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BORROWER LITIGATION THEORIES AND THEIR LIMITS

The Federal Trade Commission's Holder Rule was designed to protect consumers from being forced to repay credit obligations where the seller engaged in fraud or misconduct. By placing assignees in the same legal position as sellers for purposes of claims and defenses, the Rule prevents lenders and servicers from escaping liability when sellers acted wrongfully. In recent years, however, borrowers have advanced expansive interpretations of the Holder Rule that depart sharply from its text and purposes, nowhere more notably than in the student loan context. This article examines those emerging theories, including affirmative lawsuits seeking loan discharge, claims under unfair and deceptive acts and practices statutes, attempts to apply the Rule to refinance loans, and efforts to evade statutes of limitation. It also analyzes the ongoing dispute over the Rule's recovery cap, especially regarding attorneys' fees, and critiques the FTC's 2022 Advisory Opinion reversing prior guidance. This article argues that courts should reject these expansive borrower theories, decline to defer to the FTC's recent shift in interpretation, and enforce the Holder Rule consistent with its original, limited design.

By Eric M. Hurwitz and Christopher A. Reese *

The Federal Trade Commission's Holder Rule ("Holder Rule") has long served as a consumer protection tool designed to prevent the severing of a consumer's payment obligations from the misconduct of the seller who originally arranged financing. Codified at 16 C.F.R. § 433, the Holder Rule requires that consumer credit contracts contain a notice advising assignees that they are subject to all claims and defenses that the debtor could assert against the seller of goods or services. The Rule was designed to address the problem of sellers who arranged third-party financing, but left consumers with no recourse against the lender if the seller engaged in misconduct. 40 Fed. Reg. 53506, 53524 (Nov. 18, 1975).

When the FTC promulgated the Holder Rule in 1975, the prevailing commercial norm was governed by holder-in-due-course principles under Article 3 of the Uniform Commercial Code ("UCC"), under which assignees could enforce credit contracts free from most claims or defenses of the buyer.¹ The FTC viewed this result as unfair because sellers could escape liability for misconduct by assigning contracts to lenders, leaving consumers to pay for defective or fraudulently obtained goods or services. The Holder Rule sought to reallocate

* ERIC M. HURWITZ is a partner and CHRISTOPHER A. REESE is counsel in the Consumer Financial Services Litigation practice group at Stradley Ronon Stevens & Young, LLP's Cherry Hill, NJ office. Their e-mail addresses are ehurwitz@stradley.com and creese@stradley.com.

¹ U.C.C. § 3-302 (defining holder in due course) and § 3-305 (explaining rights of holder in due course to claims).