in *Seila Law*[3] that the removal provision for the CFPB director was unconstitutional. The district court granted the CFPB's petition, and Moroney promptly appealed to the Second Circuit on four grounds, arguing that:

1. the CID was void *ab initio* under *Seila Law*,
2. the CFPB's funding structure violated the Appropriations Clause of Article I of the Constitution,
3. Congress violated the nondelegation doctrine in creating the CFPB's funding structure, and
4. the CID was an unduly burdensome administrative subpoena.

The Second Circuit unanimously upheld the district court's decision, rejecting all four of Moroney's grounds. First, the CID was not void *ab initio* under *Seila Law* because there was no causal link between the unconstitutional removal provision of the CFPB director and the issuance of the CID. The Second Circuit relied on the concurring opinion of Justice Kagan in *Collins v. Yellen,*[4] which held that "plaintiffs alleging a removal violation are entitled to injunctive relief … *only when* the President's inability to fire an agency head affected the complained-of decision."[5] The court concluded that Moroney failed to show that the unconstitutional removal provision had any bearing on the causal link of the enforcement action being challenged. The Second Circuit rejected Moroney's attempt to distinguish *Collins* from this case[6] and held that the harm caused by the unconstitutional removal provision was equally significant regardless of the type of relief sought.

Second, the CFPB's funding structure was constitutional under the Appropriations Clause because it was authorized by a statute passed by Congress and signed into law by the President.[7] The funding structure was authorized by specific statutory provisions under the Consumer Financial Protection Act ("CFPA"), which set a cap of 12% on the amount of annual funding that the CFPB could draw from the Federal Reserve System and required that the funds remain available until the CFPB fulfilled its duties and responsibilities.[8] The CFPA also mandated that the CFPB seek appropriations from Congress through the appropriations process if it needed additional funding beyond the 12% limit.[9] Because Moroney did not dispute the authorization of the CFPB's funding structure under the CFPA, the Second Circuit concluded that the CFPB's funding structure was constitutional.

The Second Circuit diverged from the recent ruling of the Fifth Circuit regarding the constitutionality of the CFPB's funding structure.

The Second Circuit diverged from the recent ruling of the Fifth Circuit regarding the constitutionality of the CFPB's funding structure.[10] In *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, the Fifth Circuit held that Congress violated the Appropriations Clause and the separation of powers by exempting the CFPB from time-limited appropriations and allowing it to draw funding from a specific source within the Federal Reserve System, thus ceding direct and indirect control over the CFPB's funding.[11] In contrast, the Second Circuit looked to the text

Similarly, Congress prescribed the purpose, limit, and fund for the CFPB's appropriation in the CFPA with five objectives on funding and limiting the appropriation.

preceding the Appropriations Clause and determined the Constitution explicitly allowed funding through two years of time-limited appropriations without any implicit limit on the funding source beyond the congressional authorization. The Second Circuit referred to historical practices of English, colonial, and state governments to show that its approach was consistent with the Founders' understanding of the appropriations process at the time of the Constitution's enactment. In England, appropriation required securing every expenditure prescribed by law with a purpose, limit, and fund.[12] Similarly, Congress prescribed the purpose, limit, and fund for the CFPB's appropriation in the CFPA with five objectives on funding and limiting the appropriation.[13]

Third, the CFPB's funding structure was found constitutional under the nondelegation doctrine. The Second Circuit concluded that Congress had provided an intelligible principle in several provisions of the CFPA to guide the CFPB in setting and spending its budget, thereby avoiding an improper delegation of legislative power. The Second Circuit noted that the Supreme Court had found an improper delegation only twice in the past 80 years, when Congress delegated unfettered legislative power to the President without any guidance.[14] The CFPB's funding structure complied with the nondelegation doctrine because the CFPA provided specific guidance on how to set and spend its budget, which was more definite than overruled arcane precedents.

Finally, the Second Circuit found Moroney had not met its burden to show that the CID was an excessively burdensome administrative subpoena and improperly intruded on its privileged attorney-client relationships. Moroney argued that the CID was not issued for a valid purpose because it sought privileged and confidential information in the practice of law. However, the Second Circuit concluded that the CID was legitimately issued by focusing solely on Moroney's debt-collection practices and possible violations of the FDCPA.[15] Moreover, Moroney failed to provide sufficient detail to establish the application of privilege or to identify specific privileged and confidential documents. The Second Circuit also disagreed with Moroney's argument that the 2019 CID was largely duplicative of the 2017 CID, to which Moroney had already responded, because Moroney had not met its burden to prove that the 2019 CID was unreasonable.

As a result, the Second Circuit affirmed the district court's decision to enforce the CID against Moroney. The Second Circuit held that the ruling in *Seila Law* did not render the CID void, the CFPB's funding structure conformed with the Appropriation Clause of Article I and the nondelegation doctrine, and the CID properly requested material on Moroney's debt collection practices and potential FDCPA violations.

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1 *See* 12 U.S.C. § 5491
2 *See* 12 U.S.C. § 5497(a).
3 *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).
4 141 S. Ct. 1761 (2021). *Collins* addressed a similar issue to *Seila Law* regarding the removal provision of an independent agency.
5 *Id.* at 1801 (emphasis added).
6 *Collins* sought retrospective relief while this case sought prospective relief. *See id.* at 1780.
7 *See* U.S. Const. art. I, § 9, cl. 7.
8 *See* 12 U.S.C. §§ 5497(a)(2)(A), (B), (c)(1).
9 *Id.* § 5497(e).
10 *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F. 4th 616, 638-39, 642 (5th Cir. 2022).
11 *Id.* at 639.
12 *See* 7 Alexander Hamilton, The Works of Alexander Hamilton 532 (John C. Hamilton ed. 1851).
13 *See* 12 U.S.C. § 5511(b) which provides: (1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens ; (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.
14 *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).
15 While the CFPB does not have enforcement authority against attorneys engaged in the practice of law, it has enforcement authority over attorneys engaged in the offering or provision of a consumer financial product or service that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship. *See* 12 U.S.C. § 5517(e)(1)-(2)

DECEPTIVE TRADE PRACTICES AND WARRANTY

THE TEXAS CITIZENS PARTICIPATION ACT (TCPA) APPLIED TO THE CLIENT'S LAWSUIT BECAUSE IT WAS BASED ON THE ATTORNEYS' ALLEGED COMMUNICATIONS

DTPA CLAIMS ARE EXEMPT FROM THE TCPA

PLAINTIFF MAY NOT FRACTURE A PROFESSIONAL-NEGLIGENCE CLAIM AND CREATE A DTPA CLAIM TO AVOID APPLICATION OF THE TCPA

Hanna v. Williams, ___ S.W.3d ___ (Tex. App.—Austin 2022). https://scholar.google.com/scholar_case?case=11136040207317593117&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Appellant Kirsten Hanna received a DTPA letter alleging misrepresentation of property defects after selling a property to homebuyers. Hanna hired Appellee, Leighton, Williams, Adkinson, & Brown, PLLC ("LWAB"), as defense legal counsel. Lengthy proceedings led to a settlement that incurred $120,000 in attorney's fees and expenses, contradicting Hanna's expressed desire to pursue a cost-effective dismissal of the lawsuit.

Hanna filed suit against LWAB, alleging gross negligence, negligence, breach of fiduciary duty, and DTPA violations. The trial court granted LWAB's TCPA motions dismissing Hanna's claims. Hanna appealed.

HOLDING: Affirmed.

REASONING: Hanna argued that the TCPA was not applicable because LWAB did not identify any specific communications they made in or pertaining to a judicial proceeding, thus not exercising their right to petition. Hanna further alleged that her claims were based on LWAB's failure to communicate and failure to act, exempting her DTPA claims from the TCPA.

The court noted that precedent held that an attorney's alleged failure to communicate or a court filing on behalf of a client can equate to the expansive exercise of the right to petition.

The court rejected these arguments, ruling that Hanna's allegations of unnecessary legal work and inflated fees largely rested upon affirmative actions and communications by LWAB, thus establishing their right to petition and TCPA applicability. The court noted that precedent held that an attorney's alleged failure to communicate or a court filing on behalf of a client can equate to the expansive exercise of the right to petition.

Although DTPA claims are exempted from the TCPA, the court reasoned that professional negligence claims may not be divided or "fractured" into independent claims to evade the TCPA. Cases concerning an attorney's alleged improper representation are derived from a complaint of lack of adequate legal representation. Hanna's varying claims were grounded in the sole complaint of negligent representation. Thus, the DTPA exemption was not applicable.

CONSUMER MAY NOT RECAST HER NEGLIGENCE CLAIM AS A DTPA CLAIM TO AVOID THE TEXAS MEDICAL LIABILITY ACT'S PROVISIONS

Loya v. Hickory Trail Hosp., L.P., ___ S.W. 3d ___ (Tex. App.—Dallas 2022). https://law.justia.com/cases/texas/fifth-court-of-appeals/2022/05-20-00378-cv.html

FACTS: Plaintiff Marvella Loya went to a mental-health facility operated by Defendant Hickory Trail Hospital, L.P. ("Hickory") seeking medicine dosage advice and counseling services. Loya alleges Hickory admitted her against her will and forced her to remain in the facility. After admitting Loya, Hickory filed a temporary application for court-ordered mental-health services.

The mental-health court issued an order detaining Loya at Hickory's facility pending a probable cause hearing where it was found that Loya did not present a substantial risk of serious harm to herself. The mental-health court ordered her immediate release.

Loya sued Hickory for false imprisonment and unconscionable conduct under the Texas DTPA. The trial court granted Hickory's motion for summary judgment. Loya appealed.

HOLDING: Affirmed.

REASONING: Loya claimed that Hickory engaged in an unconscionable action by taking advantage of her and admitting her as an inpatient despite her seeking only merely a change to her medical prescription dosage. Loya argued that her DTPA claim was based on Hickory's intentional acts, not its negligence. The appellate court disagreed.

The appellate court held that Loya's DTPA claim was barred under Section 74.004 of the Texas Medical Liability Act ("TMLA") according to *Sorokolit v. Rhodes,* 889 S.W. 2d 239 (Tex. 1994). In construing the language of this TMLA provision, the Texas Supreme Court applied the common law meaning of "negligence." Using the common law definition, the court held that the TLMA precludes DTPA claims against a physician for damages for personal injury or death if the damages result, or are alleged to result, from the physician's negligence.

Under *Sorokolit,* a plaintiff may not recast her negligence claim as a DTPA claim to avoid the TMLA›s provisions. The lynchpin of Loya's DTPA claim is that Hickory took advantage of her by admitting her as an inpatient despite her seeking only a change to her prescription. Such a claim cannot be maintained without reference to Hickory's standard of care. Thus, because Loya's claim is that the physician was negligent as defined by the TMLA, she cannot sue under the DTPA.

RECENT DEVELOPMENTS

A BREACH OF A PROMISE IS NOT A MISREPRESENTATION OF A MATERIAL FACT

AN OMISSION OF OR A FAILURE TO DISCLOSE INFORMATION DOES NOT MAKE A SEPARATE FACTUAL STATEMENT FALSE

Parsons v. Trichter & LeGrand, P.C, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2022).
https://scholar.google.com/scholar_case?case=4550159416761549546&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellant Paul G. Parsons, a commercial pilot, was arrested for driving while intoxicated and was concerned that this criminal charge would negatively affect the renewal of his pilot's license. Parsons signed a flat fee agreement with Defendant-Appellee Trichter & LeGrand, P.C., for representation in any hearings and necessary trials relating to his DWI. Parsons became dissatisfied with Trichter & LeGrand and terminated his relationship with the firm. Parsons hired a different law firm, received deferred adjudication for the criminal charge, and learned he would not have lost his pilot's license if convicted for a first DWI offense. Parsons sued Trichter & LeGrand, and Trichter individually, alleging Trichter misrepresented his extensive experience handling DWI cases for pilots and dealing with the FAA. Parsons claimed this misrepresentation was a violation of the DTPA.

Trichter filed a no-evidence motion for summary judgment. The trial court granted Trichter's motion. Parsons appealed.

HOLDING: Affirmed.

REASONING: Parsons argued that Trichter made a misrepresentation of material fact because Trichter promised Parsons that he would personally attend every hearing in Parsons's case but did not attend any hearing. Parsons also argued that Trichter misrepresented his extensive experience handling DWI cases for pilots and licensing issues with the FAA because Trichter never told Parsons he would not lose his pilot's license if he were convicted of the DWI charges filed against him. The court rejected both arguments.

To establish a cause for negligent misrepresentation, there must be proof of false representation of an existing fact. Proof of breach of a future promise is not a misrepresentation of a material fact and does not establish cause for negligent misrepresentation. An allegation of a mere breach of contract without more does not constitute a false, misleading, or deceptive act in violation of the DTPA. The court also held that an omission of, or a failure to disclose information, does not make a separate factual statement false. Because none of the evidence relied on by Parsons concerned a misrepresentation of a material fact, the court affirmed the granting of the no-evidence motion for summary judgment.

THE DISCOVERY RULE IS AN EXCEPTION TO THE GENERAL RULE OF ACCRUAL

Ryan v. TX RCG, LLC, ___ S.W.3d ___ (Tex. App.—Dallas 2022).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2022/05-21-00382-cv.html

FACTS: Appellant-Plaintiff Shyla Ryan rented an apartment owned and managed by a succession of companies, including Defendant-Appellee TX RCG, LLC. During 2016, Ryan became ill with respiratory issues, headaches, fatigue, memory loss, shortness of breath, hives, and rashes after water leaks were found on the property. Ryan was notified in October 2016 that the property had been sold to TX RCG. Ryan found mold in her apartment during the last two weeks of November 2016. In December 2016, air quality test results showed that the apartment contained toxic molds.

Ryan filed suit in September 2018 and added TX RCG as a defendant a year later. Ryan asserted DTPA claims, among others. TX RCG filed a motion for summary judgment, asserting the applicable two-year statutes of limitations barred Ryan's claims. The trial court granted TX RCG's motion. Ryan appealed.

HOLDING: Affirmed.

REASONING: Ryan alleged that the statutes of limitations for her DTPA claims were tolled because the toxic mold was unknown, a proper mold assessment was not timely done, and she was not provided with the results. The court disagreed.

Although accrual occurs when a wrongful act causes a legal injury, the discovery rule is an exception to the general rule of accrual. It is limited to circumstances where the nature of the injury is inherently undiscoverable and the evidence of the injury is objectively verifiable. It defers accrual of a claim until the injured party discovers, or reasonably should have discovered, the nature of the injury and the likelihood that the injury was caused by the wrongful acts of another. The discovery of the injury, not the identification of an alleged wrongdoer, initiates the accrual.

The discovery of the injury, not the identification of an alleged wrongdoer, initiates the accrual.

The court noted that Ryan discovered the nature of her injury and the likelihood it was caused by the wrongful conduct of another no later than December 2016. The court concluded that Ryan's causes of action accrued no later than December 2016 and thus were time-barred against Texas RCG by the two-year statutes of limitations.

CORPORATION IS NOT A CONSUMER WITH RESPECT TO TRANSACTION ENTERED INTO BY AN UNAUTHORIZED AGENT

Amaro Oilfield Automation, LLC v. Lithia CM, Inc., ___ S.W.3d ___ (Tex. App. 2023).
https://scholar.google.com/scholar_case?case=5116853827268665409&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Brian Herron, president of Plaintiff-Appellant Amaro Oilfield Automation, LLC, ("Amaro") attempted to purchase a pickup truck at the dealership of Defendant-Appellee Lithia CM, Inc., ("Lithia") by trading in a company car and using a company check as a down payment. Herron was listed as Amaro's sole officer, director, and manager in the public information report with the Texas Comptroller. In the corporate formation documents filed with the Secretary of State two years prior to the sale, Herron was listed as a managing member. Amaro sent Lithia a DTPA demand letter, arguing that Amaro did not authorize the transaction between Herron and Lithia and alleging damages in the form of the $10,000 down payment, loss of use of the company car, and the sum of $4,300 to secure the return of the company vehicle.

Amaro sued Lithia for violations of the DTPA, among other claims. The trial court granted Lithia's motions for traditional and no-evidence summary judgment. Amaro appealed.

HOLDING: Affirmed.

REASONING: Amaro argued that no-evidence summary judgment was improper on his claims because Amaro presented at least some evidence of every element of each claim. The court disagreed.

The court reasoned that because Amaro consistently urged that Herron was the person who presented payment to Lithia, Amaro was not a consumer under the DTPA. Although a DTPA consumer need not be the one who purchases the goods, the transaction must have been required by or for the benefit of the third party and the goods must have been purchased for the third party who seeks consumer status. Although Herron presented a check from Amaro and purported to act on behalf of the company, Amaro judicially admitted that Herron did not have authority to act on its behalf. Even if Amaro established that it came into possession of the truck at some point, Amaro failed to show under what circumstances it acquired the truck after Herron left the dealership with it. The court held that Amaro failed to produce evidence as to consumer status, the first element of its DTPA claim, and was therefore preluded to bring a claim for breach of contract and DTPA violations. The no-evidence summary judgment was properly granted.

PERSON WHO DENIES ANY CONNECTION TO A CONTRACT A DEBT COLLECTOR IS ATTEMPTING TO COLLECT CANNOT BE A DTPA CONSUMER

Bishara Dental, PLLC v. Morris, Lendais, Hollrah & Snowden, PLLC, ___ F.4th ___ (5th Cir. 2023).
https://www.ca5.uscourts.gov/opinions/unpub/21/21-20418.0.pdf

FACTS: Helen Bishara signed a contract with Outfront Media LLC ("Outfront") to provide a billboard advertisement for an entity the contract identified as "Bishara Dental." Outfront sued Plaintiff-Appellant Bishara Dental, PLLC ("Bishara"), alleging Bishara's failure to pay for its advertising services was a breach of contract. Defendant-Appellee Morris, Lendais, Hollrah & Snowden, PLLC ("Morris Lendais") later appeared as counsel for Outfront and made efforts to collect the debt it claimed Bishara owed to Outfront. In disputing the validity of the debt, Bishara argued it was not the correct party as it was never a party to the contract.

Bishara filed suit against Morris Lendais, alleging that Morris Lendais's debt-collection efforts violated the FDCPA and DTPA. Morris Lendais moved to dismiss for failure to state a claim. The district court granted Morris Lendais's motion. Bishara appealed only as to the DTPA claim.

HOLDING: Affirmed.

REASONING: Bishara alleged that it was a consumer under the DTPA because it is a business that seeks to acquire goods and services. The court disagreed, holding that Bishara failed to identify any specific goods or services that it sought or acquired from anyone.

The court identified two reasons why Bishara lacked consumer standing under the DTPA. First, Bishara denied any connection to the alleged advertising contract, and thus denied that it ever sought or purchased anything from Outfront. The court noted that the only specific good or service mentioned in Bishara's complaint was the billboard, which Bishara expressly disclaimed as having any link to its DTPA complaint.

Second, because the claim arose out of Morris Lendais's debt-collection efforts, the court reasoned that Bishara's failure to allege it ever sought or purchased any good or service from Morris Lendais meant it could not sustain an action under the DTPA. Even if Bishara had purchased services from Outfront – a fact that Bishara repeatedly disputed – it did not identify how that purchase formed the basis of its complaint against Morris Lendais. The court held that a person denying any connection to a contract a debt collector is attempting to collect cannot be a DTPA consumer.

The court held that a person denying any connection to a contract a debt collector is attempting to collect cannot be a DTPA consumer.

PLAINTIFFS MAY NOT SPLIT, OR "FRACTURE," WHAT ARE IN ESSENCE LEGAL-MALPRACTICE CLAIMS INTO SEPARATE CLAIMS UNDER NON-NEGLIGENCE THEORIES LIKE FRAUD, BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, OR VIOLATIONS OF THE DTPA

Brickley v. Reed, ___ S.W.3d ___ (Tex. App. 2023).
https://law.justia.com/cases/texas/third-court-of-appeals/2023/03-22-00453-cv.html

FACTS: Plaintiff-Appellant James Allen Brickley was convicted of two counts of aggravated sexual assault and received a 35-year prison sentence. Brickley sued his defense attorney, Defendant-Appellee Justin Elliott Reed, for legal-malpractice, breach of fiduciary duty, breach of contract, and violations of the DTPA. Reed moved to dismiss for lack of a basis in law under Texas Civil Procedure Rule 91(a), arguing that all of Brickley's causes of action were improperly fractured legal-malpractice claims under the anti-fracturing rule. The trial court granted Reed's motion. Brickley appealed.

HOLDING: Affirmed.

REASONING: Brickley argued the trial court improperly dismissed each pleaded cause of action because they were truly separate claims from his legal-malpractice claim. He claimed that the anti-fracturing rule did not apply because his legal-malpractice claim, a negligence claim, was distinct from his non-negligence claims for breach of fiduciary duty, breach of contract, and violations of the DTPA. The court disagreed.

The anti-fracturing rule prohibits a plaintiff from splitting what are in essence legal-malpractice claims into separate claims under non-negligence theories like fraud, breach of fiduciary duty, breach of contract or violations of the DTPA. The claimant must do more than merely reassert the same claim for legal malpractice under an alternative label. The court examined whether the facts underlying the claims involved the attorney's duty of ordinary care or other independently actionable fiduciary, statutory, contractual or other tort duties. The acts and omissions that Brickley alleged by Reed all concerned Reed's preparation for, and conduct of, Brickley's criminal proceeding and the surrounding representation. Because the allegations still concerned allegedly improper legal representation or alleged bad legal advice, the alleged non-negligence claims were improperly fractured legal-malpractice claims.

MERE BREACH OF CONTRACT DOES NOT VIOLATE DTPA

MISREPRESENTATIONS MADE APART FROM THE CONTRACT MAY VIOLATE THE DTPA

CC&T Enters., LLC v. Tex. 1031 Exch. Co., ___ S.W.3d ___ (Tex. App.—San Antonio 2023).
https://caselaw.findlaw.com/tx-court-of-appeals/2191361.html

FACTS: CC & T Enterprises, LLC ("CC & T") contracted The Texas 1031 Exchange Company ("Texas 1031") to assist as the qualified intermediary in completing a like-kind exchange of real property pursuant to Section 1031 of the Internal Revenue Code. The Exchange Agreement described the different requirements for a basic exchange and an improvement exchange. After making the exchange, CC & T discovered that "the boot," or excess capital gains from the sale of the relinquished property not used to purchase the replacement property, could not be tax-deferred by making improvements to the replacement property because the requirements in the contract were not met under Section 1031.

CC & T sued Texas 1031, alleging violations of the DTPA. The trial court granted Texas 1031's motion to dismiss CC & T's DTPA claim. CC & T appealed.

HOLDING: Affirmed.

REASONING: CC & T argued that the trial court erred in dismissing its DTPA claim because a material issue of fact precluded summary judgment. CC & T claimed Texas 1031 breached its contract with CC & T when it failed to deliver what CC & T expected to receive, an improvement exchange. The court rejected CC & T's argument.

The court held that a mere breach of contract, without more, does not constitute a false, misleading or deceptive act in violation of the DTPA. The court reasoned that CC & T's action was one only for breach of contract because it depended entirely on pleading and proving the Exchange Agreement.

The court acknowledged that misrepresentations made apart from the contract may violate the DTPA. However, because the costs and responsibilities of a basic exchange and an improvement exchange were both set forth in the Exchange Agreement and CC & T did not allege misrepresentations apart from the Exchange Agreement, there was no violation of the DTPA.

CAUSATION-IN-FACT IS JUST ANOTHER TERM FOR PRODUCING CAUSE

Khechana v. El-Wakil, __ S. W. 3d __ (Tex. App. — Houston [14th Dist.] 2023).
https://scholar.google.com/scholar_case?case=13114800956181230396&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellee Mohamed el-Wakil bought a vehicle from Defendant-Appellant Adel Khechana to use as a taxi. Khechana owned a car dealership. El-Wakil's applied for the vehicle's title, but, because the transfer was disputed as possibly involving fraud by one of its previous owners, the Texas Department of Motor Vehicles rejected his request. El-Wakil filed suit, alleging breach of contract, common-law fraud, and violations of the DTPA arising out of the delay in the title issuance. Six weeks before the case was tried, the title dispute was resolved in el-Wakil's favor.

The case proceeded to trial and the court rendered judgment in el-Wakil's favor on each cause of action. Khechana appealed.

HOLDING: Reversed and rendered.

REASONING: Khechana challenged the legal sufficiency of the trial court's findings as to liability and damages. The court of appeals accepted the argument, explaining that causation and damages are essential elements of each of el-Wakil's causes of action of which el-Wakil had none.

The DTPA requires a plaintiff to show that a violation of the DTPA was a producing cause of economic damages or damages for mental anguish. To be a producing cause, the DTPA violation must be a substantial factor in bringing about the injury, without which the injury would not have occurred. The court noted that the causation standards for each cause of action brought by el-Wakil included causation-in-fact, which is also referred to as "but-for" causation. The court further clarified that causation-in-fact is just another term for producing cause.

To be a producing cause, the DTPA violation must be a substantial factor in bringing about the injury, without which the injury would not have occurred.

Here, Khechana did not cause the delay in the issuance of title and could not issue the title himself. Khechana could only apply in the name of the purchaser of the vehicle, which he did.

Additionally, el-Wakil offered no evidence, made no argument, and pleaded no theory of liability under which Khechana could be held responsible for the delay in el-Wakil obtaining clear title. Thus, the court held that Khechana was not liable to el-Wakil.

SUMMARY JUDGEMENT REVERSED

DTPA DAMAGES EVIDENCE WAS CONJECTURAL AND LEFT UNRESOLVED A MATERIAL ISSUE OF FACT AS TO THE PROPER AMOUNT OF DAMAGES

Largent v. Cassius Classic Cars & Exotics, ___ S.W.3d ___ (Tex. App.—Fort Worth 2023).
https://law.justia.com/cases/texas/second-court-of-appeals/2023/02-22-00043-cv.html

FACTS: Plaintiff-Appellee Cassius Classic Cars & Exotics (“Cassius”), purchased vehicles from Defendant-Appellant Adam Largent, and paid Largent to restore those vehicles. Cassius became dissatisfied with Largent’s restoration work on several of these vehicles.

Cassius sued Largent for breach of contract and DTPA violations, alleging Largent misrepresented the condition of the vehicles prior to Cassius purchasing them. Cassius also alleged Largent misrepresented his ability to perform the restoration services. Cassius moved for summary judgement, arguing that certain misrepresentations made by Largent were the producing cause of Cassius’s damages and that Cassius was entitled to recover. Largent did not respond to the motion. The trial court granted summary judgment in favor of Cassius and awarded actual damages. Largent appealed.

Cassius did not present evidence establishing the value of the vehicles as purchased or as represented by Largent nor the value of the vehicles it received.

HOLDING: Reversed and remanded.

REASONING: Largent argued that the trial court erred because the evidence was not legally sufficient to support the trial court’s summary judgment order as to both allegations. The court agreed.

In support of Cassius’ summary judgment motion, the only evidence provided by Cassius was an affidavit where he listed each of the vehicles with a round dollar amount followed by a vague description of the misrepresentations. As such, the court concluded that Cassius did not present legally sufficient evidence, such as reasonable and necessary expenses incurred, to substantiate his DTPA claim. In fact, Cassius did not present evidence establishing the value of the vehicles as purchased or as represented by Largent nor the value of the vehicles it received. Therefore, because there was no attempt to show how these damages amounts were reasonable or necessary, the court determined the damages evidence related to the defective vehicles as conjectural and inappropriate for summary judgment relief. The court reversed the trial court’s order granting summary judgment to Cassius.

DEBT COLLECTION

FDCPA PLAINTIFF MAY RECOVER COSTS OF THE ACTION, TOGETHER WITH A REASONABLE ATTORNEY'S FEE AS DETERMINED BY THE COURT

COURT FINDS REQUESTED ATTORNEYS' FEES ARE EXCESSIVE AND ARE THEREFORE REDUCED BY 50%

Beckler v. Rent Recovery Sols., ___ F. Supp. 3d ___ (D. Minn. 2022).
https://casetext.com/case/beckler-v-rent-recovery-sols

FACTS: Defendant Rent Recovery Solutions, LLC ("RRS") is a debt collection agency that contacted Plaintiff Adrianna Beckler to collect a debt. Beckler disputed the debt. RRS reported Beckler's alleged debt to a credit reporting agency. Beckler sued RRS, alleging that RRS's debt collection attempts violated the FDCPA.

Beckler sought actual damages, statutory damages, and an award of reasonable costs and attorneys' fees. RRS offered a settlement amount plus reasonable costs and attorneys' fees. Beckler accepted RRS's offer, notified RRS of the amount of requested attorneys' fees, and provided detailed billing records to support the request. RRS did not respond to Beckler's request. Beckler moved for an award of $18,810 in attorneys' fees. RRS opposed Beckler's request, arguing that the requested amount should be $1,944.

The court found the attorneys' fee rates objectively reasonable and the tasks reasonable, but the amount of time expended on the tasks unreasonable

HOLDING: Granted in part.
REASONING: Beckler argued that she was entitled to an award based on her attorneys' costs and fees. Beckler reasoned that her attorneys' rates were reasonable based on each attorney's declaration, billing statements, and curriculum vitae detailing the attorney's legal experience, including experience in FDCPA cases for one of the two attorneys. Under 15 U.S.C. § 1692k(a)(3), a plaintiff in "any successful action against a debt collector" may recover the costs of the action and reasonable attorneys' fees. The skill, experience, and reputation of counsel are factors of a rate's reasonableness. A court should also consider if the hours were reasonably expended.

The court found the attorneys' fee rates objectively reasonable and the tasks reasonable, but the amount of time expended on the tasks unreasonable based on the case's factual simplicity and early settlement. In comparable FDCPA cases, attorneys spent less than half of the number of hours that Beckler's attorneys spent on her case. Thus, the court held that Beckler's requested attorneys' fees were disproportionate to the amount of her recovery and were reduced by 50%.

COLLECTING A DEBT AND ENFORCING A SECURITY INTEREST ARE NOT THE SAME THING UNDER THE FDCPA

Adelson v. Ocwen Loan Servicing, LLC, ___ F.4th ___ (6th Cir. 2023).
https://casetext.com/case/adelson-v-ocwen-loan-servicing-llc-2

FACTS: Plaintiff-Appellant Wendy Adelson took out a loan from Sebring Capital Partners LP ("Sebring") that was secured by a mortgage initially assigned to Defendant-Appellee HSBC Bank USA N.A. ("HSBC"). Sebring transferred its right to collect payments to Defendant-Appellee Ocwen Loan Servicing, LLC ("Ocwen") who sent notification of the transfer to Adelson. After making several payments, Adelson questioned Ocwen's authority to collect and refused to continue making payments to Ocwen. Ocwen referred the loan to foreclosure.

Ocwen's lawyers at Trott Law P.C. ("Trott") sent Adelson a letter indicating that Ocwen had referred all legal matters regarding the foreclosure proceedings to Trott. HSBC then purchased the home at a sheriff's sale. Adelson filed a complaint challenging the validity of the sale. Adelson alleged that Ocwen and Trott had violated the FDCPA. The district court dismissed the claim. Adelson appealed.
HOLDING: Affirmed.
REASONING: Adelson claimed that Ocwen and Trott violated the FDCPA. The court disagreed.

The FDCPA's general terms only apply to debt collectors. Collecting a debt and enforcing a security interest are not the same thing under the FDCPA. The act of enforcing a security interest is an activity not bound by the FDCPA. When Adelson defaulted, HSBC's interest was to ensure that there is a present right to take the property, an intent to take possession, and no applicable property exemption by law. Trott's principal interest on behalf of Ocwen was to enforce a security interest. Thus, because HSBC had a right to possession of the house, intended to take possession, and was allowed to do so, Trott did not violate the FDCPA.

Regarding Ocwen, the court held that a mortgage servicer can only be a debt collector if it has acquired a debt in default or has treated the debt as if it were in default at the time of acquisition. Because Adelson made payments to Ocwen the first few months and there was no evidence of Ocwen treating the debt as if it were in default at the time of acquisition, Ocwen could not be defined as a debt collector.

DEFENDANT'S RELIANCE ON THE FDCPA MODEL FORM LETTER "OVERSTATES BOTH THE MEANING AND SCOPE OF THE REGULATORY SAFE HARBOR PROVIDED BY THE CFPB"

CONSUMER ALLEGED PLAUSIBLE FDCPA CLAIMS FOR RELIEF BASED ON THE OMISSION OF THE DATE IN THE LETTER

UNDATED LETTER'S MISLEADING NATURE AS TO THE FULL AMOUNT OF THE DEBT MIGHT "BE 'UNFAIR OR UNCONSCIONABLE' TO THE LEAST-SOPHISTICATED CONSUMER"

Roger v. GC Services, LP, ___ F. Supp. 3d ___ (S.D. Fla. 2023).
https://www.acainternational.org/wp-content/uploads/2023/02/rogers-gc-02-14.pdf

FACTS: Plaintiff Pablo Roger received a collection notice from Defendant GC Services. The letter was undated and requested payment of an outstanding debt. The Plaintiff contended that the omission of a date in the letter amounted to withholding a material term and characterized the letter as misleading and illegitimate. He alleged that the collection letter caused him to spend money and time mitigating risk of future financial and reputational harm.

The Plaintiff filed a complaint seeking relief from the Defendant's debt collection citing violations of the FDCPA. The Defendant moved to dismiss for failure to state a claim for relief.

HOLDING: Denied.

REASONING: The Plaintiff argued that Defendant's undated letter violated the FDCPA because the FDCPA requires collectors to supply certain information to debtors and prohibits use of false, deceptive, unfair, or unconscionable means. Defendant countered that the letter was protected by a safe harbor provision because the formatting mimicked the model form provided by the CFPB for debt collectors.

The court further held that the undated letter did not withstand the least-sophisticated consumer standard which asks whether such a consumer would have been deceived by the debt notice.

The court rejected this argument, holding that following the model format was not the same as meeting substantive requirements of the letter's contents, nor statutory compliance. Defendant's reliance on the model form, created to guide limited regulatory compliance, was misplaced. Defendant's reliance on the FDCPA model form "overstate[d] both the meaning and scope of the regulatory safe harbor provided by the CFPB."

The court further held that the undated letter did not withstand the least-sophisticated consumer standard which asks whether such a consumer would have been deceived by the debt notice. The least unsophisticated consumer could have been misled as to the amount of outstanding payment owed and disadvantaged by the unfair or unconscionable collection letter. Therefore, Plaintiff plausibly alleged violations of the FDCPA for relief based on the omission of the date in Defendant's letter.

ONE PRIVATE ENTITY KNOWING ABOUT THE PLAINTIFF'S DEBT IS NOT A PUBLIC DISCLOSURE OF PRIVATE FACTS AND DOES NOT RISE TO THE LEVEL OF SUSTAINING A CONCRETE INJURY NEEDED TO SUE UNDER THE FDCPA IN FEDERAL COURT

Shields v. Prof'l Bureau of Collections of Maryland, ___ F.4th ___ (10th Cir. 2022).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Shields%20v.%20Professional%20Bureau%20of%20Collections%20of%20Maryland%20-%20Order%20-%202022.12.16.pdf

FACTS: Defendant-Appellant Professional Bureau of Collections of Maryland ("Professional Bureau") used an outside mailer to compose and send Plaintiff-Appellee Elizabeth Shields three collection notices related to her student loans. Shields sued Professional Bureau under the Fair Debt Collection Practices Act ("FDCPA") for communicating her debt to the mailer.

Professional Bureau moved to dismiss Shields' claims due to lack of standing, arguing Shields had no concrete injury. The district court granted the motion. Shields appealed.

HOLDING: Affirmed.

REASONING: Shields relied on the tort of public disclosure of private facts to allege that Professional Bureau violated the FDCPA and subsequently injured her by publicly disclosing her debt total to a mailer. The court disagreed.

The element of publicity is necessary to sustain a claim of public disclosure. The court defined "publicity" as information conveyed to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The court held that without publicity, there is no invasion of privacy, and no harm suffered from public disclosure. The court determined that Professional Bureau's communication to the outside mailer did not constitute a communication to the public at large, nor to someone likely to widely communicate Shields' debt. One private entity knowing about a plaintiff's debt is not a disclosure of private facts and is not sufficient to constitute a concrete injury needed to sue under the FDCPA. Thus, because there was no public communication, the court concluded that Shields failed to establish evidence of a concrete injury.

RECENT DEVELOPMENTS

CONSUMER CREDIT

NON-TRIBE MEMBER OF TRIBE "RENT-A-TRIBE" SCHEME NOT IMMUNE FROM LAWSUIT OVER UNLAWFUL INTEREST RATES

Williams v. Martorello, ___ F. 4th ___ (4th Cir. 2023).
https://cases.justia.com/federal/appellate-courts/ca4/21-2116/21-2116-2023-01-24.pdf?ts=1674588663

FACTS: The Lac Vieux Desert Band of Chippewa Indians (the "Tribe") and Defendant-Appellant Matt Martorello (collectively, the "Parties") allegedly created businesses to make small-dollar, high-interest-rate loans to Plaintiff-Appellees, who were various Virginia citizens (collectively, the "Borrowers"). The Loan Agreement contained a waiver provision in which the Borrowers agreed to consent to the jurisdiction of the Tribe, and eschewed to serve as a representative or participate as a member of a class lawsuit against the lender "and/or related third parties." The Borrowers acknowledged the waiver provision when signing the Loan Agreement. The Borrowers filed a class suit against the Parties, alleging that the Tribe created businesses alongside Martorello as part of a "Rent-a-Tribe" scheme in which a payday lender partnered with a Native American tribe to cloak the lender in the sovereign immunity of the tribe, precluding enforcement of usury laws that cap interest rates.

Because Martorello is an individual, he was not a party exempted from class-action claims and liability.

The Parties moved to dismiss for lack of subject matter jurisdiction, asserting that they were entitled to tribal sovereign immunity. The district court concluded that the Borrowers did not waive their right to participate in a class action against Martorello. Martorello appealed.

HOLDING: Affirmed.

REASONING: Martorello argued that the Borrowers waived their right to bring class action claims against him because the Borrowers forfeited the right to participate in class actions filed against the lender or "related third parties." Martorello contended that he was an "affiliated entity" of the lenders within this definition and thus, a party immune to class-action proceedings.

The court rejected that argument by reasoning that, when used together, the terms "affiliated" and "entity" typically refer to related organizations or corporate entities, not to individuals. If the term included all individuals affiliated with the entities, then including "related third parties" in the definition would be superfluous. The court concluded that because Martorello is an individual, he was not a party exempted from class-action claims and liability.

FAIR CREDIT REPORTING ACT EXPRESSLY PRECLUDES A PRIVATE RIGHT OF ACTION AGAINST A FURNISHER FOR FAILING TO PROVIDE ACCURATE INFORMATION AS REQUIRED BY § 1681S-2(A)

CONSUMER BRINGING AN FCRA CLAIM AGAINST A FURNISHER UNDER § 1681S-2(B) MUST ESTABLISH THREE FACTS

Dixon v. Mazda Fin. Servs., Inc., ___ F. Supp.3d ___ (S.D. Tex. 2022).
https://scholar.google.com/scholar_case?case=16080906052632652934&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff Eugene Dixon entered a Consumer Credit Sale with Defendant Mazda Financial Services to purchase a vehicle. Dixon contended that Mazda Financial allowed a third party to repossess his vehicle and burdened him with a large volume of emails and negative information about his consumer report in an attempt to collect the debt.

Dixon sued Mazda Financial, alleging violation of the Fair Credit Reporting Act ("FCRA"), among other claims. Mazda Financial moved for summary judgment.

HOLDING: Granted.

REASONING: Dixon argued that Mazda Financial, as a furnisher of credit information to consumer reporting agencies, failed to provide accurate information as required by sections 1681s-2(a) and 1681s-2(b) of the FCRA.

The district court rejected Dixon's arguments. The court held that because violations of section 1681s-2(a) "shall be enforced exclusively" by certain federal agencies and federal and state officials, the FCRA explicitly precludes a private cause of action against Mazda Financial, a furnisher, for failing to provide precise information to credit reporting agencies. 15 U.S.C. § 1681s-2(d).

Furthermore, a plaintiff bringing an FCRA claim against a furnisher under section 1681s-2(b) must establish that (1) he disputed the accuracy or completeness of information with a consumer reporting agency; (2) the agency notified the furnisher of the consumer's dispute; (3) and the furnisher failed to conduct an investigation, correct any inaccuracies, or notify the agency of the results of the investigation. Here, because Dixon failed to provide summary judgment evidence on any of the three elements, Dixon's section 1681s-2(b) claim was conclusively negated and summary judgment for Mazda Financial was therefore appropriate.

CLAIM PREMISED ON AN ALLEGEDLY DISCHARGED PRIVATE STUDENT LOAN IS NOT ACTIONABLE UNDER FAIR CREDIT REPORTING ACT

LEGAL INACCURACY ERROR IS NOT ACTIONABLE UNDER THE FCRA

Mader v. Experian Info. Sols., Inc. ___ F.4th ___ (2d Cir. 2023). https://scholar.google.com/scholar_case?case=9000361603599098920&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellant Michael Mader filed for bankruptcy and was released from all dischargeable debts. Experian Information Solutions ("Experian") sent a letter to Mader explaining that his student loan was not discharged and Mader was responsible for repaying the entire remaining balance. Experian included Mader's student loan on his credit report.

Mader filed suit against Experian under the Fair Credit Reporting Act ("FCRA"), alleging legal inaccuracies in credit reporting. The court granted summary judgment in favor of Experian. Mader appealed.

HOLDING: Affirmed.

REASONING: Mader argued his student loan was dischargeable because it was a private loan and not exempted from discharge under the Bankruptcy Code. Mader claimed that Experian violated the FCRA by inaccurately reporting his credit when it included his student loan on his credit report. The court disagreed.

Under the FCRA, a credit report is inaccurate when it is patently incorrect or misleading. The credit report's inaccuracy has to be based on objectively and readily verifiable information. The court held that Mader's allegation of inaccuracies evaded objective verification. There was no bankruptcy order explicitly discharging the debt. Mader's debt status was not sufficiently objectively verifiable without a customized fact and law analysis of its post-bankruptcy validity. Thus, the court could not deem Mader's credit report "inaccurate" under the FCRA. The court held that inaccuracies that turn on legal disputes are not actionable under the FCRA. Mader failed to allege an inaccuracy within the FCRA because the question of whether his loan qualified as dischargeable remained unresolved. This unresolved legal question rendered his claim not actionable under the FCRA.

Inaccuracies that turn on legal disputes are not actionable under the FCRA.

RECENT DEVELOPMENTS

INSURANCE

THE INSURANCE CODE DOES NOT CREATE A PRIVATE CAUSE OF ACTION FOR CLAIMS UNDER THE EMERGENCY CARE STATUTES

RECOVERY IN QUANTUM MERUIT CANNOT BE HAD FROM AN INSURER BASED ON SERVICES RENDERED TO AN INSURED

DOCTORS CANNOT STATE A CLAIM FOR UNFAIR SETTLEMENT PRACTICES UNDER CHAPTER 541 OF THE INSURANCE CODE

Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc., ___ S.W. 3d ___ (Tex. 2023).
https://law.justia.com/cases/texas/supreme-court/2023/21-0291.html

FACTS: Petitioner-Appellant, Texas Medicine Resources, LLP ("Doctors"), provided emergency care to patients insured by Respondent-Appellee, Molina Healthcare of Texas, Inc. ("Molina"). Molina, a health maintenance organization ("HMO"), reimbursed less than 15% of the Doctors' usual and customary charges. The Doctors sued Molina under the Insurance Code, alleging Molina failed to pay the Doctors' usual and customary rates and that Molina engaged in unfair settlement practices. They also alleged a common law claim for quantum meruit.

Molina filed a plea stating that the Emergency Care Statutes do not create a private right of action and that the Doctors' other claims also fail as a matter of law. The trial court granted the plea and dismissed all the Doctors' claims. The court of appeals affirmed. The Doctors appealed.

HOLDING: Affirmed.

REASONING: The Doctors argued that Section 1271.155(a) of the Insurance Code implies a claim for damages because it creates a compensation requirement and identifies the measure of compensation. The Doctors asserted that, by stating that a provider or insurer may not file suit until the conclusion of arbitration, Section 1467.085 presupposes that a right to file suit existed before the amendments. The Doctors further argued that the reference to Section 1467.004 also points to a pre-existing right to sue. The Doctors also claimed quantum meruit, claiming that Molina directly benefited through the Doctor's treatment of their insureds. Lastly, the Doctors alleged that Molina violated Section 541.060(a) by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the Doctor's claims under the Emergency Care Statutes. The Doctors argued that they have standing under Section 541.151 to sue for a violation of Section 541.060(a) through Molina's insured's assignment of benefits and claims to the Doctors. The court disagreed.

The court rejected the Doctors' damages claim argument, explaining the existence of a private cause of action must be clearly implied in the statutory text.

The court rejected the Doctors' damages claim argument, explaining the existence of a private cause of action must be clearly implied in the statutory text. Section 1271.155 does not clearly imply a private damages action. Furthermore, before the 2019 amendments, Chapter 1467 did not apply to claims under the Emergency Care Statutes. Thus, the Insurance Code does not create a private cause of action for claims under the Emergency Care Statutes.

Regarding the Doctors' recovery claim, quantum meruit is inapplicable because an HMO is statutorily obligated to provide or arrange for care. The Doctors fulfilled Molina's core statutory duty by providing emergency medical care to Molina's enrollees. Recovery in quantum meruit cannot be had from an insurer based on services rendered to an insured because those services are not directed to or for the benefit of the insurer.

Section 541.060(a) prohibits "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." Failing to attempt a good-faith settlement is only unfair with respect to claims by the insureds, not the Doctors. The Doctors alleged that Molina engaged in unfair practices with respect to claims asserted by them, and those claims are not actionable under Section 541.060(a). Claims under Chapter 541 may not be assigned by an aggrieved consumer to someone else, such as the Doctors.

PLAINTIFF DOES NOT QUALIFY AS A PREVAILING-PARTY AND THEREFORE CANNOT RECOVER COURT COSTS OR ATTORNEY'S FEES UNDER TEXAS INSURANCE CODE

TEXAS SUPREME COURT LIMITS PREVAILING-PARTY STATUS TO PLAINTIFFS WHO OBTAIN A JUDGMENT FOR DAMAGES OR EQUITABLE RELIEF

Jones v. Allstate Vehicle & Prop. Ins. Co., ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2022).
https://law.justia.com/cases/texas/first-court-of-appeals/2022/01-21-00162-cv.html

FACTS: Plaintiff-Appellant Oneida Jones held a home insurance policy with Allstate Vehicle and Property Insurance Company. Jones alleged that Allstate wrongfully denied in part a claim made under the policy. Jones filed suit against Allstate, alleging breach of contract, violations of the Texas Insurance Code, and breach of the duty of good faith and fair dealing.

The jury found that Allstate failed to comply with the home insurance policy. The trial court accepted the jury's findings on liability and damages but rendered a take-nothing judgment in Allstate's favor. Jones appealed.

HOLDING: Affirmed.

REASONING: Jones argued that the trial court erred in not awarding her court costs and attorney's fees in judgment because she was entitled to recover these under the Texas Insurance Code.

The Texas Supreme Court held that a plaintiff must prove a compensable injury and secure an enforceable judgment for damages or equitable relief to qualify as a prevailing party.

The court rejected this argument by reasoning that Jones did not qualify as a prevailing party.

The court explained that favorable jury findings are not enough to make one a prevailing party. The Texas Supreme Court held that a plaintiff must prove a compensable injury and secure an enforceable judgment for damages or equitable relief to qualify as a prevailing party. The court explained that the prevailing party is the one vindicated by the trial court's judgment, not the jury's verdict.

Jones further argued that the finding that Allstate violated the Texas Insurance Code conferred prevailing-party status on her even though she did not obtain a judgment for damages. The court rejected this argument, reasoning that Allstate paid the full amount owed to Jones under the policy before trial. Because the jury awarded a single sum for all the claims Jones proved, any violation of the Texas Insurance Code was included in this amount.

RECENT DEVELOPMENTS

LANDLORD TENANT

CONSTITUTIONALITY OF NEW YORK RENT STABILIZATION LAW UPHELD

74 Pinehurst LLC v. New York, ___ F.4th ___ (2d Cir. 2023).
https://law.justia.com/cases/federal/appellate-courts/ca2/21-467/21-467-2023-02-06.html

Cmty. Hous. Improvement Program v. City of New York, ___ F.4th ___ (2d Cir. 2023).
https://cases.justia.com/federal/appellate-courts/ca2/20-3366/20-3366-2023-02-06.pdf?ts=1675697455

FACTS: Plaintiffs-Appellants in 74 Pinehurst LLC v. New York ("Pinehurst") and Cmty. Hous. Improvement Program v. City of New York (collectively, "Landlords") owned apartment buildings in New York City subject to the Rent Stabilization Law ("RSL"). Pinehurst claimed that the RSL compelled landlords to offer renewal leases to at least one tenant to whom they would not voluntarily lease an apartment, that successor rights forced landlords to continue leasing to a deceased tenant's relatives, and that landlords were prevented from reclaiming an apartment for personal use. The Landlords contended that the RSL interfered with their ability to evict tenants and reclaim units for personal use, and allowed the transfer of tenancies to successors. Pinehurst and the Landlords alleged that the RSL was unconstitutional because it acted as a physical and regulatory taking of their properties.

To show that a law is unconstitutional in its application, the plaintiff must show that the regulation goes "too far" in restricting a landowner's ability to use his own property.

The district court held that Pinehurst and the Landlords failed to meet the standard for showing the RSL was unconstitutional. Pinehurst and the Landlords appealed.

HOLDING: Affirmed.

REASONING: The Landlords alleged that the RSL was unconstitutional because the laws were facially physical and regulatory takings. Pinehurst contended that the RSL constituted an as-applied physical taking. The court disagreed.

To show that a law is facially unconstitutional, the plaintiff must show that the statute is unconstitutional in all its applications. The court held that the RSL was not unconstitutional in all its applications because the RSL regulated land use rather than effecting a physical occupation, did not bar landowners from renting property or changing the ownership, and did not violate Plaintiffs-Appellants' due process. The Plaintiffs in both cases failed to plausibly allege there were no set circumstances that exist under which the RSL would be valid.

The court found that requirements for landlords under New York's Housing Stability and Tenant Protection Act are conditional, so they do not amount to a permanent physical occupation by the government. The States have broad powers to regulate housing inclusive to the landlord-tenant relationship, without compensating landlords for all the attendant economic injuries. The court also held that an ensuing economic disadvantage from such regulation did not rise to the level of a regulatory or physical taking.

To show that a law is unconstitutional in its application, the plaintiff must show that the regulation goes "too far" in restricting a landowner's ability to use his own property. The court held that this issue was unripe to be ruled on because Pinehurst did not avail itself of any of the hardship exemptions. The Supreme Court has made clear that a plaintiff's failure to exhaust administrative procedures may render a claim unripe including where the plaintiff has "an opportunity to seek a variance." Both opinions cited precedent upholding rent stabilization because laws merely limiting a person's rights do not rise to the level of barring their rights completely.

RECENT DEVELOPMENTS

ARBITRATION

SUBARU CAN'T FORCE ARBITRATION OF SUIT OVER SAFETY CAMERAS

Giron v. Subaru of Am., Inc., ___ F. Supp. 3d. ___ (N.D. Ill. 2022).
https://casetext.com/case/giron-v-subaru-of-am

FACTS: Plaintiff Renee Giron purchased a vehicle on credit by signing a Financing Agreement with Grand Subaru, LLC, the vehicle seller. Plaintiff filed suit against Defendant, Subaru of America, Inc., under the Biometric Information Privacy Act (BIPA). Plaintiff alleged that by using a camera to track a driver's face and eyes, the vehicle's safety feature creates and stores a facial map of each driver. Defendant filed a motion to compel arbitration based on the arbitration provision in the Financing Agreement with Grand Subaru.
HOLDING: Denied.
REASONING: Defendant asserted equitable estoppel allowed it to enforce the arbitration provision. Specifically, that Defendant was induced by Plaintiff to rely to its detriment on the arbitration clause because Plaintiff benefitted from Defendant's Security Maintenance Plan. The court disagreed.

"A claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person." *Ervin v. Nokia, Inc*, 812 N.E.2d 534, 541 (2004). Noting that Defendant's Security Maintenance Plan did not address arbitrating claims, the court concluded there was no evidence that Plaintiff made any representation to induce Defendant to rely to its detriment on the arbitration clause.

Therefore, the court held that Defendant failed to meet its burden under Illinois law to enforce the arbitration clause in the Financing Agreement between Plaintiff and Grand Subaru under equitable estoppel. Though the arbitration provision validly applied to the arbitrability of the claim, the court concluded that the arbitrability was between Plaintiff and Grand Subaru, not between Plaintiff and the nonsignatory Defendant.

A NON-SIGNATORY COULD NOT INDEPENDENTLY ENFORCE AN ARBITRATION PROVISION

McGaffey v. Carolina Props., LLC, ___ S.W.3d ___ (Tex. App.—Dallas 2022).
https://casetext.com/case/mcgaffey-v-carolina-props

FACTS: Plaintiff-Appellee Carolina Properties, LLC ("Carolina Properties") agreed to buy a vehicle from Defendant-Appellant, Rodney McGaffey's ("McGaffey") company, Boss Exotics. Carolina Properties made an initial deposit and paid the remaining balance later. Carolina Properties also executed a Bill of Sale. The parties could not come to an agreement about whether an accessory was included in the sales price of the vehicle. Boss Exotics decided to "cancel the transaction" and return Carolina Properties' payment, retaining the initial deposit which it deemed non-refundable. Carolina Properties sued McGaffey and Boss Exotics.

Boss Exotics and McGaffey filed a motion to compel arbitration and attached the Bill of Sale. The trial court denied the motion, and a final judgment was entered in favor of Carolina Properties. McGaffey appealed.
HOLDING: Affirmed.
REASONING: McGaffey asserted that he met his initial burden to prove the existence of a valid, enforceable arbitration agreement by providing the Bill of Sale, which contains the arbitration provision. The court disagreed.

A party seeking to compel arbitration must prove that either he is a party to the arbitration agreement at issue or he otherwise has the right to enforce the agreement against the non-movant. As a general rule, an arbitration clause cannot be invoked by a non-party to the arbitration contract. Texas courts have recognized six theories that allow non-signatories to enforce arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary.

As a general rule, an arbitration clause cannot be invoked by a non-party to the arbitration contract.

Though McGaffey stated the Bill of Sale was enforceable against Carolina Properties because it had an arbitration provision, the court found no explanation by McGaffey as to how he, as a non-signatory, could independently enforce the arbitration provision against Carolina Properties. None of the six theories where a non-signatory can enforce an arbitration agreement were raised by McGaffey in its motion to compel. Therefore, the court held that McGaffey failed to satisfy his burden as a non-signatory to independently enforce an arbitration.

DOCUMENTS CONTAINING ARBITRATION CLAUSES WERE NOT ADMISSIBLE BECAUSE THERE WAS NO EVIDENCE THAT THEY WERE EVER SENT TO THE PLAINTIFF

Chai v. National Enterprise. Systems., Inc., ___ P.3d ___ (Cal. Ct. App. 2022).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Chai%20v.%20National%20Enterprise%20Systems%20-%202022.%2011.08.pdf

FACTS: Plaintiff-Appellee David Chai defaulted on a consumer credit account owed to Citibank, N.A. Defendant-Appellant National Enterprise Systems. Inc. ("NES") was hired to collect the debt owed by Chai. Chai filed a class action complaint against NES, alleging its routine practice of sending initial communications failed to provide notice, as required under Civil Code section 1788.14, subdivision (d)(2), for attempts to collect "time-barred" debts.

NES filed a motion to compel arbitration, which the district court denied. NES appealed.
HOLDING: Affirmed.
REASONING: NES argued it had met its burden on the motion

to compel arbitration by offering two "cardholder agreements" produced by Citibank, a declaration from the custodian of records authenticating the agreements, and a letter from the custodian indicating that the agreement copies were for Chai's credit card account. The court of appeals disagreed.

A party seeking to compel arbitration bears the burden to prove the existence of the agreement by a preponderance of the evidence. If the opposing party disputes the agreement, it can shift the burden to the moving party by declaring under perjury that the party never saw, or does not remember, the agreement. If the opposing party meets that burden, the moving party must then establish with admissible evidence that a valid arbitration agreement exists between the parties.

Here, though NES met the first step of its burden by setting forth the agreement's provision in its motion, Chai shifted the burden back to NES by declaring under penalty of perjury that he had not seen or received the card agreements prior to NES's motion to compel arbitration. Although both agreements included arbitration provisions, because neither agreement referenced Chai by name, his account number, or included Chai's signature, the agreements were inadmissible. Therefore, NES failed to provide foundational facts that Citibank and Chai communicated mutual intent to be bound by the agreements and that Chai had either seen or signed the arbitration agreement.

ARBITRATION DENIED

Lavvan, Inc. v. Amyris, Inc., ___ F.4th ___ (2d Cir. 2022).
https://scholar.google.com/scholar_case?case=7030067773918924598&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellee Lavvan, Inc. and Defendant-Appellant Amyris, Inc. entered into a contract with an arbitration agreement. In the section relating to dispute resolution, the contract specified that "if a dispute arises with respect to the scope, ownership, validity, enforceability, revocation or infringement of any Intellectual Property, . . . such dispute will not be submitted to arbitration and either Party may initiate litigation."

Lavvan sued Amyris, alleging trade secret misappropriation and patent infringement. The district court denied Amyris's motion to compel arbitration. Amyris appealed.

HOLDING: Affirmed.

REASONING: Amyris argued that the parties delegated the question of arbitrability to an arbitrator to decide. In the alternative, Amyris argued that even if the parties did not delegate the question of arbitrability to an arbitrator, Lavvan's claims were subject to arbitration. The court disagreed.

The Federal Arbitration Act ("FAA") provides that a written proviso in any contract to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable. 9 U.S.C § 2. Though the FAA's policy favors arbitration, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.

The court found insufficient evidence of the parties' intent to arbitrate the arbitrability of their dispute. In the absence of specific language evidencing such an intent, broad language expressing an intention to arbitrate all disputes may support an inference of delegating the issue of arbitrability. However, the parties' contract committed only some types of disputes to litigation. The court reasoned that the agreement did not express a broad intent to arbitrate all aspects of all disputes. The court also noted that the presumption of arbitrability may tip the scale only if an agreement is truly ambiguous. Because Lavvan asserted claims for trade secret misappropriation and patent infringement, the court reasoned these claims were clearly disputes "with respect to the scope, ownership, validity, enforceability, revocation or infringement of any Intellectual Property," and were therefore exempted from arbitration under the parties' agreement. The fact that the intellectual property claims were intertwined with contractual issues concurrently being arbitrated provided no basis on which to require claims exempted from arbitration to be subject to it.

AN ARBITRATION AGREEMENT INCLUDED IN A TIRE PURCHASE DOESN'T APPLY TO THE LIFETIME SERVICES PURCHASE

Kevin Johnson v. Walmart Inc., ___ F.4th ___ (9th Cir. 2023).
https://cdn.ca9.uscourts.gov/datastore/opinions/2023/01/10/21-16423.pdf

FACTS: Plaintiff-Appellee Kevin Johnson made two purchases from Defendant-Appellant Walmart Inc. First, Johnson purchased tires from Walmart's website, which came with a Terms of Use containing a mandatory arbitration provision. Second, Johnson separately purchased lifetime tire services from the Walmart Auto Care Center under an agreement with no arbitration provision.

Because Walmart declined to service Johnson's tires after only one time, Johnson filed a putative class action, alleging a breach of contract and breach of the duty of good faith and fair dealing arising out of the service agreement. Walmart moved to compel arbitration under the Terms of Use. The district court denied Walmart's motion because the plain meaning of the Terms of Use did not extend its arbitrability to the lifetime services agreement. Walmart appealed.

HOLDING: Affirmed.

REASONING: Walmart argued Johnson's arbitration agreement in the first purchase's Terms of Use was presumed to favor arbitration in both purchases, even without Johnson's consent to arbitration in the second purchase. Walmart argued Johnson's two purchases were connected contracts in a series of transactions, such that the arbitration agreement of the first applied to the second. The court disagreed.

The court concluded Johnson's claim arose from the lifetime services purchase and not the tire purchase from Walmart's website. Because the arbitration agreement did not exist in the lifetime services purchase, the court did not extend arbitrability from the first to the second purchase. Moreover, the Terms of Use were restricted to its online content and did not address any form of in-store engagement.

The court held that the two purchases were separate and independent. The service agreement indicated that the lifetime services purchase was negotiated and entered into separately from the tire purchase from Walmart's website. Furthermore, the two purchases involved separate considerations: the first was for purchasing goods, while the second was for performing services. Lastly, the proof for Johnson's breach of contract claim exclusively

depended on the breach of the lifetime service purchase. Therefore, the arbitration agreement in the initial purchase of tires did not encompass disputes arising from the later purchase of the lifetime services.

EMPLOYEE CANNOT EVADE AN ARBITRATION AGREEMENT WITH A HANDWRITTEN SIGNATURE BY SIMPLY SAYING, "I DON'T RECALL"

Leroy Iyere v. Wise Auto Group, ___ P.3d ___ (Cal. Ct. App. 2023).
https://scholar.google.com/scholar_case?case=10889581005356132260&q=Iyere+v.+Wise+Auto+Group,&hl=en&as_sdt=6,32&as_vis=1

FACTS: Leroy Iyere, Phillip Derbigny, and Michael Worlow (collectively, "Plaintiffs") were employees of Defendant-Appellant, Wise Auto Group ("Wise"). Upon employment, the Plaintiffs purportedly signed binding arbitration agreements mandating resolution of any claims, disputes, or controversies regarding their employment through binding arbitration. Each Plaintiff signed their agreement acknowledging that they had read, understood, and voluntarily signed the document.

Failure to read an agreement before signing it does not prevent contract formation.

When Wise terminated Plaintiffs, they filed a joint complaint alleging causes of action for discrimination, breach of contract, violation of statutory rights, and wrongful termination, among others. Wise filed a motion to sever the complaints and compel each plaintiff to pursue individual arbitration per the company agreement. The district court ruled in favor of the Plaintiffs and held that Wise failed to prove the authenticity of the signatures on the arbitration agreement. Wise appealed.
HOLDING: Reversed and remanded.
REASONING: The Plaintiffs could not prove that they did not sign the arbitration agreements. Instead, they asserted that they "did not recall signing" the agreements, and if they had known the contents of the agreements, they would have refrained from signing them. The court rejected Plaintiffs' argument.

The court reasoned that without a denial of signing a document, an individual's failure to remember signing one is of little to no significance. If one does not deny that a handwritten signature belongs to him, there is no factual dispute concerning the authenticity of the signature, nor is there an independent basis to find that a contract was not formed. Further, failure to read an agreement before signing it does not prevent contract formation. Because Plaintiffs' failure to object to Wise's assertion that the signed documents were true and correct copies of the agreements, the court held that the district court erred in refusing to compel arbitration pursuant to the signed contracts.

NONSIGNATORY SPOUSE AND MINOR CHILDREN WHO HAVE ACCEPTED DIRECT BENEFITS UNDER THE SIGNATORY SPOUSE'S PURCHASE MAY BE COMPELLED TO ARBITRATE THROUGH DIRECT-BENEFITS ESTOPPEL

Taylor Morrison of Tex., Inc., v. Ha, ___ S.W.3d ___ (Tex. 2023).
https://scholar.google.com/scholar_case?case=17876734061283508326&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Respondent-Plaintiff Tony Ha ("Ha"), purchased a home from Petitioner-Defendant Taylor Morrison of Texas, Inc ("Morrison"). The purchase agreement included an arbitration provision that required both parties to resort to arbitration in case of conflict.

Ha, together with his wife and their three minor children, sued Morrison for construction defects and fraud. Morrison moved to compel arbitration for all five plaintiffs. The trial court granted the motion to compel arbitration as to Ha, but not to his wife and children. The decision was affirmed by the court of appeals. Morrison appealed to the Texas Supreme Court.
HOLDING: Reversed and remanded.
REASONING: Taylor Morrison contended Ha's wife and children were subject to the arbitration provision under the direct-benefits estoppel doctrine. The court agreed.

The court reasoned that when a non-signatory spouse and minor children choose to live in a family home purchased by the signatory spouse, they accept the direct benefits from the purchase agreement and are bound by the arbitration provision. The court also emphasized the special nature of parent-child and marital relationships, noting that because parents and a spouse could sign arbitration agreements on behalf of the children and the other spouse, respectively, Ha's signature equitably bound his wife and children through the direct-benefits estoppel doctrine. Therefore, Ha's wife and children would be subject to the arbitration clause in the purchase agreement.

FEDERAL ARBITRATION ACT PREEMPTS CALIFORNIA'S LAW ENACTED TO PROTECT EMPLOYEES FROM "FORCED ARBITRATION" BY MAKING IT A CRIMINAL OFFENSE FOR AN EMPLOYER TO REQUIRE CONSENT TO ARBITRATE SPECIFIED CLAIMS AS A CONDITION OF EMPLOYMENT

Chamber of Commerce v. Bonta, ___ F.4th ___ (9th Cir. 2023).
https://cdn.ca9.uscourts.gov/datastore/opinions/2023/02/15/20-15291.pdf

FACTS: Plaintiff-Appellees, a collection of trade association and business groups (collectively, "Chamber of Commerce"), filed a complaint for declaratory and injunctive relief against Defendant-Appellants, various California officials (collectively, "California"), for enacting California's Assembly Bill 51 ("AB 51"). AB 51 protected employees from "forced arbitration" by making it a criminal offense for an employer to condition employment on consent to the arbitration of specified claims.

The district court granted the motion for a temporary restraining order and the motion for preliminary injunction. The court ruled that the Chamber of Commerce was likely to

succeed on the merits of its preemption claim because AB 51 treats arbitration agreements differently from other contracts and conflicts with the purposes and objectives of the Federal Arbitration Act ("FAA"). California appealed.

HOLDING: Affirmed.

REASONING: California argued that the court could sever the section criminalizing contravention of AB 51 under a severability clause that the court held inapplicable, upholding the balance. However, to avoid preemption by the FAA, the California legislature included a provision ensuring that if the parties did enter into an arbitration agreement, it would be enforceable.

The court rejected California's argument. The court explained that all provisions of AB 51 work together to burden the formation of arbitration agreements. AB 51's unusual structure of criminalizing the act of entering into an agreement while allowing the parties to enforce it once executed was for the purpose of navigating around the FAA. The FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements, but also extends to state rules that discriminate against the formation of arbitration agreements. AB 51 burdens the formation of arbitration agreements and contradicts the FAA's purpose of furthering Congress's policy of encouraging arbitration and thus is preempted.

CONSUMERS CANNOT BE ASSUMED TO HAVE AGREED TO ARBITRATION JUST BECAUSE THEIR LAWYERS KNOW ABOUT A COMPANY'S ARBITRATION PROVISION

Costa v. Rd. Runner Sports, Inc., 84 Cal. App. 5th 224 (2022).
https://law.justia.com/cases/california/court-of-appeal/2022/d079393.html

FACTS: Plaintiff-Appellee Michael O'Connor signed up for Defendant-Appellant Road Runner Sports' loyalty program. Road Runner mailed O'Connor an automatic renewal-notice each year before charging O'Connor the annual subscription fee for the next four years. Road Runner made no reference to any terms and conditions nor to an arbitration provision on the initial sign-up handout or the first two annual renewal notices. The third annual renewal notice included a URL that listed a hyperlink to another webpage that listed the program's terms and conditions, including an arbitration provision. O'Connor joined a class action suit against Road Runner alleging a violation of the Automatic Renewal Law and the Consumer Legal Remedies Act.

An agreement requires a manifestation of assent.

Road Runner asserted that the parties agreed to arbitration in the terms and conditions of the membership. Road Runner moved to compel O'Connor to arbitrate his claims individually. The trial court denied the motion to compel, and Road Runner appealed.

HOLDING: Affirmed.

REASONING: Road Runner argued that O'Connor created an implied-in-fact agreement to arbitrate when he obtained imputed knowledge of the arbitration provision through his counsel in the course of litigation and still failed to cancel his membership.

The court rejected this argument, identifying three reasons that Road Runner's argument failed. First, there is no authority that suggests consumers may be bound to an arbitration provision by mere inaction based solely on their attorneys' knowledge of the provision. Second, an attorney's knowledge is not imputed to a client before the formation of the attorney-client relationship. Road Runner did not prove that O'Connor had knowledge of the arbitration provision when he was charged the subscription fees in the four years before he joined the lawsuit. Third, imputed knowledge of the arbitration clause was not enough to establish an agreement to arbitrate was formed. An agreement requires a manifestation of assent. O'Connor did not manifest his assent to be bound by the arbitration provision at any time. Thus, O'Connor could not be assumed to have agreed to arbitration just because his attorneys knew about Road Runner's arbitration provision.

FAA REQUIRES THE TRIAL COURT TO FOLLOW THE ARBITRATOR SELECTION METHOD DETAILED IN THE AGREEMENT

Taylor Morrison of Tex., Inc. v. Glass, ___ S.W.3d ___ (Texas. App.—Houston [14th Dist.]).
https://scholar.google.com/scholar_case?case=7454214801076845853&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Defendants-Appellants Taylor Morrison of Texas, Inc., and Taylor Woodrow Communities – League City (collectively, "Appellants") entered into a Purchase Agreement with Thomas and Kittee Cart to build a home. The Purchase Agreement contained an arbitration provision that compelled arbitration under the FAA and provided that the Judicial Arbitration and Mediation Services ("JAMS") would hear any disputes between the parties. Plaintiffs-Appellees Matthew Glass and Madeline Glass ("the Glasses") bought the home from the Carts four years later.

The Glasses filed suit against Appellants for breach of the implied warranties of habitability and good workmanship, among other claims. Appellants moved to compel arbitration before the JAMS as stipulated in the Purchase Agreement. The trial court denied Appellants' motion to compel arbitration, and instead issued an order stating that the parties must agree to an alternative arbitration service or arbitrator. Appellants appealed.

HOLDING: Reversed.

REASONING: Appellants argued that the trial court erred by ordering the case to be submitted to arbitration in a manner different than specified in the Purchase Agreement. The court agreed.

The appellate court held that the trial court abused its discretion in attempting to modify the arbitration clause in the Purchase Agreement because the FAA requires the trial court to follow the arbitrator selection method detailed in the agreement. The appellate court found that the only exception allowing the change of the arbitration service would be if JAMS was unwilling or unable to serve. Because the Purchase Agreement was clear that JAMS was the required arbitrator and JAMS was not unwilling or unable to serve as the arbitrator, the trial court abused its discretion by trying to change the arbitration agreement.

DIRECT BENEFITS ESTOPPEL DOES NOT APPLY TO SUBSEQUENT HOME PURCHASERS BASED ON AN ARBITRATION PROVISION IN THE CONTRACT BETWEEN THE BUILDER AND THE ORIGINAL PURCHASER

Meritage Homes of Tex. v. Pouye, ___ S.W.3d ___ (Tex. App.—Austin 2023).
https://law.justia.com/cases/texas/third-court-of-appeals/2023/03-21-00281-cv.html

FACTS: Defendant-Appellant Meritage Homes of Texas, LLC built and sold a home to third parties who then sold the home to Plaintiffs-Appellees Sophie Pouye and Cheikh Toure (collectively, the "Homeowners"). The contract contained a provision in which the signing parties agreed to arbitrate any matter arising out of violations of the DTPA and any alleged breach of warranties, whether express or implied. The Homeowners were not a party to, nor did they sign, the contract. After moving into the home, the Homeowners sued Meritage for alleged design and construction defects. The Homeowners alleged negligence, gross negligence, and violations of the DTPA. Meritage answered with a plea in abatement and a motion to compel arbitration based on the Contract between the original homeowners and Meritage.

The court denied Meritage's motion to compel arbitration. Meritage appealed.

HOLDING: Affirmed.

REASONING: Meritage argued that because the Homeowner's claim was based on Meritage's alleged breach of contract, their claim was bound to its arbitration provision under the direct benefits estoppel doctrine, even though the Homeowners were not parties to and did not sign the Contract. The court disagreed.

Generally, parties must sign arbitration agreements to be bound by them. However, non-signatories to an agreement may be bound to an arbitration clause when rules of law or equity would bind them to the contract generally. The direct benefits estoppel applies when a non-signatory seeks the benefits of a contract, from also attempting to avoid the contract's burdens, including an obligation to arbitrate disputes. The application of the theory of direct benefits estoppel turns on the substance of the plaintiff's claim, not the pleading.

The application of direct benefits estoppel is appropriate when the substance of the claim arises solely from the contract or must be determined by reference to it then.

Here, the court of appeals rejected Meritage's argument, explaining that direct benefits estoppel does not apply when the substance of the claim arises from state law, statutes, torts, other common law duties, or federal law even if the claim relates or refers to the contract. The application of direct benefits estoppel is appropriate when the substance of the claim arises solely from the contract or must be determined by reference to it then. Put another way, if a non-signatory claim can stand independently of the contract, then arbitration should not be compelled. Therefore, because the substance of the Homeowner's claims in their live pleading arises from general obligations imposed by the DTPA and common law duties that stand independently of the contract, direct benefits estoppel does not apply.

FAA REQUIRES THE TRIAL COURT TO FOLLOW THE ARBITRATOR SELECTION METHOD DETAILED IN THE AGREEMENT

Taylor Morrison of Tex., Inc. v. Glass, ___ S.W.3d ___ (Texas. App.—Houston [14th Dist.]).
https://scholar.google.com/scholar_case?case=7454214801076845853&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Defendants-Appellants Taylor Morrison of Texas, Inc., and Taylor Woodrow Communities – League City (collectively, "Appellants") entered into a Purchase Agreement with Thomas and Kittee Cart to build a home. The Purchase Agreement contained an arbitration provision that compelled arbitration under the FAA and provided that the Judicial Arbitration and Mediation Services ("JAMS") would hear any disputes between the parties. Plaintiffs-Appellees Matthew Glass and Madeline Glass ("the Glasses") bought the home from the Carts four years later.

The Glasses filed suit against Appellants for breach of the implied warranties of habitability and good workmanship, among other claims. Appellants moved to compel arbitration before the JAMS as stipulated in the Purchase Agreement. The trial court denied Appellants' motion to compel arbitration, and instead issued an order stating that the parties must agree to an alternative arbitration service or arbitrator. Appellants appealed.

HOLDING: Reversed.

REASONING: Appellants argued that the trial court erred by ordering the case to be submitted to arbitration in a manner different than specified in the Purchase Agreement. The court agreed.

The appellate court held that the trial court abused its discretion in attempting to modify the arbitration clause in the Purchase Agreement because the FAA requires the trial court to follow the arbitrator selection method detailed in the agreement. The appellate court found that the only exception allowing the change of the arbitration service would be if JAMS was unwilling or unable to serve. Because the Purchase Agreement was clear that JAMS was the required arbitrator and JAMS was not unwilling or unable to serve as the arbitrator, the trial court abused its discretion by trying to change the arbitration agreement.

RECENT DEVELOPMENTS

MISCELLANEOUS

REDEMPTION THEORY PROVIDES NO BASIS FOR CLAIMS ASSERTING WRONGFUL REPOSSESSION

McClain v. I-10 MAC Haik CDJR LTD, ___ F. Supp. 3d ___ (S.D. Tex. 2023).
https://scholar.google.com/scholar_case?case=15133617231071030270&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff Roderick-Allen McClain ("McClain") used a bank draft to buy a truck from Defendant I-10 Mac Haik CDJR, Ltd. ("Mac Haik Chrysler"). No financial institution would honor the bank draft, so Mac Haik Chrysler, Dawn Krieg, and Henry L. Robertson (collectively, "the Mac Haik Defendants") sued McClain for damages and the return of the truck. RBEX, Inc. d/b/a Apple Towing Co. ("RBEX") repossessed the truck for the Mac Haik Defendants.

McClain sued the Mac Haik Defendants and RBEX asserting wrongful repossession under the FDCPA.
HOLDING: Dismissed.
REASONING: McClain argued that the redemption theory supported his claim. The court rejected McClain's argument as nonsensical and without merit.

The "redemption" theory claims that individuals can use the Uniform Commercial Code to create fictitious accounts in the US Treasury, redeem their birth certificates as assets, and assign them a value of up to $2 million. Followers of this theory believe that the US Treasury Department acts as a clearinghouse for the funds, and they can create money orders and sight drafts based on this "asset." Under this theory, McClain argued he could create money orders and bank drafts drawn on the Treasury Direct Accounts to pay for goods and services, and therefore, did not owe any money.

The court explained that McClain did not tender any valid payment for the repossessed truck. Instead, McClain's own filings show that he tendered a worthless piece of paper. McClain's only basis for his claim is the redemption theory, and it is meritless. The Mac Haik Defendants and RBEX did not violate the FDCPA by suing McClain and repossessing a truck that McClain never paid for because the redemption theory provides no basis for claims asserting wrongful repossession.

CFPB CANNOT NECESSARILY "IMPOSE WHATEVER CONTENT AND FORMATTING REQUIREMENTS IT CHOOSES"

PayPal, Inc. v. CFPB, ___ F.4th ___ (D.C. Cir. 2023).
https://www.cadc.uscourts.gov/internet/opinions.nsf/E944A052FDBD3C8D8525894B00533F5C/$file/21-5057-1984449.pdf

FACTS: Defendant-Appellant, the Consumer Financial Protection Bureau ("CFPB"), promulgated the Prepaid Rule, requiring digital wallet providers to disclose a prepaid account's most important fees before a consumer acquires an account and begins transacting. The Prepaid Rule also imposed formatting requirements, which dictated the disclosures' structure, the wording's font size, and the emphasis given to each fee.

PayPal filed suit, alleging that the Prepaid Rule exceeded the CFPB's statutory authority because the agency effectively mandated the adoption of a model clause in violation of the Electronic Fund Transfer Act ("EFTA"). PayPal filed for summary judgment. The district court granted PayPal's motion and vacated the Prepaid rule. The CFPB appealed.
HOLDING: Reversed and remanded.
REASONING: The CFPB argued that the Prepaid Rule did not impose mandatory model clauses. The court agreed.

The court reasoned that a model clause is a particular language that prepaid account providers can copy to satisfy their disclosure obligations. The EFTA defines a "model clause" as specific copiable language to be distinguished from content and formatting.

Although the Prepaid Rule mandates certain formatting, such requirements fall outside the scope of a model clause. The court concluded that the CFPB's Prepaid Rule did not mandate a "model clause" in contravention of the EFTA. However, the CFPB cannot necessarily impose whatever content and formatting requirements it chooses. The court remanded the case for the district court to consider PayPal's other challenges to the Prepaid Rule.

TELEPHONE CONSUMER PROTECTION ACT DOESN'T COVER FACEBOOK BIRTHDAY TEXTS

Brickman v. United States, ___F.4th ___(9th Cir. 2022).
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/12/21/21-16785.pdf

FACTS: Plaintiff-Appellant Colin Brickman filed suit against Meta Platforms, Inc. ("Meta"), formerly Facebook, Inc., alleging that Meta violated the TCPA when it sent unsolicited birthday text messages to consumers. Brickman argued that the TCPA generally bans calls generated by an automatic telephone dialing system ("autodialer") and that Meta sent the messages through an autodialer employing a random or sequential number generator ("RSNG"). Brickman asserted that the software was used to sort, store, and dial the numbers that it pulled from social media accounts.

The United States intervened in the case to defend the constitutionality of the TCPA.

The United States intervened in the case to defend the constitutionality of the TCPA. The court dismissed Brickman's case with prejudice and approved the matter for appeal. Brickman appealed.
HOLDING: Affirmed.
REASONING: Under the TCPA, an autodialer is defined as a piece of equipment with the capacity to store, produce, and call telephone numbers using an RSNG.

The court held that a plain text reading of the TCPA requires autodialers to generate the phone numbers that are dialed. The court interpreted the definition of autodialer in its

entirety to determine that RSNGs must actually produce the telephone numbers to be in violation of TCPA, not merely collect, sort, or store numbers. The court held that the messages sent by Meta did not generate these numbers randomly or sequentially, and therefore did not fit the definition of an autodialer under the statute. Therefore, the TCPA does not cover Facebook birthday texts.

COURT REVIVES A PROPOSED CLASS ACTION SAYING THE CASE ACTUALLY BELONGED IN STATE COURT UNDER THE SUPREME COURT'S OPINION IN *TRANSUNION*

Brady O'Leary v. TrustedID Inc., ___ F.4th ___ (4th Cir. 2023). https://www.ca4.uscourts.gov/opinions/212144.P.pdf

FACTS: Nonparty Equifax engaged Defendant-Appellee TrustedID Inc., to inform Plaintiff-Appellant Brady O'Leary his personal data may have been impacted by a data breach. TrustedID prompted O'Leary to enter six digits of his social security number ("SSN") on a website, and O'Leary learned that his data was not compromised. O'Leary alleged that TrustedID shared the six digits of his SSN with Equifax. O'Leary initiated a class action against TrustedID in state court, claiming the practice of requiring six digits of consumers' SSNs violated South Carolina's Financial Identity Fraud and Identity Theft Protection Act ("Act").

TrustedID removed the case to a federal district court under the Class Action Fairness Act and moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted TrustedID's motion but determined O'Leary had standing to sue. O'Leary appealed.

HOLDING: Vacated and remanded with instructions.

REASONING: O'Leary argued that he was injured when TrustedID intentionally took personal identifying information and monetized it in some way. He further claimed that TrustedID could have complied with the Act by requesting five or fewer digits of consumers' SSNs. He asked the court to affirm the lower court's holding on standing.

The court held that O'Leary's reliance on an abstract privacy interest in his SSN failed to establish an injury with a close relationship to a traditionally recognized harm for Article III standing, as required under *TransUnion.*

The court held that O'Leary failed to establish Article III standing because he did not allege an injury in fact. Although he claimed that requiring him to enter six digits instead of five digits of his SSN on TrustedID's website increased his identity theft risk, he did not explain how. His claim was solely based on a procedural violation of the Act and was insufficient to establish Article III standing. The court held that O'Leary's reliance on an abstract privacy interest in his SSN failed to establish an injury with a close relationship to a traditionally recognized harm for Article III standing, as required under *TransUnion*. O'Leary did not allege that exchanging his partial SSN to learn about Equinox's data breach could be a close relationship to 'intrusion upon seclusion' as a traditionally recognized harm, or that the disclosure of private information could be another traditional analog for intangible harm under *TransUnion*. Thus, because O'Leary failed to establish Article III standing, the court concluded that his claim belonged in state court.

THE LAST WORD

This issue begins with an article discussing a topic most of us are not very familiar with—the FTC Holder Rule, Rule 433. But all consumer lawyers should be. This regulation subjects the holder of a consumer credit contract to the same claims that the buyer of the good or service could bring against the seller of that good in connection with the purchase. It caps recovery, however, to the amount paid by to the consumer to the holder under the contract. An unresolved and important issue, however, is whether this rule also limits attorney's fees in connection with a claim against the holder.

Scott Hyman's article discusses this in detail. Although it focuses on California, it is relevant to most jurisdictions, including Texas. In *Home Savings Association v. Guerra*, 733 S.W.2d 134 (1987), the court affirmed an award of $10,000 in attorney's fees against the creditor who financed the consumer's transaction. The amount awarded was in excess of the Holder Rule's limitation. The court declined to undertake any analysis of the Holder Rule's text, purpose, or history, relying instead on the creditor's failure to ask the trial court to allocate the fee award by claim. The issue thus remains unresolved.

There also is an Editorial by F. Paul Bland, Jr., Executive Director of Public Justice, that the New York Times refused to publish. You will understand why when you read it. Finally, as usual, there are more than 35 Digests and one Note in the Recent Developments Section.

Once again, this issue has something for every consumer attorney.

Richard M. Alderman
Editor-in-Chief