

## Recurring Monthly Late Fees Generated by Single Late Auto Loan Payment Found Permissible

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*The California Second District Court of Appeal confirms that assessing recurring late fees for successive late payments does not violate California's Rees-Levering Automobile Sales Finance Act and, in turn, is not an unfair business practice under California's Unfair Competition Law.*

California's Second District Court of Appeal in *Davis v. Ford Motor Credit Company*, Cal.App.4th (Nov. 19, 2009), held that Ford Motor Credit Company's practice of charging recurring late fees for successive late payments does not violate the prohibition on charging more than one late fee per delinquent installment set forth in Civil Code § 2982(k) of the Rees-Levering Automobile Sales Finance Act, Civil Code §§ 2981, *et seq.* (the "Act"). Ford's practice was to apply a customer's current monthly payment to an earlier missed payment and charge a new late fee for the current month that was thus effectively left unpaid. The customer challenging this practice argued that these successive late fees are prohibited by Section 2982(k) of the Act, and are actionable under California's Unfair Competition Law, Business & Professions Code §§ 17200, *et seq.* (the "UCL"), and Consumers Legal Remedies Act, §§ 1750, *et seq.* (the "CLRA"). The Second Appellate District Court disagreed.

In early 2004, Davis bought a car from a dealership under a retail installment sales contract. The contract was later assigned to Ford. Under the contract, Ford assessed a late charge for each monthly payment that was unpaid for 10 or more days. Ford applied what would have otherwise been "current" monthly payments to previously missed payments and, in turn, assessed a late charge for what then became the current, unpaid month. This practice had the effect of creating recurring late charges over many months. During the life of the contract, Davis alleged that Ford applied his "on-time" monthly payments to past-due installments, which triggered multiple late charges where there was only one late payment and, on November 8, 2006, Davis filed a class action alleging that Ford's practice violates the UCL and CLRA. In response, Ford sought a dismissal of all causes of action.

The *Davis* Court dismissed Davis's complaint on all counts, holding: First, Ford's conduct does not violate Section 2982(k)'s prohibition on charging more than one late fee per delinquent installment because the late fee charged by Ford is for a subsequent, unpaid month. Second, insofar as the UCL causes of action

were premised on a violation of the Act, those causes of action failed because Ford's alleged billing practice is not unlawful under the Act. Third, the Court, citing *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394, 1403-06 (2006),<sup>1</sup> rejected Davis's attempt to raise an independent UCL claim on the ground that Ford's practice is "unfair" because the alleged injury is one Davis reasonably could have avoided by timely making his monthly payments, or within the 10-day grace period, in accordance with the contract. Finally, the Court held that, although Ford was the prevailing party, it cannot recover its attorney fees under Section 2983.4 of the Act because the alleged violation of the Act was merely a predicate to the UCL claims, and a prevailing defendant cannot recover attorney fees under the UCL.

A petition for rehearing of the Court's decision was filed on December 4, 2009.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors of this advisory.

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<sup>1</sup> Other courts have declined to follow *Camacho*, which borrows the definition of "unfair" from Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(n). See, e.g., *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718 (9th Cir. 2007) and *Overstock.com v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 715 (2007) ("the California UCL contains no directive to interpret our consumer protection statute consistently with the FTC Act").

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