

***The Consumer Finance Podcast x Payments Pros – Point-of-Sale Finance Series:***

The Holder Rule at 50

**Host:** Jason Cover

**Guests:** Brooke Conkle and Caleb Rosenberg

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**Jason Cover (00:05):**

Welcome to a special crossover edition of the [Payments Pros](#) podcast and [The Consumer Finance Podcast](#). I'm Jason Cover, one of the hosts of the [Payments Pros](#), and today I'm joined by Brooke Conkle and Caleb Rosenberg to discuss the implications of the Holder Rule for point-of-sale finance programs. 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. Brooke and Caleb, thanks for joining us today.

**Caleb Rosenberg (00:41):**

Thanks for having us.

**Brooke Conkle (00:42):**

Hey Jason, thanks for having me.

**Jason Cover (00:44):**

So, I think I've heard from a lot of clients in the point-of-sale finance space who say, well, geez, I worked with the merchant and my customer is now complaining about what the merchant did. That surely doesn't impact me. Caleb or Brooke, could you tell us why that isn't the case?

**Caleb Rosenberg (01:01):**

Sure, I'll jump on that one. So, the Holder Rule is a big part of the reason why that's not the case, but the Holder Rule itself only requires a disclosure, but the disclosure says that the creditor or the person who owns the loan or RIC is liable for claims and defenses that a consumer has against the seller of goods and services. Because of that, the person who owns the credit transaction can't simply ignore what the seller's practices are because it will end up impacting them because of the Holder Rule.

**Jason Cover (01:35):**

Caleb fully understood. My understanding of the Holder Rule is that it was essentially implemented back in the seventies because of that precise situation; a merchant would install something that didn't work properly, disappear overnight, its financier, and now the creditor,

essentially wants to force that same consumer to pay, but they didn't really get anything of value for those goods and services. And this makes a lot of sense in the context of the FTC's UDAP authority or rule making authority. It's clearly a fairly unfair practice when you have worthless goods that have been financed and then you have to keep paying for them and being charged interest or finance charges for them. And I guess the kind of question that leads itself after that is what types of transactions apply to the Holder Rule? Is this everything under the sun or what do I have to worry about if I'm a creditor operating a point-of-sale program?

**Brooke Conkle (02:28):**

Yeah, Jason, that's a great question. So, the Holder Rule applies to consumer credit transactions used to purchase goods or services. It's not credit card transactions. Those are subject to the Fair Credit Billing Act, but it does include both purchase money loans and credit sales. So, when you go to, in my line of work, when you go to finance the purchase of a motor vehicle, that credit sale is going to be subject to the Holder Rule. As I said, it also applies to other sales such as you have someone come install new windows in your house and you finance that transaction, that's going to be subject to the Holder Rule as well.

**Jason Cover (03:08):**

That's a great point on credit cards, Brooke, I think there's multiple provisions in Reg Z that sort of codify the same results for credit cards. So, I know we've had a couple podcasts about credit cards and how those work. So, something to keep in mind there too that you don't get out scot-free just because you're operating a credit card program. As a follow up to that. So that kind of defines the universe of what's in scope, how much liability am I on the hook for? Is it unlimited? Is it for all purposes? What do I need to worry about here and how broad of scope is this?

**Caleb Rosenberg (03:41):**

Yeah, so generally the liability is limited to the amount that's been paid by the consumer on the credit transaction. So, this effectively is the amount of the note or the contract. One wrinkle in that is that the FTC recently published some guidance saying that for some state claims, attorney's fees can be recoverable above the amount of the contract. That's still working its way through courts, but generally the limit is the amount of the note.

**Jason Cover (04:08):**

Yeah, I know that the attorney's fees issue in particular has been sort of a hot topic in the last few years with I think courts coming out on different ends of that scope. But the more important thing I think to take home is what type of merchant obligations apply when those are asserted? And in that vein, can we seek redress from the merchant or does the Holder Rule prohibit the creditor from attempting to hold that merchant's feet to the fire?

**Brooke Conkle (04:35):**

No, the Holder Rule does not inhibit the relationship between a merchant and a finance company. So, the Holder Rule kind of in certain ways I would say anticipates that there's going

to be a relationship there and usually the finance company is the one that has bigger pockets and that historically has been some of the FTC's rationale for the Holder Rule itself is that the consumer has the option to go after the party that probably has more money and probably has a better opportunity to make sure that the consumer is made whole. And specifically in terms of the Holder Rule, there often are vendor agreements, dealer agreements, merchant agreements that define the rights and responsibilities of the parties. And oftentimes litigation or complaints related to Holder Rule issues are covered in those agreements. So usually, again in my line of work in auto finance, what we oftentimes see is a finance company is brought into either litigation or a consumer complaint based on the actions of the dealer. And in the party's dealer agreement between the auto finance company and that dealer, there's going to be indemnification responsibilities on the dealer's part. So, if an auto finance company comes in and says, we've been named in this suit and our only act here is the fact that we accepted this credit contract. Dealer, you have an obligation to step up and indemnify us in this lawsuit.

**Jason Cover (06:05):**

Yeah, Brooke, we've spent several episodes talking about merchant agreements and contracting with merchants and diligencing merchants and that's a great point. We talked probably ad nauseum about having these types of provisions and they can take on different shapes and forms including indemnification provisions, reserves that you could have a merchant posts to cover things like this, clawbacks and offsets and everything under the sun you can think of. All great points and I think it brings up that other context of diligencing merchants, right? If there may be a difference from working with a merchant that operates on a 50-state basis is a multinational conglomerate versus Joe's shop down the street that may not have the staying power or ability to indemnify you regardless of what the merchant agreement says. So, it's kind of an important context here I think, of thinking about who you are dealing with and thinking about these, I guess there are legal implications that have business drivers at the end of the day, but sort of an important thing to think about upfront. Thank you for that. Continuing forward, what else should I be thinking about as a creditor in the context of the Holder Rule? We've kind of hit on the direct liability and how we might get indemnification for that, but are there other compliance management types of processes we should be instituting? Other things to think about here?

**Caleb Rosenberg (07:26):**

Yes, you already touched on what I think is the biggest one to mitigate risk, which is choosing your partners very carefully, which includes the upfront diligence and then having strong contract terms with them, both in terms of indemnity but also termination rights if things are going poorly for one reason or another, including because you don't feel financially secure that you're going to be able to collect that indemnity. A strong termination clause can help with that.

**Jason Cover (07:49):**

I really appreciate the termination rights, Caleb, because I spent a lot of time emphasizing that. I think that's very important.

**Caleb Rosenberg (07:56):**

Yeah, I could not agree more. And the other one that goes along with both termination rights and just general practices is having good ongoing monitoring. I think the most important place that I see this is with consumer complaints, so having your pulse on what's going on with individual dealers and your counterparties consumer complaints can be a great warning sign that can limit problems to individual contracts as opposed to systemic issues with an entire portfolio. And so having good monitoring both of your complaints and then also making sure that your dealers are forwarding their complaints to you and checking in with them regularly to make sure that you know what's going on can significantly limit exposure to Holder Rule issues. The other thing I'd say is just because there is a consumer complaint, we've seen clients go the other way. It doesn't mean that there's a meritorious claim, you don't need to roll over and provide a credit every time a consumer makes a claim. The Holder Rule only applies if the claim actually has merit. And so if a consumer's claiming for example that something wasn't delivered on time or that the quality wasn't good, you might be able to work with the dealer to show that the product was delivered on time and that there is no claim there. And that might cost you very little in terms of working with that consumer to make sure that there's no liability on your end.

**Jason Cover (09:16):**

Caleb, those are all great points. I think the customer complaint issue for, we often have startup fintechs that come to us and they don't have the resources yet to periodically monitor, audit every individual merchant that they sign up. I feel very strongly that if you did nothing else other than monitor consumer complaints, that would be something that is helpful. And to your point, that doesn't mean you have to immediately axe somebody as soon as they have a complaint, but it's a risk-based approach of, well geez, this particular merchant seems to have all of the complaints. Maybe there is something I should look into now. And I think another great point you made, Caleb, is making sure the merchants are passing along complaints too. I think a lot of our clients I see miss that, right? They have their own intake system but may not have a way to get merchant complaints to them, and that should be something in the merchant agreement as well. All great points and totally aligns with all of our other podcasts, which I find fantastic. Brooke and Caleb, do you have any other closing thoughts here on the future of the Holder Rule or what you're seeing in the market right now?

**Brooke Conkle (10:23):**

Yeah, I'll say it's interesting. We're in 2025 and we're celebrating the 50th anniversary of the Holder Rule, and it's a rule that has been extremely durable. It's one that is bedrock law in the industry, and really the only kind of substantial change is the one that Caleb mentioned and that the FTC a few years ago kind of issued the advisory opinion on the recoverability of attorney's fees. But really in a lot of ways it's a significant success for the FTC. It is a rule that a lot of folks on both sides of the aisle think that it is a good thing and that it really helps just as Caleb mentioned, monitor those relationships between merchants and finance companies. It can level the playing field a little bit and it makes sure that everybody is doing what they need to do as far as compliance goes.

**Jason Cover (11:14):**

Brooke, that's a great point. I think we've seen red states that you would not expect and include Holder Rule violation claims in enforcement, particularly in the home installation and solar space.

**Brooke Conkle (11:26):**

That's right.

**Jason Cover (11:26):**

I worry clients think this isn't a big deal or it's a one-off thing on a consumer-by-consumer basis and you might be able to ignore it, but AGs certainly have felt otherwise, and when they see systemic failure to address these types of claims, it can become a much bigger issue. Caleb, any other last thoughts?

**Caleb Rosenberg (11:46):**

No, I think that we've covered most of the things. I would just encourage people to review their oversight practices. I think that's the biggest place that you can mitigate these risks and it sounds like you guys have handled that message a number of times on the podcast, so I'm happy to hear that,

**Jason Cover (11:59):**

We're certainly trying Caleb. Well, Brooke, Caleb, thank you so much for joining us today. This has really been fantastic, and thank you to our audience for listening to today's episode. Don't forget to visit our blog, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and subscribe so you can get the latest updates. Please also make sure to subscribe to this podcast via Apple Podcast, Google Play, Stitcher, or whatever platform you use. Looking forward to the next time. Thanks so much.

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