# APPENDIX

## APPENDIX

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## APPENDIX A

**IN THE SUPREME COURT OF CALIFORNIA**

**S267576**

**Second Appellate District, Division Five**
**B293435**

**Los Angeles County Superior Court**
**BC633169**

**[Filed: May 26, 2022]**

TANIA PULLIAM,
Plaintiff and Respondent,
v.
HNL AUTOMOTIVE INC. et al.,
Defendants and Appellants.

May 26, 2022

Justice Liu authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Kruger, Groban, Jenkins, and Robie[*] concurred.

Opinion of the Court by Liu, J.

The Federal Trade Commission's "Holder Rule" requires consumer credit contracts to include specific

[*] Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

language permitting a consumer to assert against third party creditors all claims and defenses that could be asserted against the seller of a good or service. (16 C.F.R. § 433.2(a) (1975).) The required notice further states that "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." (*Ibid*., capitalization omitted here and hereafter.)

Tania Pulliam (Pulliam) purchased a used vehicle from HNL Automotive Inc. (the dealership) pursuant to an installment sales contract that included this notice. The contract was subsequently assigned to TD Auto Finance (TDAF; now merged into TD Bank), which became the "holder" of the contract. (*Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396, 402 (*Pulliam*).) Pulliam filed suit against the dealership and TDAF alleging misconduct by the dealership in the sale of the car. A jury found for Pulliam on one of her causes of action — breach of the implied warranty of merchantability under the Song-Beverly Consumer Warranty Act (Song-Beverly Act; Civ. Code, § 1790 et seq.) — and awarded her $21,957.25 in damages. Pulliam filed a posttrial motion seeking attorney's fees in the amount of $169,602 under the Song-Beverly Act. (See Civ. Code, § 1794, subd. (d).) TDAF argued that it could not be liable for attorney's fees based on the provision of the Holder Rule limiting recovery to the "amount[] paid by the debtor" under the contract. (16 C.F.R. § 433.2(a) (1975).) The trial court disagreed and granted Pulliam's motion. The Court of Appeal affirmed. (*Pulliam*, at p. 401.)

We granted review to address whether "recovery" under the Holder Rule (hereafter sometimes Rule)

includes attorney's fees and limits the amount of fees plaintiffs can recover from holders to amounts paid under the contract. The Courts of Appeal are divided on this issue. (Compare *Pulliam*, *supra*, 60 Cal.App.5th at p. 401 [Holder Rule does not limit the attorney's fees a plaintiff may recover] with *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 418–419 (*Lafferty*) [Holder Rule's limitation on recovery applies to attorney's fees sought under Civil Code § 1780 of the Consumers Legal Remedies Act (CLRA)] and *Spikener v. Ally Financial, Inc.* (2020) 50 Cal.App.5th 151, 159–163 (*Spikener*) [Holder Rule's limitation on recovery applies to attorney's fees sought under the CLRA or Civil Code § 1459.5].)

We conclude 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.

**I.**

In July 2016, Pulliam bought a "Certified Pre-Owned" 2015 Nissan Altima from HNL Automotive Inc. pursuant to a retail sales contract that included the Holder Rule Notice (Notice). The dealership advertised the car as having cruise control and six-way

power-adjustable seats. After buying the car, Pulliam learned that it did not meet the requirements of the Certified Pre-Owned program or have the advertised features she needed due to a disability.

In September 2016, Pulliam filed suit against the dealership and TDAF, which had accepted assignment of the contract. She alleged six causes of action based on the dealership's misconduct, including violation of the CLRA, breach of implied warranty under the Song-Beverly Act, fraud and deceit, negligent misrepresentation, violation of Business and Professions Code section 17200, and violation of Vehicle Code section 11711.

Following trial in April 2018, a jury found that the dealership failed to adequately package and label the car at issue and that the vehicle failed to conform to the promises of fact made on the label, in violation of the Song-Beverly Act. The jury awarded Pulliam $21,957.25 in damages. The court entered judgment in this amount jointly and severally against the dealership and TDAF.

Pulliam filed a posttrial motion seeking $169,602 in attorney's fees against both defendants under Civil Code section 1794, subdivision (d), which permits a buyer who prevails in an action under the Song-Beverly Act to recover attorney's fees. The dealership and TDAF raised several objections related to the amount of fees. TDAF also argued that it could not be liable for attorney's fees based on the Holder Rule's limitation on holder liability to amounts paid under the contract. The trial court rejected these arguments and granted Pulliam's motion.

The Court of Appeal affirmed the trial court's award, concluding that the Holder Rule does not limit liability for attorney's fees. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 401.) We granted review.

**II.**

The Federal Trade Commission (FTC) promulgated the Holder Rule in 1975 in response to rapid growth in consumer installment debt in the United States. (Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed.Reg. 53506–53507 (Nov. 18, 1975); Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed.Reg. 20022 (May 14, 1976).) Before the Holder Rule, a third party who purchased a consumer's promissory note did so "free and clear of any claim or grievance that the consumer may have with respect to the seller." (40 Fed.Reg. 53506.) This "holder in due course rule" meant a creditor could seek payment from a buyer on goods never delivered or not delivered as promised while remaining immune from the buyer's claims of fraud, misrepresentation, or breach of contract or warranty against the seller.

The FTC recognized that the application of the holder in due course rule to consumer credit sales was "anomalous" because consumers are not "in an equivalent position [to commercial entities] to vindicate their rights against a payee." (40 Fed.Reg., *supra*, at p. 53507.) "Between an innocent consumer, whose dealings with an unreliable seller are, at most, episodic, and a finance institution qualifying as 'a holder in due course,' the financer is in a better position both to protect itself and to assume the risk of

a seller's reliability." (*Id.* at p. 53509.) The FTC recognized that "[c]reditors and sellers are in a position to engage in meaningful, arms-length, bargaining," which differentiates them from buyers who sign adhesion contracts with sellers. (*Id.* at p. 53523.) Allocating the costs of seller misconduct to the creditor makes it much more likely that the "market will be policed" of "unscrupulous merchant[s]," that the market will reflect "a more accurate price for consumer goods," and that "all parties will benefit accordingly." (*Ibid.*)

To effect this allocation, the Holder Rule requires that the following Notice appear in consumer credit contracts "[i]n connection with any sale or lease of goods or services to consumers, in or affecting commerce": "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." (16 C.F.R. § 433.2(a) (1975).) This provision gives consumers the ability to "defend a creditor suit for payment of an obligation by raising a valid claim against the seller as a set-off" and to "maintain an affirmative action against a creditor who has received payments for a return of monies paid on account." (40 Fed.Reg., *supra*, at p. 53524.)

In 2015, the FTC requested public comment on "the overall costs and benefits, and regulatory and economic impact" of the Holder Rule "as part of the agency's regular review of all its regulations and guides." (Rules

and Regulations Under the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 80 Fed.Reg. 75018 (Dec. 1, 2015).) In 2019, following completion of that review, the FTC "determined to retain the Rule in its present form." (Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed.Reg. 18711 (May 2, 2019) (Rule Confirmation).)

In its Rule Confirmation, the FTC noted that it had received six comments addressing "whether the Rule's limitation on recovery to 'amounts paid by the debtor' allows or should allow consumers to recover attorneys' fees above that cap." (84 Fed.Reg., *supra*, at p. 18713.) The FTC considered these comments and concluded that "if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder — including any recovery based on attorneys' fees — cannot exceed the amount the consumer paid under the contract." (*Ibid.*)

In January 2022, the FTC issued an advisory opinion to address the Holder Rule's "impact on consumers' ability to recover costs and attorneys' fees." (FTC, Commission Statement on the Holder Rule and Attorneys' Fees and Costs (Jan. 18, 2022) p. 1 (FTC Advisory Opinion).) The opinion observed that the issue "has arisen repeatedly 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." (*Ibid.*, fn. omitted.)

**III.**

Several recent Court of Appeal decisions have considered an award of attorney's fees in the context of a claim against a seller under the Holder Rule.

In *Lafferty*, the Laffertys sued the seller of a motor home and Wells Fargo, which had accepted assignment of their installment sales contract. (*Lafferty*, *supra*, 25 Cal.App.5th at p. 405.) The parties entered into a stipulated judgment awarding recovery to the Laffertys based on negligence and violation of the CLRA in the amount of $68,000, the "total amount Plaintiffs actually paid toward (or under) their installment contract for the purchase of [the] motorhome." (*Id.* at p. 407.) The Laffertys then moved for an award of attorney's fees and costs. Wells Fargo opposed the motion as exceeding the Holder Rule's cap on recovery. The trial court awarded the Laffertys costs but denied their request for fees. (*Id.* at pp. 407–408.) The Court of Appeal affirmed, holding that costs awarded to the Laffertys under Code of Civil Procedure section 1032, subdivision (b), "as the prevailing party in this action rather than as part of the recovery secured through the cause of action provided by the Holder Rule," were "not curtailed by the Holder Rule." (*Lafferty*, at p. 415.) Similarly, it concluded that the Laffertys were entitled to prejudgment interest because "Civil Code section 3287 applies to every person entitled to recover

damages — without reference to the underlying cause(s) of action for which damages are awarded." (*Lafferty*, at p. 416.) But it held that attorney's fees sought under the fee-shifting provision of the CLRA were limited by the Holder Rule's cap because the cause of action under the CLRA was originally alleged against the seller and "applied to Wells Fargo only under the Holder Rule." (*Id.* at p. 419; *id.* at p. 414.)

In response to *Lafferty*, the Legislature enacted Civil Code section 1459.5, which provides: "A plaintiff who prevails on a cause of action against a defendant named pursuant to Part 433 of Title 16 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." (All undesignated statutory references are to the Civil Code.) The bill aimed to "legislatively correct *Lafferty* by restoring the courts' previous interpretation of the Holder Rule, thereby ensuring fairness and legal recourse to defrauded consumers." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1821 (2019–2020 Reg. Sess.) as introduced Mar. 6, 2019, p. 1.)

In *Spikener*, the court considered whether a buyer who prevailed on a CLRA cause of action against a holder could subsequently recover attorney's fees based on section 1459.5. (*Spikener*, *supra*, 50 Cal.App.5th 151.) It assumed that the Holder Rule was ambiguous and determined that the FTC's interpretation in its Rule Confirmation was entitled to deference. (*Id.* at p.

159.) The court considered the FTC to have construed the Holder Rule as "limit[ing] a plaintiff's total recovery, including attorney fees, on a claim asserted pursuant to the Holder Rule to the amount the plaintiff paid under the contract, regardless of whether the state claim being asserted pursuant to the Holder Rule contains fee-shifting provisions." (*Id.* at p. 162.) The court found that "[t]his demonstrates a clear intent to prohibit states from authorizing a recovery that exceeds this amount on a Holder Rule claim" and concluded that "to the extent section 1459.5 authorizes a plaintiff's total recovery — including attorney fees — for a Holder Rule claim to exceed the amount the plaintiff paid under the contract, it directly conflicts with the Holder Rule and is therefore preempted." (*Id.* at pp. 162–163.)

In the case before us, the Court of Appeal disagreed with *Lafferty*'s conclusion that the Holder Rule's limitation on recovery applies to attorney's fees. (*Pulliam*, *supra*, 60 Cal.App.5th at pp. 412–416.) It also disagreed with *Spikener*'s conclusion that the FTC's Rule Confirmation was entitled to deference. (*Pulliam*, at pp. 416–422.) Because it concluded that "the Holder Rule cap does not include attorney fees within its limit on recovery and that the FTC's interpretation to the contrary is not entitled to deference," it found the Holder Rule consistent with section 1459.5 and did "not address whether section 1459.5 independently applies." (*Pulliam*, at p. 422.)

**IV.**

The parties' dispute before us centers on two main arguments. First, TDAF argues that the Holder Rule,

by capping "recovery" to "amounts paid by the debtor," limits a plaintiff's ability to recover attorney's fees based on the Rule's plain language. Pulliam maintains, as did the Court of Appeal, that "recovery" under the Rule does not include attorney's fees and relies on the regulatory history and purpose of the Rule. Second, TDAF argues that if the meaning of the Rule is ambiguous, the FTC's interpretation in its Rule Confirmation is entitled to deference and precludes recovery of attorney's fees. Pulliam contends that under *Kisor v. Wilkie* (2019) 588 U.S. __ [139 S.Ct. 2400] (*Kisor*), the FTC's interpretation does not warrant deference.

We must exhaust "all the standard tools of interpretation" to determine if a regulation is "genuinely ambiguous" before considering deference to an agency's own interpretation of its regulation. (*Kisor*, *supra*, 588 U.S. at p. __ [139 S.Ct. at p. 2414].) As explained below, we find that the most persuasive reading of the Rule, in light of its history and purpose, is 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. And we need not decide whether the FTC's interpretation in the Rule Confirmation is entitled to deference because the FTC's statements on the topic are consistent with our interpretation.

**A.**

We begin with the text of the Holder Rule. " ' "We interpret relevant terms in light of their ordinary

meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." ' [Citation.] 'If we find the statutory language ambiguous or subject to more than one interpretation, we may look to extrinsic aids, including legislative history or purpose to inform our views.' " (*In re A.N.* (2020) 9 Cal.5th 343, 351–352.) We " 'must construe [remedial provisions] broadly, not . . . restrictively' " (*Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1114), " 'so as to afford all the relief' that their 'language . . . indicates . . . the Legislature intended to grant' " (*Skidgel v. California Unemployment Ins. Appeals Bd.* (2021) 12 Cal.5th 1, 23). (See *Kisor*, *supra*, 588 U.S. at p. __ [139 S.Ct. at p. 2415] [courts interpreting agency regulations take the " 'traditional' " approach of " 'carefully consider[ing]' the [regulation's] text, structure, history, and purpose"].)

The Notice required by the Rule provides: "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." (16 C.F.R. § 433.2(a) (1975).) The question is under what circumstances, if any, "recovery hereunder by the debtor" includes attorney's fees sought by a debtor from a holder.

In ordinary parlance, the phrase "recovery hereunder by the debtor" might be interpreted to limit a consumer's recovery for compensatory or

consequential damages, i.e., the amount the debtor ultimately receives. (See 40 Fed.Reg., *supra*, at p. 53526 ["While the wording of the notice is legalistic, we believe that it will be understood by most consumers."].) Attorney's fees would not be considered part of a consumer's recovery because any fees collected end up not with the consumer but with the consumer's attorney. This interpretation has particular salience in the consumer fraud context where contingency fees are commonplace. When plaintiffs represented under contingency arrangements recover attorney's fees based on fee-shifting provisions, they are not recouping an amount they have already paid to their attorneys; instead, they are being awarded fees that "belong to the attorneys who labored to earn them." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 575.)

At the same time, "recovery hereunder by the debtor" could mean any money a debtor receives, even if the money does not come to rest with the debtor. TDAF contends that "[c]ommon usage by courts and in statutes confirms that 'recovery' means all 'recoverable litigation costs,' and that 'recoverable litigation costs do include attorney fees.' " (Quoting *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.) The Court of Appeal in *Lafferty* similarly relied on the fact that "[c]ourts have used the term 'recovery' to include attorney fees and interest awarded as part of a judgment." (*Lafferty*, *supra*, 25 Cal.App.5th at p. 412.) But we do not find instructive the use of the term "recovery" by courts in contexts where the meaning of the term was not at issue.

TDAF also relies on the current version of Black's Law Dictionary in arguing that the Notice's language is unambiguous in limiting recovery of attorney's fees to amounts paid under the contract. Black's Law Dictionary defines "recovery" as: "1. The regaining or restoration of something lost or taken away. . . . 2. The obtainment of a right to something (esp. damages) by a judgment or decree. . . . 4. An amount awarded in or collected from a judgment or decree." (Black's Law Dict. (11th ed. 2019) p. 1528.) Westlake Services, LLC (Westlake), appearing as amicus curiae, argues that the version of Black's Law Dictionary contemporaneous to promulgation of the Rule should be used. At that time, recovery was defined as: "In its most extensive sense, the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit, or the obtaining, by such judgment, of some right or property which has been taken or withheld from him." (Black's Law Dict. (4th rev. ed. 1968) 1440.)

Neither of these definitions conclusively answers our inquiry. Attorney's fees are more naturally characterized as something earned or awarded after a party prevails in an action than as a right or property "which has been taken or withheld." (Black's Law Dict. (4th rev. ed. 1968) p. 1440.) Moreover, the meaning of "recovery" in the context of the Holder Rule must be considered in light of the words that surround it. The question is whether the Holder Rule's limitation on "recovery hereunder by the debtor" applies to the circumstances here. (16 C.F.R. § 433.2(a) (1975).) The fact that attorney's fees may be a type of "recovery" in some contexts because they are "collected" or

"obtain[ed]" by a judgment (see Black's Law Dict. (11th ed. 2019) 1528) does not necessarily mean that such fees constitute "recovery . . . *by the debtor*" or "recovery *hereunder*" within the meaning of the Holder Rule (16 C.F.R. § 433.2(a) (1975), italics added). The Rule subjects a creditor "to all claims and defenses which the debtor could assert *against the seller*" and limits "recovery *hereunder* by the debtor" to "amounts paid by the debtor" on the contract. (*Ibid.*, italics added.) Even if "recovery" included attorney's fees, the language of the Rule does not reveal whether its cap applies to fees sought directly against a holder under a state law.

Finally, TDAF argues that the meaning of the Rule is unambiguous because the Rule "limits a consumer's 'recovery,' . . . not by kind, but by amount." In TDAF's view, limiting "recovery" to "amounts paid by the debtor hereunder" confirms the "broad sweep" of the word "recovery." But the limitation on recovery to amounts paid by the debtor under the contract is readily understood to support the opposite conclusion — namely, that the FTC had damages rather than attorney's fees in mind. After all, the quantity of attorney's fees sought after judgment bears little relationship to the amount of the cap, while the "amounts paid by the debtor" under the contract may often be exactly the quantity sought in damages. (See, e.g., 40 Fed.Reg., *supra*, at p. 53527 ["In a case of nondelivery, total failure of performance, or the like, we believe that the consumer is entitled to a refund of monies paid on account."].)

**B.**

Because the language of the Rule is ambiguous with regard to the issue before us, we turn to extrinsic sources. (See, e.g., *Gardebring v. Jenkins* (1988) 485 U.S. 415, 428, fn. 14 [examining regulation's adoption history].) We look first to materials shedding light on the Rule's history and purpose before considering the agency's own interpretation of the Rule in its 2019 and 2022 statements. (*Kisor*, *supra*, 588 U.S. at p. __ [139 S.Ct. at p. 2415].)

In examining the history of the Holder Rule, we observe that attorney's fees are absent from the FTC's discussions of what constitutes recovery under the Rule until its 2019 Rule Confirmation. The regulatory materials issued prior to the Rule Confirmation do not refer to attorney's fees. Instead, they suggest that the FTC had damages in mind when it referred to "recovery" in the Holder Rule Notice. In its Statement of Basis and Purpose, the FTC referred to the recovery of consumers' damages when discussing why affirmative suits by consumers against sellers were an inadequate remedy for seller misconduct. (40 Fed.Reg., *supra*, at pp. 53511–53512 ["The amount of a consumer's damages in such a case may be substantial in real terms, . . . but such damages are rarely enough to attract competent representation."].) And in surveying the record, the FTC was troubled by the "magnitude or extent of consumer injury from forfeited claims and defenses in credit sale transactions." (*Id.* at p. 53510.) When discussing the affirmative actions against creditors that would be available under the Holder Rule, the FTC referred repeatedly to a return of

monies paid on account. (See *id.* at p. 53524 ["[A] consumer can . . . maintain an affirmative action against a creditor who has received payments for a return of monies paid on account."]; *id.* at p. 53527 ["In a case of nondelivery, total failure of performance, or the like, we believe that the consumer is entitled to a refund of monies paid on account."].)

Guidance issued by the FTC on the day the Rule went into effect suggests that "consequential damages and the like" are considered "recovery" under the Holder Rule and available up to the "amount[] paid by the debtor" under the contract. (41 Fed.Reg., *supra*, at p. 20023.) While the guidance notes that it has "not been formally reviewed or adopted by the Commission" (*id.* at p. 20022), the FTC later highlighted its statements without disagreement in its 2019 Rule Confirmation. (84 Fed.Reg., *supra*, at p. 18713, fn. 30; see *Kisor*, *supra*, 588 U.S. at p. __ [139 S.Ct. at p. 2416] [published staff guidance can be an appropriate source of insight], citing *Ford Motor Credit Co. v. Milhollin* (1980) 444 U.S. 555, 566, fn. 9, 567, fn. 10.) The guidance said: "[T]he consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; but the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in. [¶] *Thus, if a seller's conduct gives rise to damages in an amount exceeding the amounts paid under the contract*, the consumer may (1) sue to liquidate the unpaid balance owed to the creditor and to recover the amounts paid under the contract and/or (2) defend in a creditor action to collect the unpaid balance. *The*

*consumer may not assert* [*against*] *the creditor any rights he might have against the seller for additional consequential damages and the like*." (41 Fed.Reg., *supra*, at p. 20023, italics added.) "[C]onsequential damages and the like" that exceed the amounts of money the consumer has paid in would not be recoverable based solely on the Holder Rule. (*Ibid*.)

During congressional testimony shortly after the Rule's passage, the acting director of the FTC's Bureau of Consumer Protection similarly described the "one express cautionary limitation on a creditor's exposure[:] The consumer may never recover consequential damages under the provision which exceed the amount of the credit contract." (Consumer Claims and Defenses, Hearings before House Com. on Interstate and Foreign Commerce, Subcom. on Consumer Protection and Finance, 94th Cong., 2d Sess., at p. 23 (1976).) "The consumer, in all cases, is limited to the exact amount of legal damages. Only when a consumer's legal damages exceed the amounts he still owes a creditor under the contract will the consumer be in a position to seek a return of all or part of the monies he has already paid." (*Ibid*.)

Amici curiae in support of TDAF argue that the FTC's repeated references to damages in its Statement of Basis and Purpose demonstrate that "if the FTC had intended to limit only damage awards it would have rewritten the Rule's second sentence thus: 'Recovery *of damages* hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.' " (Italics added.) Amici curiae argue that the FTC "deliberately began the Holder Rule's second sentence with a

different word having a broader meaning." But they cite nothing in the regulatory history of the Rule that would lead us to so conclude; there is no discussion of recovery of costs, attorney's fees, or anything but damages. Had the FTC intended its Rule to sweep so broadly, we would expect to see some discussion of other types of awards, not just damages.

In sum, 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 FTC was aware of the diversity among states when it came to consumer protection and other laws. (See, e.g., 40 Fed.Reg., *supra*, at pp. 53510, 53512, 53520–53521.) In California, "attorney's fees *qua* attorney's fees" — that is, the fees "attributable to the bringing of the . . . action itself" — are not an element of damages. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 818, 817.) Instead, they are defined as "costs." (Code Civ. Proc., § 1033.5, subd. (a)(10).) And, except as otherwise expressly provided by statute, a prevailing party in California "is entitled as a matter of right to recover costs in any action or proceeding." (*Id.*, § 1032, subd. (b).) California's costs statute further specifies attorney's fees are allowable as costs when authorized by contract, statute, or law. (*Id.*, § 1033.5, subd. (a)(10).) The Song-Beverly Act is one such statute. Under Civil Code section 1794, subdivision (b), buyers of consumer goods may seek "damages . . . includ[ing] the rights of replacement or reimbursement." Subdivision (d) separately provides that buyers may, "as part of the judgment," recover "costs and expenses, including attorney's fees." The regulatory history

provides no reason to think the FTC intended to alter this state-specific statutory framework.

**C.**

The Holder Rule's regulatory history also demonstrates the FTC's expectation that buyers would be able to assert defenses against creditor claims based on the Holder Rule as well as pursue affirmative litigation against creditors for seller misconduct, which would be financially infeasible for many buyers if attorney's fees were not recoverable.

The Holder Rule was designed to abrogate "[t]he insulation obtained by creditors in consumer transactions" and to address "the loss of legitimate consumer claims" by the application of the holder in due course doctrine. (40 Fed.Reg., *supra*, at pp. 53509–53510.) The FTC's "primary concern" in promulgating the Rule was "the distribution or allocation of costs occasioned by seller misconduct in credit sale transactions." (*Id.* at p. 53522.) Rather than allocate these costs to the consumer, as the holder in due course rule had done, the new rule recognized that "the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party," and was designed to "compel[] creditors to either absorb seller misconduct costs or return them to sellers." (*Id.* at p. 53523.)

The FTC recognized that "the problems associated with the holder in due course doctrine are most keenly felt by the poor in our society . . . ." (40 Fed.Reg., *supra*, at p. 53510.) It considered the challenges, including high legal costs, for consumers associated with bringing

suits against sellers as an impetus to adopting the new rule: "[A]ggrieved consumers are often not in a position to take advantage of the legal system. Where seller misconduct in a credit sale transaction has given rise to consumer injury, the consumer is theoretically in a position to seek damages or other relief from the seller in court. . . . *The amount of a consumer's damages in such a case may be substantial in real terms . . . but such damages are rarely enough to attract competent representation. The sheer costs of recourse to the legal system to vindicate a small claim, together with the days of work that must be missed in order to prosecute such a claim to judgment, render recourse to the legal system uneconomic.* In addition, the worst sellers are likely to be the most volatile entities where market tenure is concerned. They prove difficult to locate and serve, and the marginal liquidity which characterizes their operations makes collection of a judgment difficult or impossible even if they are successfully served. Bankruptcy or insolvency becomes a final barrier to recovery." (*Id.* at pp. 53511–53512, italics added; see also *id.* at p. 53521 ["Judicial relief requires more time and money than most consumers can afford . . . ."].)

The FTC recognized similar costs associated with defending against a creditor's suit for payment under the old rule: When responding to a creditor's assertion of " 'holder in due course status,' " a consumer's "success depends on obtaining skilled counsel; and heavy expenses must be incurred to obtain the discovery and documentation needed to show concerted efforts on the part of the seller and creditor." (40 Fed.Reg., *supra*, at p. 53512.) The FTC highlighted a

comment by a private attorney describing the experience of one Northern Virginia family that was "unable to provide themselves with counsel" in defending against a claim by a creditor because of the legal costs "necessary to establish a link between the lender, the financier and the seller of the goods. Most attorneys, especially in a case of this kind where 'new ground is being plowed[,]' require a sizeable deposit for costs . . . . Additionally, [] the total attorney's fee in a matter such as this may be well over $500.00. When faced with this set of realistic facts most clients who get into such a situation in the first place are unable to provide themselves with protection in the form of adequate counsel." (*Ibid.*)

Based in part on these challenges, the FTC determined that a creditor "is always in a better position than the buyer to return seller misconduct costs to sellers . . . because (1) he engages in many transactions where consumers deal infrequently; (2) he has access to a variety of information systems which are unavailable to consumers; (3) he has recourse to contractual devices which render the routine return of seller misconduct costs to sellers relatively cheap and automatic; and (4) *the creditor possesses the means to initiate a lawsuit and prosecute it to judgment where recourse to the legal system is necessary*." (40 Fed.Reg., *supra*, at p. 53523, italics added.)

The Holder Rule reallocates seller misconduct costs by placing the creditor "in the shoes of the seller," subjecting the creditor "to all *claims and defenses* which the debtor could assert against the seller." (41 Fed.Reg., *supra*, at p. 20023, italics added,

capitalization omitted.) Thus, the FTC provided two ways for buyers to effect this reallocation: by "defend[ing] a creditor suit for payment of an obligation by raising a valid claim against the seller as a set-off" or by "maintain[ing] an affirmative action against a creditor who has received payments for a return of monies paid on account." (40 Fed.Reg., *supra*, at p. 53524.) The FTC expressly rejected requests to limit the rule to provide a consumer the ability to assert his rights "only as a matter of defense or setoff against a claim by the assignee or holder." (*Id.* at p. 53526.) It envisioned affirmative suits against creditors over seller misconduct as one of the ways that creditors would be forced to internalize the costs of seller misconduct and would thus be incentivized to police the market for "unscrupulous merchant[s]." (*Id.* at p. 53523.) It anticipated that "[a]s legal services offices, consumer groups, and individual consumers test the rule by periodic lawsuits against creditors and sellers, . . . the rule will enjoy increasing knowledge and use on the part of all consumers." (*Id.* at p. 53526.)

The Holder Rule therefore took shape with the FTC contemplating affirmative suits while expressly recognizing that the cost of suit in a case involving consumer damages may "render recourse to the legal system uneconomic." (40 Fed.Reg., *supra*, at p. 53512.) It nonetheless expected affirmative claims against sellers and creditors — not just defenses to debt collection — to help allocate risks and rationalize the market. Given these expectations, it seems unlikely that the FTC intended without comment or explanation to include attorney's fees in its limitation on creditor liability under the Rule. A consumer's ability to obtain

attorney's fees often proves critical for consumers to access the judicial system. It is true that by obviating the need for lengthy legal proceedings over a creditor's status, the Rule might decrease the legal costs consumers must incur. But it is unlikely that this would materially alter many consumers' ability to vindicate their rights given the high costs that remain "to vindicate a small claim." (40 Fed.Reg., *supra*, at p. 53512; see, e.g., Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1821 (2019–2020 Reg. Sess.) as introduced Mar. 6, 2019, p. 6 ["The vast majority of customers who pay for items such as cars and furniture in monthly installments can't afford to hire attorneys."].) Were attorney's fees part of the Holder Rule's limit on recovery, the effective result for many, if not most, consumers would be the same as their options were under the holder in due course rule that the FTC sought to supplant.

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 remove[d] 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.

TDAF also argues that recovery of uncapped attorney's fees would be contrary to the Rule's express

constraint on liability and its consumer protection purposes because it could jeopardize the availability of consumer financing. The FTC was aware of creditors' concerns at the time of promulgating the rule. (40 Fed.Reg., *supra*, at pp. 53517–53518.) Nonetheless, it rejected proposals to include an absolute upper limit on the amount a consumer could recover, considering such a cap unnecessary to protect the market for consumer debt. (*Id.* at p. 53527.) While the FTC considered creditors' concerns about exposure, it ultimately chose to provide consumers with recovery up to amounts paid on the contract, irrespective of the size of the contract, to better reallocate the costs of seller misconduct. (*Ibid.*) The FTC was not as single-mindedly concerned with creditors' bottom lines as TDAF suggests.

**D.**

In any event, the history of the Holder Rule indicates that the FTC intended the Rule to serve as a national floor, not to restrict the application of state laws authorizing additional awards of damages or attorney's fees against a seller or holder. (See FTC, FTC Finds Broad Compliance Among Auto Dealers with Rule That Protects Consumers with Car Loans (May 16, 2011) ["Without the Rule, consumers would not have this protection in states that preclude them from asserting against lenders the claims and defenses they have against dealers if the lenders bought the credit contracts in good faith and without knowledge of these claims and defenses."].)

In promulgating the Rule, the FTC detailed the patchwork of state laws in existence and anticipated further state action. (40 Fed.Reg., *supra*, at p. 53521.)

Around the time the FTC was considering the Holder Rule, Congress created the National Commission on Consumer Finance (NCCF) "to study and make recommendations on the need for further regulation of the consumer finance industry." (Pub.L. No. 90-321 (May 29, 1968) 82 Stat. 146.) In the FTC's initial proceedings, it declined to "withhold action until the report of the [NCCF] was completed and published." (40 Fed.Reg., *supra*, at p. 53521.) In promulgating the Rule, the FTC again declined to wait until "the individual states [] have an opportunity to enact the NCCF recommendations." (*Ibid.*) Importantly, the NCCF not only "recommended abolition of the holder in due course doctrine," as the FTC sought to accomplish with the Holder Rule, but also "urged restrictions on remedies such as garnishment, repossession, and wage assignment," and "recommended abolition of . . . confessions of judgment[] and harassing tactics in debt collections." (NCCF, Consumer Credit in the United States (Dec. 31, 1972) p. iii.) The FTC clearly anticipated that states implementing NCCF recommendations could and would take actions more protective than the Holder Rule.

In promulgating the Rule, the FTC also addressed the argument that "state action has made Commission action unnecessary." (40 Fed.Reg., *supra*, at p. 53521.) To this, the FTC responded that "only a few [states] have enacted a comprehensive measure" and that "partial limitations [in some other states] do not reach the full extent of the problem." (*Ibid.*) The FTC noted that "[m]any witnesses agree that a trade regulation rule would encourage rather than discourage further state action." (*Id.* at p. 53522, fn. 65.) It concluded that

"th[e] Rule will serve as a model for further state legislation and give states which lack legislation impetus to act." (*Id.* at p. 53521.)

The staff guidance reaffirms that the FTC contemplated that state law might offer greater protections for consumers. It describes how under the Notice, "[t]he creditor stands in the shoes of the seller" subject to "an important limitation on the creditor's liability." (41 Fed.Reg., *supra*, at p. 20023.) The last sentence of the Notice — that "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder" — "limits the consumer to a refund of monies paid under the contract, in the event that an affirmative money recovery is sought." (*Ibid.*, capitalization omitted.) But, it explained, "[t]he limitation on affirmative recovery *does not eliminate any other rights the consumer may have as a matter of local, state, or federal statute*. The words 'recovery hereunder' which appear in the text of the Notice refer specifically to a recovery under the Notice. *If a larger affirmative recovery is available against a creditor as a matter of state law, the consumer would retain this right*." (*Ibid.*, italics added.) The FTC highlighted these statements without disagreement in its 2019 Rule Confirmation. (84 Fed.Reg., *supra*, at p. 18713, fn. 30.) Where the FTC has disagreed with the guidance, it has expressly said so. (See FTC, FTC Staff Issues Note on Holder Rule and Large Transactions (Apr. 14, 2021) ["The new staff note corrects an erroneous statement in [the] 1976 pamphlet by FTC staff that the Holder Rule did not apply to transactions larger than $25,000."].)

This understanding of the Holder Rule also flows naturally from the text of the Notice which provides that "recovery *hereunder* by the debtor shall not exceed amounts paid by the debtor hereunder." (16 C.F.R. § 433.2(a) (1975), italics added.) The Holder Rule extended claims and defenses by a consumer against a seller based on state law or common law so that such claims and defenses would lie against third party creditors. The words "recovery hereunder" limit this extension to "amounts paid by the debtor" under the contract. (*Ibid.*) But this limitation says nothing about the ability of states to provide consumers greater recovery against creditors than that available solely under the Holder Rule or to provide for the award of fees from creditors following suit.

TDAF argues that the Rule "does not allow uncapped attorney's fees because doing so would run contrary to the Rule's goal of efficiently allocating the risks of seller misconduct without making creditors the guarantors of sellers' performance." Westlake similarly maintains that creditor liability for attorney's fees would be in excess of that intended by the Rule. To be sure, the FTC chose to limit creditor liability under the Holder Rule to amounts paid by the debtor under the contract rather than pass on all seller misconduct costs to creditors. (See 41 Fed.Reg., *supra*, at p. 20023.) But, as noted, the FTC anticipated further state action and only limited "recovery *hereunder*" to amounts paid by the debtor. (*Ibid.*, italics added, capitalization omitted.) Accordingly, the fact that consumers may be able to claim attorney's fees in suits against creditors based on state law is not at odds with the Holder Rule's purpose.

Neither the language of the Holder Rule nor its history suggest that it was intended to displace or prevent state law from authorizing greater recovery than what a plaintiff may recover based on the language of the Notice alone. In repudiating the holder in due course doctrine and expanding creditor liability up to a point, the FTC made clear it was setting a national floor, not a ceiling that states may not exceed. It cited several states' preexisting consumer protection statutes — including California's Unruh Act (§ 1801 et seq.) — as examples informing its decision to act in the first place. (40 Fed.Reg., *supra*, at p. 53527.) It is difficult to imagine the FTC citing such laws favorably if it intended, without comment, to simultaneously squelch any of their fee-shifting provisions and hamper state initiative in the consumer protection context. TDAF takes issue with the Court of Appeal's ruling in this case because, in its view, the award of attorney's fees "creates an opportunistic litigation landscape for consumers' attorneys" and "ultimately harms consumers by discouraging financing of consumer loans." But given the FTC's preservation of consumers' rights under state law, TDAF's contentions amount to a policy argument against fee-shifting provisions like those in the Unruh Act, section 1459.5, or section 1794, subdivision (d). Those contentions should be directed at the Legislature or the FTC.

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. (40 Fed.Reg., *supra*, at p. 53512.) 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.

**E.**

TDAF argues that to the extent the Holder Rule's language is ambiguous, we should defer to the FTC's interpretation. But whether or not deference is warranted, the result is the same in this case because, as we now explain, the FTC's interpretation in its 2019 Rule Confirmation, insofar as it relates to what qualifies as "recovery hereunder," accords with our own.

The FTC wrote that "if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder — including any recovery based on attorneys' fees — cannot exceed the amount the consumer paid under the contract." (84 Fed.Reg., *supra*, at p. 18713.)

We understand these statements to mean that if there is no federal or state law authorizing fees against the holder, a buyer cannot use the Holder Rule to secure from the holder a claim for fees against the seller in excess of amounts paid on the contract. It is significant that the FTC uses the phrase "if the holder's liability for fees is based on claims *against the seller* that are preserved by the Holder Rule Notice." (84 Fed.Reg., *supra*, at p. 18713, italics added.) 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." (*Ibid.*, italics added.) 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.

TDAF interprets the Song-Beverly Act's fee-shifting provision to allow a prevailing party buyer to recover attorney's fees from the holder "based on claims against the seller that are preserved by the Holder Rule Notice" (84 Fed.Reg., *supra*, at p. 18713) because TDAF was only brought into the suit based on Pulliam's claims against the dealership that were extended to lie

against TDAF under the Holder Rule. But Pulliam's claim *for attorney's fees* against TDAF is based on section 1794, subdivision (d), which permits any buyer who "prevails in an action under this section" to "recover . . . attorney's fees"; it is not "based on claims *against the seller*" for attorney's fees (84 Fed.Reg., *supra*, at p. 18713, italics added). TDAF also contends that section 1794, subdivision (d) is not "independent of claims or defenses arising from the seller's misconduct" (84 Fed.Reg., *supra*, at p. 18713) because TDAF's liability to suit in this case is based on the Holder Rule. But this interpretation similarly confuses a buyer's claim for statutory attorney's fees as a prevailing party in the litigation against a creditor with a buyer's claim against a seller that is extended to the creditor only by virtue of the Holder Rule.

The parties do not dispute that Pulliam could pursue an action under the Song-Beverly Act against TDAF because of the Holder Rule. (See § 1794, subd. (a) ["Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief."].) After Pulliam prevailed, the trial court entered judgment in Pulliam's favor jointly and severally against TDAF and the dealership. Pulliam then moved for attorney's fees against TDAF under section 1794, subdivision (d). (See *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 671, 677 [costs, including attorney's fees, " 'constitute no part of a judgment at the moment of its rendition' "].) Section 1794 contains no language limiting fee awards to sellers as opposed to any other

parties against whom a buyer has prevailed. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 [Song-Beverly " 'is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action' "].) It provides for fees against any losing defendant who chose to oppose a consumer's claim. Thus, section 1794, subdivision (d) provided the basis for Pulliam's claim for fees against TDAF and was unaffected by the Holder Rule's limitation on "recovery hereunder" for claims asserted by a buyer against a seller and extended to lie against a holder.

This understanding of the Rule and the Rule Confirmation is in agreement with a recent Advisory Opinion issued by the FTC, which states that "the Holder Rule does not limit recovery of attorneys' fees and costs when state law authorizes awards against a holder." (FTC Advisory Opn., *supra*, at p. 1.) The opinion further explains that "whether costs and attorneys' fees may be awarded against the holder . . . is determined by the relevant law governing costs and fees," and "[n]othing in the Holder Rule states that application of [prevailing party statutes] to holders is inconsistent with Section 5 of the FTC Act or that holders should be wholly or partially exempt from these laws." (*Id.* at p. 2.) "Further, if 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. The sentence in the Holder Rule Notice that limits recovery to 'amounts paid by the debtor' applies only to monetary recovery against holders based on the Holder Rule Notice . . . ; the Rule places no cap on a consumer's right to recover from the

holder for other reasons." (*Id.* at p. 3.) The FTC expressly disavowed reading the Rule Confirmation "as mandating a different result." (*Ibid.*) "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." (*Id.* at pp. 3–4.)

The FTC gave the example of a consumer authorized to recover fees from parties that unsuccessfully oppose the consumer's claims. "In this scenario," which is squarely on point, "the . . . fee award is separate and supported by a law that is independent of the Holder Rule. Thus, the Holder Rule Notice does not limit . . . attorneys' fees that the applicable law directs or permits a court to award against a holder because of its role in litigation." (FTC Advisory Opn., *supra*, at p. 3.) It is only where a "consumer is awarded fees in a suit solely against the seller, or the law allows awards only against a seller that has engaged in specified conduct," that "the seller's liability for . . . fees may be raised against the holder because of the Holder Rule Notice"; in that case, the Holder Rule "authorizes the consumer to recover such an award from the holder up to the amount paid." (*Ibid.*)

TDAF argues that the FTC Advisory Opinion "lacks any persuasive effect," citing *Christensen v. Harris County* (2000) 529 U.S. 576, 587. But the FTC's

interpretation of the Rule and the Rule Confirmation is consistent with the Rule's text, history, and purpose, including the FTC's repeated statements that it did not intend to interfere with state laws authorizing additional awards. (See 40 Fed.Reg., *supra*, at p. 53521; 41 Fed.Reg., *supra*, at p. 20023; 84 Fed.Reg., *supra*, at p. 18713.)

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 v. Wells Fargo Bank, N.A.*, *supra*, 25 Cal.App.5th 398 and *Spikener v. Ally Financial, Inc.*, *supra*, 50 Cal.App.5th 151 to the extent they are inconsistent with this opinion.

## CONCLUSION

We affirm the judgment of the Court of Appeal.

**LIU, J.**

**We Concur:**

**CANTIL-SAKAUYE, C. J.**
**CORRIGAN, J.**
**KRUGER, J.**

**GROBAN, J.**
**JENKINS, J.**
**ROBIE, J.**[*]

[*] Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*See next page for addresses and telephone numbers for counsel who argued in Supreme Court.*

**Name of Opinion** Pulliam v. HNL Automotive Inc.

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**Procedural Posture** (see XX below)
**Original Appeal**
**Original Proceeding**
**Review Granted (published)** XX 60 Cal.App.5th 396
**Review Granted (unpublished)**
**Rehearing Granted**

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**Opinion No.** S267576
**Date Filed:** May 26, 2022

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**Court:** Superior
**County:** Los Angeles
**Judge:** Barbara Marie Scheper

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## APPENDIX B

Filed 1/29/21; REVIEW GRANTED. See Cal. Rules of Court, rules 8.1105 and 8.1115 (and corresponding Comment, par. 2, concerning rule 8.1115(e)(3)).

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION FIVE**

**B293435**

**(Los Angeles County Super. Ct. No. BC633169)**

**[Filed: January 29, 2021]**

TANIA PULLIAM,

Plaintiff and Respondent,

v.

HNL AUTOMOTIVE INC. et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

McCreary, PC and Duncan J. McCreary; McGuirewoods, Leslie M. Werlin, Jamie D. Wells and Anthony Q. Le for Defendants and Appellants.

Rosner, Barry & Babbit, Hallen D. Rosner, Arlyn L. Escalante and Serena D. Aisenman for Plaintiff and Respondent.

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## *INTRODUCTION*

Defendants HNL Automotive Inc. and TD Auto Finance, LLC (TD) appeal the trial court's award of attorney's fees to plaintiff following a jury trial on plaintiff's lemon law claims. Defendants argue: (1) plaintiff's counsel failed to provide evidence of their hourly rates, (2) the trial court erred in refusing to apportion attorney's fees, (3) the trial court erred in applying a lodestar multiplier, and (4) TD was not liable for attorney's fees under title 16, section 433.2 of the Code of Federal Regulations (2020) (the Holder Rule). We affirm the amount of attorney's fees awarded, finding no abuse of discretion. We affirm the court's ruling that TD is liable for attorney's fees, and conclude that the Holder Rule does not limit the attorney's fees that a plaintiff may recover from a creditor-assignee.

## *FACTS AND PROCEDURAL BACKGROUND*

### 1. *Plaintiff's Vehicle Purchase*

In July 2016, plaintiff purchased a "Certified Pre-Owned" 2015 Nissan Altima from HNL Automotive Inc. (the dealership) pursuant to a retail installment sales contract. The contract included the following

language from title 16, section 433.2 of the Code of Federal Regulations:

> "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."

This language is commonly referred to as the Holder Rule. (*Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 404 (*Lafferty*).) We discuss in depth the Holder Rule and who is a holder in the final portion of our Discussion section below. Following plaintiff's purchase, TD accepted assignment of the retail installment sales contract and became the "Holder" of plaintiff's retail installment sales contract.

Advertisements for the particular vehicle plaintiff purchased showed that it had cruise control, 6-way power-adjustable seats, and other specific features. Plaintiff is disabled, and because of her disabilities, cruise control and power-adjustable seats were necessary features. After the purchase, plaintiff learned that the vehicle did not have cruise control or 6-way power-adjustable seats, and did not meet the requirements of the Nissan Certified Pre-Owned program as advertised.

**2. *Plaintiff's Complaint and Trial***

In September 2016, less than two months after purchasing the vehicle, plaintiff filed this lawsuit against the dealership and TD in the trial court. Her complaint had six causes of action, alleging misrepresentation in violation of the Consumer Legal Remedies Act related to the vehicle's certification, breach of implied warranty under the Song-Beverly Consumer Warranty Act (Song-Beverly) codified in Civil Code section 1790 et seq., fraud and deceit, negligent misrepresentation, violation of Business and Professions Code section 17200, and violation of Vehicle Code section 11711 (vehicle fraud).[1] Plaintiff alleged that due to the inclusion of the Holder Rule language in the retail installment sales contract, TD was liable for all of the dealership's misconduct in the sale of the vehicle.

Trial occurred in April 2018. The cause was submitted to the jury with directions to return a verdict on four causes of action. The jury found for plaintiff on one cause of action—violation of the implied warranty of merchantability under Song-Beverly. The jury's findings established plaintiff purchased a motor vehicle from the dealership, the dealership was in the business of selling motor vehicles to retail buyers, the dealership failed to adequately package and label the 2015 Nissan, and the vehicle failed to conform to the promises or affirmations of fact made on the container or label. The

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[1] All subsequent statutory references are to the Civil Code unless indicated otherwise.

jury found that the purchase contract for the vehicle was assigned from the dealership to TD.

The jury found that plaintiff's total damages were $21,957.25. On May 29, 2018, the court entered judgment in favor of plaintiff and against the dealership and TD, jointly and severally, in the amount of $21,957.25. The judgment left blank the amount of costs, attorney's fees, and prejudgment interest to be awarded.[2]

### 3. *Posttrial Motion for Attorney's Fees*

On July 26, 2018, plaintiff filed a posttrial motion seeking the award of attorney's fees. Plaintiff sought $169,602, which consisted of a lodestar figure of $141,335 and a 0.2 multiplier. Plaintiff supported the motion with declarations from Hallen D. Rosner and Michael A. Klitzke, respectively the partner and associate from Rosner, Barry & Babbit LLP, who had been working on her case. Rosner's declaration authenticated the firm's attached billing records, provided citation to similar cases where the firm's hourly rates had previously been approved, described each attorney's experience and qualifications, noted that the firm's rates were not increased in contingency matters, and explained the risks the firm weathered in taking this used-vehicle case on a contingency basis. Klitzke's declaration authenticated documents related to the litigation, as well as various communications

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[2] The record does not include motions or orders related to costs or prejudgment interest, but the case summary indicates at least the issue of costs was litigated by the parties. We do not discuss costs or prejudgment interest as they are not raised on appeal.

between himself and opposing counsel. He also described his legal experience and explained his hourly rate.

In the motion, plaintiff asserted that TD was liable for attorney's fees in addition to the amounts plaintiff paid under the retail installment sales contract. Plaintiff argued the Holder Rule did not bar plaintiff's recovery of attorney's fees from TD.

In its opposition, defendants objected to the declarations of plaintiff's counsel in support of the motion, and argued plaintiff failed to provide evidence of Rosner's hourly rate. Defendants asserted that the fee award should be reduced by 83 percent because plaintiff succeeded on only one of the six causes of action that had been alleged. Defendants also argued the lodestar multiplier was not appropriate because the lawsuit was not exceptionally difficult and plaintiff's counsel was not exceptionally skilled. Lastly, citing *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 563, defendants argued pursuant to title 16, section 433.2 of the Code of Federal Regulations, that TD was not liable for the attorney fees because as the holder of the retail installment sales contract, its liability could not exceed the amount plaintiff paid to TD.

On August 29, 2018, the trial court heard argument from counsel. In response to defendants' argument that plaintiff's fees should be apportioned, the court found that defendants' "mathematical" proposal of giving plaintiff one-sixth of the fees was not appropriate. The court stated: "I've decided they [plaintiff's counsel] have satisfied the burden establishing that there is no need

for any sort of allocation, and it in fact would be impossible, and your failure to make any suggestion to the contrary other than your mathematical equation I think demonstrates that. It's just the facts and the legal theories were completely intertwined, and I don't think that there is any way that the court can or should be required to go through on a line-by-line basis and try to figure out what work went – somehow went to a fraud cause of action that did not also relate to the successful cause of action."

In response to defendants' argument that a multiplier should not be applied to the lodestar figure because it was a simple case, the court stated: "You didn't make it simple, Mr. McCreary [defense counsel], nor did your client. I was here for this, so this is not just counsel amongst themselves discussing how, you know, difficult discovery . . . which is out of the presence of the jury. I saw plenty in my handing of this case, and whether it was because of your client or for some other reason, what would have been or could have been a fairly simple case was made much more complicated by your client's posture in this matter from the beginning to the end, as far as the court's concerned."

In an eleven-page minute order explaining its decision, the court awarded plaintiff $169,602 in attorney's fees.[3] The court reiterated that

[3] Plaintiff points out that defendants failed to include the judgment in the record. We observe that the judgment on the jury verdict can be found in the first volume of the clerk's transcript at page 121. The minute order granting attorney's fees directed the clerk to affix the attorney fees order to this judgment.

apportionment was not necessary or possible based on intertwined facts of the case and that $141,335 in fees was reasonably incurred by plaintiff in prosecuting the action. The court indicated it was capable of assessing whether the lodestar was reasonable. The court also stated Rosner's hourly rate was obvious from the billing records, and pointed out that defendants did not claim his rate to be unreasonable. The court largely overruled defendants' evidentiary objections to plaintiff's counsel's declarations.[4]

## *DISCUSSION*

Defendants contend on appeal that (1) plaintiff's attorneys failed to provide evidence of their hourly rates and failed to establish that their hourly rates are the prevailing rates in the community; (2) attorney's fees should be reduced because plaintiff did not succeed on all claims; (3) the court abused its discretion by applying a lodestar multiplier to the fees, and (4) TD is not liable for attorneys' fees in this matter. We address each issue in turn.

### 1. *Legal Overview for Awarding Attorney's Fees in Lemon Law Cases*

The jury found defendants liable for breach of the implied warranty of merchantability under Song-Beverly, commonly known as the automobile "lemon law." (*Duale v. Mercedes–Benz USA, LLC* (2007) 148

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[4] The court sustained a single hearsay objection to an exhibit titled "United States Consumer Law Attorney Fee Survey Report 2015-1016," which was attached to attorney Klitzke's declaration in support of plaintiff's motion for attorney's fees.

Cal.App.4th 718, 721.) In its more typical application, Song-Beverly requires automobile manufacturers to repair a new motor vehicle within a reasonable number of attempts. If the manufacturer cannot repair the vehicle, the manufacturer must replace it or pay restitution to the buyer, at the buyer's election. (§ 1793.2, subd. (d)(2).) The present case is not about unsuccessful efforts to repair a vehicle but is for breach of the implied warranty of merchantability in the sale of a vehicle to plaintiff.[5] Section 1794, subdivision (a) permits the buyer to bring an action for recovery of damages and other relief.

If the buyer prevails in the action against the seller, "the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (§ 1794, subd. (d).) "[A] prevailing buyer has the burden of showing that the fees incurred were allowable, were reasonably necessary to the conduct of the litigation, and were reasonable in amount." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 998 (*Doppes*).) "The reasonable hourly rate is that

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[5] Section 1792 provides: "Unless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section."

prevailing in the community for similar work." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

Courts apply the lodestar method in calculating attorney's fees. (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 818-819 (*Robertson*); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135 (*Ketchum*).) "That method requires the trial court to first determine a touchstone or lodestar figure based on a careful compilation of the actual time spent and reasonable hourly compensation for each attorney. [Citation.] The touchstone figure may then be augmented or diminished by taking various relevant factors into account, including (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the award. [Citation.] As the Supreme Court subsequently explained, the initial lodestar amount is based on the reasonable rate for *noncontingent* litigation of the same type, which amount may then be enhanced (e.g., through use of a so-called multiplier) to account for factors such as the contingent nature of the case: 'The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.' " (*Robertson, supra,* 144 Cal.App.4th at p. 819.) "In making its calculation, the

court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees." (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 437 (*569 East County).*)

"We review an award of attorney fees under [Song–Beverly] for abuse of discretion. [Citations.] We presume the trial court's attorney fees award is correct. . . . 'The " 'experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' " ' " (*Doppes, supra,* 174 Cal.App.4th at p. 998.)

**2. *Substantial Evidence Supported the Lodestar Amount***

Defendants assert plaintiff "did not establish or mention Mr. Rosner's hourly billing rate whatsoever. Mr. Rosner did not provide any evidence of his hourly rate, and Appellants were unable to determine from the submissions Mr. Rosner's hourly rate." (Emphasis omitted.) Defendants mischaracterize the record.

Plaintiff's fee motion was accompanied by a declaration from Rosner. Attached to that declaration was a copy of the firm's invoice for all work completed on the case. The invoice included a description of the work performed, identification of the attorney that performed the work, and that attorney's hourly rate. Multiple attorneys from the firm worked on the case, and each attorney's hourly rate was reflected on the

invoice, including (as noted by the trial court) Rosner's own rate. Substantial evidence supported that part of the lodestar based on counsel's hourly rate and hours worked.

Defendants also argue that plaintiff's counsel failed to establish that their hourly rates are the prevailing rates in the community. Rosner's declaration dedicated three paragraphs and multiple exhibits to establishing that the firm's rates are competitive in the local market, and he attached a national survey of prevailing rates among consumer protection attorneys, including rates for California attorneys. The declarations of Rosner and Klitzke included a section on the experience and qualifications of each attorney and paralegal who billed on the case. Defendants offer no authority to suggest that further evidence is needed to establish market rates in the community. The evidence was sufficient for the trial court which also observed that it was capable of assessing market rates in the community sua sponte. (See *569 East County, supra,* 6 Cal.App.5th at p. 437 ["In making its calculation, the court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees."].) Substantial evidence supported the lodestar amount.

In three conclusory sentences in their opening brief and without citation to authority, defendants generally argue that the trial court improperly overruled their foundation and hearsay objections to Rosner's and Klitzke's declarations. Defendants fail to make specific arguments about each objection on appeal or provide legal support for their position. We consider those

points no further as "issues not addressed as error in a party's opening brief with legal analysis and citation to authority are forfeited." (*Golden Door Properties, LLC v. Superior Court* (2020) 52 Cal.App.5th 837, 890.)

### 3. *No Abuse of Discretion in Refusing to Apportion the Fee Award*

We also find no abuse of discretion in the trial court's refusal to apportion attorney's fees based on plaintiff's success on one cause of action.

When a plaintiff is successful, "the fact that he or she has prevailed on some claims but not on others is a factor to be considered in determining the amount of the fee awarded." (*Lyons v. Chinese Hosp. Assn* (2006) 136 Cal.App.4th 1331, 1345.) Nonetheless, it is well-established that " '[a]ttorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories.' " (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 159; *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997; see *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 421 ["There is 'no mathematical rule requiring proportionality between compensatory damages and attorney's fees awards, [citation], and courts have awarded attorney's fees where plaintiffs recovered only nominal or minimal damages."].)

Here, the court found that apportionment was not possible because the claims involved a common core of facts and intertwined legal theories. The record supports the court's view. Plaintiff's claims are based

on a single set of facts: the dealership falsely representing that the vehicle had cruise control, 6-way power-adjustable seats, and other specific features. Each of plaintiff's causes of action revolve around these misrepresentations. Defendants do not explain how the causes of action were distinct from one another or based on different sets of facts.

We find no abuse of discretion.

### 4. ***No Abuse of Discretion in Applying a Lodestar Multiplier***

Defendants argue the court abused its discretion in applying a lodestar multiplier to attorney's fees because the "lawsuit was [a] simple factual and legal case involving a car transaction where the jury determined that the labeling on the car was incorrect under the Song Beverly Act."

Our Supreme Court has instructed that while the lodestar amount "is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." (*Ketchum, supra,* 24 Cal.4th at p. 1132.)

Here, plaintiff solely requested a multiplier based on her counsel's contingent risk. "The purpose of a fee enhancement, or so-called multiplier, for contingent risk is to bring the financial incentives for attorneys enforcing important constitutional rights . . . into line

with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum, supra,* 24 Cal.4th at p. 1132.) The lodestar enhancement "is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Id.* at p. 1138.)

Defendants focus on the novelty of the case in arguing the multiplier was an abuse of discretion. Defendants do not address the contingency risk, or any other factor that courts may consider when awarding a multiplier enhancement.

We conclude the trial court did not abuse its discretion in awarding a 0.2 multiplier to account for the inherent risks associated with taking the case on contingency and fronting all costs of litigation. Rosner's declaration explained that the firm bills at the same rate for contingent and non-contingent cases. Rosner also attested to the risks associated with contingent cases. The requested multiplier was modest and it accounted for the risk plaintiff's counsel took in litigating the case against defendants whom the court found made the case challenging and protracted. The 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.[6] On this record, there was no abuse of discretion.

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[6] It appears that during litigation, defendants made it difficult to secure witnesses, refused to appear and complete depositions, and withheld documents.

### 5. ***The Holder Rule Does Not Limit TD Auto Finance's Liability for Attorney's Fees***

Defendant TD alone argues that it is not liable for attorney's fees based on the Holder Rule (16 C.F.R. § 433.2). We disagree.

*a. The Holder Rule*

The Federal Trade Commission (FTC) "promulgated the Holder Rule in 1975 as a consumer protection measure to abrogate the holder in due course rule for consumer installment sale contracts that are funded by a commercial lender. [Citations.] 'Under the holder in due course principle, the creditor could "assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale." ' [Citation.] 'Before the FTC rule, if a seller sold goods on credit and transferred the credit contract to a lender, the lender could enforce the buyer's promise to pay even if the seller failed to perform its obligations under the sales contract. Similarly, despite a seller's breach, the buyer was obligated to pay the lender under a consumer loan contract that directly financed the purchase of goods or services from the seller.' " (*Lafferty, supra,* 25 Cal.App.5th at pp. 410–411.) " 'In abrogating the holder in due course rule in consumer credit transactions, the FTC preserved the consumer's claims and defenses against the creditor-assignee. The FTC rule was therefore designed to reallocate the cost of seller misconduct to the creditor. The commission felt the creditor was in a better position to absorb the

loss or recover the cost from the guilty party—the seller.' " (*Id.* at p. 411.)

The FTC's regulation requires the following notice to be given in every consumer installment sales contract that is funded by a commercial lender (*Lafferty, supra,* 25 Cal.App.5th at p. 404):

> "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." (16 C.F.R. § 433.2.)

The FTC regulation requiring use of this notice is known as the Holder Rule.[7] Somewhat more informally, the liability imposed by the notice – in contrast to the otherwise applicable holder in due course principle – is also known as the Holder Rule.

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[7] The Regulation provides that it is a deceptive trade practice to omit the Holder Rule Notice in a consumer credit contract. (16 C.F.R. § 433.2.) A consumer credit contract is, in turn, defined as "[a]ny instrument which evidences or embodies a debt arising from a 'Purchase Money Loan' transaction or a 'financed sale' " as those terms are themselves defined by regulation. (16 C.F.R. § 433.1(i).)

*b. The Parties' Contentions and Overview*

The parties wrestle with the final sentence of the Holder Rule, which states that recovery by the debtor shall not exceed the amounts paid by the debtor under the installment sales contract. TD asserts that this limits plaintiff's recovery of both damages *and attorney's fees* to the amount she paid under the retail sale installment contract. Plaintiff argues the limit applies only to compensatory damages.

A number of voices, including state and federal courts, the California Legislature, and the FTC, have all expressed opinions on the issue – many of them contradictory. A broad overview of the situation, which we will discuss in greater detail below, is this: In California, the Third Appellate District in *Lafferty, supra,* 25 Cal.App.5th 398, held that the Holder Rule's cap on recovery applies to attorney's fees as well as damages. In response to *Lafferty*, the California Legislature enacted a statute, Civil Code section 1459.5, intended to abrogate *Lafferty* and allow recovery of attorney's fees in excess of the Holder Rule's cap.[8]

In the meantime, other jurisdictions were also struggling with the issue. Some courts found the

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[8] Section 1459.5 provides: "A plaintiff who prevails on a cause of action against a defendant named pursuant to Part 433, Title 16 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."

Holder Rule's cap applied to attorney's fees. (E.g., *Simpson v. Anthony Auto Sales, Inc.* (W.D. La. 1998) 32 F.Supp.2d 405, 410; *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.* (Neb. 2008) 755 N.W.2d 583, 595; *Scott v. Mayflower Home Imp. Corp.* (2001) 363 N.J.Super. 145, 165-166, overruled on other grounds by *Psensky v. American Honda Finance Corp.* (2005) 378 N.J.Super. 221, 231.) Others found it did not. (E.g., *Oxford Finance Cos. v. Velez* (Tx.Ct.App. 1991) 807 S.W.2d 460, 464-465.) Still others imposed attorney's fees on holders in excess of the cap without even addressing the issue. (E.g., *Diaz v. Paragon Motors of Woodside, Inc.* (E.D.N.Y. 2008) 2008 WL 2004001; *In re Stewart* (E.D.Pa. 1988) 93 B.R. 878, 879.)

At the same time, as part of its review of its regulations, the FTC sought comments on the costs, benefits, and impact of the Holder Rule. (80 FR 75018.) It received a number of responses, a handful of which mentioned attorney's fees and an even smaller number of which identified the split in the law regarding the application of the cap to attorney's fees. (<https://www.ftc.gov/policy/public-comments/2015/12/initiative-631> [as of January 26, 2021] as archived <https://perma.cc/N3SN-NPSC>.) The FTC issued a Rule Confirmation in which it confirmed the Holder Rule with no modifications, but volunteered its opinion that the Holder Rule's cap applied to attorney's fees. (84 FR 18711.)

Thereafter, the issue presented itself again in California, this time, before the First Appellate District, Division Five, in *Spikener v. Ally Financial,*

*Inc.* (2020) 50 Cal.App.5th 151 (*Spikener*). The *Spikener* court concluded that the FTC's construction of the rule was "dispositive on the Holder Rule's application to attorney fees." (*Id.* at p. 158.) The court also determined that Civil Code section 1459.5 was preempted by the Holder Rule as so interpreted. (*Id.* at p. 160.)[9]

Not surprisingly, TD would have us follow *Lafferty* and *Spikener*.[10] 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.

*c. The Holder Rule Cap Does Not Apply to Attorney Fees*

Preliminarily, we set forth the rules of interpretation which apply to regulations. Next, we discuss the rationale of the *Lafferty* court which led it to conclude the Holder Rule's cap applies to attorney's fees. Lastly, we explain our disagreement with *Lafferty* and proffer our own, contrary, interpretation.

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[9] Unlike *Spikener*, *Lafferty* was not a preemption case. *Lafferty* interpreted the Holder Rule's cap as applying to attorneys' fees. (*Lafferty, supra,* 25 Cal.App.5th at p. 414.)

[10] When the parties briefed this issue, *Spikener* had not yet been decided. Upon this court's request, the parties addressed *Spikener* at oral argument.

(i) Rules of Regulatory Interpretation and Standard of Review

Generally, we apply the same rules governing statutory interpretation to the interpretation of administrative regulations. (*Regents of the University of California v. Public Employment Relations Bd.* (2020) 51 Cal.App.5th 159, 187.)

"In interpreting a statute, our primary goal is to determine and give effect to the underlying purpose of the law. [Citation.] 'Our first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.' [Citation.] ' "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' " [Citation.] In other words, we are not free to 'give words an effect different from the plain and direct import of the terms used.' [Citations.] However, ' "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." ' [Citations.] To determine the most reasonable interpretation of a statute, we look to its legislative history and background." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.)

We review statutory interpretation and preemption questions de novo. (*Spielholz v. Superior* Court (2001) 86 Cal.App.4th 1366, 1371.)

(ii) Lafferty's Rationale

In *Lafferty*, the plaintiffs purchased a vehicle under an installment contract, which was later assigned to a holder, *i.e.* a credit company. (*Lafferty, supra,* 25 Cal.App.5th at p. 405.) Like the case at bar, the plaintiffs sued the holder pursuant to the Holder Rule. (*Id.* at pp. 406–407.) After the plaintiffs and the holder entered into a settlement agreement where the holder paid the plaintiffs the amount paid under the installment contract, the plaintiffs moved for attorney fees. The trial court denied fees as barred by the Holder Rule's limitation on recovery in excess of the amount paid by the plaintiffs under the installment sales contract. (*Id.* at pp. 407-408.)

Relying on two California and two out-of-state cases, the *Lafferty* court stated the "term 'recovery' is broad and regularly used to include compensatory damages, punitive damages, attorney fees, and costs." (*Lafferty, supra,* 25 Cal.App.5th at p. 412.) The *Lafferty* court held: "a consumer cannot recover more under the Holder Rule cause of action than what has been paid on the debt regardless of what kind of a component of the recovery it might be—whether compensatory damages, punitive damages, or attorney fees." (*Id.* at p. 414.)

(iii) Our Interpretation of the Language of the Holder Rule

The statutory interpretation question for us is: Does the word "recovery," as used in the Holder Rule, include attorney's fees. If "recovery" includes attorney's fees, then the Holder Rule's limitation that recovery "by the debtor shall not exceed amounts paid by the

debtor hereunder," means that the court would add the attorney's fees to the compensatory award and limit the total recovery to the amount the debtor paid under the purchase agreement. That is *Lafferty's* holding. (*Lafferty, supra,* 25 Cal.App.5th at p. 412.)

Black's Law Dictionary defines "recovery" as "1. The regaining or restoration of something lost or taken away. . . . [¶] 2. The obtainment of a right to something (esp. damages) by a judgment or decree. . . . 4. An amount awarded in or collected from a judgment or decree." (Recovery Definition, Black's Law Dict. (11th ed. 2019) available at Westlaw; see *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122, ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"].) The dictionary definition of recovery focuses on damages, i.e. restoring money that was taken away from the plaintiff, and does not expressly address attorney's fees.

To the extent that *Lafferty* cites several cases that discuss recovery to include attorney's fees in contexts outside the Holder Rule, we do not find these to be persuasive in defining recovery for the purpose of the Holder Rule. The Rule's legislative history makes clear that the objective of the Holder Rule was to compel "creditors to either absorb seller misconduct costs or return them to sellers, by denying sellers access to cut-off devices," thereby discouraging "predatory practices and schemes." (Preservation of Consumers' Claims and Defenses, 40 FR 53506 (Nov. 18, 1975) p. 53523.) In its "Statement of Basis and Purpose"

published in the Federal Register in conjunction with the Holder Rule's enactment, the FTC stated: "It is unfair to subject an innocent party to costs and harm occasioned by a guilty party. Consumers are clearly injured by a system which forces them to bear the full risk and burden of sales related abuses. There can be little commercial justification for such a system. The desired reallocation of cost and risk will both reduce the costs of seller misconduct in the marketplace and return the residuum to the guilty parties. Consumers and honest merchants will benefit as prices come to reflect actual transactions costs and honest merchants no longer need compete with those who rely on abusive sales practices." (*Ibid.*)

The FTC also found that pre-existing law placed consumers in a precarious position of being financially incapable of enforcing their rights in court: "The Commission further finds that aggrieved consumers are often not in a position to take advantage of the legal system. Where seller misconduct in a credit sale transaction has given rise to consumer injury, the consumer is theoretically in a position to seek damages or other relief from the seller in court. . . . However, in such cases the consumer must pay the creditor holding his note or contract whether or not he ultimately receives a judgment against the seller. . . . [S]uch damages are rarely enough to attract competent representation. The sheer costs of recourse to the legal system to vindicate a small claim, together with the days of work that must be missed in order to prosecute such a claim to judgment, render recourse to the legal system uneconomic. In addition, the worst sellers . . . prove difficult to locate and serve, and the marginal

liquidity which characterizes their operations makes collection of a judgment difficult or impossible even if they are successfully served. Bankruptcy or insolvency becomes a final barrier to recovery." (40 Fed. Reg. 53512.) The Holder Rule was the FTC's answer to such consumer impediments.

In August 1976, at a congressional hearing on the recently enacted Holder Rule, acting director of the FTC's Bureau of Consumer Protection, Margery Waxman Smith, made the following statements, which echoed the FTC's comments above:

> "In times past, when sellers were fewer and consumer credit was less pervasive, it may have been reasonable to conclude that consumers could assess the risks of seller nonperformance more efficiently than a note purchaser. Under these conditions, a rule of law favoring holders-in-due course may have promoted economic efficiencies. But in today's complex credit-oriented economy of mass production and distribution, where buyers and sellers transact impersonally for standardized products, it may no longer be most efficient to place all the risks of seller nonperformance on the buyer. This is particularly true where the creditor has frequent dealings with the seller though common ownership, affiliation or a regular course of dealing. The Commission's rule, in short, carefully shifts some of these risks from consumers to those who have a better and more efficient means of assessing them, pricing them, and shifting them back to the seller.

"The purpose of the rule is to recognize these realities. Consumers who are victimized by seller misconduct and compelled to pay a third-party creditor are not in a position to obtain redress for their injuries, thus shifting the costs back to the seller. The reasons for this situation are many. They revolve around the costs of taking time off from work, finding legal representation in a context which the law would generally classify as a small claim, undertaking the costs of litigation, and meeting a rigid payments schedule whatever the ultimate result of such efforts may be.

"Creditors, in those situations to which the rule applies, are in a position to shift the risk back where it belongs, either directly or through the price mechanism. They deal in volume while consumers deal once. Creditors enjoy ready access to commercial information which consumers cannot obtain. They have the leverage to return risks to the sellers they finance. They can spread information costs over many transactions. All together their comparative advantage here is incalculable. [¶]

"The required provision does contain one express cautionary limitation on a creditor's exposure. The consumer may never recover consequential damages under the provision which exceed the amount of the credit contract."

(Consumer Claims and Defenses: Hearings Before the Subcomm. on Consumer Protection and Finance of the

Comm. on Interstate and Foreign Commerce House of Rep., 94th Cong., 2nd Sess. (1976), Serial No. 94-145, pp. 22-23.)

Acting Director Smith's comments indicate that at the time the FTC's position on the limitation on recovery was that the rule limited consequential damages, not attorney's fees. To include attorney's fees in the Holder Rule's limitation on recovery would be out of sync with its objective of reallocating the costs of the seller's misconduct from the consumer back to the seller and creditor. Attorney's fees "is a form of compensation that, along with an award of actual damages, permits the consumer to be made whole. . . . [O]ne of the objectives of the Holder Rule is to internalize the costs of a seller's misconduct. Those costs include the expense of obtaining compensation for injury caused by the seller's misconduct." (Greenfield & Ross, *Limits on a Consumer's Ability to Assert Claims and Defenses under the FTC's Holder in Due Course Rule* (1991) 46 Business Lawyer 1135, 1148.)

One commentator suggested that if the creditor is not responsible for attorney fees and costs, there would be an incentive to intentionally prolong litigation and cause a consumer to spend more prosecuting the case than the recovery available under the sales contract. "Exposure to liability for fees and costs . . . has a tendency to cut down on litigation and encourage settlement because commercial parties have less incentive to stall the litigation until the case goes away. This ability to stall is especially implicated when the commercial parties have the resources to continue the litigation while wearing down the resources of the

consumer." (Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process* (1994) 35 Wm. & Mary L.Rev. 1593, 1615.) "The statutory availability of attorney's fees and costs to a prevailing consumer is another way to level the playing field between the consumer and commercial parties to the transaction." (*Id.* at p. 1616.) Both consumer rights and the rule's purpose would be frustrated if attorney fees were not recoverable from both the seller and the creditor-assignee.[11]

*d. The FTC's Rule Confirmation Does Not Change This Result*

Were we writing on a clean slate – or one which involved only *Lafferty* – our analysis would be complete. But TD argues that, as Division Five of the First District held in *Spikener*, the language in the FTC's Rule Confirmation is entitled to such deference as to preclude our interpretation to the contrary and, therefore, to preemptively nullify Civil Code section 1459.5. Our rejection of this argument begins with an explanation of how the relevant language in the FTC's Rule Confirmation came to be.

(i) History of the FTC's Rule Confirmation

In December 2015, the FTC requested public comment on "the overall costs and benefits, and regular and economic impact" of the Holder Rule "as part of the agency's regular review of all its regulations and guides." (80 FR 75018.) The request for comment

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[11] Of course, the California Legislature has taken a similar view in its enactment of Civil Code section 1459.5.

identified 15 questions on which the FTC sought comment, including whether the Holder Rule should be modified in any way, but asked no questions specifically about attorney's fees. (80 FR 75019.) If the responding party believed any modifications to the Rule should be made, the party was also required to answer sub-questions on what evidence supported the proposed modifications, and how the modifications would affect the costs and benefits of the rule for consumers and businesses. (80 FR 75019.)

Nineteen comments were received, ranging from multi-page analyses of the Holder Rule submitted by consumer advocacy groups and trade associations for consumer credit agencies to single paragraphs submitted by individuals. (<https://www.ftc.gov/policy/public-comments/2015/12/initiative-631> [as of January 26, 2021], archived at <https://perma.cc/D4MP-68VS>.)

Of the nineteen comments received, only six of them addressed the issue of attorney's fees under the Holder Rule – their positions differed both on whether the Holder Rule cap *did* apply to attorney's fees and whether it *should*. Two consumer organizations believed that the Holder Rule's cap did not presently apply to attorney fees, but requested the FTC to clarify that it did not. Specifically, the National Association of Consumer Advocates asked that the FTC "clarify that the Holder Rule's cap on recovery does not apply to attorney fees that the holder incurs." (<https://www.ftc.gov/system/files/documents/public_comments/2016/02/00029-100584.pdf>, p. 3 [as of January 26, 2021], archived at <https://perma.cc/W2EH-L7UP>.) The National Consumer Law Center agreed, stating that

the FTC should "[c]larify that the Rule's cap on recovery does not apply to attorney fees for which the holder is liable because of the holder's own litigation conduct." (<https://www.ftc.gov/system/files/documents/public_comments/2016/02/00015-100535.pdf>, p.8 [as January 26, 2021], archived at <https://perma.cc/CP4Y-DY49>.) The National Consumer Law Center argued that "[c]larification of this point is necessary because while many courts allow fees above the cap, others do not." (*Ibid.*, fns. omitted.) Footnotes collected cases on both sides of the issue. (*Ibid.,* fns. 29 & 30.) Its comment offered policy reasons for why fees should not be encompassed by the Holder Rule's cap. (*Id.* at pp. 8-9.)

Two others wanted the Holder Rule's cap eliminated *entirely*, in language which appears to have assumed the cap presently applied to attorney fees. MFY Legal Services, Inc. sought elimination of the cap to ensure that "consumers are made whole, as many of their damages for fraud and breach of contract exceed payments made (*e.g.*, cash deposits, cash payments for add-on products, out-of-pocket losses for repairs, attorney's fees, and lost wages) and could have been avoided had the lender heeded their complaints." (<https://www.ftc.gov/system/files/documents/public_comments/2016/02/00011-100533.pdf>, p. 6 [as of January 26, 2021], archived at <https://perma.cc/LV29-PYTS>.) Another individual similarly requested the Holder Rule be modified "to expressly provide that the holder is liable to the consumer for all actual damages proximately caused by the prior holders and original seller, including consequential and incidental damages, as well as attorney fees incurred by the consumer, so

long as those remedies would be available to the consumer against prior holders and/or the original seller." (<https://www.ftc.gov/policy/public-comments/2016/02/02/comment-3> [as of January 27, 2021], archived at <https://perma.cc/K6VK-67W5>.)

On the other side of the issue, the American Financial Services Association asked that the FTC "confirm that under the Holder Rule's plain language, any court-awarded sum, under the Rule, must be 'limited to amounts paid by the debtor hereunder.' This limitation includes interest, costs and attorney fees." (<https://www.ftc.gov/system/files/documents/public_comments/2016/02/00025-100572.pdf>, p. 3 [as of January 27, 2021], archived at https://perma.cc/YLF2-ETHW>.) The association offered case law, including *Lafferty*. (*Id*. at p. 7, fn. 30, p. 8, fn. 33.)

Taking a position in the middle was CU Direct Corporation, the "nation's largest point-of-sale auto financing and indirect lending network for credit unions . . . ." (<https://www.ftc.gov/system/files/documents/public_comments/2016/02/00027-100578.pdf>, p. 1 [as of January 27, 2021], archived at <https://perma.cc/5MAX-CXRZ>.) Although CU Direct cited no cases, it appeared to be writing from experience that attorney fees were not subject to the cap. CU Direct also offered a solution. It expressed a concern about excessive attorney's fees "routinely claimed by plaintiff's counsel as part of the damages that the holder is ultimately responsible to pay under the law." (*Id*. at p. 2.) It stated, "While it may be reasonable for a lender, as holder of the contract, to be liable for some of the consumer's attorneys' fees, it is far less reasonable to

hold a lender liable for excessive or abusive levels of attorneys' fees, especially in cases where they are essentially unable to fight or contest the claim." (*Id.* at p. 3.) To resolve the problem it perceived, CU Direct sought "a fair and reasonable schedule" of attorney's fees. (*Ibid.*)

(ii) The FTC's Rule Confirmation

After reviewing the comments, the FTC "determined to retain" the Holder Rule "in its present form." (84 FR 18711.) The FTC issued a Confirmation of Rule that rejected all proposed modifications to the rule, specifically noting that "none of the comments that proposed changing the Rule provided the Commission with specific evidence of the potential costs and benefits of such modifications." (84 FR 18712.)

When it came to the issue of attorney's fees, the FTC explained that "Six comments addressed whether the Rule's limitation on recovery to 'amounts paid by the debtor' allows or should allow consumers to recover attorneys' fees above the cap . . . ."[12] (84 FR 18713.) After itemizing the six comments, the FTC stated, "We conclude that if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice,

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[12] The FTC's use of "allows or should allow" suggests that the agency itself was unclear whether the Holder Rule actually addressed the issue of attorney's fees at all.

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. 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. 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." (84 FR 18713.)

(iii) The Rule Confirmation Is Not Entitled to Dispositive Deference

In *Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2408 (*Kisor*), the Supreme Court reaffirmed the doctrine of deference to an agency's reading of its own, genuinely ambiguous regulations. However, the court also reaffirmed the limitations of that doctrine. Particularly, in considering deference, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. [Citations.]" (*Id.* at p. 2416.) "The inquiry on this dimension does not reduce to any exhaustive test." (*Ibid.*) However, the court has identified certain markers for identifying when regulatory deference is and is not appropriate. (*Ibid.*)

The four markers the court identified were: First, the "regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's

views. [Citation.]" (*Kisor, supra,* 139 S.Ct. at p. 2416.) "Next, the agency's interpretation must in some way implicate its substantive expertise." (*Id.* at p. 2417.) "Finally, an agency's reading of a rule must reflect 'fair and considered judgment' to receive . . . deference. [Citation.]" (*Ibid.*) A court should decline to defer to a convenient litigation position or post hoc rationalization. (*Ibid.*) Moreover, a court may not "defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties. [Citation.] That disruption of expectations may occur when an agency substitutes one view of a rule for another." (*Id.* at pp. 2417-2418.) Such an upending of reliance may occur without an explicit interpretive change; we will not defer to an interpretation that would impose retroactive liability on parties for longstanding conduct the agency never before addressed. (*Id.* at p. 2418.)

We consider each of the four factors the Supreme Court identified in *Kisor* and conclude the FTC's Rule Confirmation is not entitled to conclusive deference under the Court's flexible standard.

First, we assume that the FTC's "regulatory interpretation [is] one actually made by the agency," although even that assumption is somewhat challenged by our consideration of the third factor below.

Second, we do not believe resolution of the issue is easily within the FTC's substantive expertise. This is so for two reasons. (1) Resolution of the issue may turn on the particular state statute providing for attorney's fee recovery at issue, and whether that statute is intended to be punitive against the payor or simply to

make the payee whole. (2) As illustrated by the FTC's request for comments which led to the Rule Confirmation, the FTC sought to exercise its judgment based on data regarding the effect of the rule (or any proposed rule change) on consumers and businesses. No commenter provided the FTC with data on the costs and benefits to consumers or businesses in different jurisdictions based on the availability of attorney's fees or any limitations placed on them. Thus, the FTC's statement regarding attorney's fees in its Rule Confirmation was not an exercise of its substantive expertise, but simply a position taken after limited arguments were made on each side.[13]

Third, 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." (*Kisor, supra,* 139 S.Ct. at p. 2416.) Fourth, 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

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[13] The FTC had not sought comments on this specific issue; its received input was therefore limited to those six comments which had volunteered the information even though not asked expressly. Presumably, if the FTC formally and affirmatively sought comments on whether the Holder Rule's cap should apply to attorney's fees, it would have received a great deal more relevant input on which to make its determination.

attorney fees in excess of the cap had been, and were being, imposed as a matter of course.

(iv) We Disagree With Spikener

The *Spikener* court reached the opposite conclusion. Purporting to apply the *Kisor* test, the *Spikener* court concluded the FTC's Rule Confirmation was entitled to dispositive deference. The court's analysis on this point, in its entirety, is: "The Rule Confirmation was issued by the FTC and published in the Federal Register, and was indisputably the FTC's official position. Interpretation of the Holder Rule, which provides that taking a consumer credit contract without the prescribed language is an unfair or deceptive act or practice, falls within the expertise of the FTC. [Citation.] The Rule Confirmation issued after the FTC solicited and reviewed public comments and reflects the agency's considered judgment. The FTC's interpretation is entitled to deference. [Citation.]" (*Spikener, supra,* 50 Cal.App.5th at p. 159.)

We are not persuaded. In *Kisor*, the U.S. Supreme Court retained the doctrine of deference to agency interpretations, but "reinforce[d] its limits." (*Kisor, supra,* 139 S.Ct. at p. 2408.) The high court emphasized that an agency interpretation is not entitled to deference when it "does not reflect an agency's authoritative, expertise-based, 'fair[, or] considered judgment.' [Citations.]" (*Id.* at p. 2414.) As we have discussed, this requires courts considering the preclusive effect of agency determinations to make "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. [Citations.]" (*Id.* at p. 2416.) We do

not believe the *Spikener* court's brief discussion of the issue satisfies this requirement.

Our inquiry into the context of the agency's interpretation, convinces us that *Spikener's* analysis is incorrect. In particular, we find significant that the agency initially had not previously spoken on the issue, and chose to express its opinion without seeking formal input on it. Instead, the FTC had requested comments on the Holder Rule in general terms, seeking arguments on modifying the rule only if supported by data setting forth the impact of any proposed modifications on consumers and businesses. It did not receive that data. Had the FTC issued a modification based on an analysis of submitted data, or after consideration of arguments submitted in response to an express notice, it would have made a stronger case for deference. Instead, the agency, based on no data and limited argument, spoke on an issue on which it had previously remained silent for decades, and had not given notice of an intent to speak. This falls short of the type of considered analysis entitled to dispositive deference. "[W]hether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue." (*Barnhart v. Walton* (2002) 535 U.S. 212, 221-222.) This is particularly so when the issue involved is not exclusively one of federal law, but rather an issue of the intersection of federal law and state law of remedies. (Cf. *Kisor, supra,* 139 S.Ct. at p. 2417 ["Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, see *Jicarilla Apache Tribe v. Federal Energy*

*Regulatory Com.* (10th Cir.) 578 F.2d 289, 292–293, or one concerning the award of an attorney's fee, see *W. Va. Highlands Conservancy, Inc. v. Norton* (4th Cir. 2003) 343 F.3d 239"].)

Because we conclude 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.

## *DISPOSITION*

We affirm the attorney's fees awarded by the trial court. Plaintiff Tania Pulliam is awarded her costs on appeal.

RUBIN, P.J.

WE CONCUR:

BAKER, J.

KIM, J.

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**APPENDIX C**

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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

| DATE: 08/29/18 | **DEPT.** 30 |
|---|---|
| HONORABLE BARBARA M. SCHEPER JUDGE | C. WILSON DEPUTY CLERK |
| HONORABLE #10 JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR |
| P. MAPSTEAD, C.A. Deputy Sheriff | P. MEYERS, CSR #12940 Reporter |

| | | |
|---|---|---|
| 8:35 am | BC633169<br>TANIA PULLIAM VS HNL AUTOMOTIVE INC ET AL | Plaintiff Counsel HALLEN D. ROSNER (X)<br>Defendant Counsel DUNCAN McCREARY (X) |

**NATURE OF PROCEEDINGS:**

PLAINTIFF'S MOTION FOR ATTORNEY FEES;

Counsel are provided with a copy of the Tentative Ruling.

Matter is called for hearing.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

Plaintiff's counsel submits on the Tentative Ruling.

Defendants' counsel argues.

The Court adopts the Tentative Ruling as the final order of the Court as follows:

Pulliam vs. HNL Automotive, Inc., et. al, Case No. BC633169

Ruling re: Plaintiff's Motion for Attorney's Fees

Plaintiff moves for an order awarding attorney's fees in the amount of $169,602.00. (See Motion, p. 2:13-15.) This sum includes a lodestar figure of $141,335.00 and a 0.2 multiplier. (Ibid.) The motion is granted.

Costs and expenses, including attorney's fees, may be recovered by a prevailing buyer under the Song-Beverly Act. (See Civ. Code, § 1794(d).) Section 1794 provides:

> If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action.

(Civ. Code, § 1794 [emphasis added].) Thus, the statute includes a "reasonable attorney's fees" standard.

The attorney bears the burden of proof as to "reasonableness" of any fee claim. (Code Civ. Proc., § 1033.5(c)(5).) This burden requires competent evidence as to the nature and value of the services rendered. (Martino v. Denevi (1986) 182 Cal.App.3d 553, 559.) "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (Martino, 182 Cal.App.3d at 559.)

> In determining whether the requested attorney's fees are "reasonable," the Court's 'first step involves the lodestar figure-a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate. The lodestar figure may then be adjusted, based on consideration of facts specific to the case, in order to fix the fee at the fair market value for the legal services provided.'

(Gorman v. Tassajara Development Corp. (2008) 162 Cal.App.4th 770, 774 [internal citations omitted].) In determining whether to adjust the lodestar figure, the Court may consider the nature and difficulty of the litigation, the amount of money involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case. (EnPalm LLC v. Teitler (2008) 162 Cal.App.4th 770, 774; PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095.)

> ""The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. [Citations.] This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at

> below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel. [Citations.]' "

(Center For Biological Diversity v. County of San Bernardino (2010) 188 Cal.App.4th 603, 619.)

Plaintiff has submitted declarations and billing records showing that she incurred a total of $141,335.00 in attorney fees in connection with this action. (See Rosner Decl., ¶ 2, Exh. 1.) Plaintiff's attorneys bill at hourly rates between $270.00 and $620.00 per hour. (See Rosner Decl., ¶¶ 8-10; Klitzke Decl., ¶ 19.)

In its opposition, defendant argues that plaintiffs' counsel has failed to produce evidence of Mr. Rosner's hourly rate and also fails to show that the hourly rates are the prevailing rates in the community. (See Opposition, p. 3:15-4:13.) Additionally, defendant argues that the requested fees must be reduced or allocated by at least 83% because plaintiff prevailed on only 1 of 6 causes of action. (See Id. at p. 4:14-5:7.) Defendant also argues that a fee multiplier is not warranted because this was not a particularly complicated matter. (See Id. at p. 6:1-23.) Defendants' arguments are not well taken.

"In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." (Premier Med. Mgmt. Sys., Inc. v. California Ins. Guarantee Ass'n (2008) 163 Cal. App. 4th 550, 564.)

Here, with very limited exceptions, defendant has failed to object to specific time entries.

Defendant maintains that plaintiff has failed to offer proof that the requested rates are reasonable in relation to the prevailing market rate. The Court, however, is capable of making that assessment itself. Moreover, while it does not appear that Mr. Rosner has dedicated a separate paragraph in the declaration to stating his hourly rate, it is obvious from the authenticated billing records that he billed $595.00 per hour in 2016, $620.00 per hour in 2017, and $640.00 per hour in 2018. (See Rosner Decl., Exh. 1.) Defendants do not claim that these amounts are unreasonable. Instead, they claim that they "are unsure as to Mr. Rosner's hourly rate." (See Opposition, p. 4:1-2.)

Separately, defendant has objected to a few specific time entries on the grounds that they improperly seek recovery for prospective fees that have not yet been incurred. (See Opposition, p. 5:9-28.) In reply, plaintiff notes that estimates are permissible because she is "required to give notice of the fees and costs she seeks to collect and at the same time may recover the time and expense of this fee motion and opposing Defendant's Motion for an Order taxing costs. [Citation.] Plaintiff is not clairvoyant and can only estimate the time it will take to respond . . ." (Reply, p. 6:2-6.) Additionally, plaintiff now declares that she has "actually incurred $2,673.00 in reviewing the Opposition and drafting this Reply. [Citation.] Plaintiff actually incurred $2,106.00 reviewing and drafting the opposition to Defendants Motion for an Order Taxing

Costs. [Citation.] [And] Plaintiff still must review Defendants' reply to the Motion for an Order Taxing Costs and travel to the hearing on each motion." (Reply, p. 6:6-10; Klitzke Decl., ¶¶ 4-5.)

Finally, defendant argues that the requested fees must be reduced by at least 83% to account for the fact that plaintiff prevailed on only one out of six causes of action. (See Motion, p. 4:14-5:7.) Defendant claims that plaintiff "is required to prove the time and costs which were expended on the successful cause of action, but has wholly failed to do so." (Id. at p. 5:3-4.) In reply, plaintiff argues that apportionment is not necessary or proper because the Song-Beverly claim is so interrelated with the other claims that allocation would be impossible. (See Reply, p. 4:10-5:28.) Plaintiff is correct: "'Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories.' [Citation.]" (Taylor v. Nabors Drilling USA, LP (2014) 222 Cal.App.4th 1228, 1251, quoting Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal.App.4th 140, 158-159.) Here, plaintiff argues that:

> "[t]his entire case was premised on one common set of facts, that Hooman Nissan of Long Beach represented to Plaintiff that the Vehicle was the 'S' model with specific features, none of which was true. That common set of facts was the basis for the Consumers Legal Remedies Act, fraud, negligent misrepresentation, UCL, Vehicle Code § 11711, and Song-Beverly claims."

(Reply, p. 5:20-24.) The Court agrees and finds that apportionment is not necessary or possible on the facts

of this case. The Court finds the lodestar amount of $141,335 was reasonably incurred by plaintiff in prosecuting this action.

Plaintiff seeks a 0.2 multiplier to account for the inherent "risks associated with taking cases on contingency and fronting all costs of litigation." (See Motion, p. 7:15-17.)

"The award of a multiplier is in the end a discretionary matter largely left to the trial court." (Hagar v. Community Development Com'n of City of Escondido (2007) 157 Cal.App.4th 1358, 1371. See also Rey v. Madera Unif. Sch. Dist. (2012) 203 Cal.App.4th 1223, 1242.) A court may enhance the lodestar figure in appropriate cases. (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1138.) The court in Ketchum provided an explanation of the rationale behind contingent fee enhancements: "'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.'" (Id. at pp. 1132 1133 [quoting Posner, Economic Analysis of Law (4th ed. 1992) pp. 534, 567).) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (Id. at p. 1133 [internal citations and quotations omitted].) The

following factors may be considered in deciding whether to apply a multiplier: "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." (Id. at p. 1032.)

Defendant opposes an award of a fee multiplier on the ground that plaintiff's counsel was not a particularly skilled attorney and this was not an exceptionally difficult matter. (See Opposition, p. 6:4-23.) As noted above, the attorney's skill and the novelty of the issues are only some of the relevant factors to consider in awarding a fee multiplier. Plaintiff has requested a modest multiplier to account for the risk of taking the case on contingency as well as the difficulty she encountered in litigating this case. As noted above, this risk is itself sufficient to justify a fee multiplier. (See Ketchum, supra, at p. 1132-133.)

Accordingly, the Court awards plaintiff a 0.2 fee multiplier.

Finally, plaintiff argues that TD Auto Finance, LLC, the Holder of the Retail Installment Sale Contract, must be held liable for attorney fees and costs in this action. (See Motion, p. 8:14-11:16.)

Here, the parties are arguing over the proper interpretation of the "Holder Clause" required by 16 C.F. R. § 433.2, which provides, in relevant part:

> "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 PURUSANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(16 C.F.R. § 433.2, subd. (a.)

Plaintiff argues that TD Auto Finance should be required to pay the attorney fees even though the fees would exceed the amounts paid by plaintiff under the contract because the Holder Rule "does not expressly exclude the recovery of attorneys' fees and costs, nor does it need to, because the liability of the holder for such amounts is implicit in the provision, '[a]ny holder [] is subject to all claims and defenses which the debtor could assert against the seller.'" (Motion, p. 9:18-21.) The Court agrees.

Based on the foregoing, defendants are jointly and severally liable for attorney's fees in the total amount of $169,602.

Order Re Objections To Evidence Presented In Support Of Palitniff's Motion For Attorney Fees is signed, filed and incorporated herein by reference.

The clerk is directed to affix the attorney fees to the Judgment.

Plaintiff's counsel to give notice.

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## APPENDIX D

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES — STANLEY MOSK COURTHOUSE**

**BY FAX**

**Case No. BC633169**

**[Filed: May 29, 2018]**

TANIA PULLIAM, an individual,

Plaintiff,

v.

HNL AUTOMOTIVE, INC., a California corporation, *dba* HOOMAN NISSAN OF LONG BEACH; TD AUTO FINANCE, LLC; a California limited liability corporation; HUDSON INSURANCE COMPANY, a California corporation; and DOES 1 through 75, inclusive,

Defendants.

**~~[Proposed]~~ JUDGMENT ON JURY VERDICT**

Date: April 23, 2018
Time: 8:30 a.m.
Judge: Hon. Barbara M. Scheper
Dept: 30

Complaint Filed: September 8, 2016
Trial Date: April 23, 2018

[HANDWRITTEN: Attorney Fees Affixed to Judgment 8-29-17 Attest. [illegible] Deputy Clerk of the Superior Court
Costs and prejudgment interest affixed to Judgment 9-11-18. Attest. [illegible] Deputy Clerk of the Superior Court]

This action came on regularly for trial on April 23, 2018, in Department 30 of the Los Angeles County Superior Court, the Honorable Barbara M. Scheper presiding; the Plaintiff appearing by attorney Hallen D. Rosner and Defendants HNL Automotive, Inc. *dba* Hooman Nissan of Long Beach and TD Auto Finance, LLC appearing by attorney Duncan J. McCreary.

A jury of twelve persons were regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict as follows:

**"Title of Court and Cause**

**Section 1**

**Consumers Legal Remedies Act**

1. Did Hooman Nissan of Long Beach misrepresent the source, sponsorship, approval, or certification of the 2015 Nissan Altima?

   __ Yes  X No

Go on to the next Question.

2. Did Hooman Nissan of Long Beach misrepresent the 2015 Nissan Altima's affiliation, connection, or association with, or certification by, another?

   __ Yes  X No

Go on to the next Question.

3. Did Hooman Nissan of Long Beach represent that the 2015 Nissan Altima had sponsorship, approval, characteristics, ingredients, uses, or benefits which it did not have?

   X Yes  __ No

Go on to the next Question.

4. Did Hooman Nissan of Long Beach misrepresent that the 2015 Nissan Altima was of a particular standard, quality or

grade, or that the 2015 Nissan Altima was of a particular style or model?

__ Yes _X_ No

Go on to the next Question.

5. Did Hooman Nissan of Long Beach advertise the 2015 Nissan Altima with intent not to sell the 2015 Nissan Altima as advertised?

__ Yes _X_ No

Go on to the next Question.

6. Did Hooman Nissan of Long Beach represent that 2015 Nissan Altima had been supplied in accordance with a previous representation when it has not?

__ Yes _X_ No

Ga on to the next Question.

7. Did Hooman Nissan of Long Beach fail to provide Tania Pulliam with a completed inspection report of all components inspected prior to the sale of the 2015 Nissan Altima?

__ Yes _X_ No

Go on to the next Question.

8. Did Hooman Nissan of Long Beach use the term "certified" in an untrue or misleading manner?

__ Yes _X_ No

Go on to the next Question.

9. Did Hooman Nissan of Long Beach make any verbal statement which is untrue or misleading that Hooman Nissan of Long Beach knew was untrue or misleading or would have known was untrue or misleading if it had exercised reasonable care?

__ Yes _X_ No

Go on to the next Question.

10. Did Hooman Nissan of Long Beach make, disseminate, or cause to be disseminated, any statement that is part of a plan or scheme with the intent not to sell the 2015 Nissan Altima as advertised?

__ Yes _X_ No

If you answered "yes" to Question 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 go on to the next Question. If you answered "no" to Questions 1 through 10, then go on to Section 2, starting at Question 14.

11. Was Plaintiff harmed as a result of Hooman Nissan of Long Beach's conduct?

__ Yes _X_ No

12. In violating the Consumers Legal Remedies Act, did Hooman Nissan of Long Beach engage in conduct with malice, oppression, or fraud?

__ Yes _X_ No

If yes, answer Question 13. If no, go to section 2, starting at Question 14

13. Was the malice, oppression, or fraud either committed by, authorized by, or ratified, adopted, or approved by an officer, director, or managing agent of Hooman Nissan of Long Beach?

    __ Yes __ No

**Section 2**

**Song-Beverly Consumer Warranty Act (Implied Warranty)**

14. Did Tania Pulliam buy a motor vehicle from Hooman Nissan of Long Beach?

    X Yes __ No

If you answered "yes," go on to the next Question. If you answered "no," go to Section 3, starting at Question 18.

15. At the time of purchase, was Hooman Nissan of Long Beach in the business of selling motor vehicles to retail buyers?

    X Yes __ No

If you answered "yes," go on to the next Question. If you answered "no," go to Section 3, starting at Question 18.

16. Did Hooman Nissan of Long Beach fail to adequately package, and label the 2015 Nissan?

X Yes __ No

Go on to the next Question.

17. Did the 2015 Nissan Altima fail to conform to the promises or affirmations of fact made on the container or label?

X Yes __ No

Go on to Section 3, starting at Question 18.

**Section 3**

**Fraud and Deceit**

18. Did Hooman Nissan of Long Beach make a false representation of an important fact to Tania Pulliam?

X Yes __ No

If you answered "yes," go on to the next Question: If you answered "no," go on to Section 4, starting at Question 25.

19. Did Hooman Nissan of Long Beach know that the representation was false, or did it make the representation recklessly and without regard for its truth?

__ Yes X No

If you answered "yes," go on to the next Question. If you answered "no," go on to Section 4, starting at Question 25.

20. Did Hooman Nissan of Long Beach intend that Tania Pulliam rely on the representation?

    __ Yes __ No

If you answered “yes,” go on to the next Question. If you answered “no,” go on to Section 4, starting at Question 25.

21. Did Tania Pulliam reasonably rely on the representation?

    __ Yes __ No

If you answered “yes,” go on to the next Question. If you answered “no,” go on to Section 4, starting at Question 25.

22. Was Tania Pulliam’s reliance on Hooman Nissan of Long Beach’s representation a substantial factor in causing harm to Tania Pulliam?

    __ Yes __ No

Go on to the next Question.

23. Did Hooman Nissan of Long Beach, in making the misrepresentation to Tania Pulliam, engage in conduct with malice, oppression, or fraud?

    __ Yes __ No

If you answered “yes,” go on to question 24. If you answered “no,” go on to Section 4, starting at question 25.

24. Was the malice, oppression, or fraud either committed by, authorized by, or ratified, adopted, or approved by an officer, director, or managing agent of Hooman Nissan of Long Beach?

__ Yes __ No

**Section 4**

**Negligent Misrepresentation**

25. Did Hooman Nissan of Long Beach make a false representation to Tania Pulliam?

X Yes __ No

If you answered "yes,", go on to the next Question. If you answered "no," go on to Section 5, starting at Question 27.

26. Did Hooman Nissan of Long Beach either not honestly believe that the representation was true when it made it or fail to have reasonable grounds for believing it was true when made?

__ Yes X No

If you answered "yes," go on to the next Question. If you answered "no," go on to Section 5, starting at Question 27.

**Section 5**

**Damages**

Did you answer any of the questions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 21, or 26, yes?

X Yes __ No

If you answered "yes," go on to the next Question. If you answered "no," sign the verdict form.

27. What are Tania Pulliam's damages? Calculate as follows:

| | |
|---|---|
| a. Amount Paid to Date | $ 12,362.75 |
| b. Amount Currently Owed | $ 9,564.50 |
| TOTAL DAMAGES | $ 21,957.25 |

Go on to Section 6, starting at Question 28.

**Section 6**

**Holder Clause - TD Auto Finance, LLC**

28. Was the purchase contract for the 2015 Nissan Altima assigned from Hooman Nissan of Long Beach to TD Auto Finance, LLC?

X Yes __ No

If you answered "yes," go on to the next Question. If you answered "no," stop here, answer no further questions, and have the presiding juror sign and date this form.

29. What are Tania Pulliam's damages? Calculate as follows:

a. Amount Paid to Date $ 12,362.75

b. Amount Currently Owed $ 9,5964.50

TOTAL DAMAGES $ 21,957.25

Signed: */s/ Beth Carter*
Presiding Juror

Dated: April 30, 2018"

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is granted and shall be entered in favor of Plaintiff Tania Pulliam, and against Defendants HNL Automotive, Inc. *dba* Hooman Nissan of Long Beach and TD Auto Finance, LLC, jointly and severally, on her Complaint as set forth below. After payment of the judgment, the vehicle shall be delivered to defendants, along with payment of the loan balance to TD Auto Finance, LLC, and all needed transfer documents signed.

Judgment is entered in favor of Plaintiff as follows:

1. Damages of $ 21,957.25;
2. Attorneys' Fees of $169,602.00 cw
3. Costs of $ 25,494.58 cw
4. Prejudgment Interest of $ 4,186.93 cw

Dated: MAY 29 2018

/s/ Barbara M. Scheper
Honorable Barbara M. Scheper
Judge of the Superior Court

## APPENDIX E

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

### State of California

### CIVIL CODE

### Section 1791.1

1791.1. As used in this chapter:

(a) "Implied warranty of merchantability" or "implied warranty that goods are merchantable" means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

(b) "Implied warranty of fitness" means (1) that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose and (2) that when there is a sale of an assistive device sold at retail in this state, then there is an

implied warranty by the retailer that the device is specifically fit for the particular needs of the buyer.

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above.

(d) Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply.

(Amended by Stats. 1979, Ch. 1023.)

**State of California**

**CIVIL CODE**

**Section 1792**

1792. Unless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the

manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section.

(Amended by Stats. 1978, Ch. 991.)

**State of California**

**CIVIL CODE**

**Section 1794**

1794. (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.

(b) The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

(c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action under Section 382 of the Code

of Civil Procedure or under Section 1781, or with respect to a claim based solely on a breach of an implied warranty.

(d) If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action.

(e) (1) Except as otherwise provided in this subdivision, if the buyer establishes a violation of paragraph (2) of subdivision (d) of Section 1793.2, the buyer shall recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages.

(2) If the manufacturer maintains a qualified third-party dispute resolution process which substantially complies with Section 1793.22, the manufacturer shall not be liable for any civil penalty pursuant to this subdivision.

(3) After the occurrence of the events giving rise to the presumption established in subdivision (b) of Section 1793.22, the buyer may serve upon the manufacturer a written notice requesting that the manufacturer comply with paragraph (2) of subdivision (d) of Section 1793.2. If the buyer fails to serve the notice, the manufacturer shall not be liable for a civil penalty pursuant to this subdivision.

(4) If the buyer serves the notice described in paragraph (3) and the manufacturer complies with paragraph (2) of subdivision (d) of Section 1793.2 within 30 days of the service of that notice, the

manufacturer shall not be liable for a civil penalty pursuant to this subdivision.

(5) If the buyer recovers a civil penalty under subdivision (c), the buyer may not also recover a civil penalty under this subdivision for the same violation.

(Amended by Stats. 1992, Ch. 1232, Sec. 9. Effective January 1, 1993.)

## PART 433—PRESERVATION OF CONSUMERS' CLAIMS AND DEFENSES

## 16 C.F.R. § 433.1

### § 433.1 Definitions.

(a) *Person*. An individual, corporation, or any other business organization.

(b) *Consumer*. A natural person who seeks or acquires goods or services for personal, family, or household use.

(c) *Creditor*. A person who, in the ordinary course of business, lends purchase money or finances the sale of goods or services to consumers on a deferred payment basis; Provided, such person is not acting, for the purposes of a particular transaction, in the capacity of a credit card issuer.

(d) *Purchase money loan*. A cash advance which is received by a consumer in return for a "Finance Charge" within the meaning of the Truth in Lending Act and Regulation Z, which is applied, in whole or substantial part, to a purchase of goods or services from a seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement.

(e) *Financing a sale*. Extending credit to a consumer in connection with a "Credit Sale" within the meaning of the Truth in Lending Act and Regulation Z.

(f) *Contract*. Any oral or written agreement, formal or informal, between a creditor and a seller, which contemplates or provides for cooperative or concerted activity in connection with the sale of goods or services to consumers or the financing thereof.

(g) *Business arrangement*. Any understanding, procedure, course of dealing, or arrangement, formal or informal, between a creditor and a seller, in connection with the sale of goods or services to consumers or the financing thereof.

(h) *Credit card issuer*. A person who extends to cardholders the right to use a credit card in connection with purchases of goods or services.

(i) *Consumer credit contract*. Any instrument which evidences or embodies a debt arising from a "Purchase Money Loan" transaction or a "financed sale" as defined in paragraphs (d) and (e) of this section.

(j) *Seller*. A person who, in the ordinary course of business, sells or leases goods or services to consumers.

[40 FR 53506, Nov. 18, 1975]

**16 C.F.R. § 433.2**

**§ 433.2 Preservation of consumers' claims and defenses, unfair or deceptive acts or practices.**

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.

or,

(b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains 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 WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[40 FR 53506, Nov. 18, 1975; 40 FR 58131, Dec. 15, 1975]

**16 C.F.R. § 433.3**

**§ 433.3 Exemption of sellers taking or receiving open end consumer credit contracts before November 1, 1977 from requirements of § 433.2(a).**

(a) Any seller who has taken or received an open end consumer credit contract before November 1, 1977, shall be exempt from the requirements of 16 CFR part 433 with respect to such contract provided the contract does not cut off consumers' claims and defenses.

(b) *Definitions*. The following definitions apply to this exemption:

(1) All pertinent definitions contained in 16 CFR 433.1.

(2) Open end consumer credit contract: a consumer credit contract pursuant to which "open end credit" is extended.

(3) "Open end credit": consumer credit extended on an account pursuant to a plan under which a creditor may permit an applicant to make purchases or make loans, from time to time, directly from the creditor or indirectly by use of a credit card, check, or other device, as the plan may provide. The term does not include negotiated advances under an open-end real estate mortgage or a letter of credit.

(4) Contract which does not cut off consumers' claims and defenses: A consumer credit contract which does not constitute or contain a negotiable instrument, or contain any waiver, limitation, term, or condition which has the effect of limiting a consumer's right to assert against any holder of the contract all legally sufficient claims and defenses which the consumer

could assert against the seller of goods or services purchased pursuant to the contract.

[42 FR 19490, Apr. 14, 1977, as amended at 42 FR 46510, Sept. 16, 1977]