FILED
February 22, 2017

No. 95416-0

Court of Appeals
Division I
State of Washington
No. 75541-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, PS,

Respondents,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY, and
LIBERTY MUTUAL INSURANCE COMPANY,

Appellants.

BRIEF OF APPELLANTS

John M. Silk, WSBA #15035
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
(206) 623-4100

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Russell R. Yager
Manuel G. Berrelez
Admitted *Pro Hac Vice*
Vinson & Elkins L.L.P.
2001 Ross Avenue, Suite 3700
Dallas, TX 75201-2975
(214) 220-7700

Attorneys for Appellants
Liberty Mutual Fire Insurance Company, and
Liberty Mutual Insurance Company

TABLE OF CONTENTS

Page

Table of Authorities ..... iii-vi

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 2

(1) Factual Background 2

(2) Procedural History 6

D. SUMMARY OF ARGUMENT 12

E. ARGUMENT 13

(1) The Trial Court Erred in Failing to Give Full Faith and Credit to the Illinois Judgment in *Lebanon* When It Should Have Deferred to the Illinois Courts' Final Judgment that Washington Health Care Providers Were Adequately Represented 13

(a) Washington Strictly Applies Full Faith and Credit Generally and to Class Action Judgments Specifically 14

(b) Controlling Authority Defeats Chan's Collateral Attack 17

(c) Nonbinding Authority Supports Liberty's Argument on Full Faith and Credit 21

(2) If the Court Were to Reach the Issue of Class Representation Adequacy, the *Lebanon* Class Representation Was Adequate 26

F. CONCLUSION.....34

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Ambach v. French, 167 Wn.2d 167, 216 P.3d 405 (2009) 31
Body Recovery Clinic LLC v. Hartford Accident & Indemnity Co., (King County Cause No. 12-2-32265-1).....6
Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) 29
In re Estate of Tolson, 89 Wn.2d 21, 947 P.2d 1242 (1967) 15
In re Parentage of Infant Child F, 178 Wn. App. 1, 313 P.3d 451 (2013).....15
Kerbs v. Safeco Ins. Co. of Illinois, et al. (King County Cause No. 10-2-17373-1 SEA).....5, 6, 9
Klem v. Wash. Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013).....29
Knuth v. Beneficial Wash. Inc., 107 Wn. App. 727, 31 P.3d 694 (2001), *review denied*, 145 Wn.2d 1035 (2002) 18
MySpine, PS v. Allstate Fire & Casualty Ins. Co., (King County Cause No. 12-2-31979-1 SEA).....6
Nobl Park LLC of Vancouver v. Shell Oil Co., 122 Wn. App. 838, 95 P.3d 1265 (2004), *review denied*, 154 Wn.2d 1027 (2005)..... *passim*
OneWest Bank, FSB v. Erickson, 185 Wn.2d 43, 367 P.3d 1063 (2016)..... *passim*
Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 110 P.3d 733 (2005).....4
Rush v. Blackburn, 190 Wn. App. 945, 361 P.3d 217 (2015).....29
Schiff v. Liberty Mutual Fire Ins. Co., et al. (King County Cause No. 17-2-03264-6 SEA).....7
State v. Berry, 141 Wn.2d 121, 5 P.3d 658 (2000).....14, 18, 26, 34
Unigard Ins. Co. v. Mutual Ins. of Enumclaw, 160 Wn. App. 912, 250 P.3d 121 (2011) 32
W.G. Clark Constr. Co. v. Pac. NW Regional Council of Carpenters, 180 Wn.2d 54, 322 P.3d 1207 (2014).....20
Woo v. Fireman's Fund Ins. Co., 150 Wn. App. 158, 208 P.3d 557, *review denied*, 167 Wn.2d 1008 (2009) 32

Federal Cases

Chan Healthcare Group P.S. v. Liberty Mutual Fire Ins. Co.,
844 F.3d 1133 (9th Cir. 2017) 6
Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867,
104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984) 18
Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999),
cert. denied, 528 U.S. 1004 (1999) 22
Federal Trade Commission v. Sperry & Hutchinson Co.,
405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972) 29
Hesse v. Sprint, 598 F.3d 581 (9th Cir. 2010), *cert. denied*
sub nom. Sprint Spectrum LP v. Hesse,
562 U.S. 1003 (2010) 23, 24
In re Diet Drugs Prods. Liab. Litig., 431 F.3d 141
(3d Cir. 2005) 18-19, 22, 24
Kremer v. Chem. Constr. Corp., 456 U.S. 461, 102 S. Ct. 1883,
72 L. Ed. 2d 262 (1982) 17-18
Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367,
116 S. Ct. 873, 134 L. Ed. 2d 6 (1996) ..... *passim*
Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741
(9th Cir. 2006) 11, 25
Sigel v. Shell Oil Co., 612 F.3d 932 (7th Cir. 2010) 29
Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005
(9th Cir. 2012) 18, 22, 24, 25
State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408,
123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) 31
Valley Drug Co. v. Geneva Pharm., Inc.,
350 F.3d 1181 (11th Cir. 2003) 27

Other Cases

ARY Jewelers, L.L.C. v. Krigel, 85 P.3d 1151 (Kan. 2004) 32
Fine v. America Online, Inc., 743 N.E.2d 416 (Ohio App. 2000) 22
Hospitality Management v. Shell Oil Co.,
591 S.E.2d 611 (S.C. 2004) 22
Kleczek v. Jorgensen, 767 N.E.2d 913 (Ill. App. 2002) 31
Lamarque v. Fairbanks Capital Corp., 927 A.2d 753 (R.I. 2007) 22
Lebanon Chiropractic Clinic, Inc. v. Liberty Mut. Ins. Co.,
2016 WL 546909 (Ill. App. 2016) ..... *passim*
Moody v. Sears Roebuck & Co., 664 S.E.2d 569 (N.C. 2006) 22

Robinson v. Toyota Motor Credit Corp.,
775 N.E.2d 951 (Ill. 2002) 29
Simmermon v. Dryuit Sys., Inc., 953 A.2d 478 (N.J. 2008).....22
Turner v. Firstar Bank, N.A., 363 Ill. App. 3d 1150,
845 N.E.2d 816 (2006).....31
White v. DaimlerChrysler Corp., 856 N.E.2d 542 (Ill. App. 2006) 31

Washington Statutes

RCW 4.22.005(7).....5
RCW 4.56.100 32
RCW 19.86.090 31
RCW 19.86.920 28
RCW 48.18.110(1)(a) 3, 4
RCW 48.18.110(1)(c) 4
RCW 48.22.005(7).....3
RCW 48.22.030 3
RCW 48.22.030(12).....3
RCW 48.22.085 3
RCW 48.22.090 3
RCW 48.22.095 5
RCW 48.22.095(1)(a) 3
RCW 48.22.095(1)(a)-(d) 3

Illinois Statutes

735 ILCS 5/2-1303 32
815 ILCS 505/2.....7, 28
815 ILCS 505/10a(a).....31
815 ILCS 505/10a(c).....31

Rules and Regulations

WAC 284-30-330.....5
WAC 284-30-330(2)-(3).....3

Constitutions

U.S. Const. art. IV, § 1.....2, 12, 14

Other Authorities

4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 12:14 (4th ed. 2002) 18

A. INTRODUCTION

This case involves an improper collateral attack by a Washington class member on a valid Illinois judgment approving a multi-state class action settlement. The trial court here refused to give full faith and credit to that Illinois judgment approving the settlement between the class and Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company ("Liberty").

A Washington health care provider and class member litigated in the Illinois courts in *Lebanon Chiropractic Clinic, P.C. v. Liberty Mutual Ins. Co. all* of the due process objections to the class action settlement now raised by Washington health care provider and class member, Chan Healthcare Group, P.S. ("Chan") in the present case. This case is but one of three cases in which Chan and its counsel, who was also the objector's counsel in *Lebanon*, have sought to re-litigate the same essential claims that have been resolved in Illinois. Chan now hopes to spin off yet another class action, despite the *Lebanon* class action settlement, involving the very same issues raised against the same insurer.

From a practical standpoint, class action litigation must come to an end; this result is constitutionally mandated where the class action litigation was settled, the challenge to such a settlement was actually litigated, and a judgment rejecting such a challenge was entered by a court

of competent jurisdiction in a sister state. The Full Faith and Credit Clause of the United States Constitution, art. IV, § 1, requires no less.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying Liberty's motion for summary judgment in an order entered on June 24, 2016.

2. The trial court erred in granting Chan's motion for declaratory judgment in an order entered on June 24, 2016.

(2) Issues Pertaining to Assignments of Error

1. Where a Washington class member objected to the approval of a multistate class settlement in Illinois and the Illinois trial and appellate courts considered and rejected that objection, must a Washington court give full faith and credit to the resulting Illinois judgment and reject the collateral attack of another Washington class member who raises the very same issues the Washington objector presented in Illinois, particularly where both class members are represented by the same counsel? (Assignments of Error Numbers 1, 2)

2. Even if the trial court is not per se foreclosed from considering anew the same due process challenge rejected by the Illinois courts, did the trial court err in holding that minor differences between Washington and Illinois law prevented an Illinois plaintiff from adequately representing class members from Washington? (Assignments of Error Numbers 1, 2)

C. STATEMENT OF THE CASE

(1) Factual Background

This case arises out of Liberty's payment of Personal Injury Protection ("PIP") benefits and the procedures it uses to review bills from

health care providers for PIP-covered treatment. Washington law requires that auto liability insurers offer to insureds the opportunity to purchase PIP coverage. RCW 48.22.030; RCW 48.22.085. The Legislature has specified the applicable limits in such coverage, RCW 48.22.095(1)(a),[1] and the exceptions to coverage. RCW 48.22.090.[2] The statute defines "medical and hospital benefits" as "payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident[.]" RCW 48.22.005(7). Insurers must "adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies" and "conduct[] a reasonable investigation" before refusing to pay a claim. WAC 284-30-330(2)-(3).

Washington law does not define "reasonable" medical expenses covered by a PIP provision. Thus, auto insurers in Washington define that term in their policies, subject to approval by the Insurance Commissioner.[3]

---

[1] In addition to "medical and hospital benefits," the Insurance Code requires that auto policies include various other types of PIP coverage: funeral expenses, income continuation, and loss-of-services benefits. RCW 48.22.095(1)(a)-(d).

[2] The statute's purpose is "to protect innocent victims of motorists of underinsured vehicles," RCW 48.22.030(12), not to protect the billing practices of health care providers.

[3] The Commissioner is required to disapprove any policy that "is in any respect in violation of or does not comply with [the Insurance Code] or any applicable order or regulation of the commissioner issued pursuant to the [C]ode." RCW 48.18.110(1)(a). Moreover, the Commissioner is required to disapprove any policy that "contains . . . any

The Commissioner's approval means that the policy language does not conflict with Washington law, and that the policy language is not inconsistent or misleading. Once approved, the policy language establishes the insurer's payment obligations under the policy.[4]

Section I.F. of the Washington PIP endorsement for the Liberty policy in effect during the class period expressly permits Liberty to determine the reasonable charge payable under PIP coverage by using a database reflecting charges of other health care providers in the same geographic area. CP 2949. The Insurance Commissioner approved this endorsement, determining that Liberty's method of determining the reasonable charge payable under its PIP coverage is consistent with Washington law and is not misleading. RCW 48.18.110(1)(a), (c). CP 4542. Liberty's review and payment of PIP health care providers' bills at the 80th percentile charge, reflected in databases maintained by a non-profit firm called FAIR Health, complied with the Commissioner-approved standard of "reasonableness." CP 3627-28.[5]

---

inconsistent, ambiguous or misleading clauses, or exceptions and conditions[.]" RCW 48.18.110(1)(c).

[4] Courts may not rewrite or ignore such approved policy language. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005) (affirming summary judgment because plain language of policy excluded insured's claim).

[5] This practice of using a database to review and pay provider bills is common among health carriers and in government-paid health care programs like Medicaid and Medicare. CP 1824, 3626-28. Until 2011, Liberty and other carriers used medical-

Health care providers like Chan often chafe at such review of their bills, particularly if they are outliers that charge more than other health care providers in their geographic areas. Like other insurers, Liberty has been forced to defend its bill review and payment procedures for PIP health care providers in class actions filed across the country. Providers in such actions claim that Liberty's reliance on computer databases to determine reasonable charges for covered services is unfair. But court-approved settlements in those cases, including multiple King County settlements involving Chan's counsel, have expressly approved the exact same computerized bill review and payment practices Chan challenges here.[6]

---

charge databases maintained by Ingenix, Inc. CP 1881-82. In June 2011, Liberty and others switched to databases maintained by FAIR Health, funded through a settlement led by the Attorney General of New York. *Id.*, CP 4388-4402. In the present litigation, Chan argued that Liberty's policy language is irrelevant, focusing instead on the statutory requirement that Liberty pay "all *reasonable*" PIP bills and that it adopt reasonable procedures for investigating PIP claims, citing RCW 48.22.095; 4.22.005(7); WAC 284-30-330. But Washington law does not define "reasonable," and instead allows insurers to specify in their policies how the reasonableness of a PIP medical bill will be determined. Where, as here, the Insurance Commissioner approved the policy language, that policy language made clear that use of computer databases to process provider charges, common among health insurers and government health programs, was acceptable. The question in this case–as it was in *Lebanon*–was whether Liberty's practices complied with the policy standard.

[6] For example, in *Kerbs v. Safeco Insurance Company of Illinois, et al.* (King County Cause No. 10-2-17373-1 SEA), attorney Breskin represented a class that included Washington medical providers challenging Safeco's payment of PIP claims at the 85th percentile. The case settled in May 2012, with Safeco agreeing to pay class members a percentage of *past* reductions that had been taken by using the Ingenix database; the settlement further provided that Safeco would be allowed to continue paying PIP claims at the 85th percentile, according to the FAIR Health database. CP 3334-65. Breskin also negotiated a court-approved final judgment, which states:

(2) Procedural History

As the Ninth Circuit recently recognized in *Chan Healthcare Group P.S. v. Liberty Mutual Fire Ins. Co.*, 844 F.3d 1133, 1135 (9th Cir. 2017),[7] "[t]his case has a long and tortured procedural history that spans a series of interrelated lawsuits." That court also recognized the one player

---

> [I]t is hereby ordered, adjudged, and decreed that Safeco shall:
>
> A. implement the following measures concerning Future Claims:
>
> (i) for a period beginning on the Effective Date and extending five years after the Effective Date, Safeco shall pay or reimburse a Medical Provider's usual and customary charge for a Covered Treatment (subject to applicable Policy Limits) at the lowest of (a) the 85th Percentile for that Covered Treatment in the geozip area where the provider is located, as determined through the use of the FAIR Health database or another similar database, (b) the amount authorized by a state mandated fee schedule or by another applicable law or regulation, or (c) the amount authorized by a written preferred-provider network or organization ("PPN" or "PPO") agreement to which the Medical Provider is a party….

CP 4375. That judgment further decreed that Safeco's payment of future claims in this required manner "does not, in and of itself, breach any duty or obligation under any applicable law or contract requiring Safeco to pay or reimburse 'usual and customary' or 'reasonable' charges for Covered Treatments." CP 4376.

In the wake of that settlement in *Kerbs*, Breskin negotiated – and successfully secured court approval of – similar settlements in cases against Allstate and Hartford. *See MySpine, PS v. Allstate Fire & Casualty Ins. Co.* (King County Cause No. 12-2-031979-1 SEA); *Body Recovery Clinic LLC v. Hartford Accident & Indemnity Co.* (King County Cause No. 12-2-32265-1 SEA). In addition to providing for payment of a portion of past PIP reductions, the judgments approving the settlements in those cases echo the decree in *Kerbs v. Safeco* that the use of the FAIR Health database at the 85th Percentile – or even the 80th Percentile – does not violate any Washington law requiring payment of reasonable charges for covered treatment. CP 2603, 3524-52.

[7] At issue there was whether the federal district court's remand order entered after Liberty attempted to remove the present Washington state court action could be reviewed on an interlocutory basis. The Ninth Circuit held that the remand order was erroneous, but that it lacked jurisdiction to recall the case to federal court.

central to the action was attorney David Breskin, Chan's present counsel. *Id*. Breskin filed a class action in Washington state court in 2010 on behalf of a medical provider against two Safeco insurance companies. *Id*. In 2012, that case settled, with Safeco agreeing "to stop using the [Ingenix] bill-review system and start using the 'FAIR Health database' to determine the proper amount of reimbursement." *Id*.

In 2014, "the drama continued" with the *Lebanon* case in Illinois, a class-action lawsuit filed on behalf of medical providers in 39 states (including Washington) against Liberty Mutual and Safeco, raising the same allegations. *Id*. at 1135.[8] Like Chan, the named plaintiff in *Lebanon* was a chiropractic clinic. CP 4573-74, 4579. Although the statutory basis of the *Lebanon* class members' consumer protection claims varied to a degree by state, the factual predicate of those claims was identical. CP 4581-82. The complaint asserted (1) breach of contract, and (2) violation of the various states' consumer protection laws. CP 4584-87. As to the latter cause of action, the claims of Illinois class members were brought under 815 Ill. Comp. Stat. 505/2, the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"), while the claims of non-Illinois class members were brought "under the consumer protection

[8] Indeed, the drama continues. Breskin filed yet another action on behalf of a Washington provider in the King County Superior Court against Liberty taking issue with its use of the FAIR Health database. *Schiff v. Liberty Mutual Fire Ins. Co., et al.* (King County Cause No. 17-2-03264-6 SEA).

statutes of their respective states." CP 4586. The complaint specifically cited RCW 19.86, the Washington Consumer Protection Act ("CPA"), as the source of the consumer protection claims of Washington-based class members. *Id.* at n.1.

In October 2014, the parties in *Lebanon* reached a proposed class settlement, described by the Ninth Circuit as "eerily similar to the one reached in the earlier Washington case," 844 F.3d at 1135, in which class members would broadly release any and all claims against Liberty concerning any "Subject Claim" including any claims for "breach of contract, fraud, misrepresentation, consumer fraud, unfair trade practices, unfair insurance practices, unjust enrichment, and/or bad faith arising from or in any way relating to any Subject Claim." CP 3493-94.[9] The Illinois trial court preliminarily approved the settlement and set a fairness hearing to hear any objections to it. CP 3554-64.

The Ninth Circuit noted that Breskin "reentered the scene" (844 F.3d at 1135) when a Washington chiropractor he represented, Dr. David

[9] "Subject Claim" was defined to "mean[] any insurance claim submitted to Liberty or any of its agents seeking payment under MedPay and/or PIP coverage provided by a Subject Policy for Covered Treatment during the Class Period." CP 3496. For Washington-based settlement class members, the class period was June 25, 2008, through October 31, 2014. CP 3491. That encompassed the entire class period in this case (September 3, 2011 through July 21, 2014). CP 1. Policies issued by Liberty in Washington were specifically included within the definition of "Subject Policy." CP 3496. All of these terms were incorporated into the final judgment approving the *Lebanon* agreement. CP 4148-76.

Kerbs, objected, asking the Illinois trial court to disapprove the settlement or, in the alternative, to exclude Washington health care providers from the settlement class; he raised both jurisdictional and due process grounds. CP 4041-52. Dr. Kerbs' objection, later rejected by the Illinois courts, specifically asserted:

- "The Lebanon settlement is inadequate and unfair to Washington providers."
- "Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interests with Washington providers."

CP 4042. Breskin attempted "[s]imultaneously" to have the Washington court reopen Dr. Kerbs' settlement in an earlier Washington case "enjoin the proposed settlement in Illinois," but was "unsuccessful[]." 844 F.3d at 1136. Meanwhile, while the *Lebanon* case was pending in the Illinois court, "Breskin filed two new offensive class action lawsuits in Washington state court." *Id*. Those lawsuits, brought on behalf of plaintiff Chan Healthcare – this case against Liberty Mutual and another against Safeco – were filed for the purpose of collaterally attacking the Illinois settlement.[10]

In *Lebanon*, the class counsel and Liberty each filed detailed

[10] On behalf of Dr. Kerbs, the named plaintiff he represented in the "eerily similar" settlement of *Kerbs v. Safeco* in 2012, Breskin claimed that use of the FAIR Health database violated Washington law, even though he had previously settled three Washington class actions in which the parties agreed the insurers would use that very database.

responses to Dr. Kerbs' objections, along with extensive evidence establishing the fairness of the settlement. CP 2604, 4054-67 (Liberty); 4069-76 (class counsel). Liberty's submissions to the trial court there addressed the jurisdictional issues that Dr. Kerbs raised and provided additional context for evaluating the fairness of the settlement to Washington class members. CP 4054-67. Liberty also submitted evidence showing that the policy language underlying class members' claims was substantially similar in the various states covered by the settlement. CP 2604, 4087-4104.

After reviewing all objections and responses, as well as additional evidence and argument presented at a fairness hearing in February 2015, the Illinois trial court entered a final judgment approving the settlement, overruling all objections, and including specific findings on the adequacy of notice, the adequacy of representation, and the substantive fairness of the settlement. CP 4148-76. The Illinois trial court found notice to the class to be adequate. CP 4153. It expressly noted Dr. Kerbs' objection to the adequacy of class representation in its order approving the settlement. *Id*. 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. CP 4156. It concluded the settlement was "fair, adequate, and reasonable" for the class. *Id*.

Dr. Kerbs appealed, again raising his objection to the adequacy of the class representation, and the Illinois Court of Appeals affirmed the trial court's decision, rejecting in detail the very same inadequate representation arguments Chan now raises. *Lebanon Chiropractic Clinic, Inc. v. Liberty Mut. Ins. Co.*, 2016 WL 546909 (Ill. App. 2016).[11] *See* Appendix. For example, that court stated in ¶ 40: "Initially, we note that Kerbs has failed to identify any outcome determinative differences in Washington law and Illinois law."[12]

Lebanon class member Chan received notice of the *Lebanon* settlement and chose not to opt out of it. CP 2604-06. Instead, Chan filed this action in King County Superior Court while Dr. Kerbs' appeal was pending in Illinois. CP 1-31. The trial court, the Honorable Catherine Shaffer, declined to give full faith and credit to the Illinois courts' decision

---

[11] Dr. Kerbs could have sought review by the Illinois Supreme Court, but he did not do so.

[12] The Illinois trial court did not have to make explicit findings on the adequacy of class representative beyond simply rejecting Dr. Kerbs' objection. That is precisely the point addressed by the Ninth Circuit in *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 (9th Cir. 2006). The court observed at 746 where a court has addressed objections to a class action settlement, like Dr. Kerbs' objections to the *Lebanon* settlement in Illinois, the courts necessarily "adjudicate the objections…" *Id*. at 746. *The Illinois courts necessarily adjudicated Dr. Kerbs' objections*, including those relating to adequacy of the class representation; specific findings of fact were not necessary. By expressly *rejecting* Dr. Kerbs' objections to the *Lebanon* settlement based on the fairness and adequacy of that settlement to Washington class members, and the adequacy of the Illinois class representative's representation of Washington class members, the Illinois trial court found that the class representative adequately represented the interests of Washington class members.

and determined that alleged differences between Washington and Illinois law prevented an Illinois chiropractic clinic from adequately representing Washington class members, denying Liberty's motion for summary judgment based on the *Lebanon* release, CP 5248-49, and granting Chan's motion for a declaratory judgment that the *Lebanon* settlement is not enforceable in Washington. CP 5243-44. Liberty timely sought discretionary review in this Court, CP 5257-63, and this Court's Commissioner granted review. *See* Appendix.

D. SUMMARY OF ARGUMENT

Washington courts recognize and strictly apply the principle that, absent a lack of jurisdiction or a constitutional defect in the judgment, they must give full and credit to judgments entered in sister states. U.S. Const. art. IV, § 1. With regard to jurisdictional or constitutional issues, if those issues are litigated in those sister states, Washington courts give preclusive effect to those courts' decision on those questions in order to fulfill the public policy of the Full Faith and Credit Clause to provide a means of ending litigation, putting to rest matters previously decided between adverse parties in another state.

The present case, relating to the use of computerized databases to pay PIP health care providers, has a long procedural history. It is an exemplar of why the public policy of the Full Faith and Credit Clause – to

put to rest matters that have been resolved in other states – should apply with particular emphasis in class action litigation. Here, in a major interstate class action against Liberty, a settlement was negotiated. A dissident Washington health care provider, a class member, objected to the settlement in Illinois courts raising due process concerns, specifically the adequacy of the class representative's representation of Washington health care providers. Illinois courts *rejected* those objections at trial and on appeal, and approved the settlement.

Now, another dissident Washington health care provider, again a *Lebanon* class member, represented by the same counsel who represented the objector in Illinois, raises the same due process objections to the adequacy of class representation in Washington courts.

The trial court erred in failing to apply full faith and credit principles to dismiss this case. If the Court reaches the issue of the adequacy of class representation, which it should not under the facts here, the class representative met its obligation of properly representing the interests of Washington health care providers in the settlement.

E. ARGUMENT

(1) The Trial Court Erred in Failing to Give Full Faith and Credit to the Illinois Judgment in *Lebanon* When It Should Have Deferred to the Illinois Courts' Final Judgment that Washington Health Care Providers Were Adequately Represented

There is no dispute that Chan is a *Lebanon* class member and that the *Lebanon* settlement releases all of its claims in this case. Moreover, as previously noted, Chan received proper notice of the settlement and did not opt out of that settlement, and the *Lebanon* release covered Liberty's bill review reductions in Washington from June 25, 2008, through October 31, 2014, encompassing the entire class period in this case—September 3, 2011, through July 21, 2014. The only issue before this Court is whether the *Lebanon* final judgment, which approved the *Lebanon* class settlement agreement and rejected Dr. Kerbs' attack on adequacy of class representation, is now entitled to full faith and credit in Washington courts.

(a) Washington Strictly Applies Full Faith and Credit Generally and to Class Action Judgments Specifically

The Full Faith and Credit Clause of the United States Constitution requires a Washington court to enforce the judgment of a sister state's court. U.S. Const. art. IV, § 1. Washington courts faithfully interpret that Clause to give effect to foreign judgments. As our Supreme Court noted in *State v. Berry*, 141 Wn.2d 121, 127-28, 5 P.3d 658 (2000):

> "Judgments, including criminal convictions of sister states, are generally accorded full faith and credit and their validity may not be collaterally attacked," absent constitutional infirmity. *State v. Rinier*, 23 Wn. App. 102,

> 105, 595 P.2d 43 (1979). "The Full Faith and Credit Clause provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States." *In re Estate of Tolson*, 89 Wn. App. 21, 29, 947 P.2d 1242 (1967). A valid foreign judgment may be collaterally attacked only if the court lacked jurisdiction or constitutional violations were involved. Absent these grounds, " 'a court of this state must give full faith and credit to the foreign judgment and regard the issues thereby adjudged to be precluded in a Washington proceeding.' " *In re Tolson*, 89 Wn. App. at 30, 947 P.2d 1242 (quoting *In re Estate of Wagner*, 50 Wn. App. 162, 166, 748 P.2d 639 (1987)).

There, the Court affirmed a judgment based on a California judgment that actually misapplied California law because the California court had jurisdiction and no constitutional error was present. *Id*. at 128. *See also*, *In re Estate of Tolson*, 89 Wn.2d 21, 947 P.2d 1242 (1967) (full faith and credit and preclusive effect afforded to California decision on domicile emphasizing importance of Full Faith and Credit Clause as means of "putting to rest" matters litigated in other states); *In re Parentage of Infant Child F*, 178 Wn. App. 1, 313 P.3d 451 (2013) (full faith and credit to Utah adoption decision).

With regard to the exceptions to full faith and credit for putative jurisdictional or constitutional defects in the foreign judgment, our courts give preclusive effect to the determination of the foreign state's court if that court has rejected such a challenge. Recently, in *OneWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 367 P.3d 1063 (2016), for example, our

Supreme Court held that a trial court erred in failing to give full faith and credit to an Idaho court's jurisdictional ruling. There, a conservatorship proceeding was commenced in Idaho. The debtor's daughter contended that Idaho's courts lacked jurisdiction to authorize a conservator to encumber a debtor's Washington property with a reverse mortgage so that Washington courts need not give full faith and credit to the Idaho judgment in a Washington foreclosure action. Our Supreme Court held that the Idaho court's decision on the jurisdictional issue, the factor purportedly barring full faith and credit, must be given preclusive effect:

> The Idaho court's general jurisdiction depends on where McKee was domiciled when the conservatorship proceedings began in February 2007. There is some dispute as to McKee's domicile at the time of the conservatorship proceedings.
> …
>
> We agree that we cannot question McKee's domicile because the personal jurisdiction issue was already litigated and decided in the Idaho conservatorship proceedings. Generally, once a court determines it has personal jurisdiction, that decision is entitled to res judicata. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) ("By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings."); *Perry v. Perry*, 51 Wn.2d 358, 369-70, 318 P.2d 968 (1957); *Restatement (Second) of Judgments* § 10 (Am. Law Inst. 1982).
> …

> We accept the Idaho court's determination that it had jurisdiction based on res judicata principles….There was enough evidence for the Idaho court to conclude it had sufficient contacts to exercise jurisdiction over McKee. If Erickson wanted to challenge this determination, the Idaho court was the proper forum for doing so. She cannot collaterally attack that determination here.

Id. at 57-59.

Turning to class action litigation, the principles are no different, requiring that full faith and credit be given to class action judgments and preclusive effect to the decisions of sister states with regard to objections to the application of full faith and credit. In class action litigation, Washington courts have recognized that "[a] state court's judgment in a class action is … *presumptively* entitled to full faith and credit from the courts of other jurisdictions." *Nobl Park LLC of Vancouver v. Shell Oil Co.*, 122 Wn. App. 838, 844, 95 P.3d 1265 (2004), *review denied*, 154 Wn.2d 1027 (2005) (emphasis added) (citing *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996)).

(b) Controlling Authority Defeats Chan's Collateral Attack

To overcome the presumption of full faith and credit, Chan had to show that it did not receive due process when the Illinois judgment was entered. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83, 102 S. Ct.

1883, 72 L. Ed. 2d 262 (1982). Chan had to make that showing in accordance with the rule set out in *Berry* and *OneWest Bank*, and decisions of the United States Supreme Court: Washington courts must defer to prior decisions of sister states' courts on issues of due process and jurisdiction that were presented and decided in the sister state. The trial court erred in believing Chan met its high burden.

Due process requires that class members receive notice of the settlement and an opportunity to opt out of it, and that the class representative adequately represents the interests of all class members. *Id*. Here, there is no question that Chan received constitutionally-sufficient notice of the *Lebanon* class settlement. Chan also had an opportunity to opt out of that settlement, but did not do so.[13] The only issue here is

---

[13] Chan had the right to file an objection to the settlement in Illinois, but chose not to do so. Moreover, a class member who does not opt out of the class is bound by the judgment in the class action, including any settlement. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."). The finality of such class settlements is a critical component of class action litigation: "The binding effect of the judgment on all class members who do not exclude themselves is of major importance in the settlement context. A classwide judgment represents one of the major incentives that lead defendants to settle." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 12:14 (4th ed. 2002). Thus, a class member who fails to opt out of the class or timely object to the proposed settlement is prohibited from later collaterally attacking the settlement. *See Knuth v. Beneficial Wash. Inc.*, 107 Wn. App. 727, 31 P.3d 694 (2001), *review denied*, 145 Wn.2d 1035 (2002) (affirming summary judgment dismissing claim released in prior class action settlement agreement); *see also, Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1024 n.13 (9th Cir. 2012) ("Class members are not…entitled to unlimited attacks on the class settlement. Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated.") (quoting *In re Diet Drugs Prods. Liab.*

adequacy of the Lebanon Chiropractic Clinic's representation of the provider class and the preclusive effect on Chan's present due process claim arising from the Illinois courts' rejection of Dr. Kerbs' same due process challenge in *Lebanon*.[14]

The trial court here should have rejected Chan's collateral attack on the *Lebanon* settlement and it should have given the *Lebanon* judgment full faith and credit. Here, it is *undisputed* that Dr. Kerbs was a Washington health care provider and a Lebanon class member. The *Lebanon* judgment approving the class settlement over Dr. Kerbs' objection was a final judgment of the Illinois courts.[15] As a final judgment, the *Lebanon* judgment was entitled to full faith and credit in Washington unless the Illinois courts lacked jurisdiction to render the judgment or its entry somehow violated Dr. Kerbs' due process rights. Dr. Kerbs, like Chan, had an opportunity to opt out, but chose not to do so. Dr. Kerbs' identical challenge in Illinois to the adequacy of the class representative's representation of Washington class members was

---

Litig., 431 F.3d 141, 146 (3d Cir. 2005)).

[14] There is also no dispute in this case that if the *Lebanon* settlement applies to Chan, Chan's present action is foreclosed by that settlement.

[15] Although the trial court here, on the record, suggested that class settlements were somehow not "true" judgments, RP (6/24/16):46-51, 59, the trial court was wrong in light of *Nobl Park* and the authority cited there. The Illinois trial court's decision here was a final judgment – "Final Order and Judgment Approving Settlement and Dismissing This Action With Prejudice." CP 4148.

considered and *rejected* by the Illinois trial court and appellate court in *Lebanon*. That decision carries preclusive effect as to Chan's due process challenge in Washington.

Under controlling authority, Chan's action should have been dismissed. Where Illinois courts considered the due process ramifications of the settlement for class members, a similarly situated class member may not collaterally attack such an assessment in Washington. The fact that the Illinois courts rejected a Washington provider's challenge to the adequacy of the class representative's representation of Washington providers should have ended the inquiry. In *Matsushita*, *supra*, the United States Supreme Court determined that a judgment under collateral attack from dissatisfied class members met the due process requirements of the Fourteenth Amendment simply by referencing the approving court's findings on those issues, and not by conducting an independent review. 516 U.S. at 378-79. Division II cited this aspect of *Matsushita* in *Nobl Park*, Washington's most recent exposition on full faith and credit with respect to class action judgments. 122 Wn. App. at 844. Applying that controlling United States Supreme Court decision,[16] Division II stated: "a

[16] On issues of federal law, such as the full faith and credit due judgments of sister states, this Court is bound only by decisions of the United States Supreme Court; decisions of the Ninth Circuit are only *persuasive authority*. *W.G. Clark Constr. Co. v. Pac. NW Regional Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014). *Nobl Park* is controlling precedent; federal circuit court cases are not.

party's right to due process is protected by the court certifying a class action and the courts 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*." (emphasis added). *Id*. at 845 n.3. That should be true particularly where the specific due process objections to the settlement were surfaced in Illinois by the same counsel now raising those objections in Washington.

The trial court here misconstrued controlling precedent as *compelling* re-visitation of the due process challenge rejected by the Illinois courts, RP (6/24/16):76-79,[17] when the exact opposite is true. *See Matsushita*, *supra* (rejecting jurisdictional objection to judgment where that issue was litigated in state court); *OneWest Bank*, *supra* (same); *Nobl Park*, *supra* (rejecting due process objection). The trial court's topsy-turvy understanding of full faith and credit constituted error.

(c) Nonbinding Authority Supports Liberty's Argument on Full Faith and Credit

Rather than correctly applying controlling authority on full faith and credit, the trial court misapplied nonbinding federal precedents on collateral attacks on class judgments. Liberty's argument better applies

[17] The trial court also misstated the nature of the issues at stake in *Nobl Park*, claiming that case only addressed notice, and not the adequacy of class representation. RP (4/15/16):103-04; RP (6/24/16):76-77. That is simply wrong. *See* 122 Wn. App. at 847-48 (court addresses adequacy of class representative).

binding Washington and United States Supreme Court authority on this question. In fact, *Nobl Park* is consistent with those nonbinding persuasive authorities when they are properly analyzed. For example, in *Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999), the Ninth Circuit stated: ("[B]road collateral review of the adequacy of representation (or the other due process requirements for binding absent class members) is not available."). Following *Matsushita*, the Ninth Circuit held in *Epstein* that "due process does not require collateral second-guessing of those determinations and that review." *Id*. at 648. "'Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated.'" *Skilstaf*, 669 F.3d at 1024 n.13 (quoting *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005)).[18]

A proper application of full faith and credit as described above

[18] Other state courts have recognized that this "limited [collateral] review serves important judicial interests in the efficiency and finality of class-action litigation, and ensures that no 'waste of judicial resources' occurs by reason of 'reviewing courts … conduct[ing] an extensive substantive review when one has already been undertaken in a sister state.'" *Moody v. Sears Roebuck & Co*., 664 S.E.2d 569, 581 (N.C. 2006) (quoting *Hospitality Management v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004)). *See also, Simmermon v. Dryuit Sys., Inc.*, 953 A.2d 478, 485-88 (N.J. 2008); *Lamarque v. Fairbanks Capital Corp.*, 927 A.2d 753, 759-67 (R.I. 2007); *Fine v. America Online, Inc.*, 743 N.E.2d 416, 417-23 (Ohio App. 2000). Indeed, application of a standard that encourages broad collateral review would make Washington the "jurisdiction of choice for plaintiffs wishing to launch collateral challenges to other states' judicial proceedings." *Moody*, 664 S.E.2d at 581. And the prospect of broad collateral review would inhibit settlements in class litigation – including in Washington – as the finality described *supra* at n.13 that settling defendants require would prove elusive.

should have foreclosed Chan's collateral attack. Instead, the trial court misapplied nonbinding federal authorities to allow Chan's collateral attack on the *Lebanon* judgment to proceed.

Most notably, the trial court misapplied *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010), *cert. denied sub nom. Sprint Spectrum LP v. Hesse*, 562 U.S. 1003 (2010). *Hesse* was a collateral attack in federal court on a Kansas state court settlement. The Kansas litigation involved federal taxes that Sprint impermissibly passed on to consumers, when billing them for services. *Id.* at 585-86. The class settlement agreement only addressed Sprint's illicit billing of those federal taxes. *Id.* at 585 n.1. At no point in the litigation were state-imposed taxes ever litigated or even mentioned in pleadings or in the settlement agreement. Later, a Washington plaintiff sued Sprint for impermissibly passing on Washington state's business and occupation tax in billings. *Id.* at 584-85. The Ninth Circuit rejected Sprint's attempt to argue that the Kansas judgment barred the Washington action. While courts should "normally satisfy [themselves] that party received the requisite notice, opportunity to be heard, and adequate representation by referencing the [settling] court's findings," *id.* at 588, only when the settling court makes no finding on those issues does the reviewing court analyze the issue anew. *Id.*

The result in *Hesse* is not surprising. The Kansas judgment

approving the class settlement involving federal taxes did not bar a subsequent action with regard to Washington State taxes; the claims were completely unrelated and, even though the same defendant was involved, the Kansas release did not mention state taxes and settlement's terms could not bar a claim that was never at issue; neither the litigants nor the trial court addressed the issue of adequacy of representation as to those completely unrelated claims. 598 F.3d at 588.

That is not true here. The Washington providers' CPA claims were *expressly* pled in *Lebanon*. App. at 142. The Illinois courts *expressly* rejected Dr. Kerbs' argument that these claims could not be released through that settlement based on adequacy-of-representation concerns. App. at 359. Thus, *Hesse* is inapposite.

The Ninth Circuit clarified *Hesse* in *Skilstaf*, *supra* at 1024, rejecting a California collateral attack on a Massachusetts class action by a class member who appeared at the fairness hearing and litigated objections to the settlement. While the trial court read *Skilstaf* to apply only when the class members making a collateral attack where the same ones who made the direct attack at the fairness hearing in the approving court, RP (4/15/16):109; RP (6/24/16):79-80, its implication is *broader*. The *Skilstaf* court cited *Diet Drugs*, a Third Circuit decision, with approval, *id*. at 1024

n.13. There, the Third Circuit stated:[19] "Class members are not … entitled to unlimited attacks on the class settlement. Once a court has decided that the due process protections did occur for a particular class member or *group of class members*, the issue may not be relitigated." 431 F.3d at 146 (emphasis added).

The *Skilstaf* court also cited *Reyn's Pasta Bella*, *supra*, with approval, a case in which the Ninth Circuit rejected the argument that the judgment in the settlement forum must contain specific findings addressing every point dreamed up in a subsequent collateral attack. It is sufficient—and deference is due—if the issue (a) was raised in the approving forum and (b) the settlement could not have been approved without its resolution. *Id.* at 746. In such a case, the issue was actually litigated and necessarily determined. *Id.* Of course, that is exactly what occurred here. Dr. Kerbs' objections to the adequacy of the class representative's representation of Washington class members, identical to Chan's present objections, were *rejected* by Illinois courts.

Bluntly stated, there is a time when litigation – class litigation or otherwise – must end. It is not in the interest of Washington courts, as Division II recognized in *Nobl Park*, for class actions raising the identical

[19] This passage mirrors the analysis of the *Nobl Park* court. 122 Wn. App. at 85 n.3.

issues already resolved in class actions, or regular actions as the Supreme Court recognized in *OneWest Bank*, to go forward. Based on its misreading of federal authorities, the trial court erred in refusing to apply the specific rule mandated by the United States Constitution and articulated in *Berry*, *OneWest Bank*, and *Nobl Park* forbidding it from considering a collateral attack on the ruling of a competent sister state court whether on due process or jurisdictional grounds. The trial court should have dismissed Chan's action.

(2) <u>If the Court Were to Reach the Issue of Class Representation Adequacy, the *Lebanon* Class Representation Was Adequate</u>

Misapplying federal precedents, the trial court gave Chan a "second bite at the apple" and considered *de novo* a point that Chan could and should have presented in Illinois and that Dr. Kerbs *did* present in Illinois: whether the applicable law in Illinois and Washington is so substantially different that an Illinois chiropractic clinic could not adequately represent Washington class members. That assertion, *squarely rejected* by the Illinois courts in Dr. Kerbs' challenge there, is *flatly wrong*. If this Court reaches this issue, and it should not do so, the *Lebanon* class representative was an adequate representative of

Washington health care providers in the *Lebanon* settlement.[20]

The trial court misperceived its obligation in comparing the remedies available under Illinois and Washington consumer protection law. At Chan's urging, the trial court undertook a minute comparison of each aspect of Washington and Illinois consumer protection law. RP (4/15/06):106-10. But that is not the standard to be employed. There must be a "substantial" or "fundamental" conflict of interest between the parties to the class before the class representative's representation of the class is inadequate. *Nobl Park*, 122 Wn. App. at 847-48. Notably, in articulating this standard, *Nobl Park* cited with approval the Eleventh Circuit's decision in *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). 122 Wn. App. at 847-48. In that case, the court recognized that only *fundamental* conflicts defeat adequacy: "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class."

---

[20] As Chan attempted to do below, it may contend that Washington's "mandatory offer" PIP statutes, and the absence of a mandatory offer PIP statute in Illinois, compels the conclusion that Lebanon's class representation was inadequate. Such an argument is nothing but a red herring. The fact that Washington mandates PIP coverage be offered and that *the insured's* reasonable and necessary expenses incurred be paid when that coverage is in place made no difference for reimbursement of the *provider class* in *Lebanon* or here. Liberty's policy language governing payment to providers in Illinois and Washington was substantially similar. The Illinois court dispensed with Chan's argument in *Lebanon* when noted: "the claims [in Washington and Illinois] involve the same factual predicate; namely, Liberty's use of computerized databases to determine PIP and MedPay [Illinois' version of PIP] reimbursements." *Lebanon*, *supra* at ¶ 37.

Id. at 1189. *See also*, *Nobl Park*, 122 Wn. App. at 846 (recognizing that differences in the claims of class members, or even "minor conflicts," do not render representation inadequate; inadequate representation requires a "substantial" or "fundamental" conflict of interest between the parties in the class). The trial court erred in failing to apply the correct legal standard on adequacy of representation.

Chan failed to satisfy its burden to show any substantial or fundamental conflict between the Illinois and Washington statutes such that providers' claims under the Washington CPA are so substantially better than providers' claims under the Illinois CFA that an Illinois provider could not adequately represent Washington class members. Indeed, the two statutes are *virtually identical*, and any *minor* differences between them do not give rise to such antagonistic interests that would prevent an Illinois provider from representing Washington providers.

The Washington CPA and the Illinois CFA share a common origin: § 5 of the Federal Trade Commission Act ("FTC Act").[21] As such, the elements of claims under the two statutes are essentially identical. In Washington, "[t]o prevail on a CPA action, the plaintiff must prove an

[21] RCW 19.86.920 ("The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition."); 815 ILCS 505/2 ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.").

(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). In Illinois, "[t]he elements of a claim under the [CFA] are: (1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." *Sigel v. Shell Oil Co.*, 612 F.3d 932, 934 (7th Cir. 2010) (citing *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002)). Moreover, the standard for determining "unfairness" for the type of claim Chan purports to allege in this case is identical in Washington and Illinois, as both jurisdictions apply the three-factor test set forth by the U.S. Supreme Court in *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972). These factors include: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. *Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 785-86, 295 P.3d 1179 (2013); *Rush v. Blackburn*, 190 Wn. App. 945, 961, 361 P.3d 217 (2015) (applying factors); *Robinson*, 775 N.E.2d at 961 (same).

Nor did Chan demonstrate a *substantial* difference between the Washington CPA and the Illinois CFA by focusing on the differences between Washington and Illinois *insurance* law. Liberty's Commissioner-approved policy language on PIP reimbursement in Washington is essentially identical to the language of Med Pay, the counterpart coverage to PIP in Liberty's Illinois policies. CP 4106-46. While the Washington statute compels an insurer like Liberty to *offer* PIP to a prospective insured, and Illinois does not have a counterpart "mandatory offer" PIP statute, that fact is *irrelevant* to the issue of how Liberty pays health care providers when PIP coverage is present and whether Liberty's bill review and payment practices comply with Liberty's Commissioner-approved definition of "reasonable" charges. That was exactly the issue for Illinois *providers* in *Lebanon*, whose CFA claim was based on the language of Liberty's policies. Liberty's policy language governing payment to providers in Illinois and Washington was virtually identical. *See Lebanon*, *supra* at ¶ 37 (Illinois CFA and Washington CPA claims involved "the same factual predicate.").[22]

The Washington CPA and the Illinois CFA also provide nearly

[22] In fact, in *Lebanon*, Liberty submitted nearly 900 pages of policy language from all 39 states, including Washington and Illinois, showing that the applicable policy language was substantially similar in each covered state. CP 2604, 4087-4104 (Washington and Illinois policy language). Liberty used the same bill review and payment procedures for PIP and Med Pay in all of the covered states.

identical remedies. Actual damages are recoverable under both statutes. *Compare Ambach v. French*, 167 Wn.2d 167, 171, 216 P.3d 405 (2009) (citing RCW 19.86.090) with *White v. DaimlerChrysler Corp.*, 856 N.E.2d 542 (Ill. App. 2006) (citing 815 ILCS 505/10a(a)). Attorney fees are recoverable under both statutes. *See* RCW 19.86.090; 815 ILCS 505/10a(c). Both statutes provide for exemplary damages — Washington's CPA allows for an award of treble damages to a maximum of $25,000, while Illinois's CFA allows for an award of punitive damages. RCW 19.86.090; *Ambach*, 167 Wn.2d at 171; *Kleczek v. Jorgensen*, 767 N.E.2d 913 (Ill. App. 2002). Indeed, Illinois punitive damages are not limited to *treble* damages. *See Turner v. Firstar Bank, N.A.*, 363 Ill. App. 3d 1150, 1164, 845 N.E.2d 816 (2006) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)). Thus, Illinois providers could have recovered *even more* in exemplary damages in *Lebanon* than Washington providers could have recovered under the CPA and thus had *more* incentive than Washington providers to prosecute that action vigorously.

Finally, Chan focused below on the amount of pre- and post-judgment interest available under Washington law. This reliance on judgment interest is misplaced for several reasons. First, the interest rates in both jurisdictions were essentially equivalent. Chan failed below to cite

a single case holding that a CPA judgment bears interest in anything other than the judgment rate for torts, a rate far less than 9%. RCW 4.56.100. When the interest rate issue has arisen in cases where contract, tort, and CPA claims were present, the courts have applied the tort rate. *E.g.*, *Unigard Ins. Co. v. Mutual Ins. of Enumclaw*, 160 Wn. App. 912, 925-28, 250 P.3d 121 (2011); *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 172, 208 P.3d 557, *review denied*, 167 Wn.2d 1008 (2009). The Illinois judgment interest rate for CFA judgments is 9%. 735 ILCS 5/2-1303. In any event, varying rates of *post-judgment* interest under different states' laws do not require sub-classing because *post-judgment* interest is considered procedural in Illinois (and most jurisdictions), and thus the rate of the forum state applies. 735 ILCS 5/2-1303; *see also, ARY Jewelers, L.L.C. v. Krigel*, 85 P.3d 1151, 1161 (Kan. 2004) ("[P]ost-judgment interest is a question of procedure; accordingly, the law of Kansas—as the forum state—applies.").

Further, Chan made no showing that even if additional amounts were recoverable as *pre-judgment* interest under Washington law, such amounts would exceed the additional amount recoverable as *punitive damages* under Illinois law. Thus, focusing on the total recovery available under the states' respective consumer-protection laws, Chan did not show any differences between Washington and Illinois law that would give rise

to "a *'substantial' or 'fundamental' conflict of interest* between the parties in the class." *Nobl Park*, 122 Wn. App. at 846 (emphasis added).

Ultimately, the "differences" in Illinois and Washington's consumer protection statutes are minor in nature, and the trial court erred in concluding that Illinois law is somehow "less favorable" to class members. RP (6/24/16):86-90. Those statutes are not in any fashion antagonistic in their pro-consumer thrust and, from a due process standpoint, nothing in the statutes would incentivize the Illinois class representative not to vigorously represent Washington class members or prosecute their claims:

- both statutes have common substantive claim elements derived from FTCA § 5;
- both statutes permit recovery of actual and punitive damages;
- both statutes allow recovery of pre- and post-judgment interest;
- both statutes allow recovery of attorney fees.

In sum, Chan's baseless assertions below that there are "stark differences" in the legal claims under the statutes, or that Illinois providers had "antagonistic interests" to Washington providers, adopted by the trial court, do not stand up to the barest of scrutiny.

If this Court reaches the issue, which it should not, the trial court

erred in conducting its independent, *de novo* review of adequacy of representation. It further erred in concluding that Lebanon Chiropractic could not adequately represent Chan and other class members from Washington, where the nature of the claims and remedies under Illinois and Washington law were remarkably similar.

F. CONCLUSION

A judgment connotes finality. Chan and its counsel had no right to continue to litigate claims in Washington that were fully and finally resolved in *Lebanon* in Illinois. Nor can Chan resurface due process objections to the *Lebanon* settlement in Washington that were rejected by Illinois courts, objections raised by the very same counsel now representing Chan. *Matsushita*, *Berry*, *OneWest Bank*, and *Nobl Park* make clear that the trial court should not have substituted its judgment in a collateral proceeding for that of the Illinois courts. Simply stated, the Full Faith and Credit Clause barred the trial court from reviewing the propriety of the Illinois courts' due process decision.

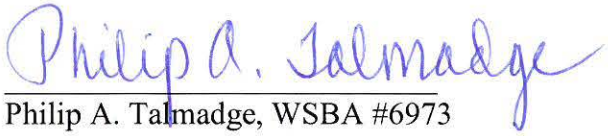
Even were this Court to reach the adequacy of the *Lebanon* class representative's representation of Washington health care providers in the settlement there (and this Court should not do so), the representation was plainly adequate.

This Court should reverse the trial court's orders denying full faith

and credit to the Illinois courts' judgment in *Lebanon*, remand Chan's case to the trial court for dismissal, and award costs on appeal to Liberty.

DATED this 23rd day of February, 2017.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

John M. Silk, WSBA #15035
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
(206) 623-4100

Russell R. Yager
Manuel G. Berrelez
Admitted *Pro Hac Vice*
Vinson & Elkins L.L.P.
2001 Ross Avenue, Suite 3700
Dallas, TX 75201-2975
(214) 220-7700

Attorneys for Appellants
Liberty Mutual Fire Insurance Co.
and Liberty Mutual Insurance
Company

APPENDIX

2016 IL App (5th) 150111-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois,
Fifth District.

LEBANON CHIROPRACTIC CLINIC, P.C., Individually and on Behalf of All Others Similarly Situated, Plaintiff–Appellee,
v.
LIBERTY MUTUAL INSURANCE COMPANY, Liberty Mutual Fire Insurance Company, Safeco Insurance Company of America, and Safeco Insurance Company of Illinois, Defendants–Appellees
(Dr. David Kerbs, Objector–Appellant).

No.
5
–
15
–
0111

Feb. 9, 2016.

Appeal from the Circuit Court of St. Clair County. No. 14–L–521, Vincent J. Lopinot, Judge, presiding.

ORDER

Justice WELCH delivered the judgment of the court:

*1 ¶ 1 *Held:* The circuit court had jurisdiction to approve the nationwide class settlement. The court did not abuse its discretion in certifying the settlement class, which included health care providers located in the State of Washington, and finding that the proposed settlement was fair, reasonable, and adequate.

¶ 2 The plaintiff, Lebanon Chiropractic Clinic (Lebanon), filed a class action complaint against the defendants, Liberty Mutual Insurance Company (Liberty), and its subsidiary, Safeco Insurance Company (Safeco), challenging the method as to how the defendants have determined the amounts payable for treatments covered by Medical Payment (MedPay) and Personal Injury Protection (PIP) coverage under personal automobile insurance policies. Thereafter, the parties entered into a nationwide class settlement. Dr. David Kerbs, a health care provider in the State of Washington, filed an objection to the class settlement, asking the trial court to deny approval of the settlement or, in the alternative, to exclude all Washington providers, on the basis that the Lebanon settlement conflicted with a prior class settlement in *Kerbs v. Safeco,* a Washington class action case in which Kerbs was the class representative. After conducting an approval hearing on the class settlement, the trial court entered a final order approving the settlement. For the reasons which follow, we affirm the decision of the circuit court.

¶ 3 Liberty issues automobile policies with MedPay or PIP coverage, forms of nofault automobile-insurance coverage, which promises to pay "reasonable expenses" to treat an insured's injuries caused by an accident. "Reasonable expenses" are defined as follows: the actual charge of the treatment; the charge negotiated with the provider; or the charge determined by the insurance company based on a methodology using a computerized database designed to reflect amounts charged by providers of medical services within the same or similar geographic region.

¶ 4 This appeal concerns the insurers' use of computerized databases to reduce medical bills submitted by health care providers. The computer databases operated as follows. Providers were required to submit claims using standardized forms and standardized coding. A third-party bill reviewer would then compare the submitted medical bills against the computerized database to determine the usual, customary, and reasonable (UCR) charge for the medical treatment. The database generated a predetermined percentile benchmark for specific treatments in defined geographical areas and capped a charge to an amount equivalent to the selected percentile. As an example, the 80th percentile benchmark means that the computerized database has determined that 80% of the charges for a given treatment in the relevant geographic area are likely to fall at or below that amount. After conducting this computerized review of the medical bill, the defendants would then send an explanation of review that sets forth the

charge, the reduction, and the basis for the reduced payment to the providers.

*2 ¶ 5 For several years, the defendants used the health care industry's database of choice, the Ingenix database. However, following an investigation by the New York Attorney General into allegations that the Ingenix database had been improperly manipulated, a new database, the FAIR Health database, was funded. In 2011, the defendants switched to the FAIR Health database to analyze medical bills.

¶ 6 There has been extensive litigation over the reasonableness of insurers' MedPay and PIP reimbursement reductions in Illinois and in other states. In 2003, class counsel initiated a class action lawsuit against Liberty for improper reductions on medical bills. Thereafter, class counsel became co-counsel in *Froeber v. Liberty Mutual Insurance Co.*, 193 P.3d 999 (Or.Ct.App.2008), a similar case pending in Oregon state court. Although the Oregon circuit court had denied class certification in the case, the parties later agreed to settle the action between defendants and a proposed nationwide settlement class. *Id.* at 1001. In the settlement, the class members, who submitted a valid claim, received 25% of the UCR reductions taken by Liberty. *Id.* at 1002. In exchange, plaintiffs, on behalf of themselves and members of the proposed settlement class, agreed to release defendants from all claims arising from payment or reimbursement of the costs of covered treatment under the PIP and/or MedPay coverage. *Id.* The circuit court approved the settlement as fair, which was affirmed by the Oregon Court of Appeals. *Id.* at 1001.

¶ 7 In 2005, a similar class action suit was filed against Safeco, alleging that Safeco had breached its contractual obligation to pay the UCR charge for reasonable and necessary services by making these reductions. *Bemis v. Safeco Insurance of America*, 407 Ill.App.3d 1164, 1165 (2011). The trial court entered an order certifying the class. *Id.* at 1166. However, the granting of class certification was reversed by this court on the basis that the commonality requirement for maintenance of class certification was not met. *Id.* at 1169. In particular, this court found that evidence would be required on an individualized basis to determine whether Safeco breached its' contract to pay the usual and customary charge for reasonable and necessary medical services for each class member. *Id.* at 1168–69.

¶ 8 In 2008, Safeco became part of Liberty. Thereafter, Lebanon filed the present class action, which was a continuation of the previous *Safeco* litigation. The four-count class action complaint alleged that Liberty and Safeco had engaged in the systematic reduction in payments for treatments covered under MedPay and PIP coverage even though the submitted charges were the usual and customary medical charges.

¶ 9 The complaint alleged the following causes of action against the defendants: (1) breach of contract, based on the allegation that the defendants breached their insurance policies, which required them to pay the UCR expenses for the medical services provided; (2) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act or Act) (815 ILCS 505/1 *et seq.* (West 2014)) and substantially similar laws of other states, based on the allegations that the defendants had committed unfair or deceptive acts by engaging in the acts and practices alleged in the complaint including, but not limited to, the regular and systematic denial or reduction of claims for payment of covered medical expenses and misrepresenting, concealing, suppressing, or omitting the material fact of and the reasons for such denials or reductions in medical payments; and (3) unjust enrichment, based on the allegation that the defendants had unjustly received and retained a benefit as a result of their acts and omissions to the detriment of Lebanon and the potential class members.

*3 ¶ 10 During the previously filed Safeco class action, the parties had engaged in settlement negotiations. After Lebanon filed the present complaint, the parties reengaged in those discussions and were successful on reaching a settlement. The pertinent terms of the settlement were as follows: (1) participating class members would receive 50% of the past UCR reductions upon submission of a valid claim form; (2) Liberty agreed to handle the payment of MedPay benefits for the next five years in a clear, transparent manner; (3) with regard to future claims, Liberty agreed to implement certain measures, such as the continued use of the FAIR Health database to determine the UCR charges, the use of at least the 80th percentile for the covered treatment in the geographical area of the provider's location for a period of five years, and specifically identified written disclosures about these measures to its insureds; (4) Liberty agreed to pay the costs of notice and claims administration estimated at $1,300,000, class representative incentive awards in the amount of $3,000, and class counsel's attorney fees and expenses in the amount of $1,200,000; and (5) Lebanon waived any future claim challenging Liberty's reduction of provider bills in accordance with the agreement.

¶ 11 On October 31, 2014, the trial court held a preliminary approval hearing to consider the settlement. That same day, the court entered a written order, preliminarily approving the proposed settlement, finding it fair, reasonable, adequate and in the best interests of the class members. The court ordered that class members receive notice by first-class mail, approved the form of notice, approved the claim form, required that a toll-free phone number and website be established so that class members had access to pertinent information, and required certain steps to "ensure that these mailings provide the best notice practicable under the circumstances ."

¶ 12 On December 22, 2014, the settlement administrator disseminated notice to the 2,953,505 potential class members. On January 21, 2015, Kerbs filed an objection to the proposed class settlement, asking the trial court to deny approval of the settlement or, in the alternative, to exclude all Washington providers from the settlement. The primary basis for this objection was that the proposed class action settlement conflicted with a prior class settlement in *Kerbs.* Liberty was not a party in that case.

¶ 13 *Kerbs* is a class action case filed in Washington against Safeco where the allegations were very similar to those in the current action, namely: that the use of computerized databases to determine whether a medical provider's charges were reasonable is improper. The complaint sought class certification for 3,500 Washington health care providers who had their bills reduced by Safeco using a computerized database. The case settled in 2012. The settlement provided, *inter alia,* that for five years after its effective date, Safeco would continue using the FAIR Health database to determine UCR charges for treatment covered by PIP benefits in Washington and that Safeco would use the 85th percentile for covered treatment. The settlement further provided that Safeco's payment of future claims in accordance with the settlement agreement did not, in and of itself, breach any duty under any applicable law or contract requiring Safeco to pay or reimburse UCR charges for covered treatment and also included a release of these claims. However, the agreement did not preclude any member from the settlement class from asserting an action on the basis that Safeco has breached the agreement by failing to pay future claims in accordance with the agreement or on the basis that Safeco's payment of a future claim in accordance with the agreement, while neither unfair, deceptive, nor unlawful in and of itself, resulted in a particular payment in a particular instance that was less than the UCR charge for a covered treatment and/or breached a duty under any applicable law or contract requiring Safeco to pay or reimburse the UCR charge for covered treatment.

***4** ¶ 14 Kerbs's objection filed in the present case argued as follows. First, the objection argued that the trial court lacked jurisdiction to approve the proposed settlement in that there was no connection between the claims of the Washington health care providers and Illinois. Next, the objection contended that the proposed settlement conflicted with the *Kerbs* settlement and therefore diminished the rights and benefits obtained by Washington providers in that settlement. Specifically, the objection identified the following conflicts between the two settlements: (1) the *Kerbs* settlement provided that Safeco would pay Washington providers at the 85th percentile where the Lebanon settlement provided for payment at the 80th percentile; (2) the *Kerbs* settlement did not waive any future claims concerning reductions in medical provider payments that are based on the FAIR Health database where the Lebanon proposed settlement waived future claims relating to the FAIR Health database from 2014 until 2019; (3) unlike the Lebanon proposed settlement, the *Kerbs* settlement did not waive any future claims relating to Safeco's practice of using the 85th percentile of the FAIR Health database; and (4) unlike the Lebanon proposed settlement, the Washington providers' reimbursement is not conditioned on their submitting a claim-reimbursement form.

¶ 15 In addition, the objection argued that the proposed settlement was unfair and inadequate for Washington providers in that the providers do not receive any payment of past reductions made using the Ingenix database because of the prior *Kerbs* settlement and that in any event, Washington providers would only receive 50% of the Ingenix database reductions and nothing for the FAIR Health database reductions. The objection also identified similar class action settlements where the defendant insurance companies had agreed to pay substantially more than 50% of past UCR reductions, where there was no waiver of future claims, and where reimbursement was not conditioned on the valid submission of a claim form. The objection also argued that Lebanon was an inadequate representative of Washington providers in that it had a conflict of interest. Further, the objection argued that the future claims waiver was contrary to Washington public policy and Washington law, which required the payment of all reasonable and necessary medical expenses incurred as a result of a covered accident.

¶ 16 After Kerbs filed his objection in the trial court, he filed, on February 2, 2015, a substantively identical motion to reopen the *Kerbs* case in the Superior Court of King County, Washington. This motion sought an order from the Washington court enjoining the parties to this action, including Liberty, which was not a party in *Kerbs,* from seeking final approval of the settlement. The motion was brought to the attention of the trial court in this case, and it entered an order addressing Kerbs's Washington motion. The court noted that the primary argument in this court and the Washington court was that some of the relief requested by the settlement agreement in this case, if granted, conflicted with some of the relief previously ordered in the final judgment entered in *Kerbs.* The court disagreed that an alleged conflict existed between the two settlements and noted that the Lebanon settlement was intentionally drafted to ensure that there was no conflict between the relief requested in this case and the relief previously ordered in *Kerbs.* The court noted that the order was not intended to fully and finally resolve Kerbs's timely filed objections to the proposed settlement, recognizing that Kerbs had raised other objections that are unrelated to any alleged conflict. The court noted that it would consider those objections during the fairness hearing.

***5** ¶ 17 Furthermore, in an effort to ensure that no conflict existed between the Lebanon settlement and the *Kerbs* settlement, the court ordered the parties to submit a proposed final order that included specific language that the Lebanon settlement would not conflict in any way with the *Kerbs* settlement. The court indicated that it would not sign any final order lacking that language.

¶ 18 On February 17, 2015, a fairness hearing was held where the trial court heard evidence of testimony from Todd Hilsee, an expert in class notice issues, about the dissemination and adequacy of the class notice. In addition, the court reviewed affidavits, submissions, and objections, and heard arguments from those who attended. Kerbs did not attend the hearing. Thereafter, the court entered a final order and judgment approving settlement and dismissing the action with prejudice. The court found that the notice given was the best notice practicable under the circumstances, that it constituted valid, due, and sufficient notice to members of the settlement class, and that the parties had fully complied with the requirements of due process, the Illinois rules of civil procedure, and all other applicable laws. The court concluded that the proposed settlement was the result of good-faith, arms-length negotiations by the parties and that final approval of the proposed settlement would result in substantial savings in time and resources to the court and the litigants and would further the interests of justice. The court concluded that, for settlement purposes only, the settlement class met the four statutory prerequisites for the maintenance of a class action claim set forth by section 2–801 of the Code of Civil Procedure (735 ILCS 5/2–801 (West 2014)). In addition, the court found that the proposed settlement was fair, reasonable, and adequate. Thus, the court entered a final order approving the class settlement. Kerbs appeals.

¶ 19 Initially, we have ordered taken with the case Kerbs's motion for supplemental citation to authority. In the motion, Kerbs is seeking to supplement the record on appeal with the following documents in accordance with Illinois Supreme Court Rule 329 (eff.Jan.1, 2006):(1) an excerpt of the transcript of an October 30, 2015, hearing in a Seattle, Washington, case called *Chan v. Safeco* (*Chan* transcript); and (2) a full transcript of the February 17, 2015, fairness hearing in this case (fairness hearing transcript). According to the motion, the circuit court in *Chan* had determined that the Lebanon class settlement cannot be applied to Washington providers and their claims for underpayment of their bills for the following reasons: (1) the Illinois court lacked subject matter jurisdiction to approve a nationwide class for consumer fraud or breach of contract in that there is no connection between Illinois and the insurers' acts and there is no evidence that the insurance policies were identical in every state; (2) Lebanon could not adequately represent Washington providers because it did not have any of the claims available under Washington law; (3) the Lebanon settlement was deficient in terms of the due process given to Washington providers; and (4) the Washington claims were undervalued in the Lebanon case given the disparity between the verdicts provided to provider classes under Washington law and the compensation Washington providers would receive under the Lebanon settlement.

***6** ¶ 20 In response, the appellees objected to the submission of the *Chan* transcript as procedurally improper. The appellees argue that Rule 329 applies to supplementation of the appellate record with materials that were before the circuit court. The *Chan* transcript was not before the circuit court in this case and therefore cannot be made a part of the record on appeal. Therefore, the appellees argue that it appears that Kerbs intends the *Chan* transcript to be supplemental legal authority, akin to new case law issued after the briefing in this appeal has closed. The appellees contend that as legal authority, the cited views expressed in the *Chan* transcript are

neither binding nor persuasive. The appellees do not object to the submission of the fairness hearing transcript.

¶ 21 First, we agree with the appellees that Kerbs's submission of the *Chan* transcript is procedurally improper under Rule 329 where Kerbs has not shown that the transcript was actually before the trial court. See *In re Estate of Albergo,* 275 Ill.App.3d 439, 444 (1995) (Rule 329 allows supplementation of the record on appeal only with documents that were actually before the trial court).

¶ 22 *Chan v. Safeco* collaterally attacks [1] the settlement that was approved in this case by seeking a judicial declaration that the Lebanon settlement is not entitled to full faith and credit in Washington and therefore does not apply to Washington providers. In support of this motion, Kerbs made the same arguments that he has made on appeal here. During the hearing on the motion for declaratory judgment, the Washington court noted that the Lebanon court "appears to have lacked the subject matter jurisdiction to approve a nationwide class for consumer fraud, or breach of contract even under Illinois law." The court indicated that it was not an expert on Illinois law, but stated that "it looks to me like *Avery v. State Farm Mutual Ins. Co.* seems to require Illinois courts to show that the insurer's acts took place in Illinois and that the insurance policy had identical language in all states," requirements that cannot be met in the Lebanon case.

¶ 23 The court also made the following "observations" regarding the Lebanon case: that Illinois plaintiffs cannot adequately represent Washington providers because they do not have any of the claims available under Washington law; that it was not willing to opine on whether the terms of the Lebanon settlement were "grossly inadequate" for Washington providers, but noted that "80% is not 85%"; and that the Lebanon settlement was deficient in terms of the due process given to Washington providers. The court also noted that it looked like the "Washington claims were undervalued in the Lebanon case given the disparity between the verdicts provided to provided classes in Washington law and the compensation Washington providers would receive under Lebanon." Therefore, the court found that the Lebanon case did not have preclusive effect as to Washington providers and that it is "inapplicable" to the *Chan* case.

*7 ¶ 24 The appellees argue that the Washington order was an "advisory order," and therefore not binding or persuasive authority on this court, noting that the court's discussion about Illinois's lack of subject matter jurisdiction was "prefaced * * * with the candid acknowledgment that [it was] 'not an expert on Illinois law' " and that the Washington court did not have the benefit of the full briefing by all parties of the present case as this appellate court does. Accordingly, the appellees argue that "speculation about how 'Illinois courts applying Illinois law' might rule in this case was clearly not meant as an authoritative statement of Illinois law or applicable federal law."

¶ 25 We agree with the appellees that the *Chan* transcript is not binding or persuasive authority on this court with regard to the issues of whether the Illinois circuit court had subject matter jurisdiction to approve this nationwide class settlement and whether it abused its discretion in approving the class settlement. In making this decision, we note that the Washington court did not have the benefit of the full briefing by all parties on these issues. Thus, we will not consider the *Chan* transcript in this appeal. As acknowledged by the appellees, the February 17, 2015, fairness hearing occurred before the trial court in this case and therefore would constitute a proper submission for supplementation of the appellate record under Rule 329. Therefore, we grant the motion to supplement the appellate record with regard to the fairness hearing transcript, but deny it with regard to the *Chan* transcript.

¶ 26 We now turn to the first issue raised on appeal: whether the circuit court lacked jurisdiction to approve a nationwide class settlement. Citing *Avery v. State Farm Mutual Automobile Insurance Co.,* 216 Ill.2d 100 (2005), Kerbs argues that the circuit court lacked jurisdiction to approve the class settlement because there is no connection between Illinois and the class of Washington health care providers certified by the Washington court in *Kerbs* or the PIP claims of Washington health care providers generally. Kerbs does not make clear whether his jurisdictional argument concerns subject matter or personal jurisdiction.

¶ 27 In *Avery,* our supreme court addressed the issue of whether a nonresident plaintiff could pursue a private cause of action under the Consumer Fraud Act. 216 Ill.2d at 17986. The court concluded that the Consumer Fraud Act did not have extraterritorial effect, in that the legislature did not intend for the Act to apply to fraudulent transactions that occurred outside Illinois. *Id.* at 185–87. In determining whether transactions occurred within this state, the court held that a nonresident plaintiff may pursue a private cause of action under the Consumer Fraud Act if the circumstances

that relate to the disputed transaction occur primarily and substantially in Illinois. *Id.* at 187.

***8** ¶ 28 Here, Kerbs argues that *Avery* stands for the proposition that an Illinois court lacks jurisdiction to certify a nationwide class where there is no connection between Illinois and nonresident plaintiffs. We disagree. *Avery* dealt with the issue of whether the Consumer Fraud Act applied to nonresident consumers, not whether an Illinois court had jurisdiction over the claims of nonresident plaintiffs in a class action case. Despite Kerbs's repeated assertion to the contrary, the present class action did not seek to apply the Consumer Fraud Act to nonresident plaintiffs. Instead, the complaint specifically stated that the claims of Illinois class members, such as the plaintiff, were brought under the Consumer Fraud Act, and the claims of nonresident class members were brought under the consumer protection statute(s) of their respective states of residence.

¶ 29 Specifically, with regard to personal jurisdiction, the relevant question is whether the nonresident plaintiffs were afforded the procedural due process protections set forth in *Miner v. Gillette Co.*, 87 Ill.2d 7, 12–14 (1981). In *Miner,* our supreme court addressed the due process concern of whether an Illinois court had jurisdiction to render a binding judgment over nonresident plaintiffs who may lack "minimum contacts" with Illinois in a class action suit. *Id.* Plaintiff was an Illinois resident bringing a nationwide class action against defendant based on allegations of unfair and deceptive business practices within the meaning of the Consumer Fraud Act and of breach of contract. *Id.* at 10. The court concluded as follows with regard to jurisdiction: "The constitutionality of the present class action on behalf of nonresident members must be determined by asking (1) if plaintiff adequately represents the nonresident parties and (2) if notice can insure the class of its constitutional opportunity to be heard and protect each member's option to choose not to participate." *Id.* at 14. Thus, the court concluded that where the trial court determines that the due process requirements of notice and adequate representation have been met, the judgment rendered on behalf of the class members—resident and nonresident—will be binding on each and such judgment will be entitled to full faith and credit. *Id.* at 16.

¶ 30 Similarly, the United States Supreme Court held that a class representative may file a class action in a jurisdiction that would not otherwise have jurisdiction over absent class members as long as the absent plaintiffs are provided with minimal procedural due process protection. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811 (1985). The Court stated as follows:

> "Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter. * * * In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection." *Id.* at 811–12.

***9** ¶ 31 Thus, the Court concluded that procedural due process would require the following: (1) the plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel; (2) the notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections; (3) the notice should describe the action and plaintiffs' rights in it; (4) an absent plaintiff must be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court; and (5) the named plaintiff must at all times adequately represent the interests of the absent class members. *Id.*

¶ 32 Initially, we note that Kerbs does not challenge the sufficiency of the class notice in his appellate briefs. At the preliminary approval hearing, the trial court ordered Liberty to make a reasonable search of its records to ascertain the name and last known address of each person in the various classes and to send individual notice and a claim form by first-class mail to each potential class member. The court approved the form of the notice and the claim form. The court also required that certain steps be taken to ensure that the individual mailings provided the best notice practicable under the circumstances, such as identifying address changes with the post office. In addition, the court ordered Liberty to establish a website for potential class members to access additional information and establish and maintain a toll-free telephone number for potential class members to call for additional information. Potential class members were given the right to object or to opt out of the settlement and the procedures for both were set forth in the order.

¶ 33 The settlement administrator then disseminated notice to 2,953,505 potential class members. At the final approval hearing, the trial court reviewed affidavits from the settlement administrator and heard testimony from Todd Hilsee, an expert in class notice issues, about the dissemination and adequacy of notice to the class members. Thereafter, the court reaffirmed its finding that class notice in accordance with the terms of the preliminary order constituted the best notice practicable under the circumstances. The court found that the evidence confirming dissemination and content of class notice demonstrated that the parties complied with the preliminary order regarding class notice; that the notice given informed members of the settlement class of the pendency and the terms of the proposed settlement, of their opportunity to request exclusion from the settlement class, and of their right to object to the terms of the proposed settlement; that the notice given was the best notice practicable under the circumstances; and that it constituted valid, due, and sufficient notice to members of the settlement class.

***10** ¶ 34 The trial court further found that the notice complied fully with the requirements of due process, the Illinois rules of civil procedure, and all other applicable laws. Thus, having afforded the potential class members procedural due process as set forth in *Miner,* the court had jurisdiction over all class members who did not opt out of this multistate settlement.

¶ 35 The next issue on appeal is whether the trial court abused its discretion in certifying a settlement class that included Washington health care providers. A court's decision on class certification is reviewed for an abuse of discretion. *Smith v. Illinois Central R.R. Co.,* 223 Ill.2d 441, 447 (2006). In making its decision as to whether to certify a settlement class, the court should not judge the legal and factual questions by the same criteria applied in a trial on the merits, nor should the court turn the settlement approval hearing into a trial. *GMAC Mortgage Corp. of Pennsylvania v. Stapleton,* 236 Ill.App.3d 486, 493 (1992). To do this would defeat the purposes of reaching a compromise, such as avoiding a determination on contested issues and dispensing with extensive and wasteful litigation. *Id.* Accordingly, a class that is suitable for settlement purposes might not be suitable for litigation purposes because the settlement might eliminate all of the contested issues that the court would have to resolve if the case went to trial. *Cohen v. Blockbuster Entertainment, Inc.,* 376 Ill.App.3d 588, 598 (2007).

¶ 36 Here, Kerbs argues that the trial court abused its discretion when it certified a nationwide class action settlement that included Washington providers because there was no connection between Washington provider claims and Illinois. Kerbs again cites *Avery* in support of his position. Unlike the present case, *Avery* involved a class-certification motion in a case that was litigated to verdict. *Avery,* 216 Ill.2d at 109. As we have already noted, *Avery's* holding that the litigation class should not have been certified focused solely on plaintiff's attempts to apply the Illinois Consumer Fraud Act to class members and transactions that had no connection with Illinois. *Avery* did not stand for the proposition that an Illinois class representative could not maintain a nationwide settlement class where the class included absent plaintiffs.

¶ 37 Kerbs also argues that the trial court abused its discretion in certifying a nationwide class that included Washington providers where Lebanon's claim did not arise from the identical factual predicate as the class claims being compromised. Kerbs noted that Lebanon's claims dealt with Liberty's failure to pay medical bills submitted under an Illinois insurance policy in Illinois. We disagree and conclude that the claims involve the same factual predicate; namely, Liberty's use of computerized databases to determine PIP and MedPay reimbursements. Further, we note that the classes were only certified for settlement purposes. As we have previously explained, a class that is suitable for settlement purposes might not be suitable for litigation purposes. In addition, for the first time on appeal, Kerbs argues that *Avery* bars nationwide certification where the insurance contracts' language is not identical in all of the included states. In his reply brief, he argues that there was no showing that the contract language relied on by Lebanon for its breach of contract claim was identical to the language in other states.

***11** ¶ 38 In *Avery,* our supreme court concluded that the alleged breach of contract claims were unsuitable for class certification in light of the number of contracts implicated by the class claims and the material differences in the policy language of these contracts. *Avery,* 216 Ill.2d at 128–33. The court found that the insurer's automobile insurance contracts in 48 states could not be given uniform interpretation and, therefore, the commonality and predominance requirement for maintenance of a class action could not be satisfied. *Id.* There was nothing in *Avery* that suggested that the certification of a settlement class must be subjected to the same rigorous scrutiny that a court applies when determining whether to certify a litigation class. Kerbs did not argue in his objection filed with the trial court that there were any material

differences in the insurance policies, nor did he identify any of these alleged material differences. Because Kerbs failed to raise this issue in his objection filed with the trial court, he has forfeited the issue on appeal. See *Ficken v. Alton & Southern Ry. Co.*, 291 Ill.App.3d 635, 644–45 (1996) ("To preserve an issue for review, a party must make the appropriate objections in the trial court or the issue will be waived."). Despite this, we note that the various insurance policies were filed in the record for the trial court to review when making its decision to certify the proposed class, which included Washington providers.

¶ 39 Kerbs also bases his argument on the differences between Illinois and Washington law. Specifically, in 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 that is reasonable, even if the amount of the claim is above the 80th percentile of a database of charges. In his objection filed with the trial court, Kerbs noted the following differences between the two states' laws: "Washington providers have rights and causes of action for relief [namely, injunctive relief for future violations of the Insurance Code,] under the Washington Consumer Protection Act not possessed or available to Lebanon as an Illinois provider" and that the "Washington Insurance Code" requires the payment of all reasonable and necessary medical expenses incurred as a result of a covered accident.

¶ 40 Initially, we note that Kerbs has failed to identify any outcome-determinative differences in Washington law and Illinois law. Although Kerbs argues that Washington law provides for payment of all "reasonable" charges incurred as a result of a covered accident, that does not necessarily mean that the provider will automatically recover more than what was provided for under the terms of this settlement. As noted by the Washington court in *Kerbs*, the determination of what constitutes a reasonable charge is for the finder of fact. In addition, the settlement does not purport to adjudicate any claim under any state's law. Instead, it sets forth a negotiated settlement that will apply to all claimants who do not opt out. Furthermore, it is well-settled law in Illinois that a class action may still be maintained despite conflicting or differing state laws. See *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill.App.3d 992, 1003 (2004) (the fact that the laws of 17 states are potentially implicated here is not necessarily problematic as the trial court may simply divide the class into subclasses); see also *Purcell or Wardrope Chartered v. Hertz Corp.*, 175 Ill.App.3d 1069, 1074–75 (1988) (a class action may still be maintained despite conflicting or differing state laws as the court may simply choose to divide the class into subclasses).

***12** ¶ 41 The next issue raised on appeal is whether the circuit court abused its discretion by approving the class settlement. There exists a strong public policy in favor of settlement and the avoidance of costly and time-consuming litigation. *Security Pacific Financial Services v. Jefferson*, 259 Ill.App.3d 914, 919 (1994). The circuit court's approval of the class settlement is reviewed for an abuse of discretion. *Steinberg v. System Software Associates, Inc.*, 306 Ill.App.3d 157, 169 (1999). A reviewing court should not overturn the circuit court's approval of a class settlement unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval. *City of Chicago v. Korshak*, 206 Ill.App.3d 968, 972 (1990). The standard used in evaluating a class settlement is whether the settlement was fair, reasonable, and adequate. *Steinberg*, 306 Ill.App.3d at 169.

¶ 42 The circuit court should consider the following factors when evaluating the fairness of a class settlement: (1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed. *Korshak*, 206 Ill.App.3d at 972. Where the procedural factors support approval of a class settlement, there is a presumption that the settlement is fair, reasonable, and adequate. *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 535 (3rd Cir.2004).

¶ 43 Kerbs argues that the trial court abused its discretion in finding that the class settlement was fair, reasonable, and adequate. He argues as follows: (1) Washington providers are paid nothing under the Lebanon settlement; (2) Washington providers will suffer a detriment from the defendants' use of the 80th percentile of the FAIR Health database to pay provider bills; (3) the inclusion of a waiver of future claims was unfair and improper; (4) payments to Washington class members for past reductions using the Ingenix database are too low in light of other UCR settlements; and (5) Washington

class members should be paid for past reductions using the FAIR Health database.

¶ 44 In the trial court's preliminary settlement approval order, it concluded that the settlement was within the range of possible approval as fair, reasonable, and adequate, and in the best interests of the class members. In making this decision, the court noted that there were several important differences between the relief provided to members of the settlement class under the proposed settlement and relief sought in similar cases in which class certification had been denied or reversed. In particular, the court noted that the proposed settlement included an agreement by Liberty to make payments to certain members of the settlement class without any finding that Liberty breached any duty owed to any member of the settlement class or that any member of the settlement class suffered any legally cognizable injury as a result of any such breach. Thus, the court concluded that the stipulation eliminated the need to resolve the individualized issues of fact and law that led this appellate court to reverse the certification of a litigation class in a similar case in Madison County. See *Bemis v. Safeco Insurance Co. of America*, 407 Ill.App.3d 1164 (2011).

***13** ¶ 45 In addition, the trial court noted that the stipulation provided for prospective relief in the form of an agreed injunction that would allow Liberty to continue to use its computerized bill-review system and require Liberty to make certain disclosures concerning its use of that system. The court found that these terms eliminated the potential conflict of interest cited by an Oregon court, a case that found the medical provider had failed to establish its adequacy to represent the proposed litigation class. See *Froeber v. Liberty Mutual Insurance Co.*, 193 P.3d 999 (Or.Ct.App.2008).

¶ 46 Thus, the trial court made a final determination that the class settlement was fair, reasonable, and adequate. In making this decision, the court reviewed the parties' written submissions to the court, the four objections to the settlement, which included the objection filed by Kerbs, and heard arguments and additional evidence regarding the substantive fairness, reasonableness, and adequacy of the settlement terms. We note that there were 2,953,505 potential class members and around 798 elected to opt out. The court concluded that the proposed settlement was the result of good-faith arms-length negotiations by the parties, a finding that was not challenged by Kerbs until this appeal, and that approval of the settlement would result in substantial savings of time and resources to the court and the litigants and would further the interests of justice. Thus, the procedural *Korshak* factors weighed in favor of approving the class settlement.

¶ 47 As for the particular terms of the settlement provision, Illinois law is clear that a trial court must evaluate a settlement as a whole, as it is the product of extensive and complex negotiations:

> "In litigation as complex as that involved in this case and with the many divergent interests it is inescapable that reasonable minds may differ as to the wisdom of certain provisions of the settlement agreement. That some alteration in the agreement may have been more beneficial to certain interests is not the test." *People ex rel. Wilcox v. Equity Funding Life Insurance Co.*, 61 Ill.2d 303, 319 (1975).

Thus, a reviewing court cannot rewrite the parties' settlement to eliminate unfair provisions; it can only approve or disapprove of the entire agreement. *Waters v. City of Chicago*, 95 Ill.App.3d 919, 925 (1981). The essence of a settlement is compromise and the court cannot reject a settlement solely because it does not provide a complete victory to plaintiffs. *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir.1996).

¶ 48 Kerbs argues that the trial court abused its discretion in approving the settlement where Lebanon did not fairly and adequately protect the interests of the class members. As a prerequisite for maintenance of a class action, the court must find that the representative parties will fairly and adequately protect the interests of the class. *Client Follow-Up Co. v. Hynes*, 105 Ill.App.3d 619, 624–25 (1982). 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 as, in that situation, due process prohibits a judgment from being binding on class members. *Id.* However, a class representative may not be disqualified merely because his claim is not exactly the same as the claims of other potential class members. *Carrao v. Health Care Service Corp.*, 118 Ill.App.3d 417, 428 (1983).

***14** ¶ 49 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 there was no consideration paid for the future waiver provision; that the future waiver was contrary to Washington public policy; that Washington law requires payment of all reasonable charges; and that Washington providers receive nothing under the Lebanon

settlement for reductions made based on the FAIR Health database. In essence, Kerbs is arguing that the Washington providers might be more successful if the suit was brought in a Washington court. Kerbs points to his attorney's previous class action results in support of his argument that Washington providers "would clearly have fared better in a Washington state court action ."

¶ 50 The standard for class settlement approval is not whether the parties could have done better—the standard is whether the compromise was fair, reasonable, and adequate. *Wilcox,* 61 Ill.2d at 317, 319. As we have previously explained, a trial court cannot reject a settlement solely because it does not provide a complete victory to the class members. See *Isby,* 75 F.3d at 1200. The trial court was presented with evidence of other class settlements and awards reached in similar cases litigated to verdict, some more favorable and others less favorable than the present settlement.

¶ 51 Further, Lebanon's complaint attacked the use of both the Ingenix and the FAIR Health database. The settlement controls Liberty's use of the FAIR Health database by requiring the fully disclosed use of the 80th percentile charge as opposed to a lower benchmark. The agreement provided that use of the FAIR Health database at the 80th percentile did not breach any duty owed to settlement class members. There was consideration to support a waiver of future claims as Liberty agreed to use the FAIR Health database for future claims, a provision that was also included in the *Kerbs* settlement, and also agreed to use the 80th percentile benchmark in paying future medical claims. Before approving the class settlement, the trial court was presented with evidence concerning the accuracy and reliability of the FAIR Health database and that the 80th percentile was the industry standard for UCR charges in the health care and insurance market places. Thus, looking at the settlement as a whole, we cannot say that the court abused its discretion in approving the settlement on this basis.

¶ 52 Kerbs argues that the settlement was against the public policy of Washington. Specifically, he argues that the inclusion of the future claims was contrary to the Washington Insurance Code and the Washington Consumer Protection Act. A settlement agreement may include a waiver of future claim provision even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action. *Hesse v. Sprint Corp.,* 598 F.3d 581, 590 (9th Cir.2010); *Froeber,* 193 P.3d at 1005. Thus, claims not alleged in the underlying class action complaint can be properly released where those claims depended on the same set of facts as the claims that gave rise to the settlement.

***15** ¶ 53 Here, the future claims waiver provided that except as otherwise provided by the final judgment entered in *Kerbs* on August 24, 2012, Liberty's payment of future claims at the 80th percentile under the settlement does not breach any duty under any applicable law or contract requiring Liberty to pay or reimburse UCR charges for covered treatments. The future claims waiver in this provision involved the same factual predicate as those raised in the class action: Liberty's use of computerized databases to determine PIP and MedPay reimbursements. From the court's preliminary and final orders, it was clear that the court had considered this objection by Kerbs. We cannot say that the trial court abused its discretion in approving the settlement on this basis.

¶ 54 With regard to Kerbs's argument that this settlement showed "clear hallmarks of a collusive settlement and a 'sweetheart' deal for the insurers in exchange for a large fee paid to Lebanon and its counsel," we note that Kerbs failed to raise this argument in his objection filed in the trial court. Thus, this argument is forfeited on appeal. *Ficken,* 291 Ill.App.3d at 644–45 ("To preserve an issue for review, a party must make the appropriate objections in the trial court or the issue will be waived.").

¶ 55 In summary, we conclude that the trial court had jurisdiction to approve the nationwide class settlement entered in this case. The trial court did not abuse its discretion in certifying the settlement class and in finding that the settlement was fair, reasonable, and adequate.

¶ 56 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 57 Affirmed.

Presiding Justice SCHWARM and Justice MOORE concurred in the judgment.

All Citations

Not Reported in N.E.3d, 2016 IL App (5th) 150111-U, 2016 WL 546909

Footnotes

1 The motion for declaratory judgment in *Chan* was filed after the circuit court approved the class settlement in this case and Kerbs filed his notice of appeal challenging that decision.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

October 25, 2016

John Michael Silk
Wilson Smith Cochran Dickerson
901 5th Ave Ste 1700
Seattle, WA 98164-2050
silk@wscd.com

Philip Albert Talmadge
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave SW
Third Floor Ste C
Seattle, WA 98126-2138
phil@tal-fitzlaw.com

David Elliot Breskin
Breskin Johnson & Townsend PLLC
1000 Second Avenue Suite 3670
Seattle, WA 98104
dbreskin@bjtlegal.com

Russell Yager
Vinson and Elkins
2001 Ross Ave., Ste. 3700
Dallas, TX 75201-2975
dblanke@velaw.com

Manuel Berrelez
Vinson & Elkins, LLP
2001 Ross Avenue Suite 3700
Dallas, TX 75201-2975
mberrelez@velaw.com

Cynthia J Heidelberg
Breskin, Johnson & Townsend
1000 2nd Ave Ste 3670
Seattle, WA 98104-1053
cheidelberg@bjtlegal.com

CASE #: 75541-2-I
Chan Healthcare Group, Respondent. v. Liberty Mutual Fire Ins. Co., Petitioners

Counsel:

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

c: Hon. Catherine Shaffer

enclosure

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

CHAN HEALTHCARE GROUP, PS, a Washington professional services corporation, Plaintiff/Respondent, v. LIBERTY MUTUAL FIRE INSURANCE CO. and LIBERTY MUTUAL INSURANCE COMPANY, foreign insurance companies, Defendants/Petitioners.	)	No. 75541-2-I COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW

This case concerns personal injury protection insurers' use of computerized databases to reduce healthcare provider bills. At issue is the effect under the Full Faith and Credit Clause of the United States Constitution of a multistate class settlement in an Illinois court. Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company (collectively Liberty) seek interlocutory review of a grant of declaratory judgment for plaintiff chiropractic care provider Chan Healthcare Group (Chan) and denial of Liberty's counter motion for summary judgment. Chan was a class member of the Illinois case, obtained notice, and did not opt out of the case. The trial court declined to give full faith and credit to an Illinois court judgment by concluding that the named plaintiffs were not adequate representatives for Washington providers' claims. Liberty argues that the trial court improperly engaged in broad collateral review of the adequacy of representation when the issue was addressed by the Illinois trial and appellate courts. As explained below, review is appropriate and is granted.

FACTS

Washington's personal injury protection (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 reviewed and paid PIP healthcare provider bills at the 80th percentile benchmark for specific treatment in relevant geographic areas as reflected in computer databases maintained by a non-profit firm FAIR Health.

There have been class action lawsuits filed across the country, where healthcare providers challenged the reasonableness of insurers' reimbursement reductions by use of computer databases. Some of these case have settled, some in a multistate class settlement. Lebanon was one of them. In June 2014, Lebanon Chiropractic Clinic filed a class action lawsuit against Liberty and Safeco Insurance Company in an Illinois court. The proposed class included healthcare providers in many other states, including Washington. The lawsuit alleged that Liberty's use of FAIR Health databases to limit provider payments to a predetermined percentile (80%) constituted unfair and deceptive acts under Illinois' consumer fraud act and other states' equivalent acts, including Washington's consumer protection act.[3] Chan was a Lebanon class member, received reasonable notice and an opportunity to opt out of the class, and did not opt out.

In October 2014, the parties in Lebanon reached a proposed class settlement. In January 2015, a Washington chiropractor David Kerbs, represented by the same counsel who represents Chan in this case, filed an objection to the proposed

---

[1] See RCW 48.22.005(7), .095.
[2] See WAC 284-30-330(4).
[3] App. 142.

settlement.[4] As grounds for objection, Chan asserted, among other things, that the Illinois court lacked "jurisdiction over the claims of Washington health care providers," that the settlement was "inadequate and unfair to Washington providers," and that Lebanon plaintiff was "an inadequate class representative for Washington providers" and had "a conflict of interests with Washington providers[.]"[5] Liberty filed a response.

In February 2015, the Illinois court conducted a fairness hearing. After the hearing, the court entered a final order and judgment approving settlement and dismissed the case.[6] In the order, the court addressed Dr. Kerbs' objection and concluded, among other things, that the class representative would "fairly and adequately protect the interests of the Settlement Class."[7] Dr. Kerbs appealed the judgment to an Illinois appellate court. He argued, among other things, that the Illinois court lacked jurisdiction, that the settlement was not fair, adequate, or reasonable, and that the Lebanon plaintiff "was not an adequate representative of the claims of Washington providers," citing a Ninth Circuit case Hesse.[8]

In February 2016, an Illinois appellate court issued an unpublished opinion, rejecting Dr. Kerbs' arguments and affirming the judgment.[9] The court addressed Dr. Kerbs' argument that "the trial court abused its discretion in approving the settlement where Lebanon did not fairly and adequately protect the interests of the class members."[10] Dr. Kerbs pointed out, among other things "that Washington law requires

---

[4] App. 245-56.
[5] App. 246 (Grounds for Objections 1, 3, 4).
[6] App. 257-73.
[7] App. 257-73.
[8] App. 311; Hesse v. Sprint Corp., 598 F.3d 581 (9th Cir. 2010).
[9] Lebanon Chiropractic Clinic v. Liberty Mutual Ins. Co., 2016 WL 546909 (Ill. Ct. App. 2016) (unpublished).
[10] Lebanon, 2016 WL 546909, at *13 ¶ 48.

payment of all reasonable charges."[11] The appellate court rejected the argument, stating that Dr. Kerbs essentially argued that "the Washington providers might be more successful if the suit was brought in a Washington court," where the "standard for class settlement approval is not whether the parties could have done better—the standard is whether the compromise was fair, reasonable, and adequate."[12]

In September 2015, when Dr. Kerbs' appeal was still pending in the Illinois appellate court, Chan filed a class action lawsuit against Liberty in King County Superior Court. Chan alleged that Liberty limited PIP reimbursement payments to the 80th percentile of the charges for the same procedures in the same geographical areas as reflected in the FAIR Health databases. Chan alleged that Liberty failed to independently investigate the reasonableness of the providers' bills, which Chan asserted constituted unfair practice under Washington's consumer protection act.

In June 2016, the trial court conducted a hearing on Chan's second motion for declaratory judgment regarding Lebanon and Liberty's counter motion seeking dismissal of the case based on Lebanon. After the hearing, the court granted Chan's motion and denied Liberty's by concluding that Lebanon did not preclude Chan's claims. The court stated that "Hesse controls whether or not I should defer to the Illinois' court's finding in Lebanon."[13] The court stated that the Illinois trial and appellate courts in Lebanon made no specific findings on whether the Lebanon plaintiff adequately represented the interests of Washington providers.[14] The court compared the Illinois and Washington laws to conclude that the Lebanon plaintiff did not adequately represent Washington

---

[11] Lebanon, 2016 WL 546909, at *14 ¶ 49.
[12] Lebanon, 2016 WL 546909, at *14 ¶¶ 49, 50.
[13] App. 85-86.
[14] App. 88.

providers' Washington state claims. The court stated that "it looks to be more difficult to make out a CPA claim in Illinois than in Washington on a couple of elements."[15] "Given the many variations in applicable state law, the Lebanon plaintiff had an insurmountable class conflict and no procedural due process protections were put in place to protect the Washington providers with CPA claims under Washington law."[16]

DECISION

Liberty seeks discretionary review of the trial court's grant of declaratory judgment and denial of summary judgment on the effect of the Lebanon settlement. Liberty seeks review under RAP 2.3 (b)(1) and (2), which set forth the following criteria:

> (1) The superior court has committed an obvious error which would render further proceedings useless; [or]
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

Although interlocutory review is generally disfavored, Liberty demonstrates that review is appropriate in this case at this time.

This case presents a threshold issue as to the scope of Washington court's collateral review of the Illinois court's class action judgment under the Full Faith and Credit Clause of the United States Constitution. The Full Faith and Credit Clause requires a state court to enforce the judgment entered by a court of another state.[17] A state court judgment in a class action is "presumptively" entitled to full faith and credit

---

[15] App. 91.

[16] App. 94.

[17] U.S. CONST. art. IV, § 1; Underwriters Nat'l Assurance Co. v. N. Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982).

from the courts of other jurisdictions.[18] But a state court is not required to give full faith and credit to a judgment entered against a party if that party did not receive minimum procedural due process protection when the judgment was entered.[19] Due process in this context requires (1) reasonable notice that apprises the absent class members of the pendency of the action, affords them the opportunity to present objections, and describes their rights, (2) the opportunity to opt out, and (3) a named plaintiff who adequately represents the absent class members' interests.[20] Here, the first two prongs are not in dispute. Chan was a Lebanon class member and received reasonable notice and an opportunity to opt out. The only issue was the adequacy of representation.

Liberty argues that the trial court erred in failing to give full faith and credit to the Lebanon judgment by collaterally assessing the adequacy of representation. Liberty relies on a Division Two opinion in Nobl Park, which cited the Ninth Circuit's decision in Epstein.[21] In response, Chan argues that the trial court properly conducted collateral review and cites the Ninth Circuit's Hesse case as "on all fours with this case."[22]

Epistein is a federal action involving the effect of a Delaware state court judgment that approved a class action settlement releasing exclusively federal claims, including those then pending in the federal court. The Ninth Circuit initially concluded that the Delaware judgment did not preclude absent class members' federal claims that

---

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

[19] Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482-83, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982); Nobl Park, LLC v. Shell Oil Co., 122 Wn. App. 838, 845, 95 P.3d 1265 (2004).

[20] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); Nobl Park, 122 Wn. App. at 845.

[21] Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999).

[22] Answer to Motion for Discretionary Review at 9.

were exclusively within the federal court jurisdiction.[23] But the United States Supreme Court reversed, holding that a federal court must look to the law of the rendering state to determine the preclusive effect of the state court judgment releasing such claims.[24] On remand, the federal court plaintiffs argued that the state court plaintiffs did not adequately represent their interests as to their federal claims. The Ninth Circuit rejected their argument, stating, "Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court."[25] Due process "does not require collateral second-guessing of those determinations and that review."[26] The court rejected a broad, merit-based collateral review and held that collateral review is limited to "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."[27]

Division Two in Nobl Park cited Epstein for the proposition that "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."[28] The trial court rejected Liberty's reliance on Nobl Park, stating that Nobl Park addressed "adequacy of notice," not representation.[29] Nobl Park appears to address the adequacy

---

[23] Epistein v. MCA, Inc., 50 F.3d 644, 663-66 (9th Cir. 1995), reversed, Matsushita, 516 U.S. 367 (1996).
[24] See Matsushita, 516 U.S. at 374-75.
[25] Epstein, 179 F.3d at 648.
[26] Id. at 648.
[27] Id. at 649 (emphasis added).
[28] Nobl Park, 122 Wn. App. at 845 n.3.
[29] App. 80.

of representation as part of its due process notice analysis.[30] But Nobl Park does not appear to address the scope of collateral review. It did collaterally assess the notice and adequacy of representation in a Tennessee court's class action settlement. It is unclear whether there was any finding on those issues made by the Tennessee court.

Hesse, relied on by the trial court and Chan, was a federal lawsuit challenging Sprint's surcharges for Washington's business and occupation tax. At issue was the preclusive effect of a Kansas court judgment that approved a nationwide class settlement where the Kansas plaintiffs challenged Sprint's surcharges for federal regulatory fees. The class included all current and former Sprint wireless customers who were charged regulatory fees during a specified time period. Citing Epstein, the Ninth Circuit said: "Normally we will satisfy ourselves that the party received the requisite notice, opportunity to be heard, and adequate representation by referencing the state court's findings."[31] The court distinguished Epstein on the ground that "the Kansas court made no finding" that the plaintiff "was an adequate representative of the class, much less that he was an adequate class representative as to the B & O Tax Surcharge claims."[32] "Because that question was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review."[33] Hesse appears distinguishable because the Kansas court there made no specific finding on the adequacy of representation, whereas the Illinois plaintiff expressly asserted Washington providers' claims under Washington's consumer protection act, and the Illinois court

---

[30] See Nobl Park, 122 Wn. App. at 845 ("Due process in a class action notice requires . . . (3) a named plaintiff who adequately represents the absent plaintiffs' interests."), at 847 (addressing the challenge to the adequacy of representation).

[31] Hesse, 598 F.3d at 588 (citing Epstein, 179 F.3d at 648).

[32] Id.

[33] Id.

rejected a Washington provider's challenge to the adequacy of representation for Washington providers' consumer protection act claims.

Chan argues that the "Illinois 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."[34] Citing the Sixth Circuit's Gooch decision,[35] the trial court stated that it was not required to defer to the Illinois court's "passing rubber stamp reference to the adequacy of the representation" or "conclusory findings of adequate representation."[36] In Gooch, the Sixth Circuit engaged in a merit-based collateral review of the notice and adequacy of representation before giving full faith and credit to an Arkansas court class action judgment. The Sixth Circuit noted Diet Drugs, where the Third Circuit said: "Once *a court has decided* that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated."[37] But the Sixth Circuit distinguished Diet Drugs by stating that "passing rubber-stamp reference in the opinion of the Arkansas circuit court —and the silence by the Arkansas Supreme Court—hardly meets this standard."[38]

The scope of collateral review of a multistate class settlement under due process appears to be an open question.[39] Liberty's argument on the issue has some support in Epstein and Diet Drugs. The trial court relied on Hesse, which distinguished but did not overrule Epstein. The trial court's decision granting declaratory judgment involves a

---

[34] Answer to Motion for Discretionary Review at 4.

[35] Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402 (6th Cir. 2012).

[36] App. 89.

[37] In re Diet Drugs (Phentermine/Fenfluraminel Dexfenfluramine) Prods. Liab. Litig., 431 F.3d 141, 146 (3d Cir. 2005) (emphasis added).

[38] Gooch, 672 F.3d at 421-22.

[39] See Juris v. Inamed Corp., 685 F.3d 1294, 1314, n.16 (11th Cir. 2012) (noting "an apparent split of authority" but declined to decide the apparent "open question" because no showing of a due process violation was made anyway).

significant question of law that affects other Lebanon class members in Washington who did not opt out. I conclude that review is appropriate at this time.

Liberty argues that the trial court erred in concluding that the differences between Washington and Illinois laws prevented an Illinois plaintiff from adequately representing Washington providers. Because review is warranted on the scope of collateral review, in the interests of judicial economy, review is also be granted on the merits of the trial court's assessment of the adequacy of representation.[40]

CONCLUSION

Discretionary review is appropriate on the trial court's decision on the preclusive effect of the Lebanon class action judgment. Therefore, it is

ORDERED that discretionary review is granted. The clerk shall issue a perfection schedule.

Done this 25th day of October, 2016.

Masako Hanzawa
Court Commissioner

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 OCT 25 AM 11:16

[40] On October 7, 2016, Chan's counsel did not appear at the scheduled time (9:30 a.m.) for oral argument on the motion for discretionary review. When I heard Liberty's argument, I incorrectly assumed that Liberty's co-counsel at counsel's table was Chan's counsel. Chan's counsel later appeared during the Court's motion's calendar scheduled for 10:30 a.m. following the discretionary review calendar. I told counsel that now that counsel for Liberty had already left, I could not hear argument in his absence and that if Chan's counsel sought any relief, it had to be in writing by a motion with proof of service. Counsel then filed a supplemental response to Liberty's motion for discretionary review. Liberty filed a motion to strike and a response. In his supplemental response, Chan's counsel states he contacted the court on October 6, 2016 and found out that the case was placed fourth on the calendar. But the case was scheduled to be heard on the 9:30 a.m. calendar, and the order of the cases on the calendar is subject to change. I allowed a motion for relief (e.g., a second hearing), not a supplemental brief on the merits. Chan's counsel states I "directed" him to "submit a summary of what [he] was intending to say in oral argument." Response to Liberty's Motion to Strike at 1. There appears to be misunderstanding. In any event, Chan's supplemental response does not change the ruling.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Appellants in Court of Appeals, Division I Cause No. 75541-2-I to the following:

John M. Silk, WSBA #15035
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164

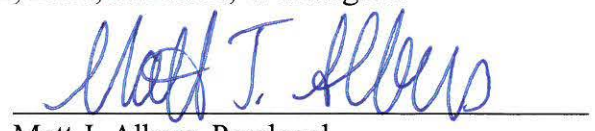
Russell R. Yager
Manuel G. Berrelez
(Admitted *Pro Hac Vice*)
Vinson & Elkins L.L.P.
2001 Ross Avenue, Suite 3700
Dallas, TX 75201-2975

David E. Breskin, WSBA #10607
Cindy Heidelberg, WSBA #44121
Breskin Johnson & Townsend
1000 Second Avenue, Suite 3670
Seattle, WA 98101

Original E-filed with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 22, 2017, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe