

FILED

NOV 16 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NANCY CARRERA; et al.,

Plaintiffs-Appellants,

v.

FIRST AMERICAN HOME BUYERS
PROTECTION COMPANY, a California
Corporation,

Defendant-Appellee.

No. 16-56038

D.C. No.
3:13-cv-01585-BAS-JLB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted November 9, 2017
Pasadena, California

Before: REINHARDT and WARDLAW, Circuit Judges, and DANIEL,^{**} District
Judge.

Appellants Nancy Carrera et al. appeal the interlocutory order of the district
court denying class certification of their fraudulent concealment and Unfair

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Wiley Y. Daniel, United States District Judge for the
U.S. District Court for Colorado, sitting by designation.

Competition Law (“UCL”) claims under Federal Rule of Civil Procedure 23(b)(3). We granted Appellants permission to file an interlocutory appeal under Federal Rule of Procedure 23(f). We have jurisdiction under 28 U.S.C. § 1292(e), and we affirm.

1. The district court did not abuse its discretion in concluding that questions of law or fact common to class members did not predominate over questions affecting individual class members. *See* Fed. R. Civ. P. 23(b)(3). Appellants argue that they are entitled to a classwide presumption of reliance and materiality because, although First American Home Buyers Protection Company (“First American”) did not make uniform representations to members of the putative class and used different sales channels to market its home warranty plans, First American uniformly concealed the same material information from all class members. Because Appellants’ fraudulent concealment and UCL claims are based on omissions, not affirmative misrepresentations, Appellants contend that they do not need to show that all First American’s representations “were uniformly made to all members of the proposed class.” *See Davis-Miller v. Auto. Club of S. Cal.*, 201 Cal. App. 4th 106, 125 (2011); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 595 (9th Cir. 2012). We disagree.

On appeal, Appellants pursued only one fraudulent concealment theory, arguing that First American’s marketing materials and contracts were deceptive because First American made partial representations to the class but suppressed some material facts about their warranty plans. *See LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997) (describing four circumstances of actionable fraudulent concealment under California law). Because Appellant’s theory of fraudulent concealment tethers the materiality of First American’s omissions to what First American represented to the putative class, Appellants cannot avoid the requirement, articulated in *Mazza v. American Honda Motor Company*, 666 F.3d 581 (9th Cir. 2012) and *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), *abrogated on other grounds*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017), that all class members have some exposure to the representations. *See also Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 n.4 (1993) (concluding that plaintiffs cannot “through clever pleading” transform “every fraud case based on material misrepresentation . . . into a material omissions case”). The district court did not clearly err in concluding that not all putative class members had been exposed to “any representations about First American, much less the alleged misrepresentations.”

To the extent that Appellants could have pursued class certification on alternative concealment theories, *see LiMandri*, 52 Cal. App. 4th at 336, Appellants forfeited these arguments by not raising them to the district court or in the appellate briefs and at oral argument. Appellants did not seek class certification, for example, under California Insurance Code section 332, which imposes a duty to disclose on an insurer. It is not clear what additional facts, if any, First American would have had to disclose to class members to satisfy section 332, or whether a class under section 332 would be sufficiently uniform and cohesive to merit certification. Neither this alternative theory nor any other is before us.

2. Nor did the district court abuse its discretion in denying Appellants leave to amend to add a claim under California Insurance Code section 12760. The district court denied Appellants' motion for leave to amend as moot because Appellants sought leave to amend the Third Amended Complaint, when the operative complaint was the Consolidated Complaint. Because Appellants cannot amend a complaint that is no longer valid, the district court did not abuse its discretion in denying the motion.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
Excerpt of Record	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	
Opening Brief	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	
Answering Brief	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	
Reply Brief	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	
Other**	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	
TOTAL:				\$ <input style="width: 50px; height: 25px;" type="text"/>	TOTAL:				\$ <input style="width: 50px; height: 25px;" type="text"/>

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk