WASHINGTON SUPREME COURT NO. 95416-0

Court of Appeals No. 75541-2-I

CHAN HEALTHCARE GROUP, PS, a Washington professional services corporation,

Plaintiff/Appellant

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY, foreign insurance companies,

Defendants/Respondents

PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners are Plaintiff Chan Healthcare Group ("Chan") and a certified class of Washington healthcare providers who submitted reasonable medical expense bills to Respondent Liberty Mutual Insurance Co. ("Liberty") for payment under the Personal Injury Protection ("PIP") coverage in a Liberty auto policy.[1]

Liberty defended the action, in pertinent part asserting that the release of claims in a prior nationwide settlement entered in an Illinois state court barred Plaintiff Chan's action and was entitled to "full faith and credit." The trial court, the Honorable Catherine Shaffer, granted Chan a declaratory judgment that the release of claims was not entitled to "full faith and credit" because of conflicts between Illinois and Washington law and because the Illinois plaintiff did not and could not adequately represent Washington providers consistent with federal due process.[2] Judge Shaffer held that Supreme Court due process precedent required the establishment of subclasses in the nationwide settlement to ensure adequate representation of Washington citizens. *Id.* at 202.

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[1] The PIP statute requires that the insurer make "payments of all reasonable" and necessary medical expenses. RCW 48.22 *et seq.* Liberty used a computer to automatically deny full payment without any consideration or determination that the bill submitted was unreasonable. Petitioners brought suit against Liberty for failing to pay their reasonable bills as required by the PIP statute and engaging in an unfair practice under Washington Consumer Protection Act, RCW 19.86 *et seq.*

[2] *See* June 24, 2016 Report of Proceedings (RP) at 186-201.

Liberty sought discretionary review which was granted based on the Commissioner's decision that "the scope of collateral review of a multistate class settlement under due process appears to be an open question" and "the trial court's decision granting declaratory judgment involves a significant question of law that affects other Lebanon class members in Washington who did not opt out." [3] The Commissioner made no findings under RAP 2.3 that would permit review.

On review, the Court of Appeals reversed. It held that the Illinois settlement was entitled to "full faith and credit." It did not address Judge Shaffer's analysis or finding that subclasses were required by Supreme Court precedent and had not been established by the Illinois trial court.

This Court should accept review of the Court of Appeals' December 11, 2017 opinion reversing Judge Shaffer's judgment because:

(1) In granting review, the Commissioner announced a new rule of law for granting discretionary review that would convert discretionary review from an extraordinary procedure in the middle of a case to the ordinary process whenever there is an "open question" and "significant question of law" that may affect Washington citizens beyond the plaintiff;

(2) The Court of Appeals answered the "open" question by adopting the incorrect legal standard for due process review of a foreign state class

[3] Ruling on Mot. for Discretionary Review at 4-5.

action settlement that does not consider the nature of the findings made by the foreign state's court relevant to ensuring due process was afforded Washington citizens;

(3) The Court of Appeals erred in finding, contrary to Judge Shaffer, that due process was met *by inferring* that the Illinois court found that the Illinois plaintiff was an adequate representative of Washington citizens when the Illinois trial court made no such finding in approving the settlement, but instead made a blanket and rote statement of adequacy; and

(4) The Court of Appeals erred by not considering Supreme Court precedent that a Washington state court's due process review of a nationwide settlement in a foreign court that affected the rights of Washington citizens required consideration of whether subclasses had to be established when the settlement was approved.

As noted, the Commissioner found that the scope of due process review presented an "open" question with no clear answer under Washington law. This case is an illustration of a prevalent problem: this was a "sweetheart" nationwide settlement that was entered into only months after the case was brought by lawyers who were then paid over a million dollars in fees under the settlement while Washington class members get nothing. To protect Washington citizens in such instances, this Court should accept review and determine the proper scope of review

by Washington courts to ensure due process is afforded Washington citizens by foreign states' courts. In such circumstances, it is hardly intrusive for a Washington court to insist that a foreign state's court make an express finding that its citizen is in fact an adequate representative of Washington providers and that subclasses are not required under Supreme Court due process precedent.

II. ISSUES PRESENTED FOR REVIEW

1. Should the Court adopt an additional standard for discretionary review beyond those set out in RAP 2.3 when there is an "open question" about a "significant question of law" that may affect a group of Washington citizens beyond the immediate parties?

2. Is the proper scope of review for a collateral attack asserting lack of due process in a sister state's class settlement approval process due to inadequate representation limited to whether the issue of inadequate representation was simply raised, litigated, and decided *at all* no matter *how* it was decided, or should review also include whether the manner in which the issue was resolved afforded Washington citizens due process?

3. Under the rule of law adopted by the Court of Appeals that limits collateral review to whether the issue of representation was raised at all, litigated, and decided, did the Court of Appeals err in reversing Judge Shaffer's finding that the Illinois trial court did *not* expressly "decide" that the Illinois plaintiff was an adequate representation of Washington citizens?

4. Did the Court of Appeals err in reversing Judge Shaffer's decision that Supreme Court precedent required that the Illinois trial court establish subclasses to protect the interests of Washington citizens in a nationwide settlement under which Washington citizens released their claims but got *nothing* under the settlement and the Illinois court's failure to do so deprived Washington citizens of due process by depriving them of adequate representation?

III. STATEMENT OF THE CASE

A. The *Chan* and *Lebanon* Proceedings

On September 8, 2015, Chan filed this class action in King County Superior Court, alleging an unfair practice under the CPA. CP 1-31.

About one year prior to Chan filing suit against Liberty, Liberty and its subsidiary Safeco entered into a nationwide settlement in an Illinois state court with an Illinois chiropractor, Lebanon Chiropractic. In the October 2014 settlement, Lebanon tried to settle all claims of every health care provider in the nation for reductions made to their medical bills by Liberty or Safeco under any auto policy issued in any state for a period going back seven years and forward five years. CP 1456-1490.

The *Lebanon* case was settled on a nationwide basis four months after it was filed. Under the settlement, Liberty agreed to pay Lebanon and other citizens of Illinois 50% of the reductions made by Liberty and its wholly owned subsidiary, Safeco Insurance Company, to their PIP and medpay claims and Lebanon's attorneys were to be paid over $1 million. Washington providers got *nothing* because of a prior settlement on Washington provider claims in the *Kerbs v. Safeco Ins. Co.* case.

In January 2015, Dr. David Kerbs, a Washington provider who was the plaintiff and class representative in a prior class settlement in Washington titled *Kerbs v. Safeco*, filed an objection in the Illinois state

court settlement proceedings. He asserted in part that the Illinois court lacked jurisdiction to certify a nationwide class, the Illinois plaintiff did not adequately represent Washington providers and had interests antagonistic to them. CP 4041-52. The Illinois trial court approved the settlement without addressing Dr. Kerbs' objections and made *no* factual findings that Lebanon was an adequate representative of Washington providers. The Illinois court simply added language to the *Lebanon* settlement agreement that the settlement would not be interpreted to conflict with the *Kerbs* agreement. CP 1648-1676.

Liberty admitted to the Washington Court of Appeals that the Illinois trial court did not make *express, specific findings* on the adequacy of representation *for Washington providers*; it simply overruled Dr. Kerbs' objection without analysis or findings.[4] The Illinois trial court made no findings that the Illinois and Washington providers possessed the same legal claim, or that Illinois provider Lebanon was an adequate representative of *Washington* providers.

Kerbs appealed, and in February 2016, the Illinois Court of Appeals affirmed the trial court's approval of the *Lebanon* settlement.[5]

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[4] *See* Brief of Appellants at 10 ("The court then expressly rejected Dr. Kerbs' objection *by overruling all objections* to the settlement and finding that the lead plaintiffs were adequate to represent *all class members*.")(emphasis added).

[5] *See* Appendix to Brief of Appellants.

But the appeals court also failed to address the adequacy of representation of Washington providers under the due process clause or the significant differences in substantive law between the Washington and Illinois PIP statutes. As Liberty's counsel admitted during a hearing before the trial court in this case,[6] it appears that the Illinois Court of Appeals did not address these issues because it believed that under Illinois law it did not matter. Instead, the appeals court concluded that a class action may be maintained under Illinois law *in the face* of conflicting state laws, and all that matters is that the settlement was fair, adequate and reasonable. App. at 359-361 (¶¶ 40, 48, 50). But this is a different question than whether Lebanon was an adequate representative of Washington providers under the due process clause.

On June 24, 2016, the Honorable Catherine Shaffer held in this case, in a detailed and well-reasoned decision, that the *Lebanon* release did not bar Chan's claims in Washington under the Washington CPA. The trial court emphasized that the Illinois court decisions lacked the specific factual findings regarding adequacy of representation under the due process clause as required in *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010), and that it was engaging in a "narrow" collateral procedural due process review under *Epstein v. MCA, Inc. (Epstein II),* 179 F.3d 641 (9th Cir.

[6] *See* April 15, 2016 RP at 88-89.

1999), *Matsushita Elec. Industrial Co. v. Epstein,* 516 U.S. 367 (1996), and *Hesse*. App. 78:7-19. The trial court made clear that this narrow review is limited to "assessing the adequacy of the procedural due process protections in the prior litigation." App. 78:7-19.

The trial court concluded that the legal claims of Washington and Illinois providers were materially different; that the Illinois trial court failed to analyze or account for these differences by, for example, creating subclasses; and that the *Lebanon* plaintiff did not adequately represent Washington providers and, therefore, the *Lebanon* settlement's release could not be applied to bar the claims of Washington providers. *See* CP 5243-44, 5248-49; RP (6/24/2016) at 186-201.

B. The Court of Appeals' Decision

On December 11, 2017, the Court of Appeals reversed the trial court's decision and held that the *Lebanon* settlement in Illinois is entitled to full faith and credit in Washington and the *Lebanon* release bars Petitioner's claims in this case in Washington. This petition follows.

IV. ARGUMENT

The Court of Appeals' decision conflicts with U.S. Supreme Court precedent and other persuasive decisions of other Courts of Appeals. RAP 13.4 (b)(1 & (2). The decision also implicates issues of substantial public interest. Specifically, whether citizens of Washington can be denied the

opportunity to collaterally attack the release of claims entered into in a nationwide class action settlement by a sister court in which there was no subclass of Washington providers and no class representative who adequately represented the interests of Washington providers.

A. The Commissioner Departed from RAP 2.3

RAP 2.3 provides for limited discretionary review of trial court decisions in the middle of a case. One reason review is limited is to avoid piecemeal review and disruption of the orderly processing of a case.

In her ruling granting discretionary review, the Commissioner did not cite to or discuss any provision of RAP 2.3. Instead, she created a new and exceedingly broad standard for discretionary review in the middle of the case whenever there is an "open question" that involves a "significant legal question" that may affect a group of citizens of Washington beyond the parties to the litigation. The Commissioner ruled that under this standard "review is appropriate." October 25, 2016 Order at 1.

Because this standard is not found in RAP 2.3, Petitioner Chan moved to modify the Commissioner's ruling. But the motion was denied without analysis. By denying review, the Court of Appeals adopted the Commissioner's new expanded standard for discretionary review because no basis for review under RAP was stated. Since discretionary review was improperly granted, the Court of Appeals lacked jurisdiction to consider

and reverse Judge Shaffer's ruling and its opinion should be reversed.

B. The Court of Appeals adopted an improperly narrow standard for collateral attack of a class action settlement entered in a sister state

The Court of Appeals held that under full faith and credit principles, the proper scope of collateral review is whether the "same due process challenge was raised, litigated, and decided in the sister state." Op. at 1. If so, "Washington courts do not second guess the analysis and resolution by the trial and appellate courts in the sister state." *Id.*

Petitioners respectfully argue that the Court of Appeals adopted the wrong standard. The court primarily looked to factually and legally distinct Washington state cases involving an *individual* plaintiff who had previously fully litigated the same issue in a sister state and which addressed whether full faith and credit and res judicata would be accorded to a judgment from a sister state. *See In re Estate of Tolson*, 89 Wn.App. 21, 947 P.2d 1242 (1997); *OneWest Bank FSB v. Erickson*, 185 Wn2d. 43, 367 P.3d 1063 (2016).[7]

[7] In *In re Estate of Tolson*, a decedent's son had been a party to a California case that fully litigated the issue of the decedent's domicile. He later collaterally attacked the domicile decision in Washington, and the Court of Appeals held that "*principles of res judicata* attach to the jurisdictional ruling and preclude relitigation...a judgment regarding domicile cannot be collaterally attacked...*by one who was a party to the proceeding.*" 89 Wn.App. at 32 (emphasis added). In *OneWest Bank*, a decedent's daughter, who had been party to an action in Idaho that determined her father's domicile, collaterally challenged in Washington the Idaho court's foreclosure on her home, arguing that the Idaho court did not have jurisdiction to affect the Washington property. 185 Wn.2d at 1-2. The Supreme Court determined that the Idaho court did have jurisdiction

But these res judicata cases involving single plaintiffs have little applicability to situations, like the instant case, involving an out-of-state, absent plaintiff collaterally attacking a class action settlement entered by a sister court. The cases the Court of Appeals relied on do not involve an analysis of whether the class action settlement approved in a foreign state comported with due process, specifically whether absent class members were afforded notice of the action, an opportunity to opt-out, and adequately represented[8]. The cases did not discuss what the standard of review in that instance should be.

Instead, the Court of Appeals should have relied on *Nobl Park*, another Washington case, but one that involved a collateral attack on a class action settlement. Indeed, the Court of Appeals acknowledged that *Nobl Park* held that "a foreign state is *not required* to give full faith and credit to a judgment against an affected party *who did not receive due process* when the judgment was entered," Op. at 5 (citing *Nobl Park*, 122 Wn.App. at 845), but the Court of Appeals did not further address *Nobl Park*'s methodology. As the trial court pointed out in analyzing the due process issue, RP (6/24/16) at 189, the court in *Nobl Park did engage* in collateral review to determine whether notice was proper and the plaintiff

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and full faith and credit applied. *Id.* at 26-27.

[8] *Nobl Park L.L.C. v. Shell Oil Co.*, 122 Wn. App. 838, 845, 95 P.3d 1265 (2004)(citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965 (1985)).

was an adequate representative of absent class members. *Nobl Park* stands *for* a right to collateral review, and the *Nobl Park* court proceeded to conduct just such a review. *See Nobl Park*, 122 Wn.App. at 845-48.

The Court of Appeals also should have relied on persuasive authority from many circuit courts involving more similar fact scenarios – collateral attacks on class actions settlements approved in a sister state. The trial court properly determined that *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010) is on all fours with this case and is "good law" on the issue of a federal due process inquiry on collateral attack. In *Hesse*, which involved a collateral attack of a Kansas state court settlement, the Ninth Circuit, like the Washington Court of Appeals in *Nobl Park*, made clear that the Full Faith and Credit clause is not without limit. *Id.* at 587 ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and we are not required to accord full faith and credit to such a judgment") (internal cites omitted). Citing *Epstein v. MCA, Inc. (Epstein II)*, 179 F.3d 641 (9th Cir. 1999), the *Hesse* court held that limited collateral review is appropriate in order to "consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Hesse*, 598 F.3d at 587. This limited collateral review includes "adequacy of representation." *Id.*

Notably, the Ninth Circuit in *Hesse* also clarified *when* collateral review is appropriate: the *Hesse* court held that when the foreign court made *specific and express* findings regarding adequacy of representation, such express findings should generally satisfy the forum state court on collateral review that due process was met. *Id.* at 588. But when the foreign state court did *not* make specific findings, the court should collaterally review the foreign court's judgment "to determine whether, in the absence of a specific finding by the [foreign] court, its judgment satisfies due process as to the claims at issue here." *Id.*.

The Second Circuit similarly held that collateral review is permissible where the court that approved the settlement did not address the adequacy of representation *as to a specific subset of a class*. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258 & n.6 (2d Cir. 2001)(citing *Shutts*, 472 U.S. at 805)"It is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment.")").

The Fifth and Sixth Circuit have adopted an even broader standard, which recognizes that it is incumbent upon the collaterally reviewing court, not the certifying court, to determine whether the rights of absent class members were protected by due process, including adequacy of representation. In *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), the

Fifth Circuit reasoned that:

> To answer the question whether the class representative adequately represented the class ... requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a collateral review of the... [trial] court's determination to permit the suit to proceed as a class action with [the named plaintiff] as the representative, while the second involves a review of the class representative's conduct of the entire suit - an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment.

Id. at 72. Similarly, in *Gooch v. Life Investors Ins. Co. of Am.* 672 F.3d 402 (6th Cir. 2012), the Sixth Circuit held:

> We conclude that... we may review the substance of whether that settlement complied with the Due Process Clause...It is incumbent upon us to apply the same scrutiny to state-court judgments that the Supreme Court would apply. Even though reconsidering whether the class judgment complied with the due process clause may not promote judicial "efficiency" or protect the "finality" of the original judgment... it is a due-process imperative that we are not free to ignore.[9]

The Sixth Circuit also aptly noted that a standard such as the one adopted by the Court of Appeals here or by the Third Circuit in *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141 (3d Cir. 2005), that bars collateral

[9] *Id.* at 420-22 (citing Newberg on Class Actions, § 16:24 (4th ed. 2002) ("[T]he potential impact of a class court judgment is not a matter for determination by the deciding court. The res judicata effect of a class judgment can only be determined by a later court in light of a specific controversy.")

review if adequacy of repesentation was "raised, litigated, and decided" does *not apply* if the reviewing court's reference to adequacy was merely a "passing rubber-stamp reference." 672 F.3d at 421-22.

Even *OneWest Bank* – which the Court of Appeals relied on heavily to support its narrow standard of review – in fact supports the broader review urged by Petitioner. In *OneWest Bank*, the Supreme Court held that:

> Under the full faith and credit clause, a state is required to enforce the judgment of sister states *unless there is a jurisdictional or constitutional defect.* A Washington court *can therefore examine whether the Idaho courts had jurisdiction.* But once it recognizes Idaho's jurisdiction, it cannot question the validity of those judgments.

185 Wn.2d at 26-27. Contrary to the Court of Appeals' conclusion that if the issue is raised, litigated, and decided by the sister state, the reviewing court cannot "second guess the analysis and resolution," Op. at 1, *OneWest Bank supports* that the standard *includes* the ability to review whether there were constitutional defects in the settlement approval. Only once the collateral court has reviewed the constitutional issues and is satisfied that there were no constitutional defects does the court grant full faith and credit to the sister state's judgment.

Indeed, the Court of Appeals' decisions appears to turn on a *res judicata*-type analysis more than a full, faith and credit analysis – that if

the issue was raised, litigated, and decided in a prior litigation it cannot be relitigated – but as discussed during the Court of Appeals' hearing, *res judicata* is not at play here because Chan Healthcare Group was not a party to the *Lebanon* proceedings. Chan was simply an absent class member. *See e.g. King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 646, 949 P.2d 1260, 1291 (1997).

For the reasons stated above, the Court of Appeals erred in adopting a narrow standard of review on collateral attack that it does not second guess the resolution of the sister court if that sister court "raised, litigated, and decided" the issue of adequacy of representation. This standard misreads *OneWest Bank*, ignores persuasive circuit court authority, and fails to sufficiently protect the interests of Washington citizens in the face of "sweetheart" deals that are rubber-stamped by certain courts across the country.

C. Applying a limited scope of review, the Court of Appeals erred in determining that that the Illinois trial court "decided" the issue of adequacy of representation for Washington providers.

Even under the limited standard of review that the court adopted, the court erred in its conclusions. The Illinois trial court *did not* "decide" the issue of the adequacy of Illinois provider Lebanon to represent *Washington* providers, given that 1) it made no *specific* findings as to

adequacy for the specific interests of Washington providers; and 2) it did not address the need, nor provide for, subclasses, as required under U.S. Supreme Court precedent.

First, the Illinois trial court *did not* "decide" the issue of the adequacy of Illinois provider Lebanon Chiropractic to represent *Washington* providers, so collateral review of the issue of adequacy of representation should not have been precluded. The trial court simply made a conclusory, generic, boilerplate conclusion that "Plaintiff Lebanon Chiropractic Clinic... will fairly and adequately protect the interests of the Settlement Class." CP at 4154. This finding did not address the specific interests of Washington providers or Lebanon's adequacy to represent them. Just like Liberty did in its brief to the Court of Appeals, the Court of Appeals implicitly acknowledged the limitations of this trial court finding by concluding that *"[I]n context*, this was not a mere boilerplate finding of adequate representation." Op. at 10 (emphasis added).

The Court of Appeals should be reversed and the trial court's decision should be affirmed. Before concluding on June 24, 2016 that the Illinois court *did not* make sufficient express findings regarding the adequacy of Lebanon to represent Washington providers, the trial court reviewed a voluminous record, multiple sets of briefings from the parties, and heard three different oral arguments on the issue of *Lebanon*,

including the details of the *Lebanon* trial court proceedings and Dr. Kerbs' objection and appeal. *See* Appellee Chan's Response Brief at 6-10.

Notably, Liberty did not assign error to this finding by the trial court. As such, it has become a verity and the Court of Appeals should have regarded it as such. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119 (1980) (the Court "consider[s] as verities on appeal any unchallenged factual findings to which a party does not assign error."). To the contrary, Liberty *admitted* that the Illinois court did not make any express factual findings regarding the adequacy of class representatives.[10]

Instead, Liberty and the Court of Appeals relied solely on the argument that the trial court "necessarily adjudicated Dr. Kerbs' objections" in rejecting them." *Id.* But Judge Shaffer thoroughly considered and dismissed this argument.[11]

As the trial court concluded, the issues Chan raises on collateral

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[10] *See* Opening Brief at 11, n. 12.

[11] *See* RP (6/24/2016) at 195-96:

> Dr. Kerbs didn't raise the same arguments being raised here... He did argue that Lebanon Clinic had a conflict of interest with Washington members. But the problem with looking at that argument as being somehow an indication that the Illinois court addressed these objections is that the Illinois court didn't address that objection that the Lebanon Clinic had a conflict of interest with Washington providers. Rather the Illinois court just carved the *Kerbs* class out of the Lebanon settlement.
>
> ... the defendants' briefing to the Illinois court didn't include any briefing on due process or adequacy of representation issues. So, I really don't see how the Illinois courts at any point examined this specific question of due process or adequacy of representation in any direct way as *Hesse* requires.

attack were not actually "litigated and determined." *Id.* There was "at best, a passing rubber stamp reference to the adequacy of representation in the final order approving settlement." *Id.* This conclusory finding is insufficient to require deference. The trial court must make *express* findings regarding the adequacy of representation under the due process clause. *See Hesse,* 598 F.3d at 588 ("we review...only to determine whether, in the absence of a specific finding by the Kansas court, its judgment satisfies due process as to the claims at issue here...").[12]

D. The Illinois courts did not conduct the required analysis of whether subclasses were required

The Illinois courts' analysis and procedure was also constitutionally deficient under the due process clause because they did not conduct the required analysis of whether subclasses would be necessary in light of the differences in the legal claims of different class members. For the Court of Appeals to find that the issues raised on collateral attack were "raised, litigated, and decided," the Illinois courts must have considered the issue of subclasses, which Chan raises in this case. But the Illinois courts ignored this issue entirely.[13]

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[12] *See also Gooch,* 672 F.3d at 421-422 ("the passing rubber-stamp reference in the opinion of the Arkansas circuit court...hardly meets this standard" for specific findings regarding adequacy of representation).

[13] As Judge Shaffer found here, the Illinois appellate court even cited to cases requiring subclasses, but then failed to analyze whether subclasses would be t to protect the interests of Washington providers. RP (4/15/2016) at 107-108 ("I will point out to you

The Court of Appeals left this important consideration out of its analysis, and ignored Judge Shaffer's finding that subclasses were necessary, even though the U.S. Supreme Court has held that subclasses are *mandatory* when a class settlement includes distinct groups of class members. *See Amchem v. Windsor*, 521 U.S. 591, 627 (U.S. 1997)(rejecting a "global compromise" that included two distinct groups of class members affected by current or future asbestos-related medical issues because the settlement had "no structural assurance of fair and adequate representation for the diverse groups and individuals affected" and holding that subclasses in such a situation are mandatory).

This issue was not "raised, litigated, and decided" in Illinois and Judge Shaffer's review of this issue – and factual finding that subclasses were mandatory – should be upheld.

V. CONCLUSION

For the foregoing reasons, the Court should accept review of the decision of the Court of Appeals.

Dated this 10th day of January, 2018.

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that I find it very disquieting that the Illinois appellate court cites to cases requiring subclasses and yet never addresses why it is that subclasses are required. Surely, it is not too much to ask a sister court to appoint a class representative from the group of Washington claimants, who can actually represent what Washington law requires.").

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 10, 2018, I caused the foregoing to be filed electronically with: The Supreme Court of the State of Washington and a true and correct copy of the same to be delivered electronically to the following:

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

s/ Jamie Telegin
Jamie Telegin, Legal Assistant

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To: Jamie Telegin
Cc: Cindy Heidelberg; David Breskin
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Subject: Petition for Review; Court of Appeals Case No. 75541-2-I

Good afternoon,

Attached is a Petition for Review for filing. I have attempted to file it electronically but the court's e-filing website is down and out deadline is today.

I have been in contact with Virginia Neal who is working to fix the issue but she does not think it will be fixed before 5pm.

Will you accept filing of the attached or allow us to file tomorrow when the website is working?

Thank you.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHAN HEALTHCARE GROUP, PS, a Washington professional services corporation, Respondent, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY, foreign insurance companies, Petitioners.	No. 75541-2-I PUBLISHED OPINION FILED: December 11, 2017

VERELLEN, C.J. — This appeal turns on the standard governing a due process collateral attack on a sister state's resolution of a multistate class action. Under full faith and credit principles, a collateral attack in Washington fails if that same due process challenge was raised, litigated, and decided in the sister state. Under these circumstances, Washington courts do not second guess the analysis and resolution by the trial and appellate courts in the sister state.

Because the substance of respondent's due process claim of inadequate representation was raised, litigated, and decided in Illinois, the Illinois settlement is entitled to full faith and credit.

Therefore, we reverse.

FACTS

This appeal concerns use by Liberty Mutual Insurance Company (Liberty) of a computerized database to determine the amounts payable for treatments covered by personal injury protection (PIP) coverage under automobile insurance policies. Washington's PIP statute requires automobile insurers to pay all reasonable and necessary medical expenses incurred by the insured.[1] Insurers must "conduct[ ] a reasonable investigation" before refusing to pay claims.[2] Liberty sets the benchmark reasonable medical charges payable using the FAIR Health database, reflecting other healthcare provider charges in the same geographic area.

Liberty's use of the FAIR Health database was previously challenged in Lebanon Chiropractic Clinic v. Liberty Mutual Insurance Company, a multistate class action lawsuit litigated in Illinois.[3] The class included Washington providers. The lawsuit alleged that Liberty's use of the FAIR Health database was unfair under the Illinois Consumer Fraud and Deceptive Business Practices Act[4] and other states' equivalent acts, including the Washington Consumer Protection Act.[5] Chan, a Lebanon class member, received reasonable notice and did not opt out.

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[1] RCW 48.22.095(1), .005(7).

[2] WAC 284-30-330(4).

[3] No. 5-15-0111, 150111, 2016 IL App (5th) 150111-U, 2016 WL 546909 (Feb. 9, 2016) (unpublished).

[4] 815 ILL. COMP. STAT. ANN. 505/1 (2007).

[5] Ch. 19.86 RCW.

In October 2014, the parties in Lebanon reached a proposed class settlement. In January 2015, class member Dr. David Kerbs, a Washington chiropractor, filed an objection to the proposed settlement asserting, among other things, "Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interests with Washington providers."[6] Dr. Kerbs argued the conflict of interest was the result of differences between Illinois and Washington's consumer protection statutes.

In February 2015, following a fairness hearing, the Illinois court entered a final order and judgment approving settlement and dismissing the case. In the order, the court acknowledged Dr. Kerbs' objection, overruled all objections to the proposed settlement, and determined the named plaintiff was an adequate representative.[7]

Dr. Kerbs appealed the judgment to the Appellate Court of Illinois. He specifically challenged the adequacy of representation resulting from conflict between the Illinois and Washington's consumer protection and PIP statutes. In February 2016, the Illinois appellate court affirmed the trial court in an unpublished opinion.[8]

In September 2015, while Dr. Kerbs' appeal was still pending in Illinois, Chan Healthcare Group, PS (Chan) filed the current case against Liberty in King

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[6] Clerk's Papers (CP) at 4042.

[7] See CP at 4155-56.

[8] Lebanon Chiropractic, 2016 WL 546909, at *15.

County Superior Court. Chan alleged Liberty's reliance on the FAIR Health database constituted an unfair practice under the Washington Consumer Protection Act.

Chan moved for a declaratory judgment that Lebanon did not preclude the claims because the class representative was an inadequate representative. Liberty moved for summary judgment seeking dismissal of the case. The superior court declined to give full faith and credit to the Lebanon settlement and found the named plaintiff in Lebanon did not adequately represent the interests of Washington providers. The trial court granted Chan's motion and denied Liberty's motion.

We granted Liberty's motion for discretionary review.

ANALYSIS

Liberty contends the trial court erred when it failed to give full faith and credit to the Lebanon settlement.

We review a court's refusal to accord full faith and credit to a foreign judgment de novo.[9] The full faith and credit clause of the United States Constitution requires states "to recognize judgments of sister states."[10] A state court judgment in a class action is "presumptively" entitled to full faith and credit

[9] OneWest Bank, FSB v. Erickson, 185 Wn.2d 43, 56, 367 P.3d 1063 (2016).

[10] Id. at 55 (citing U.S. CONST. art. IV, § 1).

from the courts of other jurisdictions.[11] "[P]arties can collaterally attack a foreign order 'only if the court lacked jurisdiction or constitutional violations were involved.'"[12] Specifically, "a foreign state is not required to give full faith and credit to a judgment against an affected party who did not receive due process when the judgment was entered."[13] Due process in a class action requires (1) "'reasonable notice' that apprises the party of the pendency of the action, affords the party the opportunity to present objections, and describes the parties' rights," (2) the opportunity to opt out, and (3) "a named plaintiff who adequately represents the absent plaintiffs' interests."[14]

Here, there is no dispute Chan had adequate notice and did not exercise the right to opt out. The sole dispute is whether Chan can collaterally attack the Lebanon settlement for lack of adequate representation. We must decide, under full faith and credit, the standard for a collateral attack asserting lack of due process in a sister state's class settlement approval.

In In re Estate of Tolson, Division Two of this court considered whether a Washington court was bound in a probate proceeding to a prior determination by a California court that decedent was domiciled in California at date of death.[15]

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[11] Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 374, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996).

[12] OneWest Bank, 185 Wn.2d at 56 (quoting State v. Berry, 141 Wn.2d 121, 128, 5 P.3d 658 (2000)).

[13] Nobl Park, L.L.C. of Vancouver v. Shell Oil Co., 122 Wn. App. 838, 845, 95 P.3d 1265 (2004).

[14] Id.

[15] 89 Wn. App. 21, 32, 947 P.2d 1242 (1997).

Division Two concluded that while "enforcement of a judgment under [the full faith and credit clause] can be challenged by a showing that the court rendering judgment lacked jurisdiction[,] . . . it is also well settled that if the jurisdictional question *has been litigated* in the rendering court, principles of res judicata attach," and that question cannot be relitigated on collateral attack.[16]

Our Supreme Court adopted a similar approach in OneWest Bank, FSB v. Erikson when considering "whether a Washington court must give full faith and credit to an Idaho court order encumbering Washington property."[17] "This case arose through OneWest Bank FSB's attempted foreclosure of Washington property based on a reverse mortgage that an Idaho court ordered through [the decedent's] conservatorship proceeding."[18] The decedent's daughter "challeng[ed] the foreclosure, claiming the reverse mortgage [was] void because she was the actual owner of the property and the Idaho court had no jurisdiction to affect Washington property."[19]

Our Supreme Court concluded, "[W]e cannot question [the decedent's] domicile because the personal jurisdiction issue was *already litigated and decided* in the Idaho conservatorship proceedings."[20] The court was persuaded the issue of jurisdiction was already litigated and decided because the record, chiefly the

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[16] Id. (emphasis added).

[17] 185 Wn.2d 43, 55, 367 P.3d 1063 (2016).

[18] Id. at 47-48.

[19] Id.

[20] Id. at 57 (emphasis added).

Idaho court's docket entries, revealed the decedent "objected to personal jurisdiction in the Idaho court, but the court denied his objection and exercised jurisdiction over him."[21]

> Although we do not have the particular Idaho court order at issue, we have sufficient evidence that the Idaho court *considered* challenges to [the decedent's] domicile and *ruled* that it had jurisdiction to appoint a conservator over him. . . . There was enough evidence for the Idaho court to conclude it had sufficient contacts to exercise jurisdiction over [the decedent]. If [the daughter] wanted to challenge this determination, the Idaho court was the proper forum for doing so. She cannot collaterally attack that determination here.[22]

Limited collateral review of a sister state court's finding of jurisdiction as provided by Tolson and OneWest Bank is consistent with nonbinding federal authority addressing the scope of collateral review in the context of a due process challenge to a foreign court's class settlement approval.

In Epstein v. MCA, Inc., the Ninth Circuit addressed the effect of a Delaware state court judgment that approved a class action settlement releasing exclusively federal claims.[23] The Ninth Circuit rejected a broad, merit-based collateral review and held that collateral review is limited to "whether the *procedures* in the prior litigation afford the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue."[24] Due process

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[21] Id. at 58.

[22] Id. (emphasis added).

[23] 179 F.3d 641, 643 (9th Cir. 1999).

[24] Id. at 649 (emphasis added).

"does not require collateral *second-guessing* of those determinations and that review."[25]

Consistent with Tolson, OneWest Bank, and Epstein, we hold Washington courts do not relitigate questions of due process previously *raised, litigated, and decided* by a sister state court when approving a class settlement. To determine whether a due process issue has been previously raised, litigated, and decided, we consider (1) whether the specific due process objection was before the sister state court, (2) whether the parties presented briefing on the objection, and (3) whether the sister state court ruled on the objection. If, after conducting this limited collateral review we are reassured the sister state court litigated and decided the same due process objection currently raised, we will not second guess the determination of that court.[26]

Here, Chan reargues Dr. Kerb's contention that the class representative in Lebanon inadequately represented Washington providers, noting

> there are fundamental differences between the Washington and Illinois consumer protection acts (including the public interest impact prong in Washington and the more restrictive requirement in Illinois of intent); between the remedies available in Washington and Illinois (e.g. treble damages versus punitive; rates of interest in judgments); and most importantly in the substantive laws underlying the

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[25] Id. at 648.

[26] The parties disagree about the significance of the Ninth Circuit decision in Hesse v. Sprint Corporation, 598 F.3d 581, 588 (9th Cir. 2010). At most, the Hesse decision recognizes that in the absence of any determination of adequate representation by the forum state, a collateral attack review of adequate representation is permissible. But here, the question of adequate representation of Washington class members was raised, litigated, and decided in both the Illinois trial and appellate courts.

> [consumer protection act] claims of Washington and Illinois providers.[27]

But the same objection concerning lack of adequate representation was before the Illinois trial court in Lebanon. Dr. Kerbs objected to the proposed settlement because, among other things, "Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interests with Washington providers."[28]

The parties in Lebanon presented briefing on that specific conflict of interest. In his written objection, Dr. Kerbs argued:

> Washington providers have rights and causes of action for relief under the Washington Consumer Protection Act not possessed or available to Lebanon as an Illinois provider. Lebanon could not adequately represent Washington providers and had a conflict of interests in obtaining benefits that benefited Lebanon but not Washington providers who get nothing under the Lebanon settlement and see key benefits and rights taken away from them.[29]

The court also received responses from Liberty and the class representative rebutting Dr. Kerbs' various objections. The class representative specifically addressed Dr. Kerbs' argument concerning differences between Illinois and Washington law:

> While [Dr. Kerbs and another objector] claim that a conflict exists, neither has specified one. Objector Kerbs fails to identify how rights under the Washington Consumer Protection Act are different. . . . In the end, there is no material difference or conflict, and both

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[27] Resp't's Br. at 20.

[28] CP at 4042.

[29] CP at 4049-50.

> Objectors simply argue that providers from their respective states have done or could do better.[30]

The record of the arguments made to the Illinois trial court is more detailed than the docket entries relied on in OneWest Bank.[31]

And the issue of adequate representation was decided by the Illinois trial court. In the written order approving class settlement, the court "overrule[d] all objections to the Stipulation and the proposed Class Settlement and approve[d] all provisions and terms of the Stipulation and the proposed Class Settlement in all respects."[32] The Illinois trial court also determined "Plaintiff Lebanon Chiropractic Clinic . . . and Class Counsel will fairly and adequately protect the interests of the Settlement Class."[33] In context, this was not a mere boilerplate finding of adequate representation.

Dr. Kerbs appealed, and the Illinois appellate court considered the same issue of inadequate representation stemming from alleged conflicts between Illinois and Washington law.[34]

In his brief to the Illinois appellate court, Dr. Kerbs renewed his specific argument concerning differences in available relief under Illinois and Washington

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[30] CP at 4073.

[31] OneWest Bank, 185 Wn.2d at 58.

[32] CP at 4156.

[33] CP at 4154.

[34] See CP at 4671 (notice of appeal to appellate court of Illinois) ("Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interest with Washington providers because Lebanon does not possess a Washington CPA claim and cannot obtain the broader relief available to Washington health care providers.").

law.[35] He argued the class representative had a conflict of interest with Washington providers because

> the Washington Act provides for treble damages, attorneys fees and litigation costs and prejudgment interest at the rate of 12% per annum on the award of actual damages. Lebanon did not have claims that would provide such relief. It was therefore in Lebanon's interests to negotiate a settlement with Liberty in which Washington providers got nothing.[36]

In response, Liberty Mutual claimed

> Dr. Kerbs' argument that the damages available under the Washington Consumer Protection Act are marginally greater than those available under the Illinois Consumer Fraud Act is legally irrelevant. Even if his damages calculations are correct, Dr. Kerbs fails to explain how such a difference creates antagonistic interests between Plaintiff and Washington providers.[37]

The class representative similarly argued, "Objector Kerbs has never identified any relief that Lebanon Chiropractic sought that is antagonistic to the interests of the Washington provider class members. . . In the end, Objector Kerbs simply argues that Washington providers *might* 'do better.'"[38]

The Illinois appellate court's unpublished opinion addressed Dr. Kerbs' adequate representation objection, described the appropriate legal standards for analyzing adequate representation, and rejected the claims:

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[35] See CP at 4354 (Lebanon "has no claim that Liberty's reductions made to Washington provider bills using the FAIR Health database violated Washington insurance regulations, the Washington PIP or CPA.").

[36] CP at 4354-55 (emphasis omitted).

[37] CP at 349 (emphasis omitted).

[38] CP at 1738.

> Kerbs argues the trial court abused its discretion in approving the settlement where Lebanon did not fairly and adequately protect the interests of the class members. . . . When evaluating whether the class representative can provide fair and adequate representation, the court must determine that the representative party is not seeking relief which is potentially antagonistic to the members of the class. . . .
>
> Here, in support of his objection filed with the trial court, Kerbs identified the following relief that was sought by Lebanon that was antagonistic to the interests of the Washington providers: . . . that Washington law requires payment of all reasonable charges[,] and that Washington providers receive nothing under the Lebanon settlement.[39]

It is clear the Illinois appellate court was aware of and rejected Dr. Kerbs' argument concerning material differences between Washington and Illinois law.[40] The court observed that Kerbs had not demonstrated any "outcome-determinative differences in Washington law and Illinois law."[41]

Dr. Kerbs did not seek review by the Illinois Supreme Court. The Illinois state court system was the appropriate avenue for continuing to challenge the certifying court's determination of adequate representation.[42]

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[39] Lebanon Chiropractic, 2016 WL 546909, at *13-14.

[40] Id. at 11 ("[I]n his appellate briefs, Kerbs notes that Illinois is an at-fault state where Washington is a no-fault state, Illinois has no comparable PIP statute requiring the payment of all reasonable medical expenses submitted, and Illinois has no comparable insurance regulation requiring insurers to investigate a PIP claim before refusing to pay a claim.")

[41] Id.

[42] See Nobl Park, 122 Wn. App. at 845, n.3 ("[A] party's right to due process is protected by the court certifying a class action and the court's reviewing subsequent appeals in the state issuing the judgment in such action; it is not the obligation of the courts of another state to collaterally review due process challenges.").

In essence, Chan asks this court to take on the role of the Illinois trial court deciding the issue of adequate representation. But we do not review de novo whether we would have found adequate representation as the Illinois trial court. Neither do we decide whether we would have affirmed the trial court determination of adequate representation sitting as the Illinois appellate court. And we do not consider whether we would have affirmed the appellate court's decision if we were the Illinois Supreme Court.

In conducting a full faith and credit analysis, we do not dwell on the precise rationale and analysis used by the sister state to resolve the due process claim. To allow an automatic de novo review by collateral attack whenever lack of due process is alleged would be contrary to full faith and credit principles emphasizing the importance of finality.

The scope of collateral attack is narrow. Our consideration of the argument and materials before the Illinois court is limited to whether the issue at hand was raised, litigated, and decided by that court. Chan contends the issues litigated in Illinois are completely different than the issues raised in Washington. But in Illinois, Dr. Kerbs argued the Lebanon plaintiff was an inadequate representative because differences between the consumer protection and PIP statutes in Washington and Illinois created a conflict of interest. Chan now attempts to revive those same claims that were raised, litigated, and decided in the Illinois trial and

appellate courts.[43] Chan's collateral attack fails. The Lebanon settlement is entitled to full faith and credit.[44]

Therefore, we reverse.

WE CONCUR:

[43] To the extent Chan suggests Washington class action standards are different than Illinois, he provides no authority that the due process standards applicable to class action settlements vary.

[44] We deny Liberty's motion to strike Chan's statement of additional authorities.