

No. 95416-0

No. 75541-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, PS,

Respondent,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The brief of respondent Chan Healthcare Group, P.S. (“Chan”) is largely a celebration of the trial court’s erroneous decision, and fails to come to grips with why this Court’s Commissioner discerned that the decision constituted obvious or probable error by granting discretionary review.

Specifically, Chan’s brief has no real answer to the controlling Washington and federal law on the Full Faith and Credit Clause of the United States Constitution provided by appellants Liberty Mutual Fire Insurance Company/Liberty Mutual Insurance Company (“Liberty”) in the opening brief. Instead, Chan resorts to a misrepresentation of what actually transpired in the Illinois courts in *Lebanon Chiropractic Clinic v. Liberty Mutual Ins. Co.*, 2016 WL 546906 (Ill. App. 2016) (“*Lebanon*”) and a misstatement of persuasive federal authority to support its argument for permitting it, yet again, to relitigate the same essential claims that were resolved in Illinois. Chan hopes to spin off yet another class action, despite the *Lebanon* class action settlement, involving the very same issues raised and rejected in Illinois against the same insurer.

This Court should reaffirm the core principle of the Full Faith and Credit Clause: litigation must come to an end when a sister state’s courts

have resolved such litigation.¹ Where a class action 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 Illinois, the Full Faith and Credit Clause requires dismissal of Chan's effort in this state to collaterally attack that judgment.

B. STATEMENT OF THE CASE

Notwithstanding Chan's statement of the case, resp't br. at 3-11, Chan does not contest certain key points articulated in Liberty's opening brief or Liberty's discussion of the key contentions in the *Lebanon* complaint.² Br. of Appellants at 2-12. It is *undisputed* that:

- Chan was a class member in the class in *Lebanon*;
- Chan had notice of the class action settlement in *Lebanon*;³ and
- Chan chose not to opt out of the settlement.

What is troubling, however, is Chan's *persistent* misrepresentation

¹ "...[E]ndless litigation leads to chaos; ... certainty in legal relations must be maintained; ... after a party has had his day in court, justice, expediency, and the preservation of public tranquility requires that the matter be at an end." *Schroeder v. 171.74 Acres of Land, More or Less*, 318 F.2d 311, 314 (8th Cir. 1963).

² See Br. of Appellants at 7-8. Indeed, like Chan, Lebanon was a chiropractic clinic. The factual predicate for the claims in both cases was identical, and as noted *infra*, the legal claims were essentially identical as well.

³ In October 2014, the parties in *Lebanon* reached a proposed class settlement in which class members would release any claims relating to challenging Liberty's use of a database to pay PIP providers. Liberty's Washington policies were included. The settlement terms were incorporated into the *Lebanon* judgment. Under that settlement, Chan's claims are barred. CP 3493-94.

of the proceedings in Illinois.⁴ Chan yet again claims, as it did before the Commissioner, that the Illinois court approved the settlement without addressing due process objections, or that court made no findings on the adequacy of Lebanon Chiropractic Clinic as a class representative. Resp't br. at 5. Those assertions are *false*. In fact, as noted in Liberty's opening brief at 8-9, another Washington chiropractor, Dr. David Kerbs, represented by Chan's present counsel, objected to the settlement, asking the Illinois trial court to reject it, or, in the alternative, to exclude Washington providers from the settlement class; his objection was based both on jurisdictional and due process grounds. Dr. Kerbs' objection, rejected by the Illinois courts, specifically asserted: "Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interests with Washington providers." CP 4042. The *Lebanon* class counsel and Liberty, in turn, specifically responded to those objections in detail, presenting *extensive* evidence to the Illinois trial court that Washington providers were adequately represented by the Illinois chiropractic clinic. CP 2604, 4054-67, 4069-76, 4087-4104.

⁴ Chan seems to claim that somehow merely because the *Lebanon* settlement was entered in a particular Illinois county, it was somehow *per se* violative of its rights. Resp't br. at 1 n.1. Liberty, of course, did not choose the forum county in *Lebanon*, the class did. Ironically, the law review article cited by Chan argues for greater utilization of the federal courts to ensure fairness in class litigation. Chan has resisted removal of this case to federal court.

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 Order and Judgment Approving Settlement and Dismissing This Action with Prejudice that approved the settlement and *overruled all objections*, and including those relating to the adequacy of notice, the adequacy of representation, and the substantive fairness of the settlement. CP 4148-76. The Illinois trial court clearly considered Dr. Kerbs’ objections and the evidence relating to it. CP 4153 (“The parties also presented evidence concerning objections filed by ... Dr. David Kerbs”); *id.* at 4156 (“The Court overrules *all* objections to the Stipulation and the proposed Class Settlement” (emphasis added)). That court also made an express finding regarding adequacy of representation. *Id.* at 4154 (“Plaintiff Lebanon Chiropractic Clinic, P.C., Plaintiff-Intervenor Leon Demond, and Class Counsel will fairly and adequately protect the interests of the Settlement Class.”).⁵

Chan’s argument that the “Illinois trial court approved the settlement without addressing Dr. Kerbs’ objections,” is demonstrably

⁵ Thus, Chan’s repeated assertion that Liberty “admits” no findings were made by the Illinois court on the adequacy of representation, *e.g.*, resp’t br. at 2, 5, 6, is deliberately obtuse to the fact that the Illinois court specifically ruled on the challenges.

false.⁶ The *Lebanon* trial court found that representation was adequate. Similarly, Chan’s assertion in its brief at 6 that the Illinois 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” is *false*.

When Dr. Kerbs appealed the Illinois trial court judgment, he argued the adequacy of class representation once again. The Illinois Court of Appeals affirmed the trial court’s approval of the settlement, addressing and rejecting each of Dr. Kerbs’ arguments, including the adequacy of class representation.⁷ In ¶¶ 35-40 of its opinion the Illinois appellate court rejected *in detail* Kerbs’ arguments on adequacy of class representation.

On Chan’s assertion that the Illinois appellate court made “no findings”⁸ regarding the remedies afforded the class under Illinois and Washington consumer laws, that assertion is also untrue as the Illinois

⁶ When the Illinois trial court stated at the fairness hearing that all objections to the settlement, including those of Dr. Kerbs, were overruled, including those based on the adequacy of Lebanon’s representation of Washington class members, the Illinois trial court “found” that the class representative adequately represented the interests of Washington class members. *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

⁷ Chan repeats its false assertion that Liberty’s counsel “admitted” that the Illinois appellate court did not address federal due process issues. Resp’t br. at 6. Liberty specifically advised this Court in its reply on its motion for discretionary review at 4 that this assertion is *false*.

⁸ As this Court knows, appellate courts do not make findings. *State v. Walker*, 153 Wn. App. 701, 708, 224 P.3d 814 (2009).

Court of Appeals clearly addressed Kerbs’ argument on this point at ¶ 40 of its opinion, holding that Kerbs “failed to identify any outcome determinative differences in Washington law and Illinois law.”

Thus, the Illinois trial and appellate courts in *Lebanon* specifically addressed the adequacy of class representation by the Lebanon Chiropractic Clinic, *rejecting* objections to it by a Washington provider represented by the same counsel who now represents Chan.⁹

Further, Chan misrepresents what has transpired in this case as well in order to advance its unfounded position on appeal. Chan asserts the trial court here made “findings of fact” that may only be reviewed by this Court to determine if they are supported by substantial evidence. Resp’t br. at 15-17. This case was resolved below on *summary judgment motions*. The trial court denied Liberty’s motion for summary judgment

⁹ Recently, in rejecting a collateral attack on *Lebanon* similar to Chan’s on full faith and credit grounds, the Massachusetts court in *Liberty Mut. Ins. Co. v. Peoples Best Care Chiropractic and Rehabilitation, Inc.*, (Mass. Super. Ct. April 15, 2017) confirmed this assessment:

The record shows, and the Illinois appellate court found, that all of these due process requirements were satisfied in this case. Both Defendants were given notice of the lawsuit and of the proposed class action settlement. Defendants were told they could opt out of the class, and took no action to do so. They were represented by class counsel. The Illinois court expressly found that the class members received adequate representation. And Defendants had the opportunity to lodge an objection to the proposed settlement, by themselves or through counsel of their choice. Nothing more was required to satisfy due process.

See Appendix.

and granted Chan's motion for declaratory judgment. CP 5243-44, 5248-49. No "findings" were made.¹⁰

Chan's counsel¹¹ has not stopped its effort to concoct a basis to challenge the *Lebanon* settlement. As noted in Liberty's opening brief at 7 n.8, Chan's counsel filed yet another action to overturn the Lebanon settlement in *Schiff v. Liberty Mut. Fire Ins. Co., et al.* (King County Cause No. 17-2-03264-6 SEA). Liberty removed that case to federal court (C17-409 TSZ), and Schiff moved to remand the case. Liberty also moved to dismiss the action. When the district court, the Honorable Thomas Zilly, determined to retain the action to rule on remand and possibly on the motion to dismiss, Schiff voluntarily dismissed the action. *See Appendix.*¹² Chan's counsel has refiled *Schiff* in the King County Superior Court (Cause No. 17-2-11676-9 SEA). This conduct exemplifies Chan's continuing effort to manipulate the law to collaterally attack class

¹⁰ Even had the trial court purported to make "findings" on summary judgment, they are superfluous to this Court's *de novo* review of the trial court's orders and the legal question under the Full Faith and Credit Clause, and must be disregarded. *Hubbard v. Spokane Cty.*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002).

¹¹ In addressing the issue of whether remand orders are reviewable under the Class Action Fairness Act, 28 U.S.C. § 1453, the Ninth Circuit Court of Appeals discussed the "drama" and "tortured" procedural history of Chan's counsel's myriad lawsuits against Liberty and its affiliates. *Chan Healthcare Group, P.S. v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133, 1135-37 (9th Cir. 2017).

¹² This is precisely the type of continuing gamesmanship that may be expected from Chan and its counsel; these collateral attacks on the *Lebanon* settlement must end.

action judgments at every opportunity.

C. ARGUMENT

(1) The Full Faith and Credit Clause Mandates Dismissal of Chan's Action

Chan has no real answer to the authority set out in Liberty's opening brief at 14-16 regarding the purpose of the Full Faith and Credit Clause. The Framers' clear-cut intent was that the Clause was to "put to rest" matters litigated in other states. Chan's purpose, on the other hand, is to frustrate that policy.

In the specific context of multistate class actions, settlements in such actions resolving large numbers of claims arising from identical factual predicates are fair. *E.g., Froeber v. Liberty Mut. Ins. Co.*, 193 P.3d 999 (Or. App. 2008). Such settlements also serve federal, state and local interests in efficiently providing remedies to consumers without swamping multiple courts with identical litigation. In light of precedent focusing on identical factual predicates underlying multistate disputes rather than nuances in legal theories, the Court should carefully consider the implications of Chan's effort to impede the proper, constitutional, and efficient functioning of our federal system based on exaggerated contentions regarding minor issues that do not show a fundamental conflict of constitutional significance on the adequacy of representation.

(a) Chan Misstates the Applicable Standard of Review

The essence of Chan’s argument in its brief is that this Court is somehow bound to defer to the trial court’s decision. Resp’t br. at 6-11. It even goes so far as to *misrepresent* the trial court’s decision below as involving “findings” to which the substantial evidence standard of review applies. The trial court decided the case below on motions for summary judgment or for “declaratory relief.” CP 5243-44, 5248-49. This Court reviews such decisions *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011) (decisions on summary judgment); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009), *review denied*, 173 Wn.2d 1012 (2012) (decisions on constitutional issues). Specifically, as to whether a trial court improperly refused to accord a foreign judgment full faith and credit is reviewed *de novo* by Washington courts. *OneWest Bank FSB v. Erickson*, 185 Wn.2d 43, 56, 367 P.3d 1063 (2016). Thus, this Court does not defer to the trial court’s decisions below, contrary to Chan’s argument.

(b) Chan Ignores the Controlling Authority Rejecting Chan’s Ability to Raise Due Process Concerns About the *Lebanon* Settlement Rejected by the Illinois Courts¹³

¹³ 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).

The Full Faith and Credit Clause of the United States Constitution requires Washington courts to enforce the *Lebanon* judgment. U.S. Const. art. IV, § 1. The only exception to that constitutional rule is if the Illinois judgment did not comport with federal due process principles. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83, 102 S. Ct. 1883, 72 L. Ed. 2d 262, *rehearing denied*, 458 U.S. 1133 (1982). And where the Illinois courts addressed the very same due process challenges Chan now surfaces, made by a Washington provider represented by Chan’s present counsel, that determination is binding as well.

Controlling precedents of the Washington courts and the United States Supreme Court make clear that Chan may not collaterally attack the Illinois courts’ due process decision in *Lebanon*. Chan ignores those controlling precedents or simply misrepresents them.

For example, Chan fails to address our Supreme Court’s decisions in *State v. Berry*, 141 Wn.2d 121, 5 P.3d 658 (2000) or *OneWest Bank*.¹⁴ The latter case is particularly damaging to Chan’s position. There, our Supreme Court specifically held that where the foreign state addressed a factor that would prevent the application of full faith and credit to the foreign judgment – there, jurisdiction – a litigant could not collaterally

¹⁴ Chan also ignores *In re Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997), a key full faith and credit decision.

attack the foreign judgment raising the same issue in Washington. It is *no different* for the due process issues litigated in Illinois in *Lebanon* that Chan now seeks to raise.

Moreover, Chan ignores the United States Supreme Court's decision in *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996), *cert. denied*, 528 U.S. 1004 (1999), a case that confirms Chan's ability to collaterally attack the *Lebanon* judgment is severely limited. There, the Court made clear that full faith and credit must be afforded to a judgment entered by a state court in a class action settlement. The Court rejected an effort by a disgruntled class member to collaterally attack the state court judgment on the grounds that the state court did not have jurisdiction over an exclusively federal securities violation claim. The state court specifically concluded that it had the authority to resolve all claims, including federal securities claims. The Supreme Court determined under full faith and credit principles that federal courts were obliged to honor that determination.

Among all the Washington authorities, Chan cites only to *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) in its brief at 12, 13, 23. However, it misrepresents the court's decision. The *Nobl Park* court 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.” *Id.* at 844 (emphasis added) (citing *Matsushita*, 516 U.S. at 374). To overcome this presumption of full faith and credit, Chan must show that it did not receive due process when the Illinois judgment was entered. *Id.* (citing *Kremer*, 456 U.S. at 482-83). The *Nobl Park* court addressed due process associated with a class action settlement in a full faith and credit case – the fact that the Illinois court rejected a Washington provider’s challenge to the adequacy of representation that ends the inquiry: “a 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.

Chan repeats its contention that *Nobl Park* “supports” its position, claiming in its brief at 12 that Liberty quoted the footnote “out of context.” Chan’s claim that Liberty mis-cited *Nobl Park* is false. Footnote 3 to the *Nobl Park* opinion is complete. The “next sentence” in the Division II opinion to which Chan refers begins with “If it did ...” Division II said that a party may not collaterally attack in Washington the rejection of a due process challenge in a sister state. *In the absence of an analysis of due process in the sister jurisdiction*, however, Division II indicated that a

Washington court may then address the elements of due process discussed in *Nobl Park* at 845. There is no question that the Illinois courts addressed Dr. Kerbs' due process challenges to the *Lebanon* settlement that are identical to the due process challenges now posited by Chan. Chan's reading of *Nobl Park* as "supporting" its position represents a tortured misreading of Division II's opinion that this Court should reject.

Simply put, under controlling federal and Washington precedent, Chan was not entitled to collaterally attack the determination of the Illinois courts in *Lebanon* that due process rights of Washington providers were not violated by the settlement.

(c) Chan Misstates the Persuasive Authority of Federal Circuit Courts Addressing the Issues Here

To achieve its goal of avoiding the finality of the *Lebanon* class settlement as to its claims – or those of any Washington provider class members – Chan misstates persuasive federal authority. Resp't br. at 12-19.

Largely Chan's whole argument that endless collateral attacks on foreign judgments in the class action setting are permissible is predicated upon its misreading of *Hesse v. Sprint*, 598 F.3d 581, *cert. denied*, 562 U.S. 1003 (9th Cir. 2010). That case 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 as part of the settlement agreement so that the ability of the class representative to adequately represent absent class members on such claims was never raised or adjudicated. *Id.* at 588. 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.*

That is not true here. The Washington providers’ CPA claims were *expressly* pled in *Lebanon*. As noted *supra*, the Illinois courts *expressly* rejected Dr. Kerbs’ argument that these claims could not be released through that settlement based on adequacy-of-representation concerns. *Hesse* is inapposite.

Moreover, Chan vastly over-emphasizes the significance of *Hesse*

in light of the Ninth Circuit’s pointed clarification of that decision in *Skilstaf, Inc. v. Caremark Corp.*, 669 F.3d 1005, 1024 (9th Cir. 2012) in which it rejected 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 Chan would confine *Skilstaf* to those class members who themselves appear at the fairness hearing, resp’t br. at 17, its implication is *broader*.¹⁵

As with other precedent unfavorable to its misreading of the Full Faith and Credit Clause, Chan ignores persuasive authority contrary to its position. The *Skilstaf* court cited *In re Diet Drugs*, 431 F.3d 141 (3d Cir. 2005), *cert. dismissed*, 548 U.S. 940 (2006) with approval, *id.* at 1024 n.13. There, the Third Circuit stated:¹⁶ “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

¹⁵ Notably, the *Skilstaf* court cited with approval *Reyn’s Pasta Bella*, which rejects 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. 442 F.3d at 746 n.6. In such a case, the issue was actually litigated and necessarily determined. *Id.* Dr. Kerbs’ specific objections to the adequacy of the class representative’s representation of Washington class members were *rejected* by Illinois courts.

¹⁶ This passage mirrors the analysis of the *Nobl Park* court. 122 Wn. App. at 85 n.3.

F.3d at 146 (emphasis added).

Properly interpreted, persuasive federal precedent also requires the rejection of Chan's due process arguments that were litigated by Dr. Kerbs in Illinois, and rejected there.

(2) If the Court Reaches the Adequacy of Class Representation in *Lebanon*, Lebanon's Representation of the Class Was Constitutionally-Proper

If this Court agrees with Liberty on Chan's inability to collaterally attack the Illinois courts' decision, that should end the inquiry. The Illinois courts in *Lebanon* expressly found class representation to be adequate.¹⁷ But if the Court reaches the issue of adequacy class representation, it should reject Chan's position.

Recognizing the baseless quality of its argument that Washington and Illinois consumer laws are "different," Chan fully shifts its argument to the contention that the public policy behind PIP coverage in Washington and Illinois is different. Resp't br. at 20-22.¹⁸ This Court

¹⁷ Dr. Kerbs raised the issue of adequacy of representation in Illinois. See *Lebanon* at ¶ 15 (noting that Kerbs raised inadequacy of representation). The Illinois trial court noted Dr. Kerbs' objection in its order approving the settlement, and the trial court 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. Motion at 5-6. The Illinois Court of Appeals affirmed, rejecting in more detail the very same inadequate representation arguments Chan now raises. *Id.* at ¶¶ 35-40. For example, that court stated at ¶ 40: "Initially, we note that Kerbs has failed to identify any outcome determinative differences in Washington and Illinois law."

¹⁸ Chan yet again repeats its false assertion that the Illinois courts made "no findings" on Washington and Illinois consumer laws. Resp't br. at 22-23. This assertion

should reject this red herring.

For Lebanon’s representation of Washington provider class members in *Lebanon* to be inadequate, the remedies available in Washington and Illinois must be *fundamentally different*, so as to limit the incentive of the class representative to litigate the interests of the Washington class members. *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). 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

cannot withstand the Illinois courts’ specific conclusion that there were *no outcome-determinative* differences in the two states’ consumer laws. *Lebanon* at ¶ 40. Chan’s repeated insistence that the Illinois courts made no findings regarding the adequacy of an Illinois provider to represent Washington providers begs a key question. The Illinois courts clearly overruled Chan’s due process objections and found Lebanon’s representation of Washington providers adequate. Chan’s brief obscures rather than illuminates this question: Under the federal Full Faith and Credit Clause, how detailed must the Illinois court’s findings regarding adequacy of representation be in order to foreclose a Washington court from re-examining the same issue on collateral attack? Must they specifically address every nuance of every contention that clever counsel might eventually invent on collateral attack? Or must they simply address the evidence and objections before them, subject to direct appeal – like the one Chan filed in this case? As explained in Liberty’s opening brief, only the latter approach makes sense and adheres to precedent.

where some party members claim to have been harmed by the same conduct that benefitted other members of the class.” *Id.* at 1189. Chan fails to identify any such *fundamental* or *substantial* conflict among class members in *Lebanon*, nor could it.

There is no appreciable difference between Washington and Illinois consumer laws, as Chan effectively concedes:

- 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.

See generally, Br. of Appellants at 26-34.

Chan now falls back on the assertion that the existence of Washington’s mandatory offer PIP statute, a statute not in place in Illinois, requires insurers to pay *reasonable* medical expenses. Resp’t br. at 21. Plainly, PIP insurers, under a Washington policy or an Illinois policy are under no obligation to pay *unreasonable* provider charges. The fact that Washington mandates that PIP coverage be offered and that *the insured’s* reasonable and necessary expenses incurred be paid when that coverage is in place makes no difference for reimbursement of the *provider class* in

Lebanon. Liberty’s policy language governing payment to providers in Illinois and Washington was virtually identical. The Illinois court dispensed with Chan’s argument in *Lebanon* when it 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* at ¶ 37. Those databases weed out providers who make outlier charges for services.

The fact that Washington’s Insurance Commissioner approves the use of data systems to process PIP provider payments and to limit payments to outlier providers is significant as well. Washington law does not define “reasonable” medical expenses covered by PIP; auto insurers define that term in their policies, subject to Insurance Commissioner approval. Insurance Commissioner approval of Liberty’s automobile liability insurance policy language that contemplated use of a computer database to define reasonable PIP provider charges means that the Commissioner has officially determined that the policy language is not inconsistent or misleading, and this Court must defer to that assessment as Washington courts generally defer to the decisionmaking of agencies with special expertise such as the Insurance Commissioner.¹⁹

¹⁹ See, e.g., *Regence Blue Shield v. State, Office of Ins. Comm’r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006) (“[W]e accord substantial deference to agency’s views

In sum, should this Court reach the issue at all, the class representation in *Lebanon*, as the Illinois courts discerned, was adequate. The class representative there had ample incentive to vigorously prosecute the interests of Washington class members under similar law, with similar remedies.

D. CONCLUSION

Nothing in the Chan brief should dissuade this Court from barring Chan's effort to relitigate claims in Washington that were fully and finally resolved in *Lebanon* in Illinois. Chan cannot 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. The Full Faith and Credit Clause barred the trial court from reviewing the propriety of the Illinois courts' due process decision.

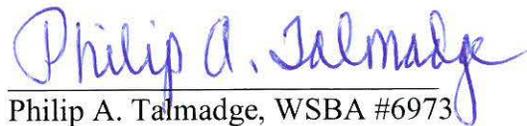
Even were this Court to reach the adequacy of the *Lebanon* class representative's representation of Washington health care providers in that settlement, the representation was plainly adequate.

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.

when an agency determination is based heavily on factual matters, especially factual matters that are complex, technical, and close to the heart of the agency's expertise." Court upheld OIC's disapproval of policy provision).

DATED this 21 day of June, 2017.

Respectfully submitted,



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APPENDIX

Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT.
1684CV01239-BLS2

LIBERTY MUTUAL INS. CO.

v.

PEOPLES BEST CARE CHIROPRACTIC AND REHABILITATION, INC.;
PLEASANT VALLEY CHIROPRACTIC LLC; and RAGHUBINDER BAJWA, M.D., P.C.

MEMORANDUM AND ORDER ALLOWING PLAINTIFFS
MOTION FOR SUMMARY JUDGMENT

This lawsuit concerns the rates that Liberty Mutual Insurance Company pays to chiropractic clinics under Personal Injury Protection ("PIP") benefit provisions in personal automobile insurance policies. Liberty seeks a declaration that an Illinois court's final judgment that approved the settlement of a nationwide class action regarding these rates is entitled to full faith and credit in Massachusetts and binds the three Defendants, who did not opt out of the Illinois proceeding and therefore are members of the plaintiff class in that case. Defendant Raghubinder Bajwa, M.D., P.C., was defaulted for failing to answer the complaint. Defendants Peoples Best Chiropractic and Rehabilitation, Inc. ("PBC") and Pleasant Valley Chiropractic LLC ("PVC") (collectively, the remaining "Defendants") oppose Liberty's request and assert counterclaims seeking to bar Liberty from implementing the settlement.

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The Court concludes that Liberty is entitled to summary judgment in its favor on all claims. With respect to Liberty's affirmative claim, the Court concludes that there is an actual controversy between the parties and that the Illinois final order and judgment is entitled to full faith and credit in Massachusetts courts. In addition, Liberty is entitled to judgment as a matter of law on Defendants' counterclaims. Defendants sought leave to conduct certain discovery before the Court decided Liberty's summary judgment motion. The Court denies this request because none of the discovery sought by Defendants concerns any factual issue relevant to whether Liberty is entitled to summary judgment.

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1. Factual Background. Liberty was the defendant in a multi-state class action filed in Illinois state court to challenge the way Liberty determines what rates it will pay to chiropractors and other medical care providers under the no-fault PIP

provisions of personal automobile insurance policies. The Illinois case was captioned *Leonon Chiropractic Clinic, P.C. v. Liberty Mutual Insurance Company* and docketed as Illinois Circuit Court for St. Clair County, no. 14-L-52.

Liberty compares billed charges for medical treatment to a database of charges that Liberty believes are for similar services provided in the same geographic area. Since 2011 Liberty has done so using data maintained by a non-profit company called FAIR Health, Inc. Liberty generally refuses to pay rates any higher than the 80th percentile of similar charges according to the FAIR Health data. The plaintiffs in the Illinois case claimed that this practice was unlawful.

The parties to the Illinois lawsuit entered into a Stipulation of Settlement in October 2014 that would resolve all claims on behalf of a proposed class. The “settlement class” included subclasses of policyholders, claimants, and medical providers in thirty-eight states, including Massachusetts. The provider subclass consisted of medical care providers that provided PIP-covered treatment from June 25, 2008, through October 31, 2014, and had their requests for reimbursement reduced by Liberty as a result of its use of a computerized database.

The essence of the proposed settlement was that the parties agreed to the method that Liberty would use to determine the reasonableness of charges for covered treatment during the five years after October 31, 2014. The settlement agreement provided that, if the class were certified and the settlement were approved, then the class members would stipulate that Liberty’s determination of the reasonableness of charges for future claims during this five-year period using the agreed-upon method would be lawful, release all claims arising from payments by Liberty made on or before October 31, 2014, and agree not to sue Liberty to contest its determination of the reasonableness of future charges using the agreed-upon method.

After the Illinois court preliminarily approved the settlement, a court-approved notice was sent to each potential class member, including PBC and PVC. This notice was sent to Defendants at the same addresses they used when billing Liberty; it is undisputed that the notice was sent to the correct addresses. Defendants had the opportunity to opt out of the proposed class, but they did not do so.

At the final settlement hearing, Attorney Brian McNiff (who now represents PBV and PVC in this case) objected to the settlement on the grounds that it was unfair to Massachusetts class members. The Illinois court overruled all objections, certified the proposed class, and approved the settlement in February 2015. That decision was affirmed on appeal in February 2016.

2. Actual Controversy. There is an actual controversy between the parties regarding the enforceability of the Illinois final order that can be resolved by declaring the rights of the parties in accord with G.L. c. 231A.

Since the Illinois class action settlement was approved in February 2015, Defendants have brought more than thirty lawsuits against Liberty in Massachusetts district courts in which Defendants have challenged Liberty's payment of less than the full face amount of a PIP charge. Liberty contends that such claims are barred by the covenant not to sue in the Illinois class action settlement, and that the final order by the Illinois court is enforceable in Massachusetts under the Full Faith and Credit clause of the United States Constitution. Defendants contend that the final order approving the Illinois class action settlement is not enforceable in Massachusetts and that they are not bound by it.

The fact that Defendants have no pending lawsuits against Liberty does not put an end to the actual controversy regarding whether the Illinois final order is valid and enforceable against Massachusetts class members like the Defendants. Cf. *St. George Greek Orthodox Cathedral of Western Mass., Inc. v. Fire Dept. of Springfield*, 462 Mass. 120, 124 (2012) (actual controversy existed as to validity of city ordinance regarding automatic fire alarm systems, even if city had not commenced any enforcement action against plaintiff).

Defendants are continuing to provide chiropractic services and thus are quite likely to continue seeking reimbursement from Liberty under PIP benefits provided to Massachusetts drivers. It is evident that Defendants will continue to dispute whether Liberty is entitled to determine the reasonableness of Defendants' charges using the method that Defendants and all other class members stipulated to in the Illinois proceeding. Indeed, Defendants own counterclaims in this action—in which they claim that Liberty violates Massachusetts law if it complies with the terms of

the Illinois final order—confirm that there remains a live, actual controversy between the parties.

3. Full Faith and Credit. The undisputed facts show that the Illinois final order and judgment is entitled to full faith and credit in Massachusetts courts and that Defendants, as members of the plaintiff class in the Illinois proceeding, are bound by that order and by the covenant not to sue Liberty.¹

“[T]he full faith and credit clause of the United States Constitution, art. IV, § 1, requires Massachusetts courts to recognize a final judgment obtained in another State as long as the judgment-rendering State possessed personal jurisdiction over the parties and jurisdiction over the subject matter of the action in which the judgment was rendered.” *Bishins v. Richard B. Mateer, P.A.*, 61 Mass. App. Ct. 423, 428 (2004). “The Constitution’s Full Faith and Credit Clause is implemented by the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738.” *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80 (1984). Under that statute, “a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit” in every other court in the United States. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374 (1996).

3.1. Due Process and Personal Jurisdiction. Defendants’ assertion that it would violate due process for them to be bound by the Illinois final order is without merit. A state court may bind an absent plaintiff in a class action “even if he or she lacks minimum contacts with the forum, so long as basic due process protections are provided.” *Moelis v. Berkshire Life Ins. Co.*, 451 Mass. 483, 486-487 (2008). Due process is satisfied so long as members of a plaintiff class are given notice of the proceeding, an opportunity to opt out of the class, and “an opportunity to be heard and participate in the litigation, whether in person or through counsel.” *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

¹ At oral argument Liberty waived the portion of its prayer for relief seeking a declaration that the Illinois final order enjoins Defendants from bringing lawsuits in Massachusetts or elsewhere. It is not at all clear that “a state-court injunction barring a party from maintaining litigation in another State” must be enforced under the Full Faith and Credit Clause. See *Baker v. General Motors Corp.*, 522 U.S. 222, 235-236 & n.9 (1998). But, as Liberty recognized by waiving this prayer for relief, the Court can resolve the current controversy between the parties without reaching that issue.

The record shows, and the Illinois appellate court found, that all of these due process requirements were satisfied in this case. Both Defendants were given notice of the lawsuit and of the proposed class action settlement. Defendants were told they could opt out of the class, and took no action to do so. They were represented by class counsel. The Illinois court expressly found that the class members received adequate representation. And Defendants had the opportunity to lodge an objection to the proposed settlement, by themselves or through counsel of their choice. Nothing more was required to satisfy due process.

Defendants received adequate notice of the class action. Service of the notice by first class mail to Defendants' correct address was sufficient because it was "reasonably calculated" to inform Defendants of the pending class action and proposed settlement, and of their opportunity to raise objections. *Town of Andover v. State Financial Svcs., Inc.*, 432 Mass. 571, 574-575 (2000), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); accord *Phillips Petroleum*, 472 U.S. at 812-814 (notice to members of putative class of plaintiffs by first class mail with opportunity to opt out satisfies due process). Liberty is not required to present direct evidence that Defendants in fact received the notice. *Id.*

Defendants' complaint that the Illinois court nullified certain opt-out requests by Massachusetts medical providers and their assertion that the court barred Defendants from seeking legal advice from their own lawyers mischaracterizes what actually happened in the Illinois proceeding. In its final order and judgment, the Illinois found that three Massachusetts law firms, including the firm that now represents Defendants in this action, had sent "materially false and misleading" descriptions of the proposed class action settlement to medical providers in Massachusetts. As a remedy, the court invalidated the roughly 500 opt-out notices that had been submitted by Massachusetts providers and ordered that those providers be provided with a curative notice regarding the proposed settlement and given additional time to decide whether they still wished to opt out. Roughly 300 providers who received the curative notice again opted out. None of that affected Defendants, because they had never opted out in the first place. The Illinois court also barred the lawyers from reiterating the substance of any of the particular

statements that the court specifically found to be false or misleading. Nothing in the Illinois order barred Defendants from speaking with their attorneys, however. Defendants' assertion that their lawyers were subject to a complete gag order and not allowed to speak with their clients is incorrect.

3.2. Consistency with Massachusetts Law. Defendants' assertion that the Illinois judgment violates Massachusetts law and therefore is not entitled to full faith and credit in Massachusetts is also without merit.

First, the Illinois settlement does not rewrite the standard Massachusetts Automobile Insurance Policy and thus did not have to be approved by the Massachusetts Commissioner of Insurance. The standard policy provides that PIP benefits include payment of "all reasonable expenses incurred as a result of the accident for necessary medical, surgical, x-ray and dental services." This coverage is mandated by statute. See G.L. c. 90, § 34A (definition of "personal injury protection") and § 34M (mandating PIP benefits). An insurer providing PIP benefits is not required to pay whatever amount a medical provider chooses to bill; only reasonable expenses need be paid. *Columbia Chiropractic Group, Inc. v. Trust Ins. Co.*, 430 Mass. 60, 64 (1999); accord *Boston Medical Ctr. Corp. v. Secretary of Exec. Office of Health and Human Svcs.*, 463 Mass. 447, 456-457 (2012) (statute requiring Medicaid program to reimburse hospitals' "reasonable" costs does not mandate reimbursement of actual but unreasonable costs).

Nothing in the settlement agreement approved in the Illinois judgment modifies Liberty's obligation under the standard policy to pay "reasonable expenses." To the contrary, the approved settlement merely reflects an agreement as to how Liberty may go about determining whether payment requests by medical providers are reasonable or not. Nothing in the standard policy or the underlying statute bars an auto insurer and a single medical provider from reaching agreement as to what range of rates both sides consider to be reasonable for purposes of paying PIP benefits. The mere fact that the Illinois judgment resolved a class action, rather than a dispute with a single medical provider, is immaterial.

Second, the stipulation of settlement approved by the Illinois court does not appear to violate G.L. c. 176D, § 3A. The settlement provides that Liberty may

determine what constitutes a reasonable charge for a covered treatment using any of several different methods, including by paying “the amount authorized by a written PPN or PPO agreement to which the Medical Provider is a party.” The Court agrees with Defendants that, if this provision allowed Liberty to take advantage of low rates that some preferred provider network or organization had negotiated with some insurer other than Liberty, then it would violate § 3A. In relevant part, that statute bars insurers from setting “the price to be paid to any health care facility or provider by reference to the price paid, or the average of prices paid, to that health care facility or provider under a contract or contracts with any other nonprofit hospital service corporation, medical service corporation, insurance company, health maintenance organization or preferred provider arrangement. G.L. c. 176D, § 3A, clause (iii). But the Court construes this provision only as allowing Liberty to hold a medical provider to rates set in a contract between Liberty and a PPN or PPO in which the medical provider is a member. Construed in this manner, the provision does not violate § 3A.

4. Disposition of Counterclaims. The rulings above also dispose of Defendants’ three counterclaims.

In Count I, Defendants claim that the Illinois settlement violates G.L. c. 176D, § 3A, because it allows Liberty to force medical providers to accept payment based on prices paid under contracts with insurers other than Liberty. As explained above, the Court construes the disputed settlement provision only as allowing Liberty to hold medical providers to rates established in contracts to which Liberty is a party. This claim therefore fails as a matter of law.

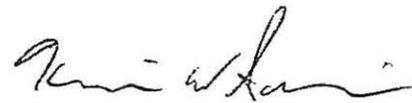
In Count II, Defendants claim that the Illinois settlement has the effect of rewriting the standard Massachusetts Automobile Insurance Policy and therefore, under G.L. c. 175, § 113A, cannot take effect in Massachusetts unless and until it is reviewed and approved by the Commissioner of Insurance. As discussed above, Defendants mischaracterize the Illinois settlement. The agreement approved by the Illinois court regarding what rates are reasonable does not rewrite the standard policy provision requiring that as part of any PIP benefits Liberty must pay reasonable medical expenses. This claim also fails as a matter of law.

Finally, in Count III Defendants allege that Liberty violated the Illinois final order “by asserting that it is the provider whose participation in the Class Settlement controls the payment of future benefits.” The Illinois class action was brought on behalf of medical providers. The settlement approved by the Illinois court was a settlement in which Liberty and all participating medical providers (including Defendants) agreed what payment levels would be deemed “reasonable” under PIP benefit provisions in automobile policies. The settlement class approved by the Illinois court included a policyholder subclass, a claimant subclass, and a provider subclass. All members of the provider subclass, including Defendants, are bound by the settlement agreement. Liberty has not violated the Illinois court’s order by accurately explaining what that order provided. This claim also has no merit as a matter of law.

ORDER

Plaintiff’s motion for summary judgment is ALLOWED. Final judgment shall enter dismissing Defendants’ counterclaims with prejudice and also declaring that: (1) the Final Order and Judgment entered in *Lebanon Chiropractic LLC v. Liberty Mutual Ins. Co.*, Illinois Circuit Court for St. Clair County, civil action no. 14-L-521, is entitled to full faith and credit in the courts of the Commonwealth of Massachusetts; and (2) Defendants Peoples Best Care Chiropractic and Rehabilitation, Inc., Pleasant Valley Chiropractic LLC, and Raghubinder Bajwa, M.D., P.C., are bound by the terms of the *Lebanon Chiropractic* Final Order and Judgment.

April 7, 2017



Kenneth W. Salinger
Justice of the Superior Court

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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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6 STAN SCHIFF, M.D., Ph.D.,

7 Plaintiff,

8 v.

9 LIBERTY MUTUAL FIRE
INSURANCE CO., et al.,

10 Defendants.

C17-409 TSZ

MINUTE ORDER

11 The following Minute Order is made by direction of the Court, the Honorable
12 Thomas S. Zilly, United States District Judge:

13 (1) This action presents issues similar to those raised in Kerbs v. Safeco Ins.
14 Co. of Ill., Inc., C11-1642 MJP, Chan Healthcare Group, PS v. Liberty Mut. Fire Ins.
15 Co., C15-1705 RSM, and Chan Healthcare Group, PS v. Safeco Ins. Co. of Ill., Inc.,
16 C16-149 RAJ. The first two cases have been remanded to King County Superior Court,
17 and the last case resolved by way of an offer and acceptance of judgment. Plaintiff has
18 filed a Notice of Related Case, docket no. 12, with respect to Case No. C15-1705 RSM,
19 with which defendants disagree, docket no. 13. In light of the procedural postures of the
20 above-referenced matters, this litigation will remain pending before Judge Zilly.

21 (2) Plaintiff's motion for relief from deadline, docket no. 21, is GRANTED in
22 part and DENIED in part, as follows:

23 (a) Defendants' amended motion to dismiss pursuant to Federal Rule of
Civil Procedure 12(b)(6), docket no. 18, is RENOTED to May 12, 2017, and will
be addressed, if appropriate, after the Court rules on plaintiff's pending motion to
remand, docket no. 19, which is noted for April 14, 2017;

(b) To the extent plaintiff seeks discovery in advance of responding to
defendants' amended Rule 12(b)(6) motion to dismiss, plaintiff's motion for relief
is DENIED.

1 (3) The Clerk is directed to send a copy of this Minute Order to all counsel of
record.

2 Dated this 28th day of March, 2017.

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4 William M. McCool
Clerk

5 s/Karen Dews
6 Deputy Clerk

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Honorable Thomas Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STAN SCHIFF, M.D., Ph.D.,

Plaintiff,

v.

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

Defendants.

NO. 2:17-cv-00409 TSZ

PLAINTIFF'S NOTICE OF DISMISSAL
WITHOUT PREJUDICE

PLEASE TAKE NOTICE THAT: Pursuant to Federal Rule of Civil Procedure 41(a)(1) (i), Plaintiff serves this Notice of Dismissal without prejudice, costs or terms. Defendants Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company have not yet filed an answer or a motion for summary judgment. This is an individual case not subject to Rules 23(e), 23.1, 23.2 or 66. Plaintiff has not previously dismissed any federal or state action based on or including the same claim. The dismissal shall be entered without court order pursuant to Rule 41(a)(1)(i).

DATED this 29th day of March, 2017.

BRESKIN JOHNSON & TOWNSEND PLLC

By: s/ Cynthia Heidelberg
Cynthia J. Heidelberg, WSBA No. 44121
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Phone: 206-652-8660
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Jamie Telegin
Jamie Telegin, Legal Assistant

DECLARATION OF SERVICE

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

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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: June 2, 2017 at Seattle, Washington.



John Paul Parikh, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

June 02, 2017 - 12:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 75541-2
Appellate Court Case Title: Chan Healthcare Group, Respondent. v. Liberty Mutual Fire Ins. Co., Petitioners
Superior Court Case Number: 15-2-21662-7

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