**Holders**

Welcome to this podcast on Holders brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is who a holder is, how someone becomes a holder, and why it is important. I find that students often get confused about the process of becoming a holder, so it is worth the time to sort this out. Yes, again, this deals with instruments, typically paper checks and promissory notes. While we might not use instruments frequently, checks and promissory notes are still used in many transactions, particularly larger ones. Moreover, financial fraud remains a problem for attorneys who might be the victim of it themselves or need to counsel clients with respect to enforcement of an instrument. Not only is this a practice issue, but holders are covered in Article 3 of the Uniform Commercial Code, which is tested by a number of states on the bar examination. Holders, particularly when coupled with holders in due course doctrine, are favorites on the bar exam. It is important to try and use the correct terminology so be on the lookout for the following: holder, indorsement, indorser, negotiation, and person entitled to enforce (or PETE).

The term holder seems a little vague so let’s start about why this is important in the first place. Remember we are dealing with negotiable instruments. Being a negotiable instrument requires the satisfaction of the seven elements of negotiability under §3-104, which is the subject of another podcast. Being a holder is important to negotiation of an instrument. Negotiation is simply the transfer of possession of an instrument by the process of signature and delivery. If done properly, the instrument is negotiated to a person who becomes the holder and thereby a person entitled to enforce the instrument. We sometimes call the person entitled to enforce the instrument a PETE. When an instrument is payable to an identified person the process of negotiation requires not only the transfer of possession of the instrument, but also the indorsement of the identified person. So if we want to be a PETE and obtain the money on the instrument, in most cases we need to be a holder.

So let’s break this down. If you are presented with a question about an instrument it is often accompanied by an issue about who can get paid. In order to get paid on an instrument, a person must be a PETE under UCC §3-301. The most frequent PETEs are those who are holders, which the term holder is defined in UCC §1-201. There are two types of holders. First, a person in possession of an instrument if the instrument is payable to bearer, often this means the instrument is payable to the order of cash or the like. Second, the person in possession of an instrument that is payable to an identified person that happens to be the person in possession of the instrument.

As always, these things are best understood with examples. If I write a check payable to the order of cash and give it to my daughter Emma, she would be a holder. Emma would be a holder because she is a person in possession of the instrument and it is payable to bearer. If Emma gives possession of the instrument to her friend Ashley, then Emma would not be a holder any longer. Ashley would be a holder because she is in possession of the instrument and it was made out to cash. Ashley could then cash the check because she is a PETE. Notice that holder status in this situation depends solely upon possession of the instrument. While someone might be a holder at some point, if they surrender possession to another person they will lose the status of being a holder. Once Emma gives possession of the check to Ashley, Emma is no longer a holder.

Let’s look at the second situation as it is the one that tends to trouble students. If I write a check payable to the order of Emma and give it to my daughter Emma she would be a holder. In this case, Emma would be a holder because she is a person in possession of the instrument and she is the person identified as payee. It is all well and good, but what if Emma still gives possession of the instrument to Ashley? In this case, Ashley would not be a holder even though she is in possession of the instrument. This is because the instrument was payable to the order of Emma, an identified person. In order for Ashley to be a holder she would need to be in possession and Emma would have to negotiate the check to Ashley. According to §3-201, negotiation is simply the transfer of possession of an instrument to a person who thereby becomes its holder. Where an instrument is payable to an identified person, §3-201 requires both transfer of possession and indorsement by the holder. This means that in order for Ashley to become a holder, Emma would need to give her possession of the instrument and to indorse the instrument by signing her name on the reverse side. At that point, Ashley would then become a holder and, therefore, a PETE and Emma would no longer be a holder.

So where might this go wrong? It always seems to go wrong in fact patterns on an examination. Well, if the instrument is payable to an identified person, make sure that both possession is satisfied and an indorsement by the identified person has been made. For instance, a common scenario is where a thief steals the check from Emma and forges an indorsement on the reverse side of the check and delivers possession to, say . . . Susie. In this case, Susie would not be a holder even if she is in possession of the instrument because Emma was a person identified and she did not provide her indorsement. Susie is not going to qualify as a PETE in order to obtain payment. On the other hand, if the check was made out to cash and the thief steals it, the possession is wrongful, but the thief is still a holder and, therefore, a PETE.

At this point, you should be able to describe what a holder is, how a person becomes a holder and why it is important.

I hope that you’ve enjoyed this podcast on Holders.

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