

No. 95416-0

NO. 75541-2-I
(King County No. 15-2-21662-7 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. I

CHAN HEALTHCARE GROUP, PS,

Plaintiff – Respondent,

v.

LIBERTY MUTUAL FIRE INSURANCE CO. and LIBERTY MUTUAL
INSURANCE COMPANY,

Defendants – Petitioners,

**APPELLEE CHAN'S RESPONSE TO PETITIONER LIBERTY
MUTUAL'S APPEAL**

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FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2017 APR 24 PM 5:05

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I. INTRODUCTION

This Response is filed by Plaintiff Chan Healthcare Group (“Chan” or “Plaintiff” or “Appellee”), on its own behalf and on behalf of the certified class of all Washington providers similarly situated.

This case involves a collateral attack of a nationwide class action settlement, titled *Lebanon Chiropractic v. Liberty Mutual Insurance Co.* (“Lebanon settlement”) that was entered into in St. Clair County, Illinois, one of a small number of counties and state courts that is a “magnet” for multi-state and nationwide class actions.¹

The *Lebanon* settlement, which was entered into only four months after the case was filed, contains a broad release of claims for reductions made by Liberty Mutual to any bill of any healthcare provider anywhere in the country that relates to Liberty’s past and future use of the Fair Health database to limit its payments on Personal Injury Protection (“PIP”) or MedPay claims. The *Lebanon* nationwide class was represented by only a single Illinois healthcare provider, *Lebanon Chiropractic*. The only reference to the various states’ laws throughout the proceedings in the Illinois trial court was a single footnote in the Complaint, by which *Lebanon* purported to bring the case under the various states’ consumer

¹ See generally, John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol’y 143 (2001); *Litigation Imbalance III, Madison County Strikes Back: Revealing Trends in Court Dockets Demonstrate Lawsuit Abuse in Select Counties*, Civil Justice Study, April 2015 (available at http://www.instituteforlegalreform.com/uploads/sites/1/ICJL_Litigation_Imbalance_III_Study.pdf?phpMyAdmin=ixWosBsjNazOMF-nz%2CnxfwkrbH2).

protection statutes. In approving that nationwide class action settlement, the Illinois trial court made no findings regarding the adequacy of Lebanon to represent Washington providers or to the merits or substance of the Washington providers' state law claims. Liberty admits this.²

Washington healthcare provider *Chan Healthcare Group* brought an action in the King County Superior Court in September 2015 alleging that Liberty's use of the Fair Health database to reduce the PIP bills of Washington healthcare providers violated the Washington Consumer Protection Act. Chan then filed a motion for declaratory judgment that its claim was not precluded by the *Lebanon* settlement because Lebanon was not an adequate representative of Washington providers and the *Lebanon* settlement could not be applied to bar the claims of Washington providers consistent with due process.

In June 2016, Judge Shaffer of the King County Superior Court properly held in a detailed and well-reasoned decision, after *four* motions and *three* oral arguments on the issue, that the Illinois chiropractor, Lebanon, did not adequately represent Washington providers and that the *Lebanon* settlement could not be applied to bar the claims of Washington providers consistent with federal due process.

Judge Shaffer's orders should be affirmed and Chan's case should be allowed to proceed in Washington on behalf of Washington providers. Washington has an interest in protecting its citizens and allowing them

² Brief at 11, n.12

their day in court, represented by an adequate representative of their interests. Finality cannot come at the expense of basic “due process imperatives.”³

II. STATEMENT OF THE CASE

A. Chan Sued in Washington Alleging that Liberty’s Practice Violates the Washington Consumer Protection Act

The Washington Personal Injury Protection (PIP) statute requires that auto insurers pay “all reasonable” bills for medical treatment incurred by a covered person. RCW 48.22.095; 4.22.005(7). The Washington Administrative Code requires that insurers adopt reasonable procedures for investigation PIP insurance claims and reasonably investigate a claim before refusing to pay the claim in full. WAC 284-30-330.

But Liberty does not pay all reasonable bills submitted or investigate PIP insurance claims before refusing to pay the provider in full for the treatment provided to its insured. Instead, Liberty uses a practice of having the providers’ bills automatically reduced by a computer to an amount that is no more than the amount represented by the 80th percentile of the FAIR Health database of provider charges for the same treatment procedure in the same area.

On September 8, 2015, Chan Healthcare Group filed a class action against Liberty in King County Superior Court. It alleged that Liberty’s

³ *Gooch v. Life Investors Ins. Co. of Am.* 672 F.3d 402, 420-22 (6th Cir. 2012)(“ Even though reconsidering whether the class judgment complied with the due process clause may not promote judicial “efficiency” or protect the “finality” of the original judgment... it is a due-process imperative that we are not free to ignore.”).

practice of making automatic computer generated reductions using the FH database, without investigating if the bill was reasonable, was an unfair claims practice and an unfair practice under the CPA. CP 1-31⁴

B. The Illinois Court Approved the *Lebanon* Settlement Without Considering Washington Provider Interests

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

In January 2015, Dr. David Kerbs, a Washington provider who was the plaintiff and class representative in a prior class settlement in Washington titled *Kerbs v. Safeco*, filed an objection in the Illinois state court settlement proceedings.⁵ He asserted in part that the Illinois court

⁴ Liberty asserts that its *policy language* was approved by the Washington Insurance Commissioner and that its *policy language* is the same in all states. This is a red herring that has been repeatedly debunked. Liberty's *policy language* is not the basis of Chan's CPA claim. Rather, the basis of Chan's CPA claim is Liberty's *practice* of automatically reducing Washington providers' bills to the 80th percentile of the FH database and Liberty's *practice* of failing to pay those bills in full without first investigating whether the bills are reasonable, in violation of its duties under Washington law. It is undisputed that this *practice* was not disclosed to, or approved by, the Insurance Commissioner, and it is this *practice* that is the focus of Chan's CPA claim. See RP (4/15/2016) at 21 ("The Court: ...I don't think that the commissioner ever approved the practice. The commissioner approved the language which doesn't, by its terms, say, "now we are going to do an 80 percent check against a computer database").

⁵ Liberty alleges that court-approved settlements involving Chan's counsel have "expressly approved" the use of the Fair Health database that Chan challenges here. First, those settlements are only that: settlements. Court approval does not convert those

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

Liberty repeatedly alleged below that the Illinois trial court made "specific findings" on the adequacy of representation for Washington providers. *See e.g.* Motion for Discretionary Review at 6. But Liberty never cited to those findings because they do not exist. Liberty now concedes this on appeal: the Illinois trial court did not "make any explicit findings on the adequacy of class representative." Brief at 11, n. 12. The only reference to Washington law and the claims of Washington providers

provisions into precedent. *See* RP (4/15/2016) at 12 (Judge: "settlements have been going on across the United States for decades. I don't think that you have given me a case saying that anybody can rely on somebody's else's settlement as precedential authority in any forum, in any context... If you want a precedent, you will need to get a court's decision on the merits and probably take it up and get it published. That is usually how our law works. I am sure that I don't have to tell you that, former Justice Talmadge."). Second, those settlements did *not* approve Liberty's reduction insofar as they violated Washington; class members retained the right to bring future suits based on violations of Washington law. Third, to the extent Liberty points to those settlements as an argument that the provisions of the *Lebanon* settlement were fair for Washington providers, it is worth noting that the *Lebanon* settlement paid providers 25% of past reductions, whereas the *Allstate*, *Hartford*, and *Kerbs* settlement paid providers at 190%, 190%, and 80%, respectively.

throughout the *Lebanon* proceedings was a single footnote in the *Lebanon* Complaint that alleged that the claims of the non-Illinois insureds were being brought under the consumer protection statutes of their various states. *See* Complaint at n.1, CP 4586. The Illinois trial court made no findings that the Illinois and Washington providers possessed the same legal claim, or that Illinois provider Lebanon was an adequate representative of Washington providers.

Dr. Kerbs filed a timely appeal. On February 9, 2016, the Illinois Court of Appeals affirmed the trial court's approval of the *Lebanon* settlement. *See* Appendix to Brief of Appellants. But the appeals court also failed to address the adequacy of representation of Washington providers under the due process clause or the significant differences in relevant law between Washington and Illinois. As Liberty's counsel admitted during a hearing before the trial court in this case,⁶ it appears that the Illinois Court of Appeals did not address these issues because it believed that under Illinois law it did not matter. Instead, the Illinois Court of Appeals stated, a class action may be maintained under Illinois law *in the face* of conflicting or differing state laws, and all that matters under Illinois law for the court to approve the settlement is that the settlement was fair, adequate and reasonable. App. at 358-359.

C. The Trial Court Repeatedly and Thoroughly Considered the *Lebanon* Issue Prior to Ruling in June 2016

Prior to the June 24, 2016 ruling that Liberty now appeals, the

⁶ *See* RP (4/15/2016) at 87.

parties briefed, and the trial court considered, the preclusive effect of the *Lebanon* settlement *four different times* with three separate hearings.

On October 30, 2015, the trial court ruled in *Chan v. Safeco Ins. Co. et al.*, a related case, that the *Lebanon* settlement could not be applied to Washington providers consistent with due process. RP (4/15/2016) at 33. Chan's motion for declaratory judgment re *Lebanon* in *this* case was scheduled to be heard at the same time as the identical motion in *Safeco*, but Liberty removed this case two days before the scheduled hearing, after it had been fully briefed.

In March 2016, the federal court remanded the case. Chan then renewed its motion for declaratory judgment re *Lebanon* in the King County Superior Court. The issue was then, again fully briefed.

On April 15, 2016, the trial court conducted a full hearing on oral argument and "tentatively" ruled that the *Lebanon* settlement could not bar the claims of Washington providers consistent with federal due process. RP (4/15/2016) at 107-108:

Courts typically deny certification unless the plaintiff can demonstrate that the varying state laws do not create an inter-class conflicts and a viable trial plan is in place. This is a real deficit in the Illinois appellate court's review in this case. There is absolute silence about in the Illinois appellate court's decision about the differences between Illinois and Washington law.

There is absolute silence, for that matter, in many of the materials I have before me for the Illinois trial court. There was no effort whatsoever to identify the differences between Washington and Illinois consumer protection law. I don't have to tell the parties in this case how really significant that is to

the court. Washington requires that reasonable and necessary payments be made to consumers, period. If that is not absolutely on all fours with what Illinois law requires, then Washington was not adequately represented -- Washington providers weren't adequately represented in Illinois.

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

But based on Liberty's representation to the court that Chan had filed a claim under the *Lebanon* settlement, the court held that Chan "may not be" the proper plaintiff to raise the issue and denied Chan's motion. *Id.* at 102.

It then came to light that Liberty's representation to the court was false: Chan had not filed a *Lebanon* claim. The court then granted reconsideration of its denial of Chan's motion for judgment. *Id.* In May 2016, Chan filed its "Second Motion for Declaratory Judgment re *Lebanon*" and Liberty filed a cross-motion for summary judgment re *Lebanon*. The parties briefed the issue for the third and fourth times and the case was set for a third hearing on oral argument on June 24.

D. The Trial Court Issued a Detailed Ruling that *Lebanon* Does Not Preclude Chan's Claims in Washington

At the conclusion of the hour-long oral argument on June 24, 2016, Judge Shaffer ruled that the *Lebanon* settlement could not be applied to bar Chan's claims or the claims of Washington providers consistent with due process. CP 5243-44, 5248-49. In a detailed decision, Judge Shaffer

found that the Illinois court had made no findings regarding the adequacy of Lebanon to represent Washington providers or the differences between Washington and Illinois law (as Liberty now admits, Brief at 11, n. 12).

Judge Shaffer found, in pertinent part:

[I]n this case, the *Lebanon* court made no findings that representation was adequate as to the Washington claims in this case. None. What findings it did make are insufficient to demonstrate that the named Illinois plaintiff adequately represented absent Washington class members.

Defendant has argued to me that the Illinois court made detailed express findings based on the extensive testimony that the factual predicate of all class members' claims was identical. Perhaps so, but nonetheless that doesn't demonstrate that the identical legal predicate was demonstrated to be identical or present. In fact, there doesn't seem to be any analysis of that in the Illinois decisions.

...There was no finding by the Illinois court in the lower court or the appellate court that the *Lebanon* plaintiff adequately represented Washington class members. There was no analysis of substantive state laws and variation thereon. There was no analysis whether subclasses would be appropriate. That is what the *Hesse* court was talking about when it found that the question of adequate representation, "was not addressed with any specificity by the Kansas court." And therefore, was a proper subject for collateral review. That is what it said. That is what happened here.

RP (6/24/2016) at 194-196.

As such, because the trial court did not make express findings regarding the adequacy of representation under the due process clause, Judge Shaffer ruled that it was appropriate under applicable case law authority to conduct a limited collateral review of the adequacy of the

procedural due process protections in the prior litigation. *Id.* at 196:

Because these issues were not actually litigated and determined and really there was just, at best, a passing rubber stamp reference to the adequacy of the representation in the final order approving settlement, there is no particular reason why I should defer to the *Lebanon's* court conclusory findings of adequate representation.

After undertaking this *limited* review⁷, Judge Shaffer concluded that the Illinois court had not analyzed the substantive differences between Illinois and Washington law, that Lebanon was not an adequate representative of Washington providers given the significant differences between the legal claims of the Washington and Illinois providers, and that the Illinois court had not created subclasses to protect the interests of Washington providers consistent with Supreme Court due process jurisprudence. Judge Shaffer concluded that because Lebanon was not an adequate representative of Washington providers, the *Lebanon* settlement's release could not bar the claims of Washington providers consistent with due process.

Judge Shaffer's conclusions were reached as a result of a thorough analysis of the nuances of the applicable case law, the Illinois courts' findings, and the substantive differences between Illinois and Washington law underlying the CPA claims. RP (6/24/2016) at 196-203. This decision

⁷ See RP (6/24/2016) at 190 ("I am not interested in obviously reviewing anything other than the degree to which the Washington plaintiffs in the *Lebanon* matter were accorded minimum due process by receiving adequate representation. If I decline to give full faith and credit to the *Lebanon* action it is only with regard to the determinations that that action made as to Washington providers.").

should be affirmed.

III. ARGUMENT

A. Collateral Review Under the Due Process Clause is Proper

The Full Faith and Credit Clause of the US Constitution requires a Washington court to enforce the judgment entered in a foreign state's court, *unless* doing so would violate federal due process. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982). In the context of class actions, Liberty concedes that procedural due process has three requirements: 1) notice; 2) opportunity to opt out; and 3) adequate representation. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 808 (1985). *Shutts* makes clear that adequate representation of absent class members by the named plaintiffs in a class action is one of the required elements of due process. *Id.* at 808.

Liberty argues, nonetheless, that the trial court erred by engaging in a collateral review of the adequacy of representation of Washington providers in the *Lebanon* settlement proceedings.⁸

The trial court did not err in holding that, under Washington law, Supreme Court precedent, and applicable Ninth Circuit decisions, 1) it could review the Illinois court decisions to determine whether the Illinois court made findings regarding the adequacy of representation of Washington providers; and 2) after determining that the Illinois court did *not* make sufficient factual findings, it could engage in a “narrow” collateral review of the due process protections of the *Lebanon* settlement.

⁸ Notice and opportunity to opt out are not disputed in this case.

In reaching this conclusion, the trial court thoroughly considered and correctly analyzed each of the argued-for and applicable precedents in great detail. The trial court's application of the legal precedents should be affirmed, as should its ultimate conclusion that Lebanon was not an adequate representative of Washington providers and that the *Lebanon* release therefore should not bar the claims of Washington providers. The decision should be affirmed.

B. Washington and Federal Law Provides for Collateral Review Where, As Here, the Sister Court Did Not Make Factual Findings Regarding Due Process Protections

Liberty's primary argument on appeal is that, where the sister court made findings on the due process protections of the settlement process, the trial court on collateral attack should solely review those findings and should not conduct independent review. Brief at 20.

Liberty argues that the Washington Court of Appeals' decision in *Nobl Park LLC of Vancouver v. Shell Oil Co.*, 122 Wn.App. 838, 844 (2004) broadly bars collateral review and stands for this proposition. Liberty is incorrect. As Judge Shaffer analyzed in great detail in her ruling, *Nobl Park* in fact stands *for*, not against, collateral review of the requirements of due process. Liberty quotes out of context a sentence in a footnote in the case, which states that a party's right to due process is protected by the court approving the settlement. *See Nobl Park*, 122 Wn.App. at 845, n.3. As the trial court pointed out, in the *very next* sentence of the decision, the Court of Appeals states that nonetheless, if the settlement deprived the plaintiff of due process, the settlement does *not*

need to be given full faith and credit. *Id.* *Nobl Park* stands for a right to collateral review, and the *Nobl Park* court proceeded to conduct just such a review. *Id.* at 845-48.

Nobl Park is a short and concise decision, however, and there is a dearth of Washington authority that discusses more thoroughly *when* and *how* collateral review of the federal due process protections (or lack thereof) of a settlement should be undertaken. The trial court thus looked to persuasive and directly relevant Ninth Circuit authority for guidance (which the Court in *Nobl Park* itself also did).⁹

The trial court properly determined that *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010) is on all fours with this case and is “good law” on the issue of a federal due process inquiry on collateral attack. In *Hesse*, which involved a collateral attack of a Kansas state court settlement, the Ninth Circuit made clear that the Full Faith and Credit clause is not without limit. *Id.* at 587 (“A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and we are not required to accord full faith and credit to such a judgment”) (internal cites omitted). Citing *Epstein v. MCA, Inc. (Epstein II)*, 179 F.3d 641 (9th Cir. 1999), the *Hesse* court held that limited collateral review is appropriate in order to “consider whether the procedures in the prior litigation afforded the party

⁹ Liberty argues that on issues of federal law, this Court is only bound by decisions of the U.S. Supreme Court, and that Ninth Circuit decisions are only persuasive authority. Brief at 20, n. 16. While that may be true, Liberty itself relies on Ninth Circuit authority in making its arguments.

against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Hesse*, 598 F.3d at 587. This limited collateral review includes "adequacy of representation." *Id.*¹⁰

Notably, the Ninth Circuit in *Hesse* also clarified *when* collateral review is appropriate: the *Hesse* court held that when the foreign court made specific and express findings regarding adequacy of representation, such express findings should generally satisfy the forum state court on collateral review that due process was met. *Id.* at 588. But when the foreign state court did *not* make specific findings, the court should collaterally review the foreign court's judgment "to determine whether, in the absence of a specific finding by the [foreign] court, its judgment satisfies due process as to the claims at issue here." *Id.* (holding that Kansas court did not make explicit findings that the Kansas plaintiff was an adequate representative and collateral review was appropriate).¹¹

¹⁰ See also *Gooch*, 672 F.3d at 420-22 ("We conclude that... we may review the substance of whether that settlement complied with the Due Process Clause...It is incumbent upon us to apply the same scrutiny to state-court judgments that the Supreme Court would apply. Even though reconsidering whether the class judgment complied with the due process clause may not promote judicial "efficiency" or protect the "finality" of the original judgment... it is a due-process imperative that we are not free to ignore.") (citing Newberg on Class Actions, § 16:24 (4th ed. 2002) ("[T]he potential impact of a class court judgment is not a matter for determination by the deciding court. The res judicata effect of a class judgment can only be determined by a later court in light of a specific controversy.")).

¹¹ This holding relied on and flowed from *Epstein*, which held that collateral review of adequate representation "is be protected by the adoption of the appropriate procedures by the certifying court and by the courts *that review its determinations.*" *Epstein*, 179 F.3d at 648 (emphasis added). See *Hesse*, 598 F.3d at 588 ("In *Epstein II* we found no need to review collaterally the Delaware Chancery Court's decision because that court expressly found that class representation was adequate as to the relevant federal claims"). But if the sister court *made insufficient or no determinations* regarding

C. The Trial Court Correctly Found That the Illinois Court Did Not Make Required Factual Findings

Before concluding on June 24, 2016 that the Illinois court did not make sufficient express findings regarding the adequacy of Lebanon to represent Washington providers, the trial court reviewed a voluminous record, multiple sets of briefings from the parties, and heard three different oral arguments on the issue of *Lebanon*, including the details of the *Lebanon* trial court proceedings and Dr. Kerbs' objection and appeal. See Section II(C),(D), *supra* p. 7-10. Substantial evidence supports this determination. See *In re Pers. Restraint of Gentry*, 137 Wn.2d 378 (1999); *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712 (1987).¹²

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

adequacy of representation, the court collaterally reviewing the settlement's due process protections must engage in this limited analysis on its own. See *e.g. Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258 & n.6 (2d Cir. 2001) (holding that under *Epstein II*, collateral review is permissible where the court that approved the settlement did not address the adequacy of representation as to a specific subset of a class "whose injuries manifested after depletion of the settlement funds")(cited in *Hesse*, 598 F.3d at 588).

¹² See also *Minehart v. Morning Star*, 156 Wn.App. 457, 463 (2010) ("even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable."); *Dragt v. Dragt*, 139 Wn. App. 560, 570 (a reviewing court must *not* substitute its judgment for the trial court's, even if it likely would have reached different factual conclusions).

express factual findings regarding the adequacy of class representatives.

See Brief at 11, n. 12.

Instead, Liberty relies solely on the argument that the trial court “necessarily adjudicated Dr. Kerbs’ objections” in rejecting them.” *Id.*

But Judge Shaffer thoroughly considered and dismissed this argument. As

Judge Shaffer stated:

Dr. Kerbs didn't raise the same arguments being raised here. He made arguments that are not part of this motion and he made arguments that are irrelevant to this motion, because those arguments are not before me in this case at this time given my prior rulings. He did argue that Lebanon Clinic had a conflict of interest with Washington members. But the problem with looking at that argument as being somehow an indication that the Illinois court addressed these objections is that the Illinois court didn't address that objection that the Lebanon Clinic had a conflict of interest with Washington providers. Rather the Illinois court just carved the Kerbs class out of the Lebanon settlement.

... the defendants' briefing to the Illinois court didn't include any briefing on due process or adequacy of representation issues. So, I really don't see how the Illinois courts at any point examined this specific question of due process or adequacy of representation in any direct way as *Hesse* requires.

RP (6/24/2016) at 195-96.

As the trial court concluded, the issues Chan raises on collateral attack were not actually “litigated and determined.” *Id.* Rather, there was “at best, a passing rubber stamp reference to the adequacy of representation in the final order approving settlement.” *Id.* This conclusory finding is insufficient to require deference. The trial court must make *express* findings regarding the adequacy of representation under the due

process clause. *See Hesse*, 598 F.3d at 588 (“we review the *Benney* Judgment only to determine whether, in the absence of a *specific finding* by the Kansas court, its judgment satisfies due process as to the claims at issue here...”)(emphasis added). *See also Gooch*, 672 F.3d at 421-422 (“the passing rubber-stamp reference in the opinion of the Arkansas circuit court...hardly meets this standard” for specific findings regarding adequacy of representation). Finality cannot come at the price of constitutional infirmity.

Liberty also argues that under the Ninth Circuit’s holdings in *Skilstaf* and *Reyn’s Pasta Bella*¹³, which it argues (incorrectly) limited *Hesse*, Chan is estopped from challenging the *Lebanon* settlement because a *different* Washington provider objected to the settlement. Judge Shaffer also analyzed this argument and the cited cases in great detail and properly rejected the argument. RP (6/24/2016) at 171. As the trial court correctly found, “all the *Skilstaf* court did was distinguish *Hesse*.” *Id.* It didn’t limit *Hesse*. In *Skilstaf*, the Ninth Circuit rejected the plaintiff’s collateral attack on the basis that, unlike Chan 1) *Skilstaf himself* had objected and appeared at the Massachusetts fairness hearing; and 2) the Massachusetts court had issued an opinion with specific findings regarding *Skilstaf’s* objections. 669 F.3d at 1014. *Skilstaf* did not address Chan’s right or ability – as a class member who did *not* object or appear in Illinois – to

¹³ *Skilstaf Inc v. CVS*, 669 F.3d 1005 (9th Cir. 2012); *Reyn’s Pasta Bella, LLC v. Visa.*, 442 F.3d 741 (9th Cir. 2006).

bring suit.¹⁴ *Skilstaf* did not undermine the holding of *Hesse*, which clearly provides for collateral review in this circumstance.¹⁵

Faced with *Hesse*'s clear holding that collateral review is appropriate where the foreign court did not make express findings regarding due process, and the lack of required express findings here, Liberty then attempts unsuccessfully to argue that *Hesse* is distinguishable. It argues that *Hesse* is distinguishable from our case because a *footnote* in the *Lebanon* Complaint states that the claims of non-Illinois insureds were brought under the various Consumer Protection Acts of those states. Complaint n. 1, CP 4586. But merely "pleading" a claim does not mean the plaintiff necessarily possesses such a claim, nor does it

¹⁴ Notably, the Ninth Circuit then stated that, "If a member of the putative class [not *Skilstaf*] files another suit against the retail pharmacies on its own behalf or as the named plaintiff on behalf of a class, the question of the enforceability of the covenant not to sue as to such a party and claims will then be before the court. The California district court did not address that question, and we express no view on its resolution." *Id.* at 1025. Liberty also seems to imply throughout its factual narrative that Chan should be estopped from collaterally attacking the *Lebanon* settlement because Dr. Kerbs and Chan have the same counsel. Liberty cites *no* legal authority for such a proposition. See *Palmer v. Jensen*, 81 Wn. App. 148, 153 (1996) (refusing to consider an issue without citation to authority because "passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

¹⁵ Liberty also argues, incorrectly, that *Reyn's Pasta Bella* somehow limits collateral review in this case. The trial court also thoroughly considered and properly rejected this argument, finding that *Reyn's* was four years *before Hesse* and is cited in *Skilstaf* only for the proposition that the same plaintiff does not get a second bite at the apple if that particular plaintiff had already raised the issue in the sister court. RP (6/24/2016) at 171-72. Moreover, even if *Reyn's* did apply in this case, its test is not met by Liberty's own admission. Under *Reyn's*, deference is due to a prior settlement if 1) the issue was raised, and 2) the settlement could not have been approved without resolution of the issue. 442 F.3d at 750. As stated above, Liberty's counsel admitted during the hearing on April 15 that the Illinois court did not need to resolve the issue of adequacy of representation of Washington providers because it "did not matter" under Illinois law.

mean that the claims of Washington providers that were mentioned in three words in a footnote at the outset of the case were considered, litigated, or addressed. As the trial court correctly found, they were not.¹⁶

D. The Trial Court Correctly Found that Lebanon Was Not An Adequate Representative of Washington Providers

Upon undertaking this limited collateral review, the trial court correctly held that Lebanon was not an adequate representative of Washington providers and that therefore, the *Lebanon* settlement did not preclude Chan's claims in Washington.

Under *Hesse*, “[c]lass representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members.” 598 F.3d at 589. To be an adequate representative, a class representative must possess the same interest and suffer the same *legal* injury as the class members. *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (U.S. 1977) (collecting Supreme Court cases). Thus, the court must analyze not only whether the class representative possesses the identical factual predicate on its claim as the absent class members, but also whether the class representative's substantive legal claims are the same as or similar to those of the absent class members.¹⁷

¹⁶ The only Washington-law-specific evidence that Liberty points to as being before the Illinois court is evidence that Liberty's policy language is the same in all states. But it is Liberty's *practice* and whether its practice complies with the requirements of Washington law that are at issue in Chan's CPA claim, not Liberty's *policy language*. See RP (4/15/2016) at 22.

¹⁷ The Illinois Court of Appeals painted the factual predicate question in broad

As Chan outlined in its briefing before the trial court and the trial court analyzed in detail during the June 24 ruling, there are fundamental differences between the Washington and Illinois consumer protection acts (including the public interest impact prong in Washington and the more restrictive requirement in Illinois of intent); between the remedies available in Washington and Illinois (e.g. treble damages versus punitive; rates of interest on judgments); and most importantly, in the substantive laws underlying the CPA claims of Washington and Illinois providers. *See* RP (6/24/2016) at 197-203 (“Let me begin to talk about all of the many ways that Washington and Illinois law differ in ways that seem really substantial to the court...”).

Liberty spends many pages arguing that the consumer protection acts of the two states are not meaningfully different and that the remedies available under the CPAs are not different, or are perhaps more favorable in Illinois. But Liberty *does not dispute* the most important difference between the states: the difference in the substantive laws underlying the CPA claims.

brush, stating that the factual predicate for all states is “Liberty’s use of computerized databases to determine PIP and MedPay reimbursements.” App at 358. But this ignores the second key question of adequacy: which is the similarity of the *legal* claims. Washington’s statutes and regulations require the payment of “all” reasonable bills and individual investigation. This makes the factual predicate and legal analysis of Liberty’s actions in Washington unique as compared to other states. *See e.g. Hesse*, 598 F.3d at 591 (“The *superficial similarity* between the two class actions is *insufficient* to justify the release of the later claims by the settlement of the former. Both involve claims that Sprint improperly billed government taxes or fees to its customers, but they deal with different surcharges, imposed to recoup different costs, that were alleged to be improper for different reasons.”) (emphasis added).

In Washington, the PIP statute mandates that auto insurers pay “*all reasonable and necessary*” medical expenses arising from a covered accident. RCW 48.22.005(7). In Washington, insurers are required to reasonably investigate a claim before refusing to pay it in full. WAC 284-30-300. As the trial court found, “it really doesn’t seem to be disputed that Illinois does not have a comparable requirement.” RP (6/24/2016) at 198. There is no statutory requirement in Illinois that insurers *offer* PIP coverage, nor any statutory or regulatory requirement that insurers pay *all* reasonable PIP claims or reasonably investigate PIP claims before failing to pay them in full. The only requirements governing PIP payments in Illinois come from the language of the insurance contract. Motion for Discretionary Review, Supp. App. at 102.

It is these underlying substantive laws that give meaning to what an “unfair practice” is in Washington and shape the strength and specifics of Washington providers’ CPA claims. These underlying substantive laws do not have equivalents in Illinois. *See Hesse*, 598 F.3d at 591 (superficial similarity between the two class actions is not enough). As the trial court correctly found, “This is key to the plaintiffs’ claims here and in *Lebanon*, because the requirements of reasonable investigation and the existence of a database, which is the sole method of determining whether or not a claim is reasonable, really are at odds with each other in a way that they are not in Illinois.” RP (6/24/2016) at 199.

In light of these stark differences in the legal claims of Washington and Illinois providers, the trial court properly determined that the *Lebanon*

plaintiff did not possess the same claim as Washington providers and had a conflict with Washington providers. *Id.* at 203.¹⁸

The Illinois court could have potentially remedied this conflict by creating subclasses, with a representative who possessed the Washington claims and adequately represented Washington providers.¹⁹ But as the trial court noted, there were no subclasses created and there were no other “procedural due process protections put in place to protect the Washington providers with CPA claims under Washington law.” RP (6/24/2016) at 201.²⁰

As the trial court correctly observed, this lack of subclasses stemmed from, and was exacerbated by, the Illinois court’s complete lack of findings or analysis regarding the adequacy of Lebanon to represent Washington providers and the differences between the legal claims of

¹⁸ See *Hesse*, 598 F.3d at 589 (finding that Missouri resident alleging improper tax surcharges under a federal statute was an inadequate representative of Washington consumers on their CPA claims arising from a specific Washington statute); *Schutts*, 472 U.S. at 822-823 (holding that Kansas resident who settled nationwide class action involving oil royalties and interest on late payments could not adequately represent Oklahoma and Texas residents because the availability and rates of interest different among the states); *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 276 (2011) (holding that nationwide class on contract claims was improper because various states’ contract laws are different, and pointing to an overwhelming number of federal courts that have denied nationwide class actions).

¹⁹ See e.g. *Amchem Prods. v. Windsor*, 521 U.S. 591, 627 (U.S. 1997) (rejecting “global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected” and holding that subclasses in such a situation are mandatory).

²⁰ During the April 15, 2016 hearing, the trial court aptly found it troubling that the Illinois Court of Appeals even cited to cases requiring subclasses in the event of such conflicts, but then failed to analyze or address the lack of subclasses in the *Lebanon* settlement. RP (4/15/2016) at 107-108.

Illinois and Washington providers.²¹

Based on the record before it, Washington law, Supreme Court precedent, and persuasive federal case law authority, the trial court did not err in ruling that Lebanon was not an adequate representative of Washington providers and that the *Lebanon* settlement could not be applied to bar the claims of Washington providers consistent with due process.

IV. CONCLUSION

For the foregoing reasons, the trial court's decisions should be affirmed in all respects.

DATED 24th day of April, 2017

BRESKIN JOHNSON & TOWNSEND, PLLC

By: _____

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Counsel for Plaintiff - Respondent

²¹ *Id.* at 200 ("I need to see some analysis from Illinois on at least some of the substantive variations in state law on the claims raised in my court and the Illinois courts...I don't have it. ...I do not have any findings whatever in Illinois on the adequacy of representation, on legal representation, really on anything. I certainly don't have any specific findings of the sort that would certainly require deference from me if they were supported, under *Nobl Park*.").

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on April 24, 2017, I caused the foregoing to be filed via legal messenger with:

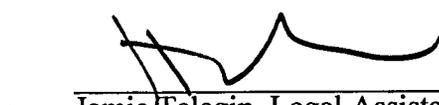
Clerk of the Court
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and a true and correct copy of the same to be delivered via email to:

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