

# The Ninth Circuit Finds California's Illustration Statutes Can Serve as the Predicate for UCL Liability

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On March 3, the Ninth Circuit in *Walker v. Life Ins. Co. of the SW*, ruled that an alleged violation of California's life insurance illustration statutes could serve as a predicate for liability under the California Unfair Competition Law (UCL). The ruling reversed in part a U.S. District Court for the Central District of California decision in a 2010-filed action by a certified class of indexed universal life policyholders residing in California. The state's illustration statutes, Cal. Ins. Code § 10509.950 et seq., are substantially similar to NAIC Model 582, and apply to all individual life insurance policies sold in California, with a few exceptions. The statutes mandate the inclusion of certain information, and prohibit various practices. For example, an insurer may not "represent the policy as anything other than a life insurance policy." Plaintiff alleged that the insurer violated California's statutes because it touted the policies as retirement or investment vehicles, "misrepresent[ed]" the costs, risks, safety and security of the policies, treated policy lapse "in a misleading matter," "deceptively present[ed] the guarantee values, fail[ed] to define key terms, and impl[ied] that nonguaranteed elements are annual guarantees." The district court dismissed those claims at the pleading stage. In 2014, after the statewide class was certified, the case ultimately went to trial, resulting in a jury verdict for the insurer on the fraudulent concealment claim. The district court, nearly a year later, found for the insurer on the remaining UCL claims, which required resolution by a judge. On appeal the California Department of Insurance filed an amicus brief supporting the plaintiff's position, and the panel spent a fair amount of time at the oral argument questioning all counsel about the statutory issue. The Ninth Circuit ultimately affirmed the district court in all respects, except on the narrow issue of whether UCL liability could be predicated on a violation of the illustration statutes. As to that issue, the Ninth Circuit found that even though the illustration statutes lack an express private cause of action, "private UCL claims are barred only when the underlying statute either actually bars private rights of action or provides a 'safe harbor' that renders the alleged conduct

lawful.” The implications for the *Walker* case are unclear: the Ninth Circuit specifically affirmed the district court’s finding “that the illustrations of the policy charges and interest rates were not unfair or deceptive.” Even assuming there were technical violations of the statute, rendering the insurer’s conduct “unlawful,” the plaintiff would still need to prove that those violations caused her and the class damage, as another California federal court recently held in *Davis v. Riversource Life Ins. Co.* There, the court dismissed solely unlawful prong UCL violations because the plaintiff failed “to allege that his economic injuries were the ‘result of’ Defendants’ alleged violations of” the statute. The ruling suggests, though, that insurers selling individual life insurance policies in California may expect to see more lawsuits – individual and putative class actions – alleging violations in the illustration statutes. Given the Ninth Circuit’s pronouncement about the UCL unlawful prong more generally, insurers might also be faced with other statutory violations serving as UCL predicates.

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