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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, INC.,

Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY
and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

**PETITIONER CHAN'S RESPONSE TO *AMICUS CURIAE* BRIEF
OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA**

David E. Breskin, WSBA #10607
Cynthia J. Heidelberg, WSBA #44121
BRESKIN JOHNSON & TOWNSEND, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Telephone (206) 652-8660
Counsel for Plaintiffs-Petitioners

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL SUMMARY 3

III. ARGUMENT..... 4

 1. Adequacy of Representation is Mandatory..... 4

 2. A Fact and Circumstance Specific Approach
 Honors the Competing Concerns of Finality
 and Due Process..... 9

 3. Allowing Limited Collateral Review will Not
 Result in Endless Relitigation..... 11

TABLE OF AUTHORITIES

Cases

| | |
|---|------|
| <i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591, 117 S. Ct. 2231 (1997)..... | 8 |
| <i>Gooch v. Life Inv'rs Ins. Co. of Am.</i> , 672 F.3d 402 (2012) | 6 |
| <i>Hanlon v. Chrysler Corp.</i> , 105 F.3d 1011 (9th Cir. 1998) | 7 |
| <i>Hansberry v. Lee</i> , 311 U.S. 32, 61 S.Ct. 115 (1940) | 4 |
| <i>Hesse v. Sprint Corp.</i> , 598 F.3d 581 (2010) | 7 |
| <i>Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)</i> , 654 F.3d 935 (9th Cir. 2011) | 11 |
| <i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)..... | 4, 5 |
| <i>State v. Homeside Lending, Inc.</i> , 175 VT 239, 826 A.2d 997 (VT 2003)..... | 2, 9 |
| <i>Stephenson v. Dow Chemical Co.</i> , 273 F.3d 249 (2d. Cir. 2001)..... | 12 |

Other Authorities

| | |
|--|---|
| Herbert Newberg & Alba Conte, <i>Newberg on Class Actions</i> , § 16:24 (4th ed. 2002)..... | 5 |
|--|---|

I. INTRODUCTION

Plaintiff-Petitioner Chan Healthcare Group hereby responds to the *amicus curiae* brief of the United States Chamber of Commerce.

The central issue before this Court is the proper scope of review where a defendant seeks to bar the rights and claims of citizens of the state of Washington in a Washington state court action based on a nationwide class action settlement entered into in a foreign state court and the applicability of the settlement is challenged by the Washington citizen on federal due process grounds. Plaintiff-Petitioner Chan's answer is consistent with the answer of the Washington Attorney General: the scope of the Washington court's collateral review is not rigid but will depend on the facts and circumstances of the case:

Where the foreign state court made all necessary and appropriate findings to satisfy the due process rights of Washington citizens and the record discloses an absence of facts showing collusion, a conflict of interests between Washington citizens and the foreign state class representative or other indicia that the due process right to adequate representation was not afforded, then the scope of collateral review will be limited. In such circumstances, a reviewing court may be satisfied that the foreign court provided the required due process.

But where, as here, the foreign state court did not make specific

and express findings as to the adequacy of representation for absent Washington class members and the record discloses collusion, conflicts of interest or other indicia showing that the due process rights of absent class members were not protected, then a more searching review is needed to determine whether the foreign court's class action settlement approval process protected the rights of absent Washington class members.

The *amicus curiae* brief of the United States Chamber of Commerce ("Chamber") provides little assistance to this Court in determining what the proper scope of review should be. The Chamber largely reiterates the points and position taken by Liberty Mutual. The Chamber represents the interests of the business community (Chamber brief at 2). Its brief focuses solely on "finality" for its members and fails to recognize the competing concern of due process for class members.¹

The Chamber also argues that notice and the opportunity to opt out are sufficient to protect the interests of absent class members, while ignoring that the third element of due process, which is adequacy of representation, is not optional. The due process right to adequate representation cannot be replaced by an opportunity to opt out or object.

Finally, the Chamber argues that if *any* collateral review is

¹ See, *State v. Homeside Lending, Inc.*, 175 VT 239, 826 A.2d 997, 1016-1017 (VT 2003), *infra*, discussing competing public interests in finality and protection of the due process rights of absent class members.

permitted at all, then there will be endless collateral attacks in Washington courts of foreign state court judgments approving class action settlements. But as Plaintiff's petition for review and the Washington Court of Appeals acknowledge there is a *single* published Washington decision addressing the issue. There is no evidence supporting the contention that there will be an endless re-litigation of foreign state court judgments in Washington courts. The Chamber's suggested legal standard, which would preclude collateral review in all circumstances, should be rejected. Instead, Petitioner urges this Court to adopt a fact and circumstance specific approach suggested by the Attorney General for appropriate collateral review. The AG's standard better balances the competing concerns of finality and due process and ensures that the competing public interest in finality and due process are met through the process of collateral review.

II. FACTUAL SUMMARY

The Chamber, like Liberty Mutual, relies on the argument that the issue of adequacy of representation was "raised, litigated, and decided" by the Illinois trial court such that collateral review is purportedly precluded. But the Chamber, like Liberty, cannot and does not point to a specific, express finding by the Illinois trial court that Illinois chiropractor, Lebanon, was an adequate representative of Washington health care providers, Washington insureds, consumers or citizens. Rather, the

Chamber merely states that the Illinois trial court “acknowledged but rejected the objection and approved the settlement.” Brief at 4.

As Chan has pointed out, and the Washington trial court in this case agreed, the Illinois trial court made a summary ruling that Lebanon was an adequate representative of the class *as a whole*, but made no specific and express finding that Lebanon was an adequate representative of *Washington* class members. Indeed, the Illinois chiropractor was the *only* plaintiff and class representative for the entire nationwide class.

III. ARGUMENT

1. Adequacy of Representation is Mandatory

The Chamber first argues, repeatedly, that absent class members are fully protected by class notice and the rights to opt out or object. Brief at 2, 10. But there are *three* due process elements that *all* must be satisfied for an absent class member to be bound to a class action judgment: notice, the opportunity to opt out, and adequacy of representation. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965 (1985). Dating back to *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115 (1940), the Supreme Court established that adequacy of representation is necessary to satisfy the requirements of due process, and that without it, the judgment shall not be granted full faith and credit. The separate right to opt out of a settlement is not a substitute for the right to adequate representation in the first place.

The Chamber's argument that absent class members should be limited to opting out, filing an objection or direct appeal in the foreign state's court concerning the adequacy of representation is not supported by any authority and is contrary to well-established legal principals applicable to class action settlements. First, as the Supreme Court has held, the *federal due process right* to adequate representation *is* subject to collateral review and as a practical matter, "[u]nlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. ... The court and named plaintiffs protect his interests." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 2973 (1985).

As a practical matter, limiting *absent* class members to opting out or direct appeal if they are concerned about adequacy of representation improperly places the burden on the *absent* class members to somehow determine adequacy of representation in a virtual vacuum of information about the litigation, the interests being served by the settlement and the potential conflicts of the foreign state representative. More fundamentally, "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); *see also* Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 16:24 (4th ed. 2002) (hereinafter *Newberg on Class Actions*) stating that:

[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.

As the Sixth Circuit stated in *Gooch v. Life Inv'rs Ins. Co. of Am.*,

672 F.3d 402, 420-421 (2012), observed:

The propriety of collateral attack in this context has a long history in Supreme Court jurisprudence:

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant [**36] whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. Ed. 22 (1940). 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, *Gough v. Transam. Life Ins. Co.*, 781 F. Supp. 2d 498, 505 (W.D. Ky. 2011), it is a due-process imperative that we are not free to ignore.

The Chambers approach ignores the above well-established principals and amounts to *no* collateral review at all. Its approach is

clearly inconsistent with *all* of the legal authority cited, which shows that collateral review was appropriately applied in a variety of circumstances involving class action settlements, as well as the careful analysis of the case law authority on point found in the AG's brief.

The absence of a clear record in the foreign court showing specific and express findings regarding adequacy of representation, the absence of conflicts of interest or collusion, makes collateral review appropriate. *See, e.g., Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (2010)(citing *Hanlon v. Chrysler Corp.*, 105 F.3d 1011, 1020 (9th Cir. 1998) (“Class 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.”)).

The Chamber's own brief illustrates why adequacy of representation is crucial. The Chamber argues that rather than collaterally attacking a settlement, if the parties want to preserve the opportunity to relitigate a specific issue, they can simply carve out such claims from a settlement. Brief at 3. But the ability to carve out a claim presupposes and requires an adequate representative who possesses the same interests as the subset of absent class members and would have incentive to carve out certain claims. The United States Supreme Court recognized and demanded as much in requiring that subclasses be created where a class

settlement includes distinct groups of class members. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627, 117 S. Ct. 2231 (1997)(“Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups.”).

No such representative was present in this case. The Illinois chiropractor was the sole representative for every insured, consumer, provider and citizen in the country. And, the absence of adequate representation to protect the interests of Washington citizens is clear from the record. For example, the undisputed fact of record is that Washington providers and citizens got *nothing*, no consideration at all, for the release of claims against Liberty’s subsidiary, Safeco Insurance Company, one of the largest insurers in the State of Washington. Illinois citizens got paid 50% of the underpayments back. Washington citizens got nothing out of the *Lebanon* settlement at all on such claims.

Despite Supreme Court precedent *requiring* subclasses and subclass representatives when interests within the class as a whole diverge, no Washington subclass was established. No Washington class representative was appointed to protect the divergent interest of

Washington citizens. Indeed, the trial court here correctly found a conflict of interest between the Illinois chiropractor and Washington insureds, providers, consumers and citizens that necessitated subclasses to meet the requirements of federal due process.

2. A Fact and Circumstance Specific Approach Honors the Competing Concerns of Finality and Due Process

The Chamber urges this Court to adopt a standard that, in the name of efficiency and finality, precludes collateral review in all instances as an improper “second guessing” of sister courts. The Chamber, which represents the interests of its business community members, focuses only on finality, ignores completely the competing concern of due process and argues the direct review should be the only “vehicle” for ensuring adequacy of representation for constitutional purposes was met.

But in a similar situation, the Vermont Supreme Court reviewed the appropriate balancing of the competing interests in finality of judgments and ensuring adequacy of representation and found that collateral review of whether the constitutional requirement of adequate representation was met; direct appeal was an inadequate vehicle for doing so for absent class members. *See, State v. Homeside Lending, Inc.*, 175 VT 239, 826 A.2d 997, 1016-1017 (VT 2003), stating:

As discussed above, Plaintiffs are locked out of that vehicle. As such, the competing—and, in any event, more fundamental—policy of enforcing the Constitution

outweighs efficiency and finality concerns.

A rule that is flexible and dependent upon the facts and circumstances of the case can appropriately balance the competing interests of finality and due process. As the Washington Attorney General points out in its *amicus* brief, although the semantics vary, in practice across courts “the reality of collateral review shows flexibility. Where the originating court carefully followed the civil rules when certifying a class and approving a settlement, making all necessary and appropriate findings supported by evidence in the record, a narrow collateral review may be sufficient.” AG Brief at 11. But where “the record in the originating court is unclear or incomplete, the conclusions are not supported by findings, or the findings are not supported by the record...[t]he record in the originating court may not be adequate to support a conclusion on collateral review if only a narrow review is conducted.” AG brief at 14. In those circumstances, a more searching review is necessary.

And this review is even more necessary where, as here, the settlement was entered into prior to class certification. As the Ninth Circuit has noted, “[p]rior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must with-stand an even higher level of scrutiny for evidence of collusion or other conflicts of interest

than is ordinarily required under Rule 23(e) before securing the court's approval as fair.” *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 946 (9th Cir. 2011).

Like the Vermont Supreme Court in *Homeside Lending, supra*. found, it is important that Washington courts afford its citizens a collateral review of the due process protections afforded them as absent class members in foreign state court class action settlement by determining whether the representation provided was adequate under the Constitutional guarantee of due process. When, as here, the foreign state court record fails to show clear and specific findings regarding adequacy of representation for a clear subclass of Washington citizens, collateral review is warranted and serves a “fundamental” public policy.

3. Collateral Review will Not Result in Endless Re-litigation

In the same vein, the Chamber argues that allowing any collateral review at all of the adequacy of representation afforded a subclass of Washington citizens in a nationwide class action settlement would undermine finality and result in “endless relitigation” that would jeopardize class action settlements. Brief at 11. The argument is baseless. As the Second and Ninth Circuits have noted in undertaking a collateral review of the adequacy of representation afforded a subclass of citizens of the forum state, collateral review does not challenge the merits of the

underlying settlement. Rather collateral review determines the extent to which such a settlement bars claims of citizens who did not receive adequate representation as required by the federal due process clause. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259 (2d. Cir. 2001); *Hesse*, 598 F.3d at 589, n. 5.

Indeed, the Chamber notes in its brief, 90% of class actions in the insurance industry resulted in class settlements. It says class action settlements throughout the country are alive and well. Brief at 12. This appears true despite the broad acceptance by courts across the country of collateral review to ensure compliance with the adequacy of representation requirement of Constitutional due process, as shown by the AG's brief.

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BRESKIN JOHNSON & TOWNSEND, PLLC

By: s/ Cynthia J. Heidelberg
David E. Breskin, WSBA #10607
Cynthia J. Heidelberg, WSBA #44121
1000 Second Avenue, Suite 3670
Seattle, WA 98104
dbreskin@bjtlegal.com
cheidelberg@bjtlegal.com

Attorneys for Plaintiff-Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the attached document with the Clerk of the Washington Supreme Court via the Appellate Court's filing portal which will automatically send notice of this filing to the following counsel of record:

John M. Silk,
Wilson Smith Cochran Dickerson
silk@wscd.com

Philip Talmadge
Talmadge Fitzpatrick Tribe
phil@tal-fitzlaw.com
Attorney for Liberty Mutual Insurance, Defendants

DATED October 23, 2018, at Seattle, Washington.

s/ Leslie Boston
Leslie Boston, Paralegal

BRESKIN, JOHNSON & TOWNSEND

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- rdeutsch@deutschhunt.com
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1000 2ND AVE STE 3670
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