

California Courts Continue to Rein in Class Certification in the Marketing and Sale of Insurance

July 16, 2011 by [Larry Golub](#) and [Marina Karvelas](#)

In *Fairbanks v. Farmers New World Life Ins. Co.*, decided July 13, 2011, [California's Second Appellate District](#), Division Three, upheld the trial court's denial of class certification for a proposed nationwide class of universal life insurance policyholders. Plaintiffs sued Farmers New World Life Insurance Company and Farmers Group, Inc. (collectively, "Farmers") alleging violations of the [Unfair Competition Law](#) (Bus. & Prof. Code, 17200, "UCL") in the marketing and sale of universal life insurance policies.

The decision, authored by [Justice Walter Croskey](#), contains in its opening pages an extensive discussion of universal life insurance policies. Justice Croskey's discussion is well worth the read as it presents in simple and understandable terms many of the intricacies of universal life insurance.

Plaintiffs alleged in their complaint numerous theories of wrongdoing against Farmers; however, their motion for class certification was narrowly tailored and based only on one of the three prongs of the UCL, that of a fraudulent business practices.

Relying on a series of recent decisions (*Knapp v. AT&T Wireless Services, Inc.*, 195 Cal. App. 4th 932 (2011); *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (2009), and *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622 (2010)), the Fairbanks opinion reiterates the requirements for class certification under the fraudulent prong of the UCL:

"[W]hen the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be required to determine whether the representations at issue were actually made to each member of the class."

Finding the case "virtually identical" to *Kaldenbach*, the Court of Appeal upheld the trial court's determination that the alleged misrepresentations were not commonly made to members of the class and thus class certification was properly denied. (For a discussion of the *Kaldenbach* case, see our firm's [prior blog](#).)

Plaintiffs argued that the class action should proceed on the theory that the language in the policies was misleading. However, the class certification motion was not based on the theory that the policy language standing alone was misleading. Even if it were, "it is still impossible to consider the language of the policies without considering the information conveyed by the Farmers agents in the process of selling them."

In addition, the *Fairbanks* Court determined that the materiality of the alleged misrepresentation was likewise not subject to common proof. Relying on the Supreme Court's recent decision in *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 332 (2011),

the standard for materiality is whether “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.” While noting that the standard is objective, the Court of Appeal nonetheless agreed with the trial court that the materiality of the representations at issue in the case was a matter of individual proof for any given policyholder.

In concluding, the Court of Appeal refused to address whether commonality existed with respect to any other purported classes. None of the alternative theories were presented to the trial court in the class certification motion. “[W]e leave it to the trial court’s discretion, on remand, to determine whether it should consider any subsequent motion for class certification, should plaintiffs choose to proceed on an alternative basis.”

As is often the case in the class certification context, plaintiffs will seek to define as narrow a class as possible to present a “common issue” for certification purposes, which attempt sometimes undercuts not only the ability to obtain certification (as in the *Fairbanks* situation) but, even if it does survive certification, sets up a defense motion for summary judgment.