



February 12, 2016

Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: Holder Rule Review
(FTC File No. P164800)

Dear Sir or Madam:

This comment letter is presented on behalf of CU Direct Corporation (“CU Direct”) in response to the Federal Trade Commission’s (“FTC’s”) request for public comments as part of its systemic review of 12 CFR Part 433, part of the Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses (the “Holder Rule”).

CU Direct Corporation: Who We Are

CU Direct is the nation’s largest point-of-sale auto financing and indirect lending network for credit unions, serving more than 1,051 credit unions, 12,500 vehicle dealers, and 42.4 million members nationwide. Since its formation in 1994, CU Direct has provided credit union members with access to credit union financing at the automotive dealership through a fully-automated credit evaluation and loan processing system. Its flagship brand is the program known as Credit Union Direct Lending or CUDL (www.cudl.com), which provides indirect and point of purchase lending services for credit unions. Some of its other lending solution brands include Lending Insights (www.lendinginsights.com), Lending 360 (www.lending360.com) and CUDL Retail (www.cudlretail.com).

CU Direct delivers its services on a web-based platform to credit unions and vehicle dealers in 48 states. In 2015, 1.2 million retail installment sales contracts for approximately \$28 billion in credit union vehicle financing were funded through the CU Direct system.



LENDING • AUTOMOTIVE • STRATEGIC SOLUTIONS

The Holder Rule: Defunct Dealers and Attorneys' Fees

The Holder Rule is intended to protect consumers who enter into credit contracts with a seller by preserving their right to assert claims and defenses against any subsequent holder of the contract. CU Direct typically sees the Holder Rule come into play when a consumer has a claim against a vehicle dealer who processed his or her vehicle purchase transaction and then subsequently assigned the contract to a credit union or other financial institution (collectively, "lender"). If at fault, the dealer is responsible to make the injured consumer whole. To the extent that the dealer is unable to do so, the lender assignee is required by the Holder Rule to compensate the damaged consumer. Given the equities presented in such a dispute, this is generally deemed appropriate.

There is one circumstance, however, where the fairness of the Holder Rule must be seriously questioned. We call this the "Defunct Dealer Situation."

When a vehicle dealer goes out of business after the subject transaction occurs, the lender to whom the contract was transferred is the only party available to address the consumer's damage claim. The lender is often completely ignorant of the facts surrounding the consumer's complaint. With the dealer now out of business and its employees scattered, there are little to no witnesses, documents or other evidentiary resources available to mount any sort of defense. As a result of the Holder Rule, the lender's only option is often to simply pay the consumer's claim. While unfair to the lender with clean hands, given the Holder Rule's purpose, this is generally deemed a cost of doing business that a lender must consider when choosing to participate in indirect lending.

However, the greater unfairness in the Defunct Dealer Situation is found not in the consumer's damage claim itself, but in the amount of attorneys' fees routinely claimed by plaintiff's counsel as part of the damages that the holder is ultimately responsible to pay under the law.

The Defunct Dealer Situation leaves lenders in a difficult and inequitable position. Because the lender cannot defend a claim it knows nothing about, settlement is almost always the best (or only) option. This is a reality that consumer attorneys know well and many try to capitalize on by front loading attorneys' fees and then demanding that all fees be paid as part of the settlement, regardless of whether reasonable, necessary, or legitimately incurred. Unfortunately, it has become somewhat routine for attorneys in these cases to generate as much in attorneys' fees as possible, often as much as \$7,500 or \$10,000, before a lawsuit is even filed. Once filed, hundreds of pages of "canned" discovery requests (often irrelevant and inapplicable) are served by plaintiff's counsel to further drive up fees. Some attorneys will even "prepare" the copious discovery requests before the defendant lender has even filed responsive pleadings in the lawsuit.

For lenders facing a Defunct Dealer Situation, settlement often involves rescission of the contract, which includes the return of all or a portion of the consumer's monthly payments, any down payment, and payment of the consumer's attorney fees. In exchange, the claim or lawsuit is dismissed and, depending on the age of the vehicle at issue, the consumer will either return the vehicle to the lender or retain possession. Even in situations where the vehicle is returned to the lender, the sale of the vehicle rarely results in sufficient funds to cover the lender's losses. Because the dealer is out of business, the lender has no recourse. The only alternative to settlement is to incur additional attorneys' fees in defending the claim in the hopes of reducing the amount of fees awarded to plaintiff's counsel, which may do no more than put the lender in an even worse position than before.

This result hardly seems equitable when the lender played absolutely no role in the dealer conduct that initially gave rise to the consumer's complaint. While it may be reasonable for a lender, as holder of the contract, to be liable for some of the consumer's attorneys' fees, it is far less reasonable to hold a lender liable for excessive or abusive levels of attorneys' fees, especially in cases where they are essentially unable to fight or contest the claim.

CU Direct and its credit union participants believe that, in the Defunct Dealer Situation, the Holder Rule has the unintended consequence of unfairly burdening the lender and exposing it to potential abuses. We strongly encourage the FTC to consider developing a fair and reasonable schedule of attorneys' fees to make it equitable and fair to credit unions and other financial institutions faced with the Defunct Dealer Situation.

We respectfully ask the FTC to correct the Defunct Dealer Situation.

We appreciate the opportunity to comment on the FTC's Holder Rule.

Sincerely,



Tony Boutelle
President & CEO