NO. 18-_____

In the
Supreme Court of the United States

PATRICK LAFFERTY and MARY LAFFERTY,

Petitioners,

v.

WELLS FARGO BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the
California Court of Appeal, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1975 the FTC issued a regulation called the "Holder Rule," codified at 16 Code of Federal Regulations section 433.2 that states in 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 PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The case presents two questions:

1. Whether the "Holder Rule" as discerned by the California Third District Court of Appeal implies a new private cause of action?

2. Whether the "Holder Rule" cap as applied by the Third District Court of Appeal preempts the California Consumers Legal Remedies Act (Civil Code

section 1780(e)) that awards reasonable attorney fees to a prevailing plaintiff ?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Patrick Lafferty and Mary Lafferty respectfully petition for a Writ of Certiorari to review the judgment of the California Court of Appeal, Third District, in this case.

OPINIONS BELOW

The opinion of the state trial court (App.57a-90a) is unreported. The opinion of the California Court of Appeal (App.1a-49a) is reported at 25 Cal. App. 5th 398 (2018). The Court's order denying rehearing (App.50a-52a) is reported at 26 Cal. App. 5th 262a (2018). The California Supreme Court's order denying further review (App.53a) is unreported.

JURISDICTION

The California Court of Appeal, Third Appellate District, entered judgment on August 17, 2018 upon denial of appellants' petition for rehearing. The California Supreme Court denied appellants' timely petition for review on October 31, 2018. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The U.S. Constitution, Article VI, cl. 2 "Supremacy Clause" states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

16 Code of Federal Regulations section 433.2 states in relevant part:

> In connection with any sale or lease of goods or services to consumers . . . it is an unfair or deceptive act or practice . . . 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 . . . RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED

> AMOUNTS PAID BY THE DEBTOR HERE-UNDER.

California Civil Code sections 1751 and 1780(e), part of the Consumers Legal Remedies Act, Civil Code sections 1750 et. seq. state in relevant part:

> **1751.** Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.
>
> **1780(e).** The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section . . .

STATEMENT OF THE CASE

I. The Regulation

On January 26, 1971, the Federal Trade Commission (FTC) published a proposed "Trade Regulation Rule concerning Preservation of Consumers' Claims and Defenses" in the Federal Register for comments and hearings. 36 F.R. 1211. The regulation was promulgated on November 14, 1975 to become effective on May 14, 1976. 40 F.R. 53506, Nov. 18, 1975; 40 F.R. 58131, Dec. 15, 1975; 16 Code of Federal Regulations section 433.2.

The regulation, commonly called the "Holder Rule" states that taking or receiving a consumer contract which lacks a specified notice, will be an unfair or deceptive practice within the meaning of section 5 of the Federal Trade Commission Act of 1914, 15 United States Code sections 41-58, as amended.

16 C.F.R. section 433.1(a) defines a "consumer" as, "A natural person who seeks or acquires goods or services for personal, family, or household use."

16 C.F.R. section 433.1(i) defines a "consumer credit contract" as, "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).

16 C.F.R. 433.1 paragraphs (d) and (e) define a "purchase money loan" and "financing a sale" as,

> (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. …

The "Holder Rule," 16 C.F.R. 433.2 states:

> 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:
>
> 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:

The Laffertys argued to the California courts that the foregoing "Holder Rule" as promulgated by the FTC, prescripts inclusion of the *Notice*[1] into millions of private consumer retail installment sale contracts (called "RISCs"). The Regulation states that the FTC will consider omission of the notice, to be an unfair practice. Such consideration by the FTC the Laffertys argued, does not mean that it will or must take enforcement action. Rather, the regulation says that if a bank were not to include the suggested language in a consumer's RISC, then the FTC will consider omission of the language, to be an unfair business practice.

The California Third District Court of Appeal decided that the *Holder* Regulation, 16 C.F.R. section 433.2, was a quasi-legislative regulation by which the FTC created a "new [implied] cause of action" for consumers. The court pronounced (App.14a):

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[1] The FTC refers to the *Holder Legend* as the "Notice." *FTC Staff Guidelines*, 41 Fed. Reg. 20022, 20023.2.

In addition to preventing the creditor from continuing to collect on a debt for a defective product or deficient service, the FTC also provided consumers with a new cause of action against their creditors. This new cause of action allows consumers to assert against the creditors "all claims and defenses which the debtor could assert against the seller of goods or services" to which the *Holder Rule* applies. (40 Fed. Reg. 53506) Thus, the FTC declared that "a consumer can (1) defend a creditor suit for payment of an obligation by raising a valid claim against a seller as a set-off, and (2) maintain an affirmative action against a creditor who has received payments for a return of monies paid on account. The latter alternative will only be available where a seller's breach is so substantial that a court is persuaded that rescission and restitution are justified." (40 Fed. Reg. 53524.)

This new cause of action, however, was expressly constrained. The *Holder Rule* language delineates the new cause of action by declaring: "RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." (40 Fed. Reg. 53506; 16 C.F.R. § 433.2.) The contours of this limitation in the *Holder Rule* are the subject of this appeal. In construing this limitation, we hue to the plain meaning of the language employed by the *Holder Rule*.

The foregoing analysis by the Third District disregarded the hybrid nature of the "Holder Rule" that encourages banks to include standard contract language (the *Notice*)[2] in their RISCs. In fact the RISC contract creates a private relationship between the holder of a consumer's chattel paper, and the debtor. The relationship is a contract, with all of the legal accoutrements of a contract. By adopting this unique "private contract" approach, the FTC avoided interference with any state's existing consumer or commercial laws.

During the 33 years since the *Holder* regulation was issued, it has achieved recognition in commercial law. The best example of this is found in the Uniform Commercial Code.

In 2000[3] for example, California amended its Commercial Code to adopt extensive changes to UCC Article 9 on Secured Transactions that were promulgated by the National Conference of Commissioners on Uniform State Laws. Amended California Commercial Code section 9403(d) now states that:

> In a consumer transaction, if a record evidences the account debtor's obligation, law other than this division requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could

[2] Throughout their briefing below the Laffertys referred to the *Notice* as, the "*Holder Legend*," borrowing language used by the financial industry to describe restricted stock bearing a legend or banner.

[3] Stats. 2000, effective January 1, 2001.

assert against the original obligee, and the record does not include such a statement, then both of the following apply:

(1) The record has the same effect as if the record included such a statement.

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

The California Third District Court of Appeal however, expansively decided that the "Holder Rule" is not of a contractual[4] nature. Rather, the Court discerned that the "Holder Rule" created a "new [implied] cause of action."

This interpretation of the "Holder Rule" disregards the *Notice*'s existence as an individual term of contract. In fact the "Holder Rule" as pronounced by the FTC suggests inclusion of additional contract language that has no existence apart from a RISC.

The FTC itself in describing the meaning of the *Holder Notice*, used the word "refund," stating that the *Holder Notice*, "limits the consumer to a refund of monies paid under the contract, in the event affirmative money recovery is sought." FTC Guidelines, 41 F.R. 20023.)

The FTC intended by demanding inclusion of the *Holder Notice* into specified consumer contracts, to require judicial scrutiny of bona fide disputes in credit

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[4] The "record" in UCC parlance.

sale transactions. The FTC Statement of Basis and Purpose (1975), 40 F. R. 53506 at 53527, says:

> . . . it is important to remember that the contract provision this rule will require can only be enforced between the parties in a court of competent jurisdiction. The purpose of this role is to mandate judicial scrutiny of a credit sale transaction, when a bona fide dispute develops between buyer and seller.

The Third District's interpretation of 16 CFR section 433.2 creates a federal Constitutional issue. The *Holder Notice* is a promise of a limited refund to the consumer. That is, the ordinary consumer—and here the Laffertys—reading their contract and seeing the *Notice*'s 10 point bold face type, would conclude that they could have all their money back if they got a lemon.

But the Third District's interpretation of the "Holder Rule" makes the regulation a quasi-legislative rule that creates a new implied private legal cause of action. This interpretation requires that the FTC intended to preempt California Consumer law with its rule: Specifically, to preempt the California Consumers Legal Remedies Act, Civil Code section 1780(e) that allows costs and attorney fees to a prevailing consumer. The Laffertys assert that the FTC intended no such thing.

The California Consumers Legal Remedies Act provides that a court shall award costs and attorney's fees to a prevailing party. The language of section 1780(e) is a direct order to state courts from the California Legislature. The California Legislature also enacted Civil Code section 1751 that voids any purported waiver of the Consumers Legal Remedies Act. To Constitutionally overcome by preemption this convincing assertion of California policy is a challenge.

The FTC enacted the *Holder Rule* because it believed it was "an unfair practice for a seller to employ procedures in the course of arranging the financing of a consumer sale which separate[d] the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised." (Statement of Basis and Purpose, 40 F.R. 53522 (Nov. 18, 1975).) The FTC explained (*Ibid.*):

> Our primary concern . . . has been the distribution or allocation of costs occasioned by seller misconduct in credit sale transactions. These costs arise from breaches of contract, breaches of warranty, misrepresentation, and even fraud. The current commercial system which enables sellers and creditors to divorce a consumer's obligation to pay for goods and services from the seller's obligation to perform as promised, allocates all of these costs to the consumer/buyer.

The "Holder Rule" requires that a specific contractual provision, the *Notice*, appear in certain consumer sale contracts. The *Notice* appeared in the Lafferty RISC in this matter. Wells Fargo Bank in writing thus agreed to be liable for claims the Laffertys could have also brought against the dealership, called Geweke, which sold them their motorhome.

The Laffertys brought claims about their motorhome and proved them against Geweke in a jury trial. Years later Wells Fargo Bank, who held the Laffertys' chattel paper secured by the motorhome, stipulated to take a $68,000 judgment against it on its contractual liability under the *Notice*. The stipulated grounds of liability were negligence and violation of the California Consumers Legal Remedies Act.

II. Rulings Below

In November 2005 the Laffertys purchased a new Fleetwood "Providence" model motor home from Geweke Auto & RV Group, Fleetwood's dealer in Lodi, California. The total sale price was stated as $389,929.24. Wells Fargo Bank agreed to finance the purchase on a standard form retail installment sales contract furnished by Geweke RV and assigned to Wells Fargo.

The defendants' actions described by the Third Amended Complaint were that the Laffertys took delivery of their Fleetwood on November 1, 2005 (with 2332 delivery miles showing) and left immediately for a 7 day trip.

They returned the motor home for warranty repairs on November 7, 2005 with 3,411 miles showing. Repairs were delayed while the unit sat for more than 12 days at Geweke. Rather than to cancel their upcoming Thanksgiving holiday plans, the Laffertys traveled with the unrepaired coach from November 23, 2005 through December 1, 2005. On December 2, 2005, they returned the Fleetwood to the dealer for completion of the original repairs, and for resolution of other complaints that arose during the additional trip. The motor home again sat unrepaired on Geweke's lot.

On January 11, 2006 the Laffertys wrote to Fleetwood describing the situation, quoting a provision of

Fleetwood's "on-line warranty statement," and stating: "The RV is and has been at the dealership for the last 42 days. Due to the nature of the failures, principally electrical in nature the RV is considered an unsafe vehicle and may fall under California Lemon laws."

On November 3, 2006 the Laffertys sued Fleetwood Motor Homes; Geweke; Phoenix American Warranty; and Wells Fargo Bank alleging claims for breach of warranty; breach of contract; breach of the covenant of good faith and fair dealing; violation of the Consumer Legal Remedies Act; violation of the Song-Beverly Act; violation of the Tanner Consumer Protection Act; and negligence.

On February 4, 2013, the California Third District Court of Appeal reversed a judgment in favor of Wells Fargo Bank, remanding the matter to the trial court as published in *Lafferty v. Wells Fargo Bank* (2013), 213 Cal.App.4th 545, 153 Cal. Rptr. 3d 240, modified on denial of reh'g (Feb. 27, 2013). The Court of Appeal reversed, in part, the judgment entered March 9, 2011 in favor of Wells Fargo Bank, stating:

> The judgment is reversed insofar as the trial court (1) sustained the demurrer to Patrick and Mary Laffertys' causes of action for negligence and under the Consumer Legal Remedies Act (Civ. Code, § 1770 et seq.), and (2) awarded attorney fees to Wells Fargo Bank. On remand, Patrick and Mary Lafferty may proceed to trial on these two causes of action against Wells Fargo Bank that the Laffertys would otherwise have had only against Geweke Auto & RV Group but for the

> Holder Rule, title 16, section 433.2 of the Code of Federal Regulations.

Lafferty v. Wells Fargo Bank, 213 Cal.App.4th 545, 572-573; 153 Cal. Rptr. 3d 240 (2013).

The Court decided that "the plain meaning of the "Holder Rule allows the Laffertys to assert all claims against Wells Fargo they might otherwise have against Geweke." *Lafferty v. Wells Fargo Bank,* 213 Cal.App.4th 545, 551; 153 Cal. Rptr. 3d 240 (2013).

Following remand on May 6, 2015 shortly before date set for trial, the parties negotiated a stipulated judgment against the Bank favoring the Laffertys. The judgment states that, "The plaintiffs are the prevailing party." (App.72a, ¶2)

After entry of the judgment, plaintiffs filed motions for recovery of trial court and appellate attorney fees.

The *Holder Notice* states that "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." On July 1, 2015 the trial court awarded prejudgment interest at the rate of 7% for 3113 days. It did not apply the foregoing *Holder Notice* cap to that balance. On September 8, 2015 the trial judge allowed trial costs in the amount of $8,384.33. He did not apply a *Holder Notice* cap.

On September 28, 2015 the trial court denied plaintiffs' motion for post-trial award of attorney fees because "they exceed the Holder Rule cap." (App.68a-70a) The court also denied recovery of attorney fees on appeal for the same reason. (App.65a-68a) The court denied the Laffertys' application for post-trial award of costs in the amount of $16,816.15.

On November 16, 2015 the Laffertys appealed the trial court orders: 1) Denying post appeal attorney fees; 2) denying plaintiffs' Motion For Post-Trial Award of Attorney Fees and Costs, and 3) denying costs in the amount of $16,816.15.

The Third District Court of Appeal ruled on July 19, 2018. (App.1a-41a) It denied rehearing on August 17, 2018. (App.42a-43a). The California Supreme Court denied review on October 31, 2018. (App.44a)

The Court of Appeal ruled that the "Holder Rule" as it named 16 Code of Federal Regulations section 433.2, created a new, but limited, cause of action in California. Since the cause of action is new the court reasoned, it cannot be a claim under the California Consumers Legal Remedies Act (CLRA). Consequently the sections of that Act prohibiting its waiver, and permitting recovery by a prevailing consumer of attorney fees and costs, do not apply despite that the consumer has brought his claim on the predicate of the CLRA.

The Court of Appeal did not discuss this Court's history of decisions regarding when and how a federal statute may imply a new legal cause of action. The Court of Appeal did not discuss this Court's line of decisions regarding when and how a federal law might preempt state law under the Supremacy Clause of the U.S. Constitution, Article VI, cl. 2.

The Court of Appeal instead stated:

> In addition to preventing the creditor from continuing to collect on a debt for a defective product or deficient service, the FTC also provided consumers with a new cause of

action against their creditors. This new cause of action allows consumers to assert against the creditors "all claims and defenses which the debtor could assert against the seller of goods or services" to which the Holder Rule applies. (40 Fed. Reg. 53506) Thus, the FTC declared that "a consumer can (1) defend a creditor suit for payment of an obligation by raising a valid claim against a seller as a set-off, and (2) maintain an affirmative action against a creditor who has received payments for a return of monies paid on account. The latter alternative will only be available where a seller's breach is so substantial that a court is persuaded that rescission and restitution are justified." (40 Fed. Reg. 53524.)

This new cause of action, however, was expressly constrained. The Holder Rule language delineates the new cause of action by declaring: "RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." (40 Fed. Reg. 53506; 16 C.F.R. § 433.2.) The contours of this limitation in the Holder Rule are the subject of this appeal. In construing this limitation, we hue to the plain meaning of the language employed by the Holder Rule. "Fundamentally, the Holder Rule language for contracts constitutes a notice to consumers. . . . It would be antithetical to the language and its typographic emphasis to hold that the Holder Rule language does not mean what it says."

> (Lafferty I, supra, 213 Cal.App.4th at p. 560.) (App.14a-15a)
>
> However, a consumer cannot assert an uncapped claim under the cause of action provided by the Holder Rule.

(App.19a).

The petitioners disagree. They assert that by application of principles defined by this Court, the "Holder Rule" does not imply a new private cause of action, but instead creates terms of contract enforceable under existing common law standards. Further the Laffertys assert, that if previous decisions by this Court are applied to the regulation, then the "Holder Rule" does not preempt state laws.

REASONS FOR PETITION TO BE GRANTED

The FTC adopted the *Holder Rule* regulation because it believed it was "an unfair practice for a seller to employ procedures in the course of arranging the financing of a consumer sale which separate[d] the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised." (Statement of Basis and Purpose, 40 Fed. Reg. 53522 (Nov. 18, 1975).) The FTC explained (*Ibid.*):[5]

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[5] "As one court noted, before this rule was adopted "[t]he reciprocal duties of the buyer and seller which were mutually dependent under ordinary contract law became independent of one another. Thus, the buyer's duty to pay the creditor was not excused upon the seller's failure to perform. In abrogating the holder in due course rule in consumer credit transactions, the

> Our primary concern . . . has been the distribution or allocation of costs occasioned by seller misconduct in credit sale transactions. These costs arise from breaches of contract, breaches of warranty, misrepresentation, and even fraud. The current commercial system which enables sellers and creditors to divorce a consumer's obligation to pay for goods and services from the seller's obligation to perform as promised, allocates all of these costs to the consumer/buyer.

Having noted and discussed the FTC's purpose (Opinion, App.13a), the California Third District Court of Appeal continued to state that (Opinion, App.14a):

> In addition to preventing the creditor from continuing to collect on a debt for a defective product or deficient service, the FTC also provided consumers with a new cause of action against their creditors. This new cause of action allows consumers to assert against the creditors "all claims and defenses which the debtor could assert against the seller of goods or services" to which the Holder Rule applies. (40 Fed. Reg. 53506)

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." (*Home Sav. Ass'n v. Guerra* (Tex. 1987) 733 S.W.2d 134, 135.)" *Music Acceptance Corp. v. Lofing* (1995), 32 Cal.App.4th 610, *at* 626-630; 39 Cal. Rptr. 2d 159.

However there is no sound basis in the regulation to imply such a "new cause of action." When the *Holder Notice* has been included in a RISC, the common law of contracts provides a full remedy for the consumer, against the holder of his chattel paper. There is no indication in the language of 16 C.F.R. section 433.2 that the FTC intended its rule to imply a new private cause of action.

I. NO IMPLIED CAUSE OF ACTION

"Rulemaking" is the "agency process for formulating, amending, or repealing a rule." Administrative Procedures Act, section 2(c); 5 U.S.C. section 551(5) (2011) The *Act* defines a "rule" as " the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ". 5 U.S.C. section 551(4) (2011)

The FTC rigorously followed the notice and hearing provisions of the APA when it promulgated the "Holder Rule." (App.73a-74a) In 1977 it responded to several letters from a representative of the International Consumer Credit Commission to state in an Advisory Opinion (89 F.T.C. 675, 1977 WL 188533):

> The rule does not create new rights for the consumer against the seller. Claims and defenses of a consumer, assertable against a seller under state law, remain unchanged under the rule. When a consumer contract is negotiated or transferred, the rule, through the required contract notice, merely preserves the claims and defenses a consumer may

> assert against a seller so that he may raise them against the holder of the contract. Accordingly, if the consumer, under applicable law, is entitled to withhold payment from the seller, he may, pursuant to the notice, withhold payment from the holder.
>
> By direction of the Commission.

(App.74a)

In 1999 the FTC issued a Staff Opinion Letter in response to a request from the National Consumer Law Center, stating (App.100a-101a):

> The line of cases stemming from *Ford Motor Co. v. Morgan*, 536 N.E.2d 587, 589-90 (Mass. 1989), interpreting the provision [the Holder Rule] to allow a consumer an affirmative recovery only if he or she is entitled to rescission or similar relief under state law, are inconsistent with our position.

In 2012 the FTC issued yet another letter to the National Consumer Law Center, stating (App.93a):

> The Commission affirms that the Rule is unambiguous, and its plain language should be applied. No additional limitations on a consumer's right to an affirmative recovery should be read into the Rule, especially since a consumer would not have notice of those limitations because they are not included in the credit contract.

In none of these comments did the FTC discuss that it intended to create a "new cause of action" on behalf of consumers. Rather, the FTC carefully denoted that the "Holder Rule" *Notice* is a contract provision. The FTC stated that any existing rights a consumer might have against a seller under a state law, would be available to the consumer against the holder of his note—according to his credit contract.

In *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001), Justice Scalia writing for the Court changed substantially, the Court's previous reasoning about whether a statute should imply a private cause of action.

Before *Sandoval* the Court often employed a four factor test to determine whether a statute (or quasi-regulation) included an implied private cause of action. The test was as follows (*Cort v. Ash*, 422 U.S. 66, 78 (1975)):

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See, e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp. v.*

> *Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *cf. J. I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394 -395 (1971); id., at 400 (Harlan, J., concurring in judgment).

But after *Sandoval* a plaintiff seeking to imply a private cause of action must establish primarily and firstly, legislative intent to create the cause. *Sandoval* states (at 532 U.S. 286-287):

> Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). Statutory intent on this latter point is determinative. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharmaceuticals*

> *Inc. v. Thompson*, 478 U.S. 804, 812, n. 9 (1986) (collecting cases). Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. *See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 148 (1985); *Transamerica Mortgage Advisors, Inc. v. Lewis, supra, at 23; Touche Ross & Co. v. Redington*, supra, at 575-576.

In the matter at hand the fact that FTC determined to alter the holder in due course doctrine by the unusual route of adopting specific language of contract to be included in RISC agreements, strongly implies that the FTC wished to deploy the standard common law of contracts with which consumers and their attorneys would be familiar, to enforce its rule - not to create a new implied private cause of action.

The Third District Court of Appeal declared that the "Holder Rule" "also provided consumers with a new cause of action against their creditors." (Opinion, App.14a) But the court offered no discussion to disclose how it had ascertained the intent of the FTC. In fact the *Holder Notice* is a contract clause that the FTC determined, if it were omitted from certain defined consumer contracts (commonly called "Retail Installment Sales Contracts"), then the FTC would consider the omission an unfair practice. (Statement of Basis and Purpose, 40 F.R. 53522 (Nov. 18, 1975); 16 CFR section 433.2.) Causes of action under the clause are not new. They are existing causes that the consumer would have brought against his dealer, but by contract, the consumer's bank agrees they may be brought against the bank.

The "Holder Rule" operates solely and exclusively, by suggesting inclusion of the *Holder Notice* as a provision of the RISC. 16 Code of Federal Regulations section 433.2. The only application of the "Rule," is through that private RISC agreement between the parties. There is no statute or regulation that directly applies the Holder *Notice* to Wells Fargo Bank. It is the Bank's acceptance of assignment of the chattel paper from Geweke that applies the *Notice* to the Bank.

This Court recently revisited the implied private cause of action issue in *Ziglar v. Abbasi*, 582 U.S. ___, 137 S.Ct. 1843 (2017). It determined that a (137 S.Ct. at 1848-1849):

> *Bivens* [*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619] type remedy [of a private cause of action] should not be extended to the claims challenging the confinement conditions imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks." . . .
>
> (b) *Bivens*, *Davis*, and *Carlson* were decided at a time when the prevailing law assumed that a proper judicial function was to "provide such remedies as are necessary to make effective" a statute's purpose. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423. The Court has since adopted a far more cautious course, clarifying that, when deciding whether to recognize an implied

> cause of action, the "determinative" question is one of statutory intent. *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517. If a statute does not evince Congress' intent "to create the private right of action asserted," *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 61 L.Ed.2d 82, no such action will be created through judicial mandate.

The Third District opinion in this matter does not comply with the Court's foregoing "cautious course."

II. NO PREEMPTION

The California Consumers Legal Remedies Act, Civil Code section 1780(e) provides that the court shall award costs and attorney's fees to a prevailing party. The statute states:

> **1780.** (a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following: . . .
>
> (e) The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.

The language of section 1780(e) is mandatory.

Further California Civil Code section 1751 voids any purported waiver of the law. It commands that, "Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." This is a convincing assertion of California policy.

If the effect of the FTC's *Holder Notice* were to waive recovery of attorney fees under the CLRA, then the California statute, Civil Code section 1751, must in turn act to void the Holder *Notice*. The California Third District Court of Appeal attempted to avoid this apparent conflict by finding that the FTC "Holder Rule" created a new implied private cause of action. (App.14a) That new action said the court, was not one brought under the CLRA whose provisions therefore did not apply. Consequently section 1780(e) allowing recovery for attorney fees by the Laffertys under the *Act*, did not apply.

Even upon rehearing, the Third District continued to assert that (App.43a):

> As the Laffertys point out in their petition for rehearing, the trial court misspoke when it stated they recovered against Geweke for failure to comply with the CLRA. The record indicates they recovered against Geweke for violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.), for money had, and for negligence. The trial court's misstatement does not undermine our conclusion that the Laffertys did not file this action "pursuant to" Civil Code section 1780.

This reasoning is sophistry. With the "Holder Rule" the FTC issued a quasi-legislative rule "On

Preservation of Consumers' Claims and Defenses." As it stated in its 1977 Advisory Opinion (App.74a),

> The rule does not create new rights for the consumer against the seller. Claims and defenses of a consumer, assertable against a seller under state law, remain unchanged under the rule.

Thus the Third District opinion asserts that the FTC in effect preempted the attorney fee recovery provision of the California Consumers Legal Remedies Act. But the opinion does not discuss whether the FTC intended to preempt. As stated above, it did not.

The Third District did not discuss whether a valid ground for preemption existed under the decisional authority of this Court. A valid ground does not exist.

Federal laws that preempt state law include not only legislation, but also administrative rules and regulations made pursuant to authority delegated by Congress. *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). ("Federal regulations have no less pre-emptive effect than Federal Statutes"). In the instance of the "Holder Rule" the FTC invoked the authority of section 5 of the Federal Trade Commission Act, 15 U.S.C. sections 41-58, as amended.

In *Fidelity*, *supra,* this Court found that a Federal Home Loan Bank Board regulation permitting a "due-on-sale" clause in home mortgages, preempted contrary California state law. (*Id.,* 458 U.S. 141, 170) The Court stated (at 152-153):

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art.

VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

So long as a regulation is adopted with a valid Congressional delegation of authority it may have preemptive effect. *N.Y. v. FERC*, 535 U.S. 1, 18 (2002). In the matter at hand there has not been any question that the FTC acted within the scope of its congressionally delegated authority to promulgate the "Holder Rule."

The question in this case is whether a presumption against pre-emption should apply because the controversy concerns not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority. *New York v. FERC*, 535 U.S. 1, 17. Petitioners contend that the presumption against preemption does indeed here apply and that the California CLRA attorney fee recovery provision has not been preempted by the "Holder Rule" cap, for several reasons.

The *Holder Notice* "cap" provides that, "RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

The first reason that the "Holder Rule" cap does not preempt California law is that the FTC did not intend to preempt and did not express an explicit intention to preempt. In *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) the Court stated:

> First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (internal quotation marks omitted); *see Retail Clerks v.*

> *Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated... in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S.Ct. 2240 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

Clearly the FTC did not intend to supersede state law by including the Holder *Notice* into RISC contracts. The very indirectness of the FTC's approach—by suggesting the inclusion of standard form contract language in certain types of contracts—indicates its intention to leave state laws undisturbed.

In its Statement of Basis and Purpose published November 18, 1975, 40 F. R. 53506 at 53523 the FTC declared:

> Redress via the legal system is seldom a viable alternative for consumers where problems occur. Delays combine with the unpredictable results produced by the legal system to often result in increased harm for the consumer litigant. Where a seller is sued, the consumer must undertake the further risk that his defendant will prove insolvent or unavailable on the day of legal reckoning."
>
> This rule approaches these problems by reallocating the costs of seller misconduct in

> the consumer market. It would, we believe, reduce these costs to the minimum level obtainable in an imperfect system and internalize those that remain. As a practical matter, the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party.

Far from expressing an explicit intent to preempt state laws, the foregoing passage indicates a desire to avoid the courthouse by utilizing provisions of the private RISC contract between buyer, seller and bank.

The second reason that the "Holder Rule" does not preempt, is that the FTC did not imply by enacting an extensive regulatory framework, that it wanted to preempt the field of consumer protection. *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989) (A state law is preempted where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.")

Again, the *Holder Notice* is contract language that can only be enforced by application of the laws of a state. The FTC in its Statement of Basis and Purpose (1975)*,* 40 F.R. 53506 at 53527, also stated:

> . . . it is important to remember that the contract provision this rule will require can only be enforced between the parties in a court of competent jurisdiction. The purpose of this role is to mandate judicial scrutiny of a credit sale transaction, when a bona fide dispute develops between buyer and seller.

Preemption here is not implied by a conflict of state law with the "Holder Rule." It is possible to comply with both California state law under its *CLRA*, and the "Holder Rule." *See, Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Nor does state law pose an obstacle to the "Rule." *See, Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Third District's implication of a "new cause of action" under the *Holder Notice* has given rise to an apparent conflict between the "Holder Rule" and the California CLRA attorney fee recovery provision. Without that implication, when the *Holder Notice* and its cap are properly interpreted as terms of a contract, the California CLRA statute remains unfettered in its operation and there exists no conflict between California law and the "Holder Rule."

CONCLUSION

This petition for a Writ of Certiorari should be granted and the order of the appellate court refusing to award petitioners a reasonable attorney fee recovery under California law should be reversed.

Respectfully submitted,

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