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The Holder Rule and Attorneys' Fees: The FTC Speaks

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On January 20, the Federal Trade Commission (FTC) issued an [advisory opinion](#) on the impact of the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (Holder Rule) on the recovery of attorneys' fees and costs above the amount paid on a consumer receivable arising out of a financed sale of goods or services. Siding with consumers and rejecting the reading put forward by loan holders, the FTC declared that the Holder Rule does not prevent a plaintiff from recovering attorneys' fees and costs against a "loan holder" where another state, local, or federal law permits the recovery.

The Holder Rule is a regulation issued by the FTC that allows consumers to bring any legal claims against the "holder" of a retail installment sales contract or other credit contract that it could assert against the original seller of the good or service, even if the claim springs from the seller's misconduct alone. This situation frequently arises in auto finance litigation or litigation under state deceptive acts and practices laws — for example, where a consumer sues both the car dealer as the seller and the bank as the loan provider and "holder" of the retail installment sales contract, for the seller's failure to disclose a defect or repair the vehicle. The Holder Rule, however, states that a plaintiff's recovery from the holder for those claims "shall not exceed amounts paid by the debtor" under the sales contract.

Multiple courts nationwide have ruled that the Holder Rule's recovery cap prevented courts from requiring holders to pay a plaintiff's attorneys' fees and costs over and above the plaintiff's previous payments to the seller. 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); *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 276 Neb. 481, 495–96 (2008). But other courts have disagreed. See *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988); *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987). The California Supreme Court is currently considering an appeal of one recent decision that rejected a Holder Rule cap in *Pulliam v. HNL Automotive, Inc.*, No. S267576 (Cal. 2021).

The FTC's new opinion sides with courts that have refused to automatically cap attorneys' fees and costs, stating that applying the Holder Rule to preempt state laws and limit recovery of fees and costs "misconstrues" the FTC's prior statements. The FTC previously voted 5-0 to issue a [confirmation of the Holder Rule in 2019](#), which noted that several commenters had asked whether the Holder Rule's limitation on recovery to "amounts paid by the debtor" allows consumers to recover attorneys' fees above that cap. The rule confirmation stated, "The Commission does not believe that the record supports modifying the Rule to authorize recovery of attorneys' fees from the holder, based on the seller's conduct, if that recovery exceeds the amount paid by the consumer." Three of those five commissioners are still serving on the FTC.

Now, in a 180 degree turn, the FTC has voted 4-0 (including aye votes from the three commissioners who were already serving in 2019) to adopt this opinion that if the applicable state or federal law allows an attorneys' fee award against any defendant, whether holder or seller, then the Holder Rule places no limit on the amount of fees and costs the plaintiff may recover from a holder. For example, if the law allows the prevailing party to recover fees from any party that opposes its claims, and the holder opposed the prevailing plaintiff's claims, the Holder Rule would not cap a plaintiff's recovery of attorneys' fees and costs. Additionally, even if the law in question allows attorneys' fee awards against the seller exclusively and expressly, the Holder Rule allows the plaintiff to recover those fees from the holder instead, though that award would be subject to the Holder Rule cap and limited to the amounts the consumer had previously paid.

In other words, litigants will have to narrowly examine the language and framing of the various state and federal statutes allowing recovery of attorneys' fees to determine whether the Holder Rule's cap will apply to fees and costs under the applicable statute, and courts may interpret broader fee recovery statutes that do not expressly apply only to sellers to allow unlimited fee recovery from holders as well. This advisory opinion thus raises holders' risk exposure and potential costs in litigation where the dealer has not indemnified the holder or the dealer is judgment proof. It also will likely impact the California Supreme Court's forthcoming decision on this question in *Pulliam*.

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