

The Consumer Finance Podcast x Payments Pros – Point-of-Sale Finance Series: Door-to-Door Sales and Home Improvement Financing

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Jason Cover: Welcome to a special crossover edition of *Payments Pros* and *The Consumer Finance Podcast*. I'm Jason Cover, one of the hosts of the *Payments Pros* podcast. And today, I'm joined by my colleagues, Taylor Gess and Andrew Thurmond, to discuss some issues specific to home solicitation and home improvement contract laws.

But before we jump into today's episode, let me remind you to visit and subscribe to our blog, troutmanfinancialservices.com. And don't forget to check out our other podcasts on troutman.com/podcast. We have episodes that focus on trends that drive enforcement activity, digital assets, consumer financial services, and more. Make sure to subscribe to hear the latest episodes.

Andrew and Taylor, thank you for joining us.

Taylor Gess: Thanks, Jason. It's good to be here.

Andrew Thurmond: Yeah, thanks, Jason.

Jason Cover: Taylor, I think something that may be lost on some folks when we talk about home improvements and home improvement finance is that a lot of the transaction can actually happen at the consumer's household, right? Someone is out, leaving flyers for a new roof or whatnot. And you call them, they're invited in, they give you a quote. Are there laws that apply when that type of transaction happens?

Taylor Gess: Yeah, Jason. So, in our previous podcast, we briefly touched on how home improvement finance can implicate these home solicitation sales laws. That's true also of the solar vertical. And many industries can face compliance issues related to federal and state home solicitation sales laws. And those laws could apply both to the sale, like you're talking

about, for example, the home improvement contract, or the HIC, and any credit agreement, maybe the loan that's financing the home improvement.

Very generally speaking, the Federal Trade Commission's Cooling-Off Rule and many state analogs cover non-emergency sales made at a consumer's home. It could also be a workplace or some sort of temporary location of a seller like a convention center or a sale at the fairgrounds. If that sale is for \$25 or more, if at a home, or \$130 or more, if at a temporary location.

There's some nuance here from state to state on the scope of the provisions and some additional exceptions, such as if the buyer has initiated the contact and requested the seller visit the buyer's home for the purpose of repairing or performing maintenance on the buyer's personal property, and there are no additional goods, or services, or any sort of upsale sold beyond those originally requested, that could be an exception to application of the laws.

But, really, anytime, if there's an out-of-business sale by a seller, the application of these laws should be thought about. And broadly speaking, the Cooling-Off Rule makes it an unfair or deceptive practice to fail to provide buyers with a right to cancel. And so that cancellation period under the federal rule is three business days. And the rules also require that the buyer be made aware of that right to cancel at the time of the sale.

And I think it's important to note that this cancellation right, it's not that the consumer needs a specific reason or something has gone wrong to cancel the sale. This consumer can cancel for any reason or no reason at all if they're in that cancellation time frame. So, the seller has to make that consumer aware of the right both by providing an oral notice and written notices at the time the buyer signs a contract or purchases the goods or services.

And there's two types of written notices that must be provided in the same language that was used in the sales presentation. There's a signature line disclosure that's given in the space right above where the consumer signs an agreement or on the front page of a receipt, and a cancellation notice that is provided in duplicate and detachable form that a buyer can sign and send back to the seller to cancel the sale.

And if a consumer cancels, the seller has obligations that they need to take care of within 10 days, cancelling and returning any check, cancelling a security interest, refunding the money. And the seller also needs to pick up any items left or reimburse the buyer with the cost of mailing items back to the seller upon cancellation.

Jason Cover: Taylor, I know we were bemoaning earlier today that it would be nice if there was just one federal rule that preempted all the other rules, but that's not the case for the most part. Could you elaborate on that a bit?

Taylor Gess: Yeah, unfortunately not, Jason. There are a lot of state laws that set forth requirements that are similar to the FTC's Cooling-Off Rule, but they can also differ in some really important ways. There's some states out there that have cancellation periods longer than the three business days under the federal rule, or maybe differing cancellation periods that are based on the product type, or whether the buyer is a senior citizen. For example, California, North Dakota, and Maryland all have some extended cancellation periods in certain circumstances.

There are also some states with specific cancellation notice language targeted at specific types of sales. North Carolina has some language about antique sales specifically. It's also fairly common to see state-specific signature line disclosure language or changes in the permitted methods for the buyer to deliver the cancellation notice or specific formatting requirements. State laws can also have some features that impact how the number of days in the cancellation period are calculated.

The state could have different definitions of holidays, or business days, or the days included as a business day. So, the counting of the cancellation period might not be the same under federal and state law. And then when you have these situations where the federal law and the state law have differing disclosure language, or timing requirements, or business day definitions, companies need to consider how those state-specific requirements will be addressed. Are there going to be state-specific disclosure language in a separate notice? Or are the federal notices

going to be modified in a way that's more consumer-friendly to align with state law? It can be a really complicated maze.

And, I guess, although it isn't a state law, I just want to also note that Regulation Z has a cancellation right that applies when a security interest is or will be retained or acquired in a consumer's principal dwelling. That generally means a security interest in a consumer's residential structure that's his or her primary home. But there is some nuance under Reg Z with respect to materialman's liens and mechanic liens, even if a contractor creditor is not taking a security interest. So, that can get a little tricky when we're trying to think about the FTC's Cooling-Off Rule, and TILA and Regulation Z, and state laws. It really is a bit of a maze.

Jason Cover: What are you seeing clients do when they offer an array of products to finance and there's multiple different time frames or multiple different notices? Do you see them trying to navigate all of the different requirements? Give one form, multiple forms? Give the best terms possible? What are you kind of seeing is the industry standard or where the industry is coalescing?

Andrew Thurmond: I would answer that as yes, Jason. Kind of everything you just said is something we have probably seen our clients do, right? There is no industry standard here, and it really sometimes boils down to client preference. Things like the Cooling-Off period or the cancellation notices, right? I think sometimes that's something very simple that a lot of folks have seen, right? We will see some clients decide they want to just give two copies. Of course, one form of a cancellation notice. Other times they'll want a federal or compliant form, and then a state-specific form. And sometimes it varies on the number of business days or the exact language that they use. And I think that applies across the board. We can see all kinds of different options here trying to tackle it. And quite frankly, it just depends on our conversations with our clients of how they want to do it and how they think it best fits for their product and for, really, their risk tolerance as well.

Jason Cover: We talked about this on a podcast one or two ago, but the other thing to consider here is when funding occurs, right? If you fund at origination and there's a rescission period, you may need to get that money back somehow. It's another kind of important overlay on that. And

some of our clients have even delayed funding until substantial completion or things of that nature to avoid some of the similar problems that come up. But lots of jumping off points and decisions to make if you're going to get into this.

Taylor, I guess in my mind, the policy rationale for these home solicitation statutes is that when someone's in your house, you may just sign the thing to get them out of it. And this gives you the opportunity to do that and cancel later without the pressure of someone being in your home. Which leads us to another ever-popular talk topic we've hit on in some of the other podcasts is the merchant bad acts that are a source of contention in point of sale finance. Have you seen anything in that vein that ties in with home solicitation statutes?

Taylor Gess: Yeah, definitely, Jason. I think there are certainly some opportunities for some of those dealer bad acts we've been discussing to occur in the home solicitation context. One is that a salesperson or another employee that is in the home making the sale could fail to provide that required oral notice of the right to cancel. They're focused on the sale and not the fact that the sale could be cancelled, right?

There's also risk that a dealer will use a language other than the language the agreement or receipt is provided in during the sale. For example, a dealer at someone's house, maybe they're speaking in Spanish to make the sales presentation, and then all the agreements and signature line disclosures and cancellation notices are provided in English. That's a problem under the FTC rule. And how foreign language usage is to be handled in a program that involves door-to-door sales? That's a great item to address in the dealer agreements that we've talked about and also in the training, right? And to be reviewed in audits and ongoing monitoring.

And I think we'd also previously talked about some complexities that change orders can bring in the home improvement context. And when we're talking about home solicitation sales, there's the potential that a change order could present the risk of an additional right to cancel applying to the change scope of work or financing. And there's also some risk that someone could argue that cancellation disclosures provided electronically are not easily detachable, as the federal rule and most state analogs require.

Jason Cover: You can't electronically print a perforated line in the contract, Taylor?

Taylor Gess: Yes. Still working on a solution to that one.

Jason Cover: Andrew, I guess sort of dovetailed to these laws are actual statutes that govern contractors or home improvements. And some of these, I think the solicitation rules are buried in those. It seems like we are getting an email every other day about a new home improvement contract law or a modification of one. And I think maybe folks that are on the contracting side know lots about these, but I feel like our clients that are on the finance side are increasingly becoming aware of them because they increasingly impact the financing and the product terms. But just curious if you had any thoughts about what's going on in that area at this point.

Andrew Thurmond: Yeah, you're right. That is becoming more and more important with our financing clients as well. The home solicitation roles that Taylor just talked about really overlap with contractor laws, home improvement contractor laws, or just general contractor laws. A lot of times, they will either have the same exact rule or they will just maybe conflict, but often overlap or be complimentary. You really need to be looking at every kind of possible statute if you were engaged in any type of home improvement.

And one of the most important things I noticed with this is it does depend on kind of exactly what your product is of what rules might apply to you. Some states have very broad rules. Some states have solar-specific, solar-specific home improvement rules, others are solar improvement goods. Some are solar improvement services. Some are solar home improvement or home improvement goods and services. It just really runs the gamut, and every state is different.

And to Taylor's point earlier, there is definitely no one-size-fits-all federal law here for home improvement contractor laws. And that's the biggest thing I think we see is it depends on what you are looking to do. What are you looking to finance for a consumer, and what state are you in. Are some of the biggest things to look at.

Jason Cover: Andrew, if you're a finance company or a lender, what are some of the impacts these laws might have on your product?

Andrew Thurmond: I think some of the most important ones to think about are the flow of money restrictions. Some of these laws have down payment restrictions. Either you can't take a down payment or it's limited to maybe 10%. And, of course, it must be clearly disclosed. But yeah, there are percentage limitations for the down payment and then also progress payment.

Oftentimes, one of the things that a lot of folks see is contractors try to get paid as early as possible before their work is complete, and then they're not necessarily willing to stand behind the work product or get to completion. And some states have decided that they saw too many complaints or things like that. So, they now regulate the progress payments as well. A substantial amount, or maybe nearly all of the payments, must be made after the construction is completed. And that varies, of course, by size of project, too. Larger projects, tens of thousands of dollar projects, I think there is more flexibility in some state laws for some earlier progress payments. But smaller home improvements often lead to requiring completion before payment or before a substantial payment.

Jason Cover: We've also seen, I guess, that surprisingly enough, or maybe not surprisingly, a lot of these laws also have licensing requirements for the contractors themselves. That's another thing, when you're diligencing your contractor parties, confirming and asking about their licensure and making sure they have it, because it can become kind of like a downflow issue when someone finds out that these guys are running around without licenses as well.

Andrew Thurmond: And making sure it's properly disclosed. A lot of these laws require it to be very conspicuous, right? First page, or bold, caps, whatever. You must present it very early on, the license number, the type of license, which is another very important thing. Depending on the type of work you're doing is what type of contractor license that your entity has.

California is the most notorious. They have what feels like a million different licensing types. I'm sure it's just like a thousand. And it's very specific. It's solar, electric. It can be very nuanced. And so you want to make sure that your contractor has the license that, really, you're hiring, the homeowner is hiring them to perform and make sure that number is listed.

And one thing we also recommend, of course, gold standard here, and not all clients can do this. Not all financing entities can do this. But doing periodic checks, too, is a good idea. If you're in an ongoing five-year relationship with someone, maybe you want to, every year, make sure that these contractors are actually staying in good standing and things like that, too, and keeping their licenses up to date. Because maybe when you signed up with them, they did have a good licensing. They did have all their licenses, but they didn't keep them up to date, or maybe the licensing regime changed. And so, you need to be checking on an ongoing basis as well.

Jason Cover: That's a great point, Andrew. Taylor, I guess in addition to these contractor-specific laws, there are also laws specifically about home improvement financing. Could you tell us a little bit about those?

Taylor Gess: Sure, Jason. There are some states that have home improvement financing acts that specifically govern the financing of home improvements. For example, Michigan, Pennsylvania, and New Jersey all have significant laws on this topic. And the scope of these laws can be a little unclear or maybe leave a little room for disagreement as to the type of financing products covered under the law. For example, whether the laws apply only to retail installment contracts or if they also encompass loans as well.

And when these home improvement financing acts do apply to a product, they contain some pretty material requirements that need to be evaluated. The laws tend to include registration or licensing requirements. They may have finance charge limitations, require specific notices and other disclosures, and very specific formatting. How Andrew was just discussing, they may have additional or differing cancellation rights to what we talked about earlier. There are also requirements for assignment or limitations on fees, like late fee limitations. And there might be some prepayment requirements. So, definitely something to give some thought to.

Jason Cover: Taylor, I think you're saying all the way back to one of our original podcasts that it still is very important to determine whether you're a lender or a sales finance company and whether you're on a lending or a RIC model.

Taylor Gess: Yes, I think that's definitely key.

Jason Cover: That's great. I guess closing thoughts on this. Are there any trends, hot topics, or areas of concern or import that you would highlight to the audience?

Taylor Gess: Yeah, I think we're just seeing a lot of changes. And states have been just really active in this area with different types of laws. There's a law pending in California that would have some pretty significant impacts on home improvement finance, and solar. And so, just really staying on top of what's going on is important. Andrew, do you have some more thoughts?

Andrew Thurmond: There is ongoing changes, right? I think that's maybe the biggest trend we're seeing in all of these areas is attorneys general are focused on everything. And the laws are just constantly changing as more bad acts are kind of discovered. And everything we've talked about, too, kind of goes together, both home solicitation, home improvement, and home improvement financing. I think that's a trend, too. We're starting to see it all be wrapped as one.

Jason Cover: I guess I mentioned earlier, it seems like every other day there's an alert about a new state statute for the most part. I think that is going to be an increasing burden for clients whether you're on the contractor side of the house or the finance side of the house, monitoring all these new laws, amendments, and changes. And then to Andrew's point, sort of that state AG regulatory overlay as well is increasingly important, particularly as the activity at the federal level does decrease at least for the foreseeable future.

Andrew Thurmond: One thing I've been thinking about as well is the type of contracts and the breaking up of our contracts is becoming both more important and less important. I think from our perspective, we think it's very important to make sure that your financing agreement is separate from your construction agreements, your installation agreements. And making very clear who's the party to what document is becoming more and more important as certain states are looking more at the contractor's licenses and things like that, and questioning why you're a party to an agreement that you don't list your contracting license to, and it's because you're a financing entity. But really, you put too much home improvement contract language in your

contract. And so now a state is looking at you saying, "Well, you've kind of held yourself out to a homeowner as performing construction." Things like that are very critical to make sure you get your documents right.

But we're also seeing a trend where some of these state AG actions just treat it all as one big lump sum, and they'll reference, "Oh, we know you had five different agreements clearly between five different entities appropriately between five different entities doing five different things." But they don't care. They lump it all in with the bad acts together. So, I do think paying attention to who is contracting, and what agreements, and what roles the entities are providing is becoming more and more important.

Jason Cover: I feel you, Andrew. That's just been kind of a theme for all of these podcasts on point-of-sale finance in particular. Because that overlay of the merchant, or the contractor, or whatever it might be introduces this new party that, for just a lender that makes cash-out loans, you don't have to worry about. And it's a great point that the documentation of that. I think we talked a little bit about on the contracting podcast as well, that's a huge consideration and something you need to come to terms with if you're running one of these programs.

Andrew and Taylor, thank you so much for joining us today.

Taylor Gess: Yeah, thanks for having us, Jason.

Andrew Thurmond: Yeah, thanks, Jason.

Jason Cover: And thank you for our audience for listening to today's episode. Don't forget to visit our blog, troutmanfinancialservices.com, and subscribe so you can get the latest updates. Please also make sure to subscribe to the podcast via Apple Podcasts, Google Play, Stitcher, or whatever platform you use. We look forward to seeing you next time. Thanks.

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