COURT DETERMINES FINANCE COMPANIES NOT LIABLE FOR ATTORNEY'S FEES WHEN SUED SOLELY AS HOLDER

By Darryl J. Horowitt and Paul M. Parvanian

As any auto finance company is aware, the FTC "Holder Rule" makes the finance company jointly and severally liable with the seller for any claims that a consumer may have against the seller arising from the sale of a vehicle. Consumer attorneys made a cottage industry in suing finance companies knowing that if the seller could not pay, they could get recovery from the finance company, and recover fees and costs as well.

One issue that was not previously decided by an Appellate Court in California is whether a consumer could recover attorney's fees in a claim brought against a finance company solely based on its capacity as a holder (assignee) of the consumer finance contract. This question was recently answered in *Lafferty v. Wells Fargo Bank*, *N.A.* (2018) 25 Cal.App.5th 398, 235 Cal.Rptr.3d 842, in which the Court found that a holder is not liable for attorney's fees based on the plain language of the Holder Rule. This article will discuss *Lafferty* and its possible effect on holders.

Lafferty was the third appellate decision in a long running case. In the action, Lafferty purchased a recreational vehicle from Geweke Auto & RV Group, financed by Wells Fargo Bank. After he experienced mechanical difficulties with the RV, which were not repaired, he sued Geweke and Wells Fargo. Geweke failed to respond and a default judgment was obtained. Lafferty and Wells Fargo thereafter litigated as to whether or not Lafferty could pursue a claim against Wells Fargo under the Holder Rule and the extent of Wells Fargo's liability.

Wells Fargo demurred to the complaint and the demurrer was sustained. In *Lafferty I* (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545), the court reversed the trial court's ruling and allowed the consumer to sue Wells Fargo based on its status as holder under the FTC Holder Rule.

In *Lafferty II* (*Lafferty v. Wells Fargo Bank* (March 25, 2015, C074843) [nonpub. op.]), the court reversed the trial court's award of attorney's fees to Lafferty arising from the first appeal, finding the request premature as judgment had not yet been obtained against Wells Fargo.

After *Lafferty II* was decided, Lafferty and Wells Fargo entered into a stipulated judgment by which Wells Fargo agreed to rescind the finance contract, reimburse all payments made by Lafferty for the RV ($68,000.00), and that Lafferty was the prevailing party. Lafferty then filed a motion for attorney's fees and a memorandum of costs. The motion for attorney's fees was denied by the trial court on the basis that the plain language of the Holder Rule limited Wells Fargo's liability to the amounts the consumer had paid under the contract and no more, as held in *Lafferty I*. (*Lafferty v. Wells Fargo Bank*, *supra*, 213 Cal.App.4th at 551.) The court did, however, award costs as well as prejudgment interest. Cross-appeals were thereafter filed, with Wells Fargo appealing the granting of costs and prejudgment interest and Lafferty appealing the denial of attorney's fees.

The appellate court affirmed the trial court's decision in all respects. In doing so, the court conducted a thorough analysis of the statutory language of the Holder Rule and came to the

conclusion that the trial court was correct in determining that where a holder is sued solely in its capacity as holder, liability is limited to the amount the consumer paid under the finance contract, and the rule does not permit the recovery of attorney's fees. In doing so, the court analyzed the express language of the Holder Rule, which reads:

> "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.)

In analyzing the two sentences that comprise the Holder Rule, the court evaluated the rule as interpreted by the FTC, which implemented the rule. In doing so, it determined that the plain language of the statute was unambiguous and that the term "recovery" was qualified by the term "hereunder" to limit liability solely to the amount paid by a consumer and did not include attorney's fees. The court noted statements by the FTC that supported this conclusion and concluded:

> "To sum up, the language of the Holder Rule plainly defines the amount subject to the Rule broadly by using the word 'recovery' to include more than just compensatory damages but narrows the amount that may be recovered to those monies actually paid by the consumer under the contract. And the Holder Rule constraint on recovery does not apply to separate causes of action that might exist independently under state or local law. However, 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's fees." (*Lafferty v. Wells Fargo Bank, N.A., supra,* 235 Cal.Rptr.3d at 855; emphasis original.)

The court also reminded the parties:

> "It is possible for a consumer to assert uncapped claims against a creditor or seller of goods sold on an installment basis if another state or local cause of action can be found to support such claim . . . However, ***a consumer cannot assert an uncapped claim under the cause of action provided by the Holder Rule***." (*Ibid.,* emphasis added.)

The court did find that costs were recoverable as nothing in the Holder Rule prevented such. The court determined that the award of costs would be governed under Code of Civil Procedure § 1032(b), rather than the Holder Rule and nothing in that section prohibited recovery of costs. Lafferty contended attorney's fees were available under that statute as Wells Fargo was sued under the CLRA and Song-Beverly Consumer Warranty Act, both of which provide for recovery of attorney's fees. The court, however, noted that Wells Fargo was not sued for violations of those acts, but rather on a derivative basis as the holder. In other words, the consumer did not sue Wells Fargo because it violated either the CLRA or Song-Beverly, but because it was the holder. The attorney's fees provisions in those statutes thus did not apply to Wells Fargo.

The court also rejected the recovery of attorney's fees under Code of Civil Procedure § 1021.5 (private attorney general fees), because an award against Wells Fargo did not benefit the public at large, only the consumer.

Lafferty is direct, to the point, and logically concludes why a holder should not be liable for attorney's fees in claims brought solely in its capacity as holder. This does not mean that finance companies should aggressively fight consumer claims and then hope a court will later refuse to award attorney's fees. It does mean that holders can, and perhaps should, consider making early settlement offers that may exclude an award of attorney's fees in order to avoid possible imposition of attorney's fees later on if a trial occurs. After all, based on the amounts involved in such consumer claims, an early settlement is often the best resolution even if the seller believes it did nothing wrong.

It can be expected that consumer lawyers will seek to de-publish this case or seek review by the Supreme Court. We will keep you advised if that happens.

This article was written by Darryl J. Horowitt and Paul M. Parvanian.

***Darryl J. Horowitt** is the managing partner of Coleman & Horowitt, LLP. He practices in the litigation department of the firm where he represents clients in complex business, construction, banking and real estate litigation, consumer finance litigation, commercial collections, professional liability defense, insurance coverage, and alternative dispute resolution. He was named one of the Top 100 California litigators by the American Society of Legal Advocates (an invitation-only association of the top lawyers) and a Top 100 Northern California lawyer by Super Lawyers®, where he has been listed as a Northern California Super Lawyer® from 2007 through 2015. He holds an AV®-Preeminent rating from Martindale Hubbell, and is a Premier 100 Trial Lawyer (American Academy of Trial Lawyers) and a Fellow of the Trial Lawyer Honorary Society (Litigation Counsel of America). He is a member of the Fresno County Bar Association, American Bar Association, Association of Business Trial Lawyers, California Creditors Bar Association, and NARCA. If you have any questions regarding the subject of this article, please contact Mr. Horowitt at (559)248-4820 / (800)891-8362, or by e-mail at dhorowitt@ch-law.com.*

***Paul M. Parvanian** is a partner with Coleman & Horowitt, LLP. He practices in the litigation department handling a wide variety of business, construction, consumer finance and real property matters. Paul also assists clients in real property and business transactions. Throughout his time at Coleman & Horowitt, Paul has developed substantial knowledge relating to the consumer laws to be able to help the firm's business and lender clients find the most cost-effective solutions to defending consumer claims, whether that be early resolution or taking a matter to trial or arbitration. If you have any questions regarding the subject of this article, please contact Mr. Parvanian at (559)248-4820/ (800)891-8362, or by e-mail at pparvanian@ch-law.com.*

AUTO FINANCE PRACTICE GROUP

The Auto Finance Practice Group at Coleman & Horowitt, LLP, represents clients in a wide variety of commercial and consumer litigation including the prosecution of auto finance agreements with consumers, enforcement of dealer agreements as well as the defense of individual and class action consumer claims brought against lenders.

Darryl J. Horowitt
E-mail: dhorowitt@ch-law.com Ext. 111

Sheryl D. Noel
E-mail: snoel@ch-law.com Ext. 140

Russell W. Reynolds
E-mail: rreynolds@ch-law.com Ext. 134

Jennifer T. Poochigian
E-mail: jpoochigian@ch-law.com Ext. 102

Judith M. Sasaki – Litigation
E-mail: jsasaki@ch-law.com Ext. 202

C. Fredrick Meine III – Litigation
E-mail: fmeine@ch-law.com Ext. 134

Paul M. Parvanian Ext. 105
E-mail: pparvanian@ch-law.com

Coleman & Horowitt, LLP provides legal counsel to the business community in the areas of business, commercial, and real estate litigation and transactions, construction litigation, appeals, professional liability defense, casualty insurance defense, insurance coverage, tax, probate, and estate planning. This newsletter is intended to provide the reader with general information regarding current legal issues. It is not to be construed as specific legal advice or as a substitute for the need to seek competent legal advice on specific legal matters. This publication is not meant to serve as a solicitation of business. To the extent that this may be considered as advertising, then it is herewith identified as such.

© 2018, Coleman & Horowitt, LLP