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STUDENT ARTICLES

Affirmative Recovery Under The FTC Holder Rule

Ellen Carey

I. Introduction

Suppose a consumer purchases a defective product and signs a retail installment contract which provides that the seller can assign the contract to a creditor who finances such purchases. If the seller does assign the contract to a creditor, the consumer is forced to pay the creditor even though the product is defective and the purchaser could normally withhold payment from the seller. To protect consumers in this situation, the Federal Trade Commission ("FTC") promulgated a law known as the FTC Holder Rule.¹ Generally, the trade regulation rule preserves consumer's claims and defenses. A consumer who purchases a defective product, for example, has a defense if the creditor sues for payment.² The regulation also provides that in certain circumstances, a consumer may be entitled to affirmative recovery from the creditor for the seller's misconduct.³ For example, the consumer may initiate an affirmative breach of warranty action against the creditor even if the creditor elects not to sue the consumer.⁴

Depending on which state a consumer lives in however, the consumer may not be entitled to such affirmative recovery. The Eighth Circuit, in *LaBarre v. Credit Acceptance Corporation*, recently denied affirmative recovery to a purchaser of a defective used car.⁵ The court found that a Minnesota statute limited consumer's rights

to asserting defenses against creditors or assignees.⁶ This decision essentially prohibits affirmative recovery under the FTC Holder Rule in Minnesota and potentially, in any state which has a consumer protection statute containing similar limiting language. Under *LaBarre*, state consumer protection statutes can deny consumers the right to bring affirmative claims against a creditor when that creditor has chosen not to sue the consumer. The decision thwarts FTC intentions and promotes inconsistency in consumer protection by allowing individual states to alter the FTC Holder Rule with respect to affirmative recovery. Consumers in states with limiting consumer protection statutes may not enjoy the consumer protection that the FTC sought to ensure by implementing the Holder Rule.

This Note will discuss the FTC Holder Rule and the effects that the Eighth Circuit's decision likely will have on consumers. Part II offers an overview of the Holder in Due Course doctrine, an introduction to the FTC Holder Rule, and the development of the trend towards affirmative recovery under the Rule. Part III of the Note will then discuss the Eighth Circuit's decision in *LaBarre v. Credit Acceptance Corporation*, and Part IV will analyze how the court's decision departs from the recent trend towards affirmative recovery. Finally, Part V will discuss the possible effects the *LaBarre* decision will have on a consumer's ability to obtain affirmative recovery under the Holder Rule.

II. The FTC Holder Rule Abrogates the Holder in Due Course Doctrine and Offers Consumers Additional Protection by Allowing Affirmative Recovery

A. The Holder in Due Course Doctrine

Ordinarily when a consumer makes a purchase, the seller's obligation to perform is conditional on the buyer's obligation to pay the seller.⁷ Suppose, however,

that a consumer purchases a defective diamond watch, and pursuant to the retail installment contract the consumer signed, the seller assigns the contract to a credit corporation which provides financing for such purchases. If the credit corporation, or the assignee, takes the consumer credit instrument (here the assigned installment contract) "for value, in good faith, and without notice of any defenses against it or claim to it," the assignee is considered a holder in due course.⁸ The assignee can demand payment even though the diamond watch is defective.⁹

Because the watch is defective, the buyer's obligation to pay the seller would usually be extinguished or the buyer would have a defense to the seller's demand for payment. The holder in due course doctrine (the HDC doctrine) however, entitles subsequent holders of the consumer credit instrument to full payment. The doctrine insulates them from any defenses the buyer would have had against the original holder of the note (i.e. the seller).¹⁰ Hence, the buyer's obligation to pay is independent of the seller's obligation to perform. The buyer is forced to pay the assignee regardless of seller misconduct such as breach of warranty, breach of contract or even fraud on the seller's part.¹¹

B. The FTC Holder Rule

Under the HDC doctrine, consumer's rights were not protected. The seller could easily separate its duty to perform from the buyer's obligation to pay the assignee of the consumer credit instrument. In 1975, the Federal Trade Commission introduced the Preservation of Consumers' Claims and Defenses, known as the FTC Holder Rule, in an effort to abrogate the HDC doctrine in consumer credit transactions.¹² The Holder Rule requires most consumer credit contracts to include the following provision:

Notice

Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.¹³

The rationale behind implementing this trade regulation rule was two-fold: (1) to protect consumers by preventing credit terms which allow a seller to divorce his obligation to perform from the consumer's obligation to pay, and (2) to internalize the cost of seller misconduct such as breach of warranty, breach of contract, or fraud by forcing creditors to absorb the cost of this misconduct and redirect it back to the seller.¹⁴

The rule was designed to prevent credit terms which ultimately forced a consumer to pay a creditor even if the seller's actions would entitle the buyer to withhold payment from the seller.¹⁵ The FTC sought to make available to consumers claims and defenses to defeat the right of the creditor to be paid in cases where sellers arrange financing for buyers and then fail uphold their obligations.¹⁶ Under the Holder Rule, consumers' rights are significantly increased because essentially the HDC doctrine is abrogated. Consumers are entitled to all defenses they would have against the seller when a creditor sues for payment.¹⁷ Additionally, a consumer may, in certain circumstances, be entitled to affirmative recovery.¹⁸ A consumer may sue a creditor for the seller's fraud. For example, by seeking the return of money, the consumer seeks return of monies paid to the creditor pursuant to the financing arrangement.

The other rationale behind implementing the FTC Holder Rule was to internalize the costs of seller misconduct.¹⁹ According to the FTC's Statement of Basis and Purpose for the Holder Rule, the costs of seller misconduct are completely allocated to the buyer under a

commercial system which allows sellers and creditors to make a buyer's obligation to pay independent of the seller's obligation to perform as promised.²⁰ The FTC found it an unfair practice for the costs resulting from breaches of contract and warranties, misrepresentation, or fraud to be allocated to the buyer.²¹ Hence the Holder Rule was designed to reallocate the costs of seller misconduct.²²

The FTC found that creditors are in a better position than consumers to redirect seller misconduct to its rightful place; i.e., to the seller where the seller is the guilty party.²³ Under the rule, the buyer is not forced to bear the costs of seller misconduct because the seller can no longer effectively divorce its obligation to perform from the buyer's obligation to pay.²⁴ Because creditors are forced to absorb the cost of seller misconduct or redirect the cost back to those sellers, the costs become internalized under the Holder Rule.²⁵

C. The Trend Towards Allowing Affirmative Recovery under the Holder Rule

The FTC Holder Rule effectively allows consumers to assert all claims and defenses against creditors that the consumer would be entitled to assert against the seller had the contract not been assigned.²⁶ The issue is whether a consumer can assert such claims and defenses against a creditor only when the creditor has instituted an action against the consumer. Several courts have addressed the question of whether the FTC Holder Rule provides for affirmative recovery from a creditor, or whether a consumer is limited to asserting claims against a creditor only in response to a claim initiated by the creditor. Decisions by such courts have led to the development of a trend towards allowing consumers to seek affirmative recovery under the rule. The following will discuss the development of this trend and will provide background for the discussion of the *LaBarre* decision and its ultimate effects on consumers.

The district court's decision in *Mayberry v. Said*, clearly illustrates the recent trend towards allowing affirmative recovery under the FTC Holder Rule.²⁷ In that case, a purchaser of a truck with a rolled-over odometer sued the seller and the bank which financed the sale.²⁸ The purchaser brought claims under the Kansas Consumer Protection Act, the Federal Odometer Statute, and for fraud in the mileage representations.²⁹ The bank argued that the purchaser was precluded from asserting affirmative claims against the bank because the FTC Holder Rule only permits defensive use of claims and defenses.³⁰ The *Mayberry* court held that the FTC Holder Rule authorizes consumers to assert affirmative claims against creditors because both the plain language and the history of the rule indicate that the FTC intended consumers to be able to assert either defenses or initiate affirmative claims.³¹ The court noted that the plain language of the Holder Rule authorizes the use of affirmative claims and nowhere does the rule indicate that a consumer's claims and defenses are limited to being asserted in a defensive manner.³²

The *Mayberry* court found that the rule's history supported the conclusion that affirmative claims by consumers are permissible under certain circumstances.³³ According to the court, the FTC specifically considered and rejected the proposition that consumers' claims and defenses be limited to defensive use.³⁴ The court quoted the FTC:

Many industry representatives suggest that the rule be amended so that the consumer may assert his rights only as a matter of defense The practical and policy considerations which militate against such a limitation on affirmative actions by consumers are far more persuasive.³⁵

Other courts examined the circumstances under which such an affirmative claim may be asserted by the

consumer. A few courts have found that in order to assert an affirmative claim against a creditor or assignee of the contract, a consumer must have either (1) received little or nothing of value from the seller or (2) have the right to rescind the contract.³⁶ In contrast, two courts held that a consumer *need not* show that he or she has received little or nothing of value in order to affirmatively recover from a creditor.³⁷ Those courts held that because the FTC Holder Rule's notice provision does not advise creditors that a consumer must have received little or nothing of value in order to assert affirmative claims against the creditor, the consumer need not make such a showing.³⁸

Regardless of what type of limitations a court may place on a consumer who desires to assert affirmative claims against a creditor or assignee, most courts seem to agree that a consumer is entitled to affirmative recovery from a creditor.³⁹ Some courts expand the trend allowing affirmative recovery under the FTC Holder Rule by eliminating the requirement that a consumer make a showing that he or she has received little or nothing of value, while other courts still require such a showing.⁴⁰ Another issue regarding affirmative recovery under the Holder Rule can arise when a state statute conflicts with the FTC rule. What happens when a state statute expressly limits a consumer's right to assert claims and defenses against a creditor or assignee?

The district court in *Eachen v. Scott Housing Systems, Inc.*, found that the FTC rule does not permit individual states to rescind the regulation with respect to consumers' rights to assert claims and defenses against creditors.⁴¹ The Eachens brought an affirmative claim against the seller and the creditor when they became dissatisfied with the defective mobile home they had purchased.⁴² The credit corporation argued that the Eachens could not assert an affirmative claim against it because under Alabama law, the Eachens were only entitled to assert their claim as a matter of defense or to

offset a claim asserted by the creditor.⁴³ The Alabama Consumer Finance Law states in relevant part:

... an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessee arising out of the sale or lease. . . Rights of the buyer under this section can only be asserted as a matter of defense or to set-off against a claim by the assignee.⁴⁴

The *Eachen* court held that the Alabama law was inapplicable because the consumers' claim was not premised on that law but was brought under the FTC Holder Rule.⁴⁵ The consumers' rights were not asserted under the appropriate section of the Alabama law and therefore, were not limited by it.⁴⁶ The court noted that the FTC rejected a proposed amendment to the regulation that would limit consumers to asserting claims in a defensive manner. According to the FTC, the rule specifically allows a consumer to obtain affirmative relief from a creditor for monies paid.⁴⁷ The *Eachen* court explained one of the FTC's policy reasons for refusing to limit consumers' rights to asserting claims only in a defensive manner. The FTC was concerned that if such a limitation existed, a creditor may elect not to sue in hopes that the threat of an unfavorable credit report may compel the consumer to pay the creditor.⁴⁸

The creditors then argued that the state law should be "engrafted" onto the FTC Holder Rule because the rule's guidelines state that applicable state law governs the manner and procedure by which a consumer may assert claims and defenses.⁴⁹ The *Eachen* court rejected this argument also, finding that the language in the guideline refers to state laws such as statutes of limitation or principles of equitable estoppel.⁵⁰ The court noted that if the state law was to be engrafted onto the FTC rule, then any state would be permitted to rescind the portion of the rule which provides for affirmative recovery for

buyers.⁵¹ Because the FTC did not intend for individual states to be able to rescind that portion of the Holder Rule, and nowhere in the rule is there express or implied authorization for such rescission, the court found that the state law should not be engrafted onto the FTC rule.⁵² Therefore, the buyers were permitted to assert affirmative claims against the creditor even though the Alabama law limits buyers to asserting claims only as a matter of defense or to offset a claim by the creditor.⁵³ Although the FTC intended for consumers to be able to assert affirmative claims against creditors under the Holder Rule, difficulties arise with respect to this intention when a state consumer protection law allows consumers to assert their rights only when a creditor has already initiated a claim against the consumer. Part III will show that not all courts agree what to do when a state law limits the FTC Holder Rule's provisions regarding affirmative claims.

III. The *LaBarre v. Credit Acceptance Corporation* Decision Departs from the Recent Trend Towards Allowing Affirmative Recovery

In *LaBarre v. Credit Acceptance Corporation*, a purchaser of a used vehicle attempted to bring affirmative claims against a credit corporation which provided financing for the purchase.⁵⁴ LaBarre signed a retail installment contract which provided that the dealer was assigning the contract to a credit corporation.⁵⁵ When LaBarre became dissatisfied with the purchase, she sought relief from the creditor pursuant to the FTC Holder Rule. The creditor however, had not sued LaBarre for payment.⁵⁶ LaBarre initiated the suit and attempted to assert claims against the creditor for the car dealer's breach of contract, violation of the Minnesota Motor Vehicle Retail Installment Sales Act, and breach of fiduciary duty.⁵⁷ LaBarre's installment contract contained the FTC Holder Rule, providing in relevant part:

Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof.⁵⁸

LaBarre asserted her claims against the creditor based on this language from the FTC Holder Rule.⁵⁹ The *LaBarre* court had to determine whether LaBarre could assert affirmative claims against the creditor when the creditor had not instituted an action against LaBarre.

The *LaBarre* court held that because Minnesota's consumer protection statute limited consumers to asserting their rights only as a matter of defense, LaBarre was not permitted to bring affirmative claims against the creditor when the creditor had not sued her.⁶⁰ The Minnesota statute subjects creditors or assignees to claims and defenses the consumer has against the seller.⁶¹ It provides in relevant part, "the rights of the consumer under this subdivision can only be asserted as a matter of defense to or set off against a claim by the assignee."⁶² The *LaBarre* court found the Minnesota limitation applicable because the Holder Rule guidelines state that appropriate statutes, rules, and decisions of each jurisdiction are to apply.⁶³ Because the Minnesota statute limits consumers to asserting their rights as a matter of defense, the court prevented LaBarre from asserting affirmative claims against the creditor.⁶⁴

IV. The *LaBarre* Holding Directly Contravenes FTC Intentions With Respect to the Holder Rule.

The *LaBarre* court fails to follow the established trend of allowing affirmative recovery under the FTC Holder Rule by denying a purchaser of a used vehicle the right to bring affirmative claims against her creditor. Several courts interpreting the Holder Rule have clearly

established that consumers have the right to bring affirmative claims under the rule despite the fact that the creditor has not initiated an action against the consumer.⁶⁵ Furthermore, these courts have specifically noted that the FTC intended consumers to be able to assert their rights in an affirmative manner.⁶⁶ These courts supported such a conclusion by examining both the history of the rule and its plain language.⁶⁷

The *LaBarre* holding also directly contravenes FTC intentions with respect to the Holder Rule. According to the FTC's Statement of Basis and Purpose for the rule, the consumer can "maintain an affirmative action against a creditor who has received payments for a return of monies paid on account."⁶⁸ Moreover, the FTC specifically rejected amendments to the rule that would limit consumers to asserting their rights only as a defense to claims by the creditor.⁶⁹ The FTC noted that certain policy considerations militate against the adoption of such a limitation.⁷⁰ One such policy consideration addressed by the FTC was the possibility that a creditor may choose not to sue a consumer in hopes that the fear of an unfavorable credit report may prompt the consumer to pay.⁷¹ The *LaBarre* court seems to completely disregard the FTC's express intentions.

The court's understanding of the FTC guidelines is misguided. While the FTC suggested that the laws in each jurisdiction were to control, the FTC intended laws such as local statutes of limitations and rules of equitable estoppel to apply.⁷² The guidelines suggest that the Holder Rule is not intended to create any new rights or defenses but that the rule incorporates those claims which, under applicable law, are legally sufficient claims and defenses.⁷³ The guidelines also state that "applicable statutes, decisions, and rules in each jurisdiction will control. . ."⁷⁴ The *LaBarre* court relied on this quote in holding that the Minnesota consumer protection statute and its relevant limitations apply regardless of whether the consumer asserts her claims under the FTC Holder

to hold improperly that the Minnesota consumer protection statute controlled.

The decision in *Eachen v. Scott Housing Systems, Inc.* illustrates the importance of this distinction. In *Eachen*, the consumers were permitted to assert affirmative claims against their creditor despite the fact that the consumer protection statute in the consumers' state limited consumers to asserting their rights in a defensive manner.⁷⁵ The *Eachen* court found that because the consumers were not bringing their claims pursuant to the state statute, the limitations contained in that statute were inapplicable.⁷⁶ Similarly, the *LaBarre* court should have found that the limitation in the Minnesota statute was inapplicable because *LaBarre* was asserting her rights under the FTC Holder Rule and not under the subdivision of the Minnesota statute which limits consumers' rights.

V. The *LaBarre* Decision Undermines the FTC's Attempt to Minimize Seller Misconduct and to Reallocate the Cost of Seller Misconduct Back to the Seller.

The *LaBarre* decision essentially renders affirmative recovery against a creditor under the FTC Holder Rule an impossibility in Minnesota and potentially, in any state which has a consumer protection statute containing similar limiting language. The FTC clearly intended consumers to be able to assert both defensive and affirmative claims against creditors or assignees, even if a creditor elects not to sue the consumer.⁷⁷ The reason the FTC sought to protect consumers' rights in such a manner was to minimize seller misconduct and redirect the costs of such misconduct back to the seller.⁷⁸ Under the HDC Doctrine, sellers could effectively separate their obligation to perform as promised from the buyer's obligation to pay the creditor or assignee.⁷⁹ The FTC implemented the Holder Rule to prevent this type of practice.⁸⁰

The *LaBarre* decision denies Minnesota consumers the right to assert affirmative claims against a creditor when the creditor has not initiated an action against the consumer. Hence, if a creditor chooses not to sue for payment, the buyer is without any remedy for the seller's failure to perform. For example, suppose a consumer had paid \$1000 to a creditor for the defective diamond watch discussed earlier in the Note, and the creditor chooses not to sue for the rest of the money owed on the watch. Under *LaBarre*, the consumer is left with a watch that fails to work and no way to recover the money she has already paid for it.

The *LaBarre* holding affects consumers because it promotes inconsistency with respect to consumer protection. The decision allows individual states, at least those within the Eighth Circuit, to alter the FTC Holder Rule with respect to affirmative recovery under the rule. Therefore, a consumer in one state may be entitled to assert affirmative claims against a creditor while a consumer in another state, Minnesota for example, is limited to asserting his or her rights as a matter of defense.

VI. Conclusion

Unfortunately, the *LaBarre* court failed to recognize the impact its decision will have on consumers in states which have limiting consumer protection statutes. Consumers in these states may no longer enjoy the protection from seller misconduct that the FTC Holder Rule once afforded them. In any jurisdiction that upholds *LaBarre*, if the creditor chooses not to sue the consumer, the consumer is without remedy for claims such as breach of warranty, breach of contract, or fraud on the seller's part.

Ultimately, the *LaBarre* decision thwarts FTC intentions and purports to allow individual states to control the issue of affirmative recovery from creditors. The FTC promulgated the Holder Rule because state consumer protection statutes did not effectively protect consumers from problems associated with the HDC

doctrine (i.e., the seller divorcing his obligation to perform from the buyer's obligation to pay).⁸¹ The *LaBarre* decision essentially holds that each state has the power to control the issue of affirmative recovery. The consumer will ultimately suffer when a state prohibits affirmative recovery because contrary to FTC intentions, the consumer will again bear the costs of seller misconduct.

Endnotes

1. Martin B. White, *Coping with Violations of the Federal Trade Commission's Holder in Due Course Rule*, 66 TEMP. L. REV. 661, 666 (1993).
2. Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2 (2000).
3. *Id.* Under the FTC Holder Rule, a consumer may bring an affirmative claim against the creditor for seller misconduct. *Id.* An example of an affirmative claim is when a consumer sues a creditor for the seller's breach of warranty. When a creditor sues a consumer for payment, the consumer may assert all claims and defenses it would have had against the seller. This means that the consumer may assert a Statute of Frauds defense and assert an affirmative claim for the seller's breach of contract. The issue courts face is whether a consumer is entitled to "affirmative recovery," or whether a consumer may bring affirmative claims against a creditor when that creditor has elected not to sue the consumer for payment. The Note will discuss the trend towards allowing affirmative recovery under the FTC Holder Rule.
4. *Id.* A consumer may want to sue a creditor who has received payments for a return of monies paid. Suppose for example, a consumer bought a used car with a two-year warranty and the car's engine dies after six months. The consumer could sue the creditor for the dealer's breach of warranty, seeking a return of monies paid to the creditor. The consumer may not have the option of recovering from the seller because the seller may have disappeared or declared bankruptcy. Hence, the consumer seeks recovery from the creditor.
5. 175 F.3d 640, 644 (8th Cir. 1999).
6. *Id.*

7. Michael M. Greenfield & Nina L. Ross, *Limits on a Consumer's Ability to Assert Claims and Defenses Under the FTC's Holder In Due Course Rule*, 46 BUS. LAW. 1135 (1991).
8. Timothy J. Grendell, *Let the Holder Beware! A Problematic Analysis of the FTC Holder in Due Course Rule*, 27 CASE W. RES. L. REV. 977, 978 (1977).
9. *Id.*
10. *Id.* Although by the mid-1970's, over forty states had passed statutes limiting the use of holder in due course status in consumer transactions, the laws tended to differ widely in their effects. In 1975, the FTC promulgated the FTC Holder Rule to eliminate the holder in due course doctrine throughout the country. Martin B. White, *Coping with Violations of the Federal Trade Commission's Holder in Due Course Rule*, 66 TEMP. L. REV. 661, 664-64 (1993).
11. Federal Trade Commission, *Preservation of Consumers' Claims and Defenses, Final Regulations, Proposed Amendment and Statement of Basis and Purpose*, 40 Fed. Reg. 53506, 53507 (1975).
12. *Simpson v. Anthony Auto Sales, Inc. et al.*, 32 F. Supp. 2d 405, 409 (W.D. La. 1998).
13. 16 C.F.R. § 433.2 (2000).
14. Michael M. Greenfield & Nina L. Ross, *Limits on a Consumer's Ability to Assert Claims and Defenses Under the FTC's Holder In Due Course Rule*, 46 BUS. LAW. 1135, 1146 (1991).
15. 41 Fed. Reg. at 20023.
16. *Id.*
17. 41 Fed. Reg. at 20023.
18. *Id.*
19. 40 Fed. Reg. at 53522.
20. *Id.*
21. *Id.*

22. "Creditors can and have protected themselves against seller misconduct by such mechanisms and recourse and reserve arrangements. Their ability to protect against the loss was stated as an important consideration in the adoption of this rule." *Tinker v. DeMaria Porche Audi, Inc.*, 459 So. 2d 487, 492 n.5 (Fla. Dist. Ct. App. 1984) (citing 40 Fed. Reg. at 53522).

23. 40 Fed. Reg. at 53523. Creditors are in a better position than consumers to redirect the cost of seller misconduct (such as fraud) back to the seller because: (1) the creditor engages in many transactions while the consumer engages in relatively few, (2) the creditor has access to information systems unavailable to the consumer, (3) the creditor has access to routine contractual devices which return the cost of seller misconduct back to the seller, and (4) the creditor possesses the means to initiate and carry through a lawsuit to judgment. *Id.*

24. *Id.*

25. *Id.*

26. 41 Fed. Reg. at 20023.

27. 911 F. Supp. 1393, 1401 (D. Kan. 1995).

28. *Id.* at 1393.

29. *Id.* at 1398.

30. *Id.* at 1401.

31. *Id.* at 1403.

32. *Id.*

33. *Id.* at 1402.

34. *Id.*

35. *Id.* The court quotes the FTC, citing 40 Fed. Reg. 53526.

36. In *Ford Motor Credit Co. v. Morgan*, the court found that absent a showing that the consumer had a right to rescind the sale or that the consumer had received little or nothing in value from the dealer, the consumer had no right to affirmative recovery pursuant to the FTC Holder Rule. The *Ford* court did specifically state however, that they

did not hold that a consumer may only assert her rights in a defensive manner because such a limitation would directly contravene FTC intentions. The court noted that the FTC intended affirmative recovery to be an option for the consumer because otherwise that creditor could elect not to sue in hopes that the fear of an unfavorable credit report may prompt a consumer to pay the creditor. 404 Mass. 537, 541 (Mass. 1989). In *Felde v. Chrysler Credit Corp.*, the court noted that the FTC stated that a consumer would not be able to obtain affirmative recovery from a creditor unless that consumer had received little or nothing of value from the seller. The *Felde* court held however, that a consumer may assert an affirmative claim against a creditor when a seller's breach is sufficiently egregious to warrant rescission of the sales contract. 219 Ill. App. 3d 530, 537 (Ill.App. Ct.1991).

37. In *Oxford Finance Co. v. Velez*, the court addressed the creditor's contention that the FTC's Statement of Basis and Purpose for the Holder Rule specifically limited affirmative recovery to circumstances in which the purchaser had receive little or nothing of value from the seller. 807 S.W.2d 460, 463 (Tex. App. 1991). According to the court, the FTC made that statement to explain its refusal to adopt a version of the Holder Rule that would limit consumers to asserting their claims and defenses only in defending a suit by a creditor. *Id.* Because the rule's notice provision does not include such a requirement, the *Oxford* court held that the FTC comment does not require the consumer to obtain a finding that he or she received little or nothing of value under the sales agreement before being able to affirmatively recover. *Id.* The court in *Simpson v. Anthony Auto Sales, Inc.* also found that because the FTC Holder Rule's notice provision does not advise creditor's that a consumer must have received little or nothing of value in order to assert affirmative claims against the creditor, the consumer need not make such a showing. 32 F. Supp. 2d 405, 409 n.10 (W.D. La. 1998).

38. *Id.*

39. *Simpson*, 32 F. Supp. 2d 405; *Oxford*, 807 S.W.2d 460; *Ford*, 404 Mass. 537; *Felde*, 219 Ill. App. 3d 530.

40. *Simpson*, 32 F. Supp. 2d 405; *Oxford*, 807 S.W.2d 460. *See also Ford*, 404 Mass. 537; *Felde*, 219 Ill. App. 3d 530. Courts that require a showing that the consumer has a right to rescission or has received little or nothing of value seem to do so based on the FTC's Statement of Basis and Purpose for the Holder Rule. *Id.* Others courts do not require such a showing because the Rule's notice provision does not

advise consumers of this requirement and because the statements referring to rescission or receiving nothing of value were made to explain the FTC's refusal to adopt a version of the Holder Rule that would limit consumers to asserting their claims and defenses only in defending a suit by a creditor.

41. *Eachen v. Scott Housing Systems*, 630 F. Supp. 162, 165 (M.D. Ala. 1986).

42. *Id.* at 163-64.

43. *Id.* at 164.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 165.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 166.

54. *LaBarre v. Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999).

55. *Id.* at 642.

56. *Id.* at 644.

57. *Id.* at 643.

58. *Id.*

59. *Id.*

60. *Id.* at 644.

61. *Id.* (citing Minn. Stat. section 325G.16, subd. 3 (1998).)

62. *Id.* (citing Minn. Stat. section 325G.16, subd. 3 (1998).)

63. *Id.* at 644.

64. *Id.*

65. *Simpson*, 32 F. Supp. 2d at 405; *Oxford*, 807 S.W.2d at 460; *Ford*, 404 Mass. at 537; *Felde*, 219 Ill. App. 3d at 530; *Eachen*, 630 F. Supp. at 162.

66. *Id.*

67. *Id.*

68. 40 Fed. Reg. 53524.

69. 40 Fed. Reg. 53526.

70. 40 Fed. Reg. 53526.

71. 40 Fed. Reg. 53527.

72. 41 Fed. Reg. 20024.

73. 41 Fed. Reg. 20023-20024.

74. *Id.*

75. *Eachen*, 630 F. Supp. at 165.

76. *Id.*

77. 41 Fed. Reg. 20023.

78. *Id.*

79. *Id.*

80. *Id.*

81. Martin B. White, *Coping with Violations of the Federal Trade Commission's Holder in Due Course Rule*, 66 TEMP. L. REV. 661, 664 (1993).

