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NO. 95416-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, INC.,

Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY
and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

**PETITIONER'S RESPONSE TO ATTORNEY GENERAL'S
*AMICUS BRIEF***

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I. RESPONSE

In its Amicus Brief, the Washington State Attorney General (“AG”) provides an informative history and analysis of the issue of the appropriate review to be engaged in by a forum state court when asked to enforce a foreign state court judgment that will deprive citizens of the forum state of their rights and forever bar claims the citizens could have asserted against the defendant. As the AG’s brief makes clear, the forum court has a duty to its citizens to ensure their due process rights were protected in the foreign state court proceedings before a foreign judgment based on a state court class action settlement involving the citizens of the forum state may be used in the forum state’s courts to expunge the rights of its citizens.

Indeed, the supreme courts of other states have recognized that ensuring the protection of the due process rights of their citizens in proceedings in the forum state’s courts is a paramount public interest to the finality of the foreign state court’s judgment in the forum state. *See, State v. Homeside Lending, Inc.*, 2003 VT 17, 37, 826 A.2d 997, 1011 (2003).

As the AG correctly notes, due process requires both adequacy of notice to absent class members and adequacy of representation of *the citizens of the forum state* by the plaintiff and class representative in the

foreign state court proceedings. The issue this Court asked the AG to address was the appropriate standard of this due process review and how it would be appropriately applied to the facts of this case with regard to adequacy of representation. The AG provided the Court with guidance as to the first issue and declined to provide guidance on the latter, choosing not to become engaged in an analysis of the facts and circumstances of this case that would dictate the appropriate result. That said, the AG provides the Court with guidance on both issues.

First, the AG concludes from its analysis of the approaches taken by various courts to collateral review, that courts attempt at times to distinguish between a “merits” based review of due process and a “non-merits” (or “narrow”) based review, ascribing the first type of review to courts that follow the Second Circuit’s decision in *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) and the second type of review to courts that follow the Ninth Circuit’s decision in *Epstein v. MCA, Inc.* (*Epstein II*), 179 F.3d 641 (9th Cir. 1999). But as the AG astutely observes the labeling is both confusing and misleading.

The AG concludes that the more accurate assessment is that courts have applied a “flexible” sliding scale of review depending on the circumstances and facts relating to the underlying class action settlement in the foreign state, the degree of express consideration and findings

relating to conflicts of interest between the representative of the foreign state and forum state citizens, and ultimately the foreign court's compliance with the due process requirement for adequacy of representation to each specific group as opposed to summarily "checking off" the requirement for class certification of adequacy of representation for the settlement class as a whole. The AG specifically notes that where, as here, there are facts showing the possibility of collusion in the settlement or potential conflicts of interests between the foreign state plaintiff and members of the class from the forum state, a more searching review is mandated and appropriate before the foreign state judgment based on the class settlement will be enforced under the full faith and credit clause.

The facts and circumstance of the *Lebanon* nationwide class action settlement shows the very type of indices of collusion – conflict of interests between the Illinois chiropractor and Washington citizens, the confirmation of such conflicts by the Illinois Court of Appeals, and the absence of any express finding by the Illinois trial court that the subclass of Washington citizens were adequately represented by the Illinois chiropractor – that calls for a more searching and substantive review of the federal due process protection of Washington citizens. The Washington trial court conducted such a review and concluded that the Washington

class members were not adequately represented. But the Washington Court of Appeals reversed and failed to employ such a review, wrongly concluding that the rule of law prohibited such review. Instead the Court of Appeals applied an extremely superficial review that merely “checked the box” of whether adequacy of representation for the class *as a whole* was considered and decided. The Court of Appeals did not consider the facts or circumstances showing collusion (or at the least, lack of a true adversarial proceeding), conflicts of interest, and lack of express findings pertaining to the specific claims and interests of Washington class members. In doing so, and in adopting an extremely narrow scope of review that essentially bars collateral review altogether, the Court of Appeals abdicated the very due process review owed to citizens of Washington before their rights and claims could be expunged in their own state’s court based on a nationwide class action settlement in a foreign state court.

II. STATEMENT OF FACTS

The *Lebanon* nationwide class action in Illinois state court involved a single Illinois chiropractor who purportedly represented citizens of Washington on Washington Consumer Protection Act claims against the Defendant Liberty Mutual insurance companies for a practice that violated the Washington Personal Injury Protection (“PIP”) statute

and was an unfair insurance claims handling practice in Washington under the Washington Administrative Code regulation 284-30-330. Washington Consumer Protection Act. The settlement was reached less than 150 days after the case was filed. The settlement occurred without any discovery being taken by the plaintiff's counsel, without any motions practice and prior to any effort by plaintiff to certify either an Illinois or a nationwide class.

In the settlement Liberty obtained a broad release of every claim of every citizen of every state, including Washington citizens, for violation of every insurance law and regulation for denying payments of PIP or medical expense claims on automobile policies written in nearly every state. The release covered claims based on Liberty's use of two different databases of provider charges, the Ingenix database and the FAIR Health database. The Ingenix database covered claims for an earlier and substantially shorter period of time. The FAIR Health database covered claims through the date of settlement and a substantially longer period of time. CP 1456-1490.

In exchange for the release, Washington citizens got next to nothing. Illinois citizens got 50% of the amount of expenses not paid by Liberty and its subsidiary Safeco on Ingenix claims. Washington citizens got no consideration under the settlement for Ingenix reductions by Safeco

because of a prior settlement in Washington. And Washington citizens and the citizens of the other states got absolutely nothing any claims based on the FAIR Health database. *Id.* This meant that the only consideration Washington class members got under the settlement was 50% of the amount of expenses not paid by Liberty, which represents only a small portion of the market share in Washington as compared to Safeco. Washington citizens were differently situated in the consideration received under the agreement than Illinois chiropractor Lebanon and there was no Washington subclass or Washington class representative to represent their interests. *Id.*

For agreeing to this settlement, the Illinois Chiropractor got paid a class representative fee of \$3,000 and the Illinois attorneys representing the Class got paid \$1.2 million only a few months after the case was filed. CP 1480-81.

The Illinois trial court approved the nationwide class action settlement without making any finding that the Illinois chiropractor and the Illinois attorney adequately represented the citizens of *Washington*. It found adequacy of representation met for certification of a nationwide settlement class only. It did not consider subclasses or make findings related to the specific interests of Washington class members. CP 1654, 1656.

The Illinois court of appeals noted an objection made by a Washington citizen that the results of Washington citizens could be better under Washington law than Illinois law but concluded that the nationwide settlement was fair adequate and reasonable under Illinois law, even if the results might be better for Washington citizens under Washington. CP 4178-88. It acknowledged that in fact the settlement terms in prior Washington class actions involving similar claims had *in fact* been better.¹

III. LEGAL ARGUMENT

As the AG's brief makes clear, when confronted by an lack of specific findings as to adequacy of representation as to a specific subset of the class and/or facts showing possible collusion or conflicts of interest between the citizen of the foreign state and the forum state's citizens, courts apply a more substantive and searching review of whether federal due process adequacy was protected for its citizens in the foreign court proceedings. While some courts label this a "merits" review of due process and different than the review appropriate under the Ninth Circuit's decision in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), the AG correctly observes that the label is confusing and misleading, and that it suggests more of a divergence in the various standards than there is in practice.

¹ See *Durant v. State Farm Mut. Auto Ins. Co.*, 191 Wn.2d 1, 419 P.3d 400 (2018); *Folweiler Chiropractic v. American Family Insurance Co.*, No. 76448-9-1 (Div. I, WA Ct.App, Aug. 27, 2018).

Indeed, even the Ninth Circuit in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), employed a more substantive, searching and hence “merits” based review in finding that the due process right of Washington citizens to adequate representation in a nationwide class action settlement in a Kansas court had not been provided. The court so found noting that the interests between Washington citizens and the class representative, who was from Missouri, could be divergent on the claims being settled. The *Hesse* court stated that its review was completely consistent with the appropriate review under *Epstein*. *Hesse*, 598 F.3d at 587.

That a more searching due process review is warranted in cases involving nationwide class action settlements that show signs of collusion is certainly consistent with the Ninth Circuit’s view in the context of approving fee awards in such cases. *See, Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935 (9th Cir. 2011), stating:

Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must with-stand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair. *Hanlon*, 150 F.3d at 1026; *accord In re Gen. Motors*, 55 F.3d at 805 (courts must be "even more scrupulous than usual in approving settlements where no class has yet been formally certified"); *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987)

(Posner, J.) ("[W]hen class certification is deferred, a more careful scrutiny of the fairness of the settlement is required."); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.) (reviewing courts must employ "even more than the usual care"); *see also Manual for Complex Litig.* § 21.612 (4th ed. 2004). The district court's approval order must show not only that "it has explored [the Churchill] factors comprehensively," but also that the settlement is "not [] the product of collusion among the negotiating parties." *In re Mego Fin. Corp.*, 213 F.3d at 458.

Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations. *Staton*, 327 F.3d at 960; *see also Third Circuit Task Force*, 108 F.R.D. at 266. A few such signs are:

(1) "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded," *Hanlon*, 150 F.3d at 1021; *see Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000);

(2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class," *Lobatz*, 222 F.3d at 1148; *see Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) ("[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees."); and

(3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund, *see Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.).

The Illinois trial court did not make any inquiry and gave no consideration of possible collusion. It made no findings. The Illinois appellate court made no inquiry, gave no consideration, and did not review any trial court findings about possible collusion. Perhaps such considerations are irrelevant under Illinois law for purposes of approving a class settlement under *Illinois law*. But as the AG's brief makes clear, such considerations are relevant for determining the appropriate *federal due process* review when a defendant seeks to use the foreign state court judgment approving the settlement to expunge the rights and claims of the forum state's citizens.

In our case, *indicia* of collusion was clearly present:

1. A nationwide class action settlement that occurred less than 150 days after the case was filed.
2. A class settlement that occurred without any discovery, active litigation and before a class was certified.
3. A settlement under which citizens of some states get nearly nothing and substantially less than citizens of other states and the class representative.

4. A settlement where the citizens of that state could fair better under their state’s law and no subclasses have been established to adequately represent their interests.

5. A settlement under which the plaintiff and class representative is paid a disproportionately high fee and has performed no work for the benefit of the class: i.e. no deposition, no responses to discovery or other efforts.

6. A settlement where the plaintiff’s attorneys are paid a \$1.2 million fee for doing little work in the case.

7. A “clear sailing” agreement under which the defendant agrees to not oppose the class representative fee and attorney fee awards.

As the framework and considerations outlined in the AG’s brief make clear, a more searching review of the due process protections for Washington citizens in the *Lebanon* settlement was warranted than the review afforded by the Washington Court of Appeals.

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DATED: October 23, 2018

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the attached document with the Clerk of the Court and caused service on the following counsel of record, in the manner indicated:

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