

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TD BANK, N.A.,

Applicant,

v.

TANIA PULLIAM,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

RULE 29.6 STATEMENT

Applicant TD Bank, N.A. is a national banking association and wholly-owned subsidiary of TD Bank US Holding Company, a Delaware corporation, which in turn is a wholly-owned subsidiary of TD Group US Holdings LLC, a Delaware limited liability company.

TD Group US Holdings LLC is a wholly-owned subsidiary of The Toronto-Dominion Bank, a Canadian-chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol "TD". No publicly held company directly owns more than 10% of the stock of TD Bank, N.A.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, T.D. Bank, N.A., respectfully requests a 30-day extension of time, until Friday, September 23, 2022, within which to file a petition for a writ of certiorari. The California Supreme Court entered its judgment on May 26, 2022. Unless extended, the time for filing a petition for a writ of certiorari will expire on August 24, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257.

1. This case concerns the meaning of a regulation promulgated by the Federal Trade Commission (FTC) in 1975 commonly referred to as the “Holder Rule,” which applies to hundreds of thousands of consumer loan contracts entered each year across the United States. *See* Preservation of Consumers’ Claims and Defenses, Unfair or Deceptive Acts or Practices, 16 C.F.R. § 433.2. When consumers finance the purchase of goods or services from a retailer or other seller, a consumer loan contract sets the terms of financing agreement. Sellers often assign those contracts to third-party creditors. The Holder Rule requires that such contracts contain the following language:

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.

16 C.F.R. § 433.2.

The Holder Rule ensures that the consumer may assert any claims and defenses he or she could assert against the seller—*e.g.*, breach of warranty or fraud—against any third-

party creditor who comes to own the loan that financed the purchase. Importantly, however, the Rule limits the third-party creditor's liability to the amount that the consumer has paid on the loan. *See* 16 C.F.R. § 433.2 ("Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."). This case presents the question of whether a consumer who prevails in an action against a third-party creditor based on claims asserted under the Holder Rule may obtain attorney's fees in excess of the Holder Rule's limitation on recovery.

2. Respondent Tania Pulliam purchased a used vehicle from HNL Automotive Inc. pursuant to a consumer sales contract that included the notice required by the Holder Rule. Op. 2-3. The contract was subsequently assigned to TD Auto Finance (TDAF), now merged into Applicant TD Bank, which became the "holder" of the contract. Op. 3. Pulliam later filed suit against HNL Automotive, alleging that the dealership had falsely advertised the car's features and making six claims under California law. *Id.* Pulliam asserted the same claims against TDAF under the Holder Rule. *Id.* Pulliam prevailed on one claim at trial under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code, § 1790 *et seq.*, and was awarded damages in the amount of \$21,957.25. Op. 3. Pulliam filed a post-trial motion seeking attorney's fees in the amount of \$169,602 under Cal. Civ. Code § 1794(d). Op. 3. TDAF argued that it could not be liable for fees in excess of what Pulliam had paid under the consumer sales contract, based on the provision of the Holder Rule limiting "recovery hereunder" to the "amount[] paid by the debtor," 16 C.F.R. § 433.2. Op. 3. The trial court granted Pulliam's motion for attorney's fees in full, and the California Court of Appeal affirmed. Op. 3-4.

3. The Supreme Court of California affirmed, concluding that the Holder Rule’s limitation on recovery “does not limit the award of attorney’s fees where, as here, a buyer seeks fees from a holder under a state prevailing party statute.” Op. 2; *see* Op. 1-32. The court acknowledged that “attorney’s fees may be a type of ‘recovery’ in some contexts.” Op. 13. But the court observed that the preamble to the Holder Rule “do[es] not refer to attorney’s fees.” Op. 14. And it noted that guidance issued by the FTC’s staff the following year explains that the Holder Rule limitation applies to “consequential damages and the like,” but also does not discuss attorney’s fees. Op. 15. The court thus determined that the FTC must have “had damages in mind when limiting recovery under the Rule,” but found “no indication that attorney’s fees were intended to be included within its scope.” Op. 16.

The California Supreme Court further reasoned that applying the Holder Rule’s limitation on recovery to attorney’s fees would impede some consumers’ ability to pursue litigation against sellers. The court noted that the FTC was aware that, under the pre-Holder Rule regime, legal costs imposed barriers to vindicating a consumer’s claims against sellers. Op. 18-19. And it observed that the FTC “envisioned affirmative suits against creditors over seller misconduct” in some circumstances. Op. 20. “Given th[o]se expectations,” the court found it “unlikely that the FTC intended without comment or explanation to include attorney’s fees in its limitation on creditor liability under the Rule.” Op. 21.

Finally, the Supreme Court reasoned that the FTC “intended the [Holder] Rule to provide a minimum, not maximum, liability rule for the nation.” Op. 26-27. “To be sure,” the court acknowledged, “the FTC chose to limit creditor liability under the Holder Rule to

amounts paid by the debtor under the contract rather than pass on all seller misconduct costs to creditors.” Op. 25. But it noted that the limitation applied only to “recovery *hereunder*” the Holder Rule. *Id.* Accordingly, the court reasoned that permitting consumers to obtain attorney’s fees under state law in suits under the Holder Rule “is not at odds with the Holder Rule’s purpose.” *Id.*

4. The California Supreme Court’s decision is wrong, and its interpretation of the Holder Rule conflicts with decisions of other state courts of last resort. In *State ex rel. Stenberg v. Consumer’s Choice Foods, Inc.*, 755 N.W.2d 583 (2008), for example, the Nebraska Supreme Court concluded, after surveying numerous decisions considering the question, that the Holder Rule “limits a debtor’s recovery to the amounts paid by the debtor,” including any attorney’s fees award. *Id.* at 495-96. “A rule of unlimited liability,” the Nebraska court explained, “would place the creditor in the position of an insurer or guarantor of the seller’s performance,” contrary to the text and purpose of the Holder Rule. *Id.* at 495 (citation omitted). In *Reagans v. MountainHigh Coachworks, Inc.*, 881 N.E.2d 245 (2008), the Ohio Supreme Court held that the Holder Rule does not permit “derivative liability on a bank for an attorney-fees award against a seller.” *Id.* at 254. The court reasoned that “[t]he costs that the FTC rule seeks to shift to the creditor for the seller’s misconduct” are only “the actual, compensatory damages incurred in the consumer contract with the seller.” *Id.*; see also *Hardeman v. Wheels, Inc.*, 565 N.E.2d 849, 853 (Ohio Ct. App. 1988). Other courts have reached similar conclusions. See, e.g., *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411, 417 (W.D. La. 1998) (holding that the Holder Rule limits attorney’s fees where the fees are made available by statutes asserted against the creditor

only because of the Holder Rule); *Alduridi v. Community Trust Bank, N.A.*, No. 01A01-9901-CH-63, 1999 WL 969644, at *12 (Tenn. Ct. App. 1999) (applying the Holder Rule limitation to a request for attorney's fees based on the Holder Rule).

5. TD Bank respectfully requests an extension of time to determine whether to file a petition for a writ of certiorari, and to prepare and file any such petition, seeking review of the California Supreme Court's decision in this case. The case presents an important question of federal law with potentially wide-reaching consequences. And TD Bank's undersigned appellate counsel have been heavily engaged with other matters and have several other pending deadlines and commitments that would make the existing deadline difficult to meet, including a brief filed in the Fourth Circuit on July 19; a brief filed in Fourth Circuit on July 21; a brief filed in the Fourth Circuit on August 2; a brief filed in the Ninth Circuit on August 3; a brief filed in the Georgia Court of Appeals on August 8; a brief due to the Ninth Circuit on August 11; a brief due to this Court on August 12; a brief due to the California Court of Appeal on August 15; a brief due to the Fourth Circuit on August 17; a brief due to the New York Appellate Division on September 6; and a brief due to the Eleventh Circuit on September 7. The requested extension would allow counsel to continue to research the relevant legal issues and to prepare a petition that appropriately addresses the important issues raised by this case.

Accordingly, TD Bank respectfully requests an extension to file a petition for a writ of certiorari to and including September 23, 2022.

Date: August 11, 2022

Respectfully submitted,



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