No. C097061

Court of Appeal

OF THE

State of California

Third Appellate District

CHAD GRAYOT,

Plaintiff and Appellant,

vs.

BANK OF STOCKTON,

Defendant and Respondent.

AMICUS BRIEF SUPPORTING DEFENDANT BY AMERICAN FINANCIAL SERVICES ASSOCIATION

Appeal from a Judgment of the Placer County Superior Court
Case No. S-CV-0045347, Honorable Trisha Hirashima, Judge

---

*Jan T. Chilton (SBN 47582)
jtc@severson.com
SEVERSON & WERSON
A Professional Corporation
595 Market St., Ste. 2600
San Francisco, California 94105
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

Scott J. Hyman (SBN 148709)
sjh@severson.com
SEVERSON & WERSON
A Professional Corporation
The Atrium
19100 Von Karman Ave., Ste. 700
Irvine, California 92612
Telephone: (949) 442-7110
Facsimile: (949) 442-7118

Attorneys for Amicus Curiae American Financial Services Association

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Case No.: C097061

Case Name: *Chad Grayot v. Bank of Stockton*

☑ There are no interested entities or persons that must be listed in this certificate under Rule 8.208

/s/ Jan T. Chilton
Signature of Attorney Submitting Form

Printed Name: Jan T. Chilton (State Bar No. 47582)

Address: Severson & Werson
A Professional Corporation
595 Market St., Ste. 2600
San Francisco, CA 94105

Party Represented: Amicus Curiae American Financial Services Association

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF AUTHORITIES

Page(s)

Other Authorities

I.

INTEREST OF AMICUS CURIAE

Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 100 years, AFSA has represented financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA supports financial education for consumers of all ages. AFSA advocates before legislative, executive, and judicial bodies on issues affecting its members' interests. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1245.) AFSA has filed many amicus briefs in California state and federal courts on issues of importance to its members. (See, e.g., *Pulliam v. HNL Automotive, Inc.* (2022) 13 Cal.5th 127; *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899.)

II.

INTRODUCTION

The Federal Trade Commission ("FTC") promulgated 16 C.F.R. § 433.2 to abrogate the holder-in-due-course doctrine in consumer credit

contracts.[1] At the time of its adoption, the regulation was popularly known as the "Holder-in-Due-Course Rule"—since shortened to "Holder Rule."[2]

That focus left a clear imprint on the Holder Rule's text. In contrast to contemporaneous state statutes, the Holder Rule applies to "[a]ny holder" of the consumer credit contract. "Holder" had then and has now a settled meaning under negotiable instruments law, now codified in the Uniform Commercial Code ("UCC"), to which the FTC expressly referred in adopting its Holder Rule.

A "holder" is the person in physical possession of the negotiable instrument with the right to enforce its terms. (Com. Code, § 1201(b)(21)(A).) Only one person can be in physical possession of an instrument at any given time. Hence, there can be only one holder of an instrument.

In choosing to make its rule applicable to "[a]ny holder," the FIC adopted that settled meaning of the term, limiting the rule's application to the person who currently possesses the consumer credit contract with the right to enforce its terms.

So interpreted, the Holder Rule achieves the FTC's purpose in adopting the regulation. The FTC found the holder-in-due-course doctrine and related waivers of claims and defenses unfair to consumers because they separated the buyer's obligation to pay from the seller's corresponding

---

[1] FTC, Part 433—Preservation of Consumers' Claims and Defenses; Promulgation of Trade Regulation Rule and Statement of Basis and Purpose (Nov. 19, 1975) 40 Fed. Reg. 53506, 53522 ("Statement of Basis").

[2] FTC, Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 14, 1976) 41 Fed. Reg. 20022 ("FTC Guidelines").

duty to keep its promises.[3] That is, the Rule was adopted to prevent use "of credit terms which compel consumers to pay a creditor even if the seller's conduct would not entitle the seller to be paid.[4]

Interpreting the Rule to apply only to the person currently possessing and holding the right to enforce the consumer credit contract fully achieves the FTC's purpose, preventing any separation of the buyer's promise to pay from the seller's obligation to perform.

By contrast, plaintiff's interpretation of the Holder Rule gives "holder" an unusual and illogical meaning to further a policy goal that the FTC never espoused.

III.

ARGUMENT

As the parties' briefs make clear, this appeal turns on the correct interpretation of the first two words of the notice which, under the Holder Rule, must be included in a consumer credit contract; namely, "[a]ny holder." (See AOB, 16-22; RB, 16-29; ARB, 7-8, 14-19.)

In deciding between the parties' conflicting interpretations of those words, this Court must " 'carefully consider[ ]' the text, structure, history, and purpose of [the] regulation." *Kisor v. Wilkie* (2019) 588 U.S. ___, 139 S.Ct. 2400, 2415; *Pulliam v. HNL Automotive Inc*. (2022) 13 Cal.5th 127, 137.)

---

[3] Statement of Basis, 40 Fed. Reg. at pp. 53507, 53522, 53523; FTC Guidelines, 41 Fed. Reg. at pp. 20022, 20023.

[4] Statement of Basis, 40 Fed. Reg. at p. 53523; FTC Guidelines, 41 Fed. Reg. at p. 20023.

A. Textual Analysis Disproves Plaintiffs' Theory

1. "Any" Does Not Answer The Question On This Appeal

To begin with the regulation's text, contrary to plaintiff's contention, "any" does not alone answer the question this appeal raises. (See AOB, 16-17; ARB, 7-8, 18-19.) " 'The word "any" has a diversity of meanings and may be employed to indicate "all" or "every" as well as "some" or "one" ' " (*Hernandez v. Apple Auto Wholesalers of Waterbury, LLC* (2021) 338 Conn. 803, 823, 259 A.3d 1157, 1168 (*Hernandez I*).)

Moreover, as defendant correctly points out, "any" cannot be considered in isolation. It is an adjective. It modifies the following noun, "holder" and must be interpreted in light of that noun's limitations. (RB, 18.)

2. There Can Be Only One "Holder" Under That Term's Well-Settled Legal Meaning

Unlike "any," "holder" has a single well-settled meaning. It denotes the person "who has legal possession of a negotiable instrument and is entitled to receive payment on it." (Garner, ed., Black's Law Dict. (11th ed. 2019) p. 879, "holder," def. 1; see also Com. Code, § 1201(b)(21)(A).)[5]

> Although it is true, as the plaintiff argues, "[t]he word 'any' has a diversity of meanings …; the word "holder" does not. It has a decidedly singular meaning in the law: "[s]omeone who

[5] "Holder" was similarly defined under the original version of the UCC in effect when the FTC promulgated its Holder Rule as well as under pre-existing statutory and case authority. (See, e.g., *Pazol v. Citizens Nat. Bank* (1964) 110 Ga.App. 319, 320-321, 138 S.E.2d 442, 445; *Federal Land Bank v. Miller* (1946) 199 Miss. 615, 622-623, 25 So.2d 11, 12; *Hodes v. Hodes* (1945) 176 Or. 102, 108, 155 P.2d 564, 567.)

> has legal possession of a negotiable instrument and is entitled to receive payment on it."

(*Hernandez I, supra,* 338 Conn. at p. 823, 259 A.3d at p. 1168; citations omitted.)

In order to protect the obligor against the risk of duplicate liability, there can be only one "holder" of an instrument—the person with physical possession of and the right to enforce the instrument. "The purpose of the possession requirement is to protect the maker or drawer from multiple liability on the same instrument." (*M & I Marshall & Ilsley Bank v. National Financial Services Corp.* (E.D. Wis. 1989) 704 F.Supp. 890, 892, quoting *Hanalei, BRC Inc. v. Porter* (1988) 7 Haw.App. 304, 308, 760 P.2d 676, 679.)[6]

Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp. (1970) 255 Or. 192, 465 P.2d 868 ("*Martin Bros.*") illustrates the point. In that case, Quinco, Inc., the payee, deposited Martin Bros.'s a check in its account at U.S. National Bank ("US"). The check was dishonored and returned unpaid. US charged the check back to Quinco, overdrawing its account. (*Id.*, 255 Or. at pp. 193-194, 760 P.2d at pp. 868-869.)

---

[6] "It is essential that this element [possession] be established in order to protect the maker from any possibility of multiple judgments against him on the same note through no fault of his own. If such proof were not required, the plaintiff could negotiate the instrument to a third party who would become a holder in due course, bring a suit upon the note in her own name and obtain a judgment in her favor. Thereafter, the holder in due course could bring suit upon the note and possibly also obtain a judgment against the defendant." (*Liles v. Myers* (1978) 38 N.C.App. 525, 527, 248 S.E.2d 385, 387; see also *Pazol v. Citizens Nat. Bank* (1964) 110 Ga. App. 319, 320-321. 138 S.E.2d 442, 445.)

US sent the check to Quinco which sued Martin Bros. on the instrument. Quinco's suit was later dismissed for lack of prosecution. Meanwhile, US' assignee[7] sued Martin Bros. on the check. When the suit was filed, Quinco still possessed the check, but it later returned the check to US, which introduced the check in evidence at trial. (*Id.*, 255 Or. at pp. 194-195, 760 P.2d at pp. 868-869.)

Oregon's Supreme Court affirmed the judgment in favor of Martin Bros. (*Id.*, 255 Or. at pp. 193, 209, 760 P.2d at pp. 868, 875.) It held that while US had become the holder of the check upon the initial deposit, it lost that status when it returned the check to Quinco. (*Id.*, 255 Or. at pp. 195-196, 760 P.2d at p. 869.) As US then did not possess the check, it was not a holder and could not sue. " 'The owner of an instrument who is not in possession cannot sue thereon for he is not the holder ….' " (*Id.*, 255 Or. at pp. 196-197, 760 P.2d at p. 870.)

This rule, the court explained, protected the obligor from the risk of multiple liability on the instrument.

> In the instant case payment by the defendant to US at the time US instituted this action could have resulted in double liability for Martin Bros. Payment to US would not have been a bar to Quinco's recovery on the check based upon Quinco's then existing rights as a holder. …
>
> US would be considered to be a prior holder with respect to Quinco after Quinco reacquired the check by transfer from US. Professor Britton stated the law under the NIL to be:

---

[7] Since US' rights in the check were determinative, the court referred to US as the plaintiff rather than Investment Service, its assignee. (*Id.*, 255 Or. at pp. 194-195, 760 P.2d at p. 869.) The text follows the same convention.

> ‘Payment to a prior holder does not operate as a discharge of the instrument ….’
>
> This remains the law under the UCC.

(*Id.*, 255 Or. at p. 203, 760 P.2d at pp. 872-873.)

Thus, under current as well as prior law, there can only be one "holder" of an instrument at any time. A previous holder cannot enforce or sue on the instrument, and payment to a previous holder does not discharge the obligation.

Moreover, one must be a "holder" to be a "holder in due course." "[I]t is clear that plaintiff was never a holder in due course. To have such status a party must be a holder." (*National Bank of North America v. Flushing Nat. Bank* (N.Y. App. Div. 1979) 72 A.D.2d 538, 538, 421 N.Y.S.2d 65, 66.); *M & I Marshall & Ilsley Bank v. National Financial Services Corp*. (E.D. Wis. 1989) 704 F.Supp. 890, 892 ["In order to establish a claim as a holder in due course, the plaintiff must first qualify as a holder."]; *Schneider Fuel v. West Allis Bank* (1975) 70 Wis.2d 1041, 1051, 236 N.W.2d 266, 271 [same]; Com. Code, § 3302(a).)

3. "Holder" Is Properly Given Its Settled Legal Meaning In Interpreting The FTC's Regulation

For several reasons, the word "holder" must be given its well-settled legal meaning in interpreting the FTC Holder Rule.

First, "when a word used in a [regulation] has a well-established legal meaning, it will be given that meaning in construing the [regulation]." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19; *Bradley v. United States* (1973) 410 U.S. 605, 609 ["Rather than using terms in their everyday sense, '[t]he law uses familiar legal expressions in their familiar legal sense.' "]

Second, though well aware of similar contemporaneous state and federal statutes, which used the term "assignee," the FTC elected to use "holder" in its regulation instead.[8] The FTC did so with express reference to the holder-in-due-course doctrine as then codified in UCC Article 3. (Statement of Basis, 40 Fed. Reg. at pp. 53507) As already shown, that doctrine is closely tied to the settled legal meaning of "holder." Had the FTC intended some other meaning, it surely would have specially defined "holder" or have chosen a different word.

Third, as shown below (see pp. ___), the FTC adopted the Holder Rule for the express purpose of abrogating the holder-in-due-course doctrine in consumer credit contracts so that the buyer's obligation to pay would not be separated from the seller's obligation to perform. The regulation achieves that purpose by applying to any "holder" within the settled legal meaning of the term since any purported holder in due course must also be such a "holder." (See, e.g., *Mitchell v. Church* (Del. Super. Ct., July 31, 2006, No. CIV.A. 04L-10-042) 2006 WL 2194738, at *1.)

Fourth, there is no plausible alternative definition of the word "holder." Plaintiff has not suggested that the word has any different meaning.[9] His opening brief was silent on the subject. His reply brief

---

[8] See, e.g., Cal. Civ. Code, §§ 1804.2(a) [added by Stats. 1967, c. 1294, § 2], 2983.5(a) [added by Stats. 1961, c. 1626, § 4]; Md. Code Ann., Com. Law, § 12-628(b) [added by Acts 1975, c. 49, § 3 as Md. Ann. Code, Art. 83, § 147(b)], Wash. Rev. Code Ann. § 63.14.020 [added by Stats. 1969, c 234, § 1], 15 U.S.C. § 1641 [added by Pub. L. 90-321, § 115, approved May 29, 1968]; Statement of Basis, 40 Fed. Reg. at pp. 53508, 53509 n. 13, 53527, 53528 n. 5.

[9] The "usual and ordinary meaning" of "holder" offers no plausible alternative meaning. (See AOB, 17, citing *Lloyd Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198.) Merriam-Webster defines "holder" as "a person in possession of and legally entitled to receive

(Fn. cont'd)

concedes that as used in the Holder Rule, "holder" retains its settled legal meaning. (ARB, 19 ["[I]t is undisputed that there is only ever one holder of a consumer credit contract at any given time."].)

4. Plaintiff's Contrary Arguments Are Without Merit

Contrary to plaintiff's argument (AOB, 16-17; ARB, 14-15), according "holder" its well-established legal meaning does not render "any" superfluous or insert any words into the Holder Rule.

"Any" retains an important function even though there cannot be more than one "holder" of a note or contract. "Any" indicates that the Holder Rule applies to the holder regardless of whether it is the first or a subsequent holder and irrespective of how it became a holder. (See Merriam-Webster Dict., any, defs. 1, 2 ["any" means "of whatever kind" as well as "of whatever quantity"].)

Nor is it necessary to insert "the" or "current" into the Holder Rule to disprove plaintiff's theory. (See AOB, 16-17; ARB, 7-8, 19.) As explained above (see pp. __), there can be only one "holder," so that word alone suffices. An entity that previously held the note or contract but has transferred it to another is no longer a "holder" and so has neither the rights nor the liabilities that attend "holder" status. (See *Martin Bros., supra,* 255 Or. at p. 203, 760 P.2d at pp. 872-873.)

Similarly, any President (whether elected to that office or assuming it on the death or resignation of his/her predecessor) may appoint a

---

payment of a bill, note, or check." (Merriam-Webster Dict., holder, def. 1(b).)

Supreme Court justice with the Senate's consent. But one who previously held the nation's highest office may not. (Cf. ARB, 19.)

B. The Holder Rule's Regulatory History And Purpose Confirm The Meaning Of Its Text

1. The Rule Was Adopted To Abrogate The Holder-In-Due-Course Doctrine And Prevent Separation Of Buyer's Obligation To Pay From Seller's Duty To Perform

The FTC's adoption of 16 C.F.R. § 433.2 in 1975 was the culmination of more than a decade of public criticism by consumer advocates and others of the holder-in-due-course doctrine as applied to consumer credit contracts. (See Bennson, The Role of the Holder in Due Course Doctrine in Consumer Credit Transactions (1974) 26 Hast. L. J. 427, 432-452.) Just three years earlier, the National Commission on Consumer Finance[10] had recommended that any holder of a note issued in a consumer credit transaction be subject to all claims and defenses the consumer had against the seller. (Consumer Credit in the United States: Report of the National Commission on Consumer Finance (1972) 34-38.)

The FTC built on those earlier efforts. Its Statement of Basis cites the National Commission's report frequently and borrows much of its discussion of the evolution of the holder-in-due-course doctrine and its ill effects when applied to consumer credit transactions. (Statement of Basis, 40 Fed Reg. at pp. 53507-53509 & nn. 1-3, 5, 7, 12.)

As the National Commission had recommended, the FTC's new trade regulation rule was adopted specifically to prevent application of the

[10] The Commission was established by Title IV of the Consumer Credit Protection Act, the same legislation that enacted the Truth in Lending Act. (Pub. L. 90-321, §§ 401-407, approved May 29, 1968.)

holder-in-due-course doctrine to consumer credit transactions—a doctrine that the FTC deemed an "anomaly," one which had "not kept pace with changing social needs" and had "worked to deprive consumers of the protection needed in credit sales."[11] The principal target of the new regulation was reflected in its popular title at the time of its adoption: the "Holder-in-Due-Course Rule." (FTC Guidelines, 41 Fed. Reg. at p. 20022.)

As the FTC explained, the particular evil of the holder-in-due-course doctrine lay in its separation of the buyer's obligation to pay from the seller's obligation to perform, thus "insulating the creditor's claim to re-payment from any and all seller misconduct in the underlying transaction." (Statement of Basis, 40 Fed. Reg. at p. 53507.)

"Under [the holder-in-due-course] doctrine, the obligation to pay for goods or services is not conditioned upon the seller's corresponding duty to keep his promises." (FTC Guidelines, 41 Fed. Reg. at p. 20022.) As a result, the consumer is "robbed of the only realistic leverage he possesse[s] that might have forced the seller to provide satisfaction—his power to withhold payment." (*Ibid*.)

> In adopting this Rule the Commission determined that it constitutes an unfair and deceptive practice … for a seller, in the course of financing a consumer purchase of goods or services, to employ procedures which make the consumer's duty to pay independent of the seller's duty to fulfill his obligations.
>
> * * *

[11] Statement of Basis, 40 Fed. Reg. at p. 53507; FTC Guidelines, 41 Fed. Reg. at p. 20022.

> The Commission's Rule is … designed to prevent the … use of credit terms which compel consumers to pay a creditor even if the seller's conduct would not entitle the seller to be paid. It is designed to preserve the consumer's legally sufficient claims and defenses so that they may be asserted to defeat or diminish the right of a creditor to be paid, where a seller who arranges financing for a buyer fails to keep his side of the bargain.

(*Id.*, at p. 20023.)[12]

2. The Plain Meaning Interpretation Of The Rule's Text Fulfills The Rule's Stated Purpose

The FTC's twin purpose of abrogating the holder-in-due-course doctrine and preventing any separation of the buyer's obligation to pay from the seller's duty to perform is fully satisfied when the Holder Rule's text is interpreted in accordance with its plain, well-settled legal meaning.

So interpreted, the Holder Rule prevents the holder from becoming a holder-in-due-course because the consumer credit contract recites that the holder takes subject to all claims and defenses. (See Com. Code, § 3302(a)(2).) To abrogate the holder-in-due-course doctrine, the Rule

---

[12] See also Statement of Basis, 40 Fed. Reg. at pp. 53522 ["The Commission believes that it is an unfair practice for a seller to employ procedures in the course of arranging the financing of a consumer sale which separate the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised."], 53523 ["We conclude that a consumer's duty to pay for goods or services must not be separated from a seller's duty to perform as promised, regardless of the manner in which payment is made."], 53524 ["We have reached a determination that it constitutes an unfair and deceptive practice to use contractual boilerplate to separate a buyer's duty to pay from a seller's duty to perform. We are persuaded that this bifurcation of duties with its attendant externalization of costs injures both consumers and the market."].

need not apply to anyone else because no one other than the holder could become a holder in due course anyway. (*Id.*, § 3302(a).)

Under that interpretation, the Rule also prevents separation of the buyer's obligation from the seller's duty since the only person entitled to enforce the buyer's obligation—the holder—is expressly subjected to all claims and defenses that the buyer may have against the seller.[13]

3. Plaintiff's Contrary Arguments Are Meritless

a. The Holder Rule's Purpose Was Not To Assure Consumers An Alternative Source Of Recovery

Plaintiff asserts that "the underlying purpose of the Holder Rule [is] to ensure consumers had recourse against someone other than the seller." (AOB, 19-20; ARB, 20-21.)

Plaintiff cites nothing to support that key assertion. It is demonstrably incorrect. The FTC's Statement of Basis and Guidelines do not suggest, let alone state, that the Holder Rule's purpose was to assure that consumers could recover against someone other than the seller.

Nor can the Rule's text be squared with that purpose. So long as the seller retains the consumer credit contract—as many major retailers and buy-here-pay-here car dealers do—the Holder Rule does nothing to ensure the consumer may recover against anyone else.

---

[13] Plaintiff complains that by "reassigning the contract to Exclusive Motors, Bank of Stockton simply subjected [Plaintiff] to a different entity that continues to collect the debt despite [Plaintiff's] disputing the contract's validity." (ARB, 21.) What Plaintiff ignores is that, by reason of the Holder Rule, he can assert the same claims and defenses against Exclusive Motors after the reassignment as he could have asserted against defendant before the reassignment.

b. Common Law Rules Do Not Bar Reassignment Of The Contract To The Seller

Plaintiff also argues that a reassignment of the contract to the seller is prohibited because it would "materially impair [his] chance of obtaining the performance he expected." (AOB, 20, citing *Farmland Irrigation Co., Inc. v. Dopplmaier* (1957) 48 Cal.2d 208, 222.) The assertion is irrelevant and wrong.

Dopplmaier and the rule it mentions are irrelevant. They address a common law restriction on assignment, not the meaning of the FTC's Holder Rule, which was first adopted two decades after *Dopplmaier* was decided. Plaintiff sued Bank of Stockton under the Holder Rule, not the common law.

Moreover, plaintiff is wrong. The re-assignment did not materially impair plaintiff's chance of obtaining the performance he expected the conditional sale contract. That performance was delivery of the purchased car in the advertised condition.[14] Plaintiff could obtain that performance only from the seller, not a creditor like Bank of Stockton. And the seller's performance was not made any less likely by its reacquisition of the buyer's contract.

c. Re-Assignment Internalizes The Cost Of Seller Misconduct

One of the FTC's principal reasons for adopting the Holder Rule was its view that the new regulation would force miscreant sellers to internalize

[14] In a footnote, plaintiff claims that the expected performance was "the vehicle Grayot bargained for or rescission and restitution." (AOB, 20 n. 4.) Not so. Delivery of the vehicle is the promised performance. Rescission and restitution is a remedy for breach or fraud, not a performance promised in the conditional sale contract.

the cost of their misconduct. Re-assignment of the consumer credit contract to the seller achieves that purpose.

As the Statement of Basis explains, because of the holder-in-due-course doctrine and similar "cut-off devices," the cost of seller misconduct was "not incorporated in the price of the goods or services." (Statement of Basis, 40 Fed. Reg. at p. 53522.) "Seller misconduct costs [were] thus externalized in a way that render[ed]many sales finance transactions inherently deceptive and misleading." (*Id.*, at p. 53523.) The FTC "believe[d] that a rule which compels creditors to either absorb seller misconduct costs ***or return them to sellers*** … will discourage many of the predatory practices and schemes" mentioned earlier in the Statement of Basis. (*Ibid*.; emphasis added.)

The FTC further stated that "repurchase" or "other recourse devices available to creditors [could] facilitate the return of an account to a seller" and thus "compel the seller to carry the costs occasioned" by its misconduct. (*Ibid*.) The result of that repurchase or return of the account, the FTC reasoned, "will be a more accurate price for consumer goods." (*Ibid*.)

By reassigning plaintiff's contract to the seller, Exclusive Motors, Bank of Stockton forced Exclusive Motors to bear the cost of its own alleged misconduct, thus internalizing seller misconduct costs in the very manner the FTC intended its Holder Rule to cause.

Plaintiff scoffs, claiming that the FTC mentioned repurchase as a way the creditor could recoup money the Holder Rule forced it to pay the buyer rather than as a way for the creditor to avoid liability under the Rule. (AOB, 20, quoting *Hernandez I, supra*, 338 Conn. at pp. 826-827, 259 A.3d at p. 1170.) What plaintiff overlooks is that the economic effect is the same regardless of whether reassignment occurs before or after the buyer is

paid.[15] Either way, the seller bears the cost of its own misconduct, just as the FTC intended.

d. Plaintiff's Tarbaby Theory Separates Payment From Performance Contrary To The Holder Rule's Central Premise

Plaintiff's theory that a creditor remains liable under the Holder Rule even after assigning the contract to the seller or a third party should be rejected for another reason as well: it re-creates the very separation of the buyer's and seller's reciprocal obligations that the Holder Rule was intended to avoid.

As previously explained, the FTC's principal critique of the holder-in-due-course doctrine was that it separated the buyer's obligation to pay from the seller's obligation to perform. (See pp. ___ above.)

Plaintiff's once-a-holder-always-a-holder interpretation of the Holder Rule would reimpose that same separation. After assigning the contract to another, the creditor can no longer enforce the buyer's obligation to pay; yet under plaintiff's theory, it would still retain liability for the seller's non-performance.

Thus, as plaintiff interprets it, the Holder Rule forces the same separation of reciprocal duties that it was designed to prevent. Needless to say, nothing in the FTC's Statement of Basis or Guidelines supports that inherently contradictory proposition.

---

[15] Whether reassignment occurs before or after the buyer is paid matters only if the seller is insolvent and thus unable to pay the buyer. Nothing in the record of this case suggests that plaintiff could not recover his alleged damages from Exclusive Motors from whom he bought the car.

For the same reason, it is wrong to ask "what policy or purpose would be served by giving a creditor-assignee such an easy exit strategy." (*Hernandez I, supra,* 338 Conn. at p. 825, 259 A.3d at p. 1169.) The FTC's purpose in adopting the Holder Rule was to unite the buyer's obligation to pay and the seller's obligation to perform. That purpose is fully served so long as the party that currently holds the right to enforce the buyer's obligation to pay is subject to any claim or defense the buyer has against the seller.

So, the proper question is not why give the former assignee an easy exit, but rather why hold it still liable after it no longer can enforce the buyer's obligations? Plaintiff supplies no answer to that question. Nor do the FTC's Statement of Basis or Guidelines.

Under normal common law rules, an assignee steps into the assignor's shoes. (*Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co*. (2011) 191 Cal.App.4th 1394, 1402.) But they are not Denver boots. The assignor can shed those shoes by reassigning the obligation to another. Nothing in the Holder Rule's text or regulatory history suggests any reason for treating holders of consumer credit contracts any differently.

e. Other Rules Adequately Prevent Any Harmful Misuse Of Re-Assignment

Finally, plaintiff argues that if a former assignee is no longer liable under the Holder Rule after further assigning the consumer credit contract, "there could be an endless change in holders" or other misuse of reassignments to harm the consumer. (AOB, 21-22.)

The record of this case reveals no such misuse of reassignment. And, as Bank of Stockton has pointed out, there are a variety of other legal

rules which a consumer can invoke to prevent prejudicial misuse in other cases. (See RB, 23.) In addition, the Uniform Voidable Transactions Act (Civ. Code, § 3439, et seq.) affords a consumer a remedy if his contract is reassigned to an insolvent seller.

Thus, there is no need to distort the Holder Rule to prevent hypothetical misuse of reassignments.

IV.

CONCLUSION

For the reasons stated above as well as those set forth in Bank of Stockton's briefs, the Court should reject plaintiff's misinterpretation of the FTC Holder Rule and affirm the judgment.

DATED: September ___, 2023 SEVERSON & WERSON
A Professional Corporation

By: /s/ Jan T. Chilton
JAN T. CHILTON
Attorneys for Amicus Curiae
American Financial Services
Association

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains _____ words, as shown by the word count function of the computer program used to prepare the brief.

Dated: September ___, 2023

/s/ Jan T. Chilton
Jan T. Chilton

sPROOF OF SERVICE
Grayot v. Bank of Stockton
California Court of Appeal
Third Appellate District, No. C097061

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On November 16, 2021, I served true copies of the **Amicus Brief Supporting Defendant By American Financial Services Association** on the interested parties in this action as follows:

[SEE ATTACHED SERVICE LIST]

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC SERVICE: I electronically served the document(s) described above via **TrueFiling** system on the recipients designated on the Transaction Receipt located on the **TrueFiling** website (https://www.TrueFiling.com) pursuant to the Court Order establishing the case website and authorizing service of documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September __, 2023, at San Francisco, California.

Sandra Chao

SERVICE LIST
Grayot v. Bank of Stockton
California Court of Appeal
Third Appellate District, No. C097061

Placer County Superior Court
Appeals Division
P.O. Box 619072
Roseville, CA 95661-9072
(*Via Mail*)

Matthew J. Weber, Esq.
Jennifer L. Williams, Esq.
DOWNEY BRAND LLP
3425 Brookside Road, Suite A
Stockton, California 95219

Attorneys for Respondent
BANK OF STOCKTON
(*Via TrueFiling*)

Christopher P. Barry
Gregory T. Babbitt
Michelle A. Cook
Auto Fraud Legal Center LLP
9988 Hibert Street, Suite 150
San Diego, CA 92131

Attorneys for Appellant
CHAD GRAYOT
(Via TrueFiling)

Mark A. Vaughn
Law Offices of John L. Fallat
68 Mitchell Blvd., Suite 135
San Rafael, CA 94903

Attorney for Hudson Ins. Co.
(Via TrueFiling)

Daryl J. Lander
Lander & Paul
4120 Cameron Park Dr., Ste. 102
Cameron Park, CA 95682

Attorney for Exclusive Auto Group, Inc.
(*Via TrueFiling*)