

California's ASFA Construed to Permit Leeway in Consumer Disclosures

by Greg L. Johnson, Amy L. Pierce and Meredith E. Nikkel

The California Third District Court of Appeal held that a dealership's overestimation of vehicle license fees by two dollars and four-month delay in obtaining a smog check and certification do not violate California's Rees-Levering Automobile Sales Finance Act.

California's Third District Court of Appeal in *Bermudez v. Fulton Auto Depot, LLC*, --- Cal.App.4th --- (December 3, 2009), held that Fulton Auto Depot's ("Fulton Auto") two dollar overestimation of vehicle license fees and charging for a smog check that did not occur until after the plaintiffs brought the error to the dealership's attention four months later do not violate the Rees-Levering Automobile Sales Finance Act, Civil Code §§ 2981, *et seq.* ("AFSA" or the "Act"). Under Section 2982 of the Act, every conditional sale contract must disclose all details concerning the sale, financing and complete costs of purchasing the vehicle. Challenging the estimate and charge for the delayed smog check as "untruthful" disclosures, the customers sought to rescind the contract and recoup what they paid on the contract. The Third Appellate District Court disagreed.

In November of 2005, plaintiffs Eleonor Bermudez and Antonio Aceves bought a Cadillac Escalade from Fulton Auto under a retail installment sale contract that was subject to the Act. The contract was later assigned to a credit union. Plaintiffs sued Fulton Auto and the credit union¹ after discovering the overestimated vehicle license fees and the charge for a smog check that had not timely been performed. After a bench trial, the court entered judgment for Fulton Auto and the credit union, and plaintiffs appealed.

The *Bermudez* Court upheld the trial court judgment. First, it found that California's Vehicle Code allows a dealer to estimate the vehicle license fees and later refund any excess over the actual fees. It further found that estimating fees in good faith, as permitted by Vehicle Code § 11713.4, does not result in an untruthful disclosure that violates the Act, especially when the estimate is **almost exactly the actual amount** and is **clearly marked as an estimate**.² It distinguished plaintiffs' claims from those in *Story v. Gateway Chevrolet Co.*, 237 Cal. App. 2d 705, 707-09 (1965), where a two-dollar discrepancy was

¹ Plaintiffs sued the credit union as the holder of the note under the Act, Civil Code §2983.5.

² It cited Civil Code § 3533 ("The law disregards trifles.").

combined with a “substantial misrepresentation concerning the value of the plaintiff’s trade-in property.” It further found that Fulton Auto’s failure to reimburse the two-dollar overestimate did not violate the Act.

Second, it found that the initial charge for the vehicle smog check and certificate in the contract were not untruthful statements because even though the dealership failed to obtain a smog check and certification at the outset, that action **remained a legally-required part of the sale transaction**³ and was eventually completed. The *Bermudez* Court found that the failure to provide the smog certificate before or at the time of delivery without a representation concerning whether the smog check had already occurred did not render untruthful these charges in the contract.


It is uncertain how forgiving courts may be in evaluating claims of “untruthfulness” of estimated figures in a contract under the AFSA in the aftermath of *Bermudez*. Lenders that are assigned contracts governed by the AFSA should nevertheless take care to investigate the dealers’ practices relative to estimating cost figures, effecting refunds and performing contract obligations, where appropriate.

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.

Greg L. Johnson (bio)
Sacramento
+1.916.329.4715
greg.johnson@pillsburylaw.com

Amy L. Pierce (bio)
Sacramento
+1.916.329.4765
amy.pierce@pillsburylaw.com

Meredith E. Nikkel (bio)
Sacramento
+1.916.329.4747
meredith.nikkel@pillsburylaw.com

 ³ Under Vehicle Code § 24007(b)(2), before or at the time of delivery of a vehicle, the dealer must provide the buyer with a smog certificate. Whether the dealership violated Section 24007 was not at issue in *Bermudez*.