

California Supreme Court Prepares to Weigh In on Holder Rule

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On March 1, the Supreme Court of California held oral arguments in *Pulliam v. HNL Automotive, Inc.*, No. S267576 (2021). The appeal may decide (at least under California state law) whether the Federal Trade Commission's (FTC) "Holder Rule" permits a consumer to recover amounts beyond what he or she has paid to the holder, including — most importantly — the recovery of attorneys' fees incurred in the case of a favorable ruling. While the Supreme Court of California limited recovery under the Holder Rule in the past, the *Pulliam* justices, on balance, appeared receptive to allowing unlimited attorneys' fee awards under California fee-shifting laws. Their attention focused more on the pro-consumer regulatory history and purpose of the Holder Rule, rather than the textual arguments advanced by HNL Automotive.

The FTC's Holder Rule permits consumers to bring any legal claims against the "holder" of a credit contract that the consumer could assert against the original seller of the good or service, even if the claim springs from the seller's misconduct alone. Important here, however, the Holder Rule limits a plaintiff's recovery from the holder to only those "amounts paid by the debtor" under the applicable credit contract. Jurisdictions nationwide have disagreed about whether the Holder Rule's recovery cap prevents courts from requiring holders to pay a plaintiff's attorneys' fees and costs over and above the plaintiff's payments under the contract, even in the face of state laws to the contrary. See, e.g., *Reyes v. Beneficial State Bank*, No. BCV-17-100082 (Cal. Sup. Ct., Kern Co., Dec. 5, 2019), appeal docketed, No. F080827 (Cal. Ct. App. Feb. 13, 2020) (capping attorneys' fees); *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 276 Neb. 481, 495–96 (2008) (same); but see *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988) (declining to apply Holder Rule limits); *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987) (same). The FTC also [added to the confusion](#) when it released an [advisory opinion](#) earlier this year that sides with courts that refused to automatically cap attorneys' fees and costs after issuing a 2019 confirmation of the Holder Rule that appeared to expressly reject limitless attorney fee awards against holders.

Diving into the center of this debate, the *Pulliam* oral arguments centered on two main issues: (1) the impact of the 2022 FTC advisory opinion, and (2) the interplay between the language and purpose of the Holder Rule itself. First, HNL Automotive argued that the advisory opinion was not entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), which controls judicial deference to an agency's interpretation of its own regulations. Chief Justice Cantil-Sakauye appeared to agree, indicating that she thought the FTC's rule confirmation and advisory opinion were contradictory and unhelpful, and that the Supreme Court did not need to consider either. But Justices Kruger and Liu seemed more inclined to consider the advisory opinion, asking questions about how the parties would determine whether a fee-shifting statute operated "independently" of the Holder Rule.

Several justices pointed to the pro-consumer purpose of the Holder Rule, asking whether the language in the first

sentence of the Holder Rule, which subjected a holder to “all claims and defenses” a consumer could assert against a seller, was broad enough to allow for attorneys’ fee awards under state statutes. HNL Automotive argued that the first sentence must be read in light of the second sentence, which limits amounts recovered “hereunder.” In other words, while the first sentence expands the types of claims and defenses that may be asserted against a holder, the second sentence caps the amount of the recovery for all those claims, including attorneys’ fee recovery. HNL Automotive also argued that the FTC weighed the consumer impacts when creating and confirming the Holder Rule, deciding that a limitation on holders’ exposure was consumer-friendly because it encouraged lenders to stay in the market. Pulliam, however, argued that the FTC identified holders as better able to bear the costs of the attorneys’ fee awards that enabled consumers to litigate.

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

Troutman Pepper will continue to monitor this case and the decision of the court.

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