

ELECTRONICALLY FILED
Jefferson County Circuit Court
Lafayette L. Woods, Circuit Clerk
2020-Jan-13 09:12:08
35CV-20-43
C11WJD02 : 14 Pages

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

FRENZETTA WILSON, BETINA INGRAM,
RONNIE DICKERSON, and
DEVON BYRD, on behalf of themselves
and all others similarly situated

PLAINTIFFS

v.

CASE NO. _____

SANTANDER CONSUMER
USA, INC.

DEFENDANT

CLASS ACTION COMPLAINT

Plaintiffs Frenzetta Wilson, Betina Ingram, Ronnie Dickerson, and Devon Byrd individually and on behalf of all persons similarly situated, seek actual damages and an injunction against Santander Consumer USA, Inc. (“Santander”) for violations of the Texas Debt Collection Act and for grounds state:

1. Plaintiffs each entered into a Retail Installment Sales Contract with Santander to finance the purchase of their respective vehicles.

2. Every time Plaintiffs have made loan payments online or over the phone, Santander has charged them a fee of up to \$10.95 (“Pay-To-Pay fees”). Santander is prohibited by law from collecting these fees.

3. The contract each Plaintiff entered with Santander is a form contract that contains a Texas choice-of-law provision: “Federal and Texas law apply to this contract.” *See, e.g.*, Ex. 1 at 2, ¶ 8.

4. An Arkansas federal court recently found that the Texas choice-of-law provision in Santander’s contract is binding on Arkansas residents. *Brunson v. Santander Consumer USA, Inc.*, 5:17-cv-284-JM, ECF No. 26 (E.D. Ar. Aug. 27,

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2018). In arguing (successfully) for the enforceability of this provision, Santander explained that it, “like any multistate company entering into consumer contracts, has an interest in ensuring that its contracts are governed by uniform law to ensure consistency in their interpretation and application.” *Id.*, ECF No. 17 at 8 (E.D. Ark. July 6, 2018).

5. One such law that applies to Santander’s form contract is the Texas Debt Collection Act (“TDCA”).

6. Santander is a debt collector as defined by the TDCA. The TDCA prohibits debt collectors from “collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is *expressly authorized* by the agreement creating the obligation or *legally chargeable* to the consumer[.]” Tex. Fin. Code § 392.303(a)(2) (emphases added). Pay-to-Pay fees are neither.

7. Moreover, on information and belief, Santander pockets nearly the entire amount of the Pay-to-Pay fees as profit. Nevertheless, Santander represents them as pass-through fees to the payment processor: “A third party payment processing company may charge a fee to process your payment.”¹

8. During the course of their loans, Plaintiffs have paid these fees multiple times.

¹ <https://santanderconsumerusa.com/support/payments> (last accessed by counsel on January 10, 2020).

9. On behalf of themselves and all others similarly situated, Plaintiffs bring claims for actual damages and injunctive relief against Santander for its violations of the TDCA.

PARTIES

10. Defendant Santander Consumer USA, Inc. is an Illinois corporation that has its principal place of business in Dallas, Texas. It is a consumer finance company that focuses on vehicle finance and unsecured consumer lending products. Santander is registered to do business in Arkansas.

11. Ms. Wilson, Ms. Ingram, and Mr. Dickerson reside in Jefferson County, Arkansas.

12. Ms. Byrd resides in Union County, Arkansas.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Santander because it does business in Arkansas. Each Plaintiff executed his or her Retail Installment Sales Contract in the State of Arkansas and made payments on those contracts from the State of Arkansas.

14. Venue is proper because a substantial part of the events giving rise to Plaintiffs' cause of action occurred in Jefferson County, Arkansas.

COMMON FACTUAL ALLEGATIONS

15. The Texas Debt Collection Act ("TDCA") prohibits a debt collector from "us[ing] unfair or unconscionable means" in the collection of a consumer debt. Tex. Fin. Code § 392.303(a).

16. Santander is a *debt collector* under the TDCA because it is “a person who directly or indirectly engages in debt collection . . .” *Id.* at § 392.001(6).

17. Santander engages in *debt collection*, which the TDCA defines as “an action, conduct, or practice in collecting, or in soliciting for collection, consumer debts that are due or alleged to be due a creditor.” *Id.* at § 392.001(5).

18. A *consumer debt* under the TDCA is “an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.” *Id.* at § 392.001(2).

19. As “an individual who has a consumer debt,” each Plaintiff is a *consumer* under the TDCA. *Id.* at § 392.001(1).

20. As alleged above, the Pay-to-Pay fees Santander charges are not expressly authorized in the uniform contract each Plaintiff executed.

21. Nor is there any law that affirmatively permits Santander to collect Pay-to-Pay fees from the Plaintiffs or other borrowers.

22. By charging those fees, Santander engaged in prohibited “unfair or unconscionable means” of debt collection by “collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer[.]” *Id.* at § 392.303(a)(2).

23. Moreover, Santander’s violations of the TDCA have been willful and knowing.

24. In June 2015, Santander was sued in California for nearly identical violations of an analogous state debt-collection law. Thus, Santander has persisted in its unlawful behavior despite being on notice that Pay-to-Pay fees violate certain state debt collection laws.

25. More particularly, Santander has been on notice that its collection of Pay-to-Pay fees beyond what is necessary to reimburse a third-party payment processor violates provisions of the federal Fair Debt Collection Practices Act and state debt-collection laws analogous to the TDCA.

26. Furthermore, Santander has concealed, and continues to conceal, these violations from its borrowers.

27. As of the date of this filing, Santander continues to misrepresent to its borrowers that Pay-to-Pay fees are fees imposed by the third-party payment processor.

28. On information and belief, Santander collects and retains more than 90% of each Pay-to-Pay fee its borrowers pay.

PLAINTIFFS' ALLEGATIONS

29. Plaintiff Frenzetta Wilson took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Wilson's loan.

30. During the life of that loan, Ms. Wilson paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

31. Plaintiff Betina Ingram took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Ingram's loan.

32. Ms. Ingram has paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

33. Plaintiff Ronnie Dickerson took out a loan with Santander to finance the purchase of his car. Texas law applies to Mr. Dickerson's loan.

34. During the life of his loan, Mr. Dickerson paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

35. Plaintiff Devon Byrd took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Byrd's loan.

36. Ms. Byrd has paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

CLASS ALLEGATIONS

37. Plaintiffs bring this action individually and on behalf of all others similarly situated pursuant to Arkansas Rule of Civil Procedure 23. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

38. The proposed Class is defined as:

All persons in the United States who (1) have a car loan with Santander, (2) that provides "Federal and Texas law apply to this contract," and (3) who paid a fee for making their loan payments online or over the phone.

39. Plaintiffs reserve the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

40. Excluded from the Class are Santander, its parents, subsidiaries, affiliates, officers and directors, any entity in which Santander has a controlling

interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

41. The members of the Class are so numerous that joinder is impractical. The Class consists of thousands of members, the identities of whom are within the knowledge of Santander and can be ascertained only by resort to Santander's records.

42. Plaintiffs' claims are typical of the claims of the Class in that Santander collected from Plaintiffs, like all Class members, Pay-to-Pay fees that are neither authorized by contract nor legally chargeable to the borrower. Plaintiffs, like all Class members, have been damaged by Santander's misconduct. Furthermore, the factual basis of Santander's misconduct is common to all Class members.

43. There are numerous questions of law and fact common to the Class and those common questions predominate over any questions affecting only individual Class members.

44. Among the questions of law and fact common to the Class are:

- a. Whether Santander collected a portion of the Pay-to-Pay fees its borrowers paid;
- b. Whether Santander violated the TDCA by collecting Pay-to-Pay fees;
- c. Whether Plaintiffs' are entitled to actual damages and, if so, in what amount;

- d. Whether Plaintiffs are entitled to an injunction restraining Santander from future collections and attempted collections Pay-to-Pay fees; and
- e. Whether Santander's actions are sufficiently egregious as to warrant punitive damages.

45. Plaintiffs' claims are typical of the claims of other Class members, in that they arise out of the same wrongful policies and practices of Santander. Each Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other Class member.

46. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers. Accordingly, each Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

47. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Santander, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and Santander's misconduct will proceed without remedy.

48. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

CAUSE OF ACTION

Violations of the Texas Debt Collection Act

49. Plaintiffs executed Santander's standard loan agreement, which contains a Texas choice-of-law provision.

50. Each Plaintiff took out his or her loan to purchase a car for personal, family, or household use.

51. Each Plaintiff is therefore, under the TDCA, a "consumer" who took out a "consumer debt."

52. Santander is a "debt collector" under the TDCA.

53. In the process of "debt collection," by collecting or attempting to collect Pay-to-Pay fees, Santander engaged in "unfair or unconscionable means" of "collecting or attempting to collect . . . a charge, fee, or expense incidental to the

obligation” that was not “expressly authorized by the agreement creating the obligation or legally chargeable to the” Plaintiffs and the Class.

54. As such, Santander has violated the TDCA.

55. Moreover, Santander has misrepresented, and continues to misrepresent, to its borrowers that Pay-to-Pay fees are fees charged and collected by third-party payment processors.

56. In truth, Santander collects and retains nearly the entire amount of each Pay-to-Pay fee a borrower pays.

57. These continual misrepresentations demonstrate the Santander’s violations of the TDCA were made with ill will or gross negligence to the rights of Plaintiffs and the Class as to amount to willful and wanton acts.

58. On behalf of the Class, Plaintiffs seek actual damages and an injunction restraining Santander from collecting and attempting to collect Pay-to-Pay fees.

TOLLING

59. Santander concealed from Plaintiffs and the Class the fact that Santander, not the third-party payment processor, collected nearly the entirety of every Pay-to-Pay fee.

60. These intentional misrepresentations prevented Plaintiffs from discovering a basis for a TDCA claim existed.

61. For these reasons, Plaintiffs’ claims that pre-date two years before the filing of this Complaint are tolled.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class demand a jury trial on all claims so triable; an order certifying the class, appointing Plaintiffs as Class representatives, and designating the undersigned counsel as Class Counsel; and judgment as follows:

1. That judgment be entered against Santander and in favor of Plaintiffs and Class members on Count One and Count Two as alleged in this Complaint, and for actual, compensatory, punitive, and treble damages in an amount to be determined at trial;
2. That judgment be entered imposing interest on damages, litigation costs, and attorneys' fees against Santander;
3. That judgment be entered enjoining Santander from collecting and attempting to collect Pay-to-Pay fees from members of the Class; and
4. Such other relief as this Court deems just and proper.

DATED: January 10, 2020

/s/ Lee Lowther
CARNEY BATES & PULLIAM, PLLC
Lee Lowther, ABN 2013142
llowther@cbplaw.com
Randall K. Pulliam, ABN 98105
rpulliam@cbplaw.com
Cassandra DeCoursey, ABN 2018179
519 W. 7th St.
Little Rock, AR 72201
Telephone: (501) 312-8500
Facsimile: (501) 312-8505

EXHIBIT 1

