Supreme Court Case No.: S267576

In The Supreme Court of the State of California

TANIA PULLIAM
Plaintiff and Respondent,

vs.

TD AUTO FINANCE LLC
Defendant and Petitioner.

After A Decision By The Court Of Appeal For the Second Appellate District
Division Five
2nd Civil No. B293435

After An Appeal From the Superior Court of Los Angeles County
Hon. Barbara M. Scheper, Judge
Case Number BC633169

REPLY IN SUPPORT OF PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED PARTIES

TD Auto Finance LLC is a Michigan Limited Liability Company, and a wholly-owned subsidiary of TD Bank, N.A., a national banking association that is a wholly-owned subsidiary of TD Bank U.S. Holding Company, a Delaware Corporation, which in turn is a wholly-owned subsidiary of the Toronto-Dominion Bank, a Canadian-chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol "TD."

DATED: April 9, 2021

Respectfully submitted,

MCGUIREWOODS LLP

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ARGUMENT

I. The parties agree that this Court should grant review.

Petitioner and Respondent agree that a split of authority exists between decisions of the California Courts of Appeal on the two questions presented in the petition. *See* Br. in Opp. (BIO) 8. They also agree that the questions are of high importance to the industry and for consumers in California. BIO 10 (citing eight current cases in the Courts of Appeal that raise the same issues). Ultimately, "Pulliam agrees that this Court should grant review to settle this important area of the law." BIO 8.

Respondent also argues extensively about the merits of the two questions presented. BIO 20-32; *contra* Pet. 19-25. Respondent's arguments are wrong. At this petition stage, the exchange of arguments simply shows the need for this Court to grant the petition and hear the case on its merits. TDAF will address Pulliam's arguments in detail at the merits stage should this Court grant its petition for review.

II. *Pulliam* should not remain precedential during review.

Next, Respondent asks this Court to order that the decision below remain precedential during this Court's review. BIO 9-11 (citing Rule 8.1115(e)(3)). Respondent wants this Court to keep the problematic split in authority in place as long as possible. The Court should decline this invitation.

First, Respondent cites no case in which this Court has used Rule 8.1115(e)(3) to preserve "uncertainty." BIO 10 (citing only *People v. Meraz* (2017) 215 Cal. Rptr. 3d 3 and *In re Humphrey* (2018) 19 Cal. App. 5th 1006). In *Meraz*, this Court left as precedential the Court of Appeal's discussion of a constitutional Confrontation Clause issue, while granting review on separate issues related to an offender's youth. *People v. Meraz* (2018) 425 P.3d 584. Nor does the grant of precedential effect in *In re Humphrey* favor doing so here. In that case, this Court *denied* Rule 8.1115(e)(3) relief at first, and only granted it *in part* two years after the parties had fully briefed the case on the merits, and a few months before affirming the Court of Appeal anyway. Neither *Meraz* nor *Humphrey* is at all similar to this case. Preserving "uncertainty"—that is, intentionally prolonging a split of published authority—is not a proper use of this Court's discretion under Rule 8.1115(e)(3).

Second, the core reason Respondent gives for maintaining the precedential value of *Pulliam* during this appeal is that dueling precedents may facilitate settlements. BIO 9-10. But precedential value is unnecessary for that. If this Court grants review, all parties in all the cases bringing these issues will understand that the issue is in question and up for decision. The (presumably) compromise settlements that Respondent seeks to encourage thus may occur regardless of whether the decision below maintains precedential value.

Third, the fact that some of these cases go to arbitration is irrelevant. Respondent suggests that "only with precedential caselaw [can] consumers . . . argue to arbitrators that *Lafferty* and *Spikener* were wrongly decided." BIO 11. That is wrong. Just like the parties, arbitrators will understand that while this case is pending review in this Court, the law is open to question. Nothing stops plaintiffs from arguing the persuasive value of *Pulliam* in arbitrations, whether or not it is precedential. *Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal. App. 4th 881, 887 (noting that arbitrators are free to take their own views on legal issues). Similarly, any trial court that does not wish to rule on this issue while this case is pending review in this Court has the "inherent power, in its discretion, to stay proceedings when such a stay will accommodate the ends of justice." *OTO, L.L.C. v. Kho* (2019) 8 Cal. 5th 111, 141. Such a stay would also freeze the accumulation of further attorney's fees, reducing the eventual risk of loss to both the plaintiffs' bar and financial institutions.

Fourth, there is nothing "unfair" about following the usual course so that *Pulliam* will not be precedential during review in this Court. BIO 11-12. *Lafferty* and *Spikener* are published decisions and they are precedential because this Court denied review and declined to depublish them. Now a split has arisen and review is warranted. There is no "blow to Californian consumers," BIO 12, from the orderly path this Court normally follows in reviewing cases.

III. This Court should deny Respondent's new questions presented.

Respondent also asks this Court to address two new issues: one about the scope of the Federal Trade Commission's power to preempt state law, and one about whether the Holder Rule preempts California Civil Code § 1459.5. BIO 12. Neither question is properly before this Court.

As a threshold matter, both of these issues focus on preemption. Respondent tries to inject preemption here to gain freewheeling review of all Holder Rule-related issues that have aggrieved the plaintiffs' bar. But the Court of Appeal below specifically declined to address § 1459.5 at all, much less whether it was preempted. Op. 33 ("We need not address whether section 1459.5 independently applies"). Thus, the Court of Appeal stopped *two steps* short of ever addressing preemption. Nor is preemption or § 1459.5 necessary to this Court's consideration of the Petition's two issues presented.

A. This Court should not review a point made in an entirely different case.

In *Spikener v. Ally Fin., Inc.* (2020) 50 Cal. App. 5th 151, 162, *review denied* (Oct. 14, 2020), the Court of Appeal ruled that the Holder Rule preempted § 1459.5. This Court denied review of that holding and declined to depublish it.

Respondent's first new issue seeks review of a point made in *Spikener*, not here. BIO 13-14. *Spikener* recognized that the Holder Rule

and the FTC's comments informing its meaning bar state law from changing the remedies in a Holder Rule case. According to Respondent, *Spikener* got that wrong because the FTC lacks the authority to preempt state law. Respondent admits that this issue comes from *Spikener*. BIO 13 (conceding that the court below in this case was "[not] presented with this argument"). In fact, even in *Spikener itself*, no party presented this issue. *Id.* Review by petition is not a stew where either party can throw in anything they dislike from any appellate decision in the same field of law. This Court should grant only the two original questions presented in the Petition.

B. The preemption of § 1459.5 was not addressed below, may never arise in this case, and there is no split on it.

Respondent's second new issue is whether the Holder Rule conflicts with, and thus preempts, § 1459.5. For four reasons, this issue does not warrant review now.

First, the Court of Appeal below stopped far short of ever reaching this issue. The Court of Appeal declined to decide whether § 1459.5 "independently applies" at all, much less whether it was preempted. Op. 33.

Second, § 1459.5 does not apply here at all. Preemption thus should *never* arise in this case. The California legislature created § 1459.5 in 2019, and it took effect on January 1, 2020. Yet this lawsuit was filed in

2016, and the attorney's fees motion was granted in August 2018. Any application of § 1459.5 thus would impose on Petitioner liability for attorney's fees based on conduct years before § 1459.5 ever existed.

Respondent thus would have to prove that § 1459.5 is retroactive for it to apply here at all, even before reaching any preemption analysis. *Myers v. Philip Morris Companies, Inc.*, (2002) 28 Cal. 4th 828, 839 ("a statute that operates to increase a party's liability for past conduct is retroactive"). But "there is a strong presumption against retroactivity." *McClung v. Employment Dev. Dep't.* (2004) 34 Cal. 4th 467, 475. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at p. 479.

Some precedent holds that certain attorney's fees statutes are "procedural" and thus can properly apply to cases on appeal when the statute takes effect. *See Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal. 3d 917. But this Court has since moved away from the procedural versus substantive distinction. *Quarry v. Doe I* (2012), 53 Cal. 4th 945, 980 ("when we are called upon to determine whether a statute permissibly may apply retroactively, the distinction between procedural and substantive rules is not particularly helpful.").

Modern case law is not clear about whether a statute like § 1459.5 should be applied retroactively. For instance, in *Andreini & Co. v.*

MacCorkle Ins. Serv., Inc. (2013) 219 Cal. App. 4th 1396, 1406, the court refused to apply a new court rule about imposition of costs to a case pending on appeal when the rule changed. On the other hand, in *USS-Posco Indus. v. Case* (2016) 244 Cal. App. 4th 197, 221, the court disagreed with *Andreini* and applied a new version of an attorney's fees statute, but acknowledged "there is not total unanimity on this score" and addressed different positions taken by the U.S. Supreme Court, federal courts, and various California courts on retroactivity of similar statutes and rules.

Ultimately *Andreini* was right. Applying § 1459.5 retroactively here would "clearly qualify as new or different liability, an increased liability, and thus a substantial change in the legal consequences of past conduct." 219 Cal. App. 4th at 1406 (adding that changing an award from $6,500 to $221,000 would be an improper retroactive application of law). The same is true here, where § 1459.5 may purport to impose *fifteen times* the proper amount of liability on TDAF.

The point is, it is far from clear whether § 1459.5 should apply here at all, long before any court could reach the preemption issue Respondent suggests. No court below has addressed that issue in this case. This Court should not take it up now.

Third, even if this Court could reach preemption here, there is no split in the Courts of Appeal on the preemption issue. *Spikener* is the only

published authority on point, and it finds § 1459.5 preempted. Disagreement among the Courts of Appeal is the main reason why the questions in the Petition should be granted here. But on preemption there is no split.

Fourth, Respondent's argument about preemption lacks merit. The sole Court of Appeal authority on point is correct: the Holder Rule preempts § 1459.5. The federal Holder Rule limits recovery against the holder of the loan to "amounts paid by the debtor." 16 C.F.R. § 433.2. California law, on the other hand, announces that a plaintiff who prevails "on a cause of action against a defendant named pursuant to Title 16, Part 433 of the Code of Federal Regulations"—that is, against a holder of the loan—may "claim attorney's fees . . . to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller." Cal. Civ. Code § 1459.5.

The conflict appears on the face of the federal regulation and state statute. Federal law allows a plaintiff to sue the holder of the loan but limits recovery. State law piggybacks on the same cause of action but then expressly calls for unlimited recovery. As *Spikener* held, "to the extent section 1459.5 authorizes a plaintiff's total recovery—including attorney fees—for a Holder Rule claim to exceed the amount the plaintiff paid under the contract, it directly conflicts with the Holder Rule and is therefore

preempted." *Spikener*, 50 Cal. App. 5th at 162–63, *review denied* (Oct. 14, 2020).

CONCLUSION

This Court should grant review of the two issues in the Petition, deny Respondent's request to maintain the precedential weight of the decision below during review, and deny Respondent's request to add new issues.

DATED: April 9, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1800 Century Park East, 8th Floor, Los Angeles, CA 90067-1501.

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Executed on April 9, 2021, at Los Angeles, CA.

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STATE OF CALIFORNIA
Supreme Court of California

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4/9/2021

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