



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

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Commission Statement on the Holder Rule and Attorneys' Fees and Costs

This advisory opinion addresses the Federal Trade Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2, commonly known as the Holder Rule, and its impact on consumers' ability to recover costs and attorneys' fees. This 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,¹ and others misinterpreting the Holder Rule as a limitation on the application of state cost-shifting laws to holders.²

Background on the Rule. The Commission adopted the Holder Rule to protect consumers when they purchase goods or services on credit. The Commission identified multiple practices that sellers use to "cut off" consumers' rights so that the holder of the loan may demand full payment from the consumer despite misconduct by the seller.³ The Commission determined that

¹ See, e.g., *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); *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985); *Reliance Mortg. Co. v. Hill-Shields*, No. 05-99-01615-CV, 2001 Tex. App. LEXIS 140 (Tex. App. Jan. 10, 2001); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460 (Tex. App. 1991); *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416 (Tex. App. 1989); see also *Pulliam v. HNL Auto. Inc.*, 60 Cal. App. 5th 396, 274 Cal. Rptr. 3d 547, 559-67 (Cal. Ct. App. 2021), review granted, 484 P.3d 564, 277 Cal. Rptr. 3d 323 (Cal. Apr. 28, 2021) (No. S267576) (concluding that Holder Rule does not limit attorney fee recovery from holder; rejecting contrary position attributed to FTC and ruling that such an agency interpretation would not be entitled to deference).

² See, e.g., *Spikener v. Ally Fin., Inc.*, 50 Cal. App. 5th 151, 162, 263 Cal. Rptr. 3d 726, 735 (Cal. Ct. App. 2020) (concluding statements by the Commission in 2019 (84 Fed. Reg. 18,711, 18,713 (May 2, 2019)) demonstrate "clear intent" to preempt attorney fee recovery "regardless of whether state claim being asserted pursuant to the Holder Rule contains fee-shifting provisions", but declining to express opinion on whether costs are preempted for the same reason); Order on Motion, *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) (ruling state statute is preempted by Commission statements on application of Holder Rule to attorney's fees); see also *Lafferty v. Wells Fargo Bank, NA*, 25 Cal. App. 5th 398, 414-16, 275 Cal. Rptr. 3d 842, 855-57 (Cal. Ct. App. 2018) (concluding that second sentence of the Holder Rule Notice caps attorneys' fees claim against defendant-holder unless "another state or local cause of action can be found to support such a claim," but that costs are not subject to the same cap).

³ See 40 Fed. Reg. 53,506, 53,507-08 (1975) (use of promissory notes and waiver of defense clauses in seller-financed sales); *Id.* at 53,514-15 (use of "vendor-related" or "direct" loans by

sellers' use of these practices to foreclose consumer claims and defenses constitutes an unfair practice under Section 5 of the FTC Act.⁴ To preserve consumers' claims and defenses, the Holder Rule requires a seller that finances sales to include in credit contracts the following provision, also known as the "Holder Rule 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(a). Where the seller is not the creditor, but receives payment from the proceeds of a loan by a creditor that has a referral or business relationship with the seller (defined in the Rule as a "Purchase Money Loan"), the consumer credit contract must have the same provision, except the words "PURSUANT HERETO OR" are omitted. *Id.* § 433.2(b). A creditor or assignee of credit contracts with the Holder Rule Notice is thus subject to any claims or defenses that the consumer could assert against the seller.

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

third party) (1975); *see also* FTC, Statement of Enforcement Policy, 41 Fed. Reg. 34,594, 34,596 (1976). (explaining affiliation and referral standards applicable to "transactions in which a seller accepts the proceeds of a loan extended directly from a lender to a purchaser.").

⁴ 40 Fed. Reg. at 53,523.

⁵ States have passed varying laws regarding recovery of attorneys' fees and costs under which responsibility to pay fees may depend a variety of factors. *Compare* ALASKA R. CIV. P. 82(a) (2021) ("Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule"); WASH. REV. CODE § 4.84.330 (2021) (if a contract provides for fees to one party, the prevailing party is entitled to fees); KY. REV. STAT. Ann. § 367.220(1) (West 2015) (court may award attorneys' fees and costs to prevailing party in any action under Kentucky Consumer Protection Act), *with* WASH. REV. CODE § 4.84.185 (court may award fees incurred in opposing claims or defenses that court finds were "frivolous and advanced without reasonable cause"); COLO. REV. STAT. § 6-1-113(2)(b) (2021) (in successful action to enforce liability, "person who is found to have engaged or caused another to engage in" deceptive trade practice is liable for costs and attorney fees).

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 (*i.e.*, recovery on the claims or defenses the debtor could assert against the seller); the Rule places no cap on a consumer's right to recover from the holder for other reasons. Thus, for example, in an action between a consumer and a holder, if the applicable law authorizes the consumer to recover costs or fees from parties that unsuccessfully oppose the consumer's claims or defenses, a prevailing consumer's right to recovery against the holder is not restricted by the Holder Rule Notice. In this scenario, the cost or fee award is separate and supported by a law that is independent of the Holder Rule. Thus, the Holder Rule Notice does not limit costs or attorneys' fees that the applicable law directs or permits a court to award against a holder because of its role in litigation.

In a situation where the applicable law permits assessing costs or attorneys' fees exclusively against the seller, the seller's liability for such costs and fees may be raised against the holder because of the Holder Rule Notice. The holder's obligation to pay costs or fee awards available exclusively against the seller, however, would be limited to the amount paid by the consumer. Thus, for example, if 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, the Holder Rule Notice authorizes the consumer to recover such an award from the holder up to the amount paid. The consumer also may rely on a claim against the seller for costs or attorneys' fees to offset an obligation to the holder.

Some courts have read the Commission's statements in a 2019 Rule Confirmation notice regarding the Holder Rule as mandating a different result.⁶ Insofar as these decisions conclude that the Holder Rule precludes state law from providing for costs or attorneys' fees against the holder, they misconstrue the Commission's statements. 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

⁶ *Supra* note 2.

provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct.⁷

By direction of the Commission.



April J. Tabor
Secretary

⁷ We have previously observed that the Holder Rule Notice does not limit the availability of injunctive relief against a holder: “The final sentence of the Holder Rule Notice does not restrict the types of remedies available when a claim or defense is preserved; it simply states that the money that a consumer may obtain from a holder based on the Notice may not exceed amounts paid. The Commission affirms that the plain language of the Rule does not limit the types of relief a court may award against a holder.” 84 Fed. Reg. at 18,713 n.32.