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No. 95416-0

SUPREME COURT
OF THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, PS,

Petitioner,

v.

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

Respondents.

RESPONDENTS' ANSWER TO AMICUS BRIEF OF THE ATTORNEY GENERAL OF WASHINGTON AND AMICUS BRIEF OF U.S. CHAMBER OF COMMERCE

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A. INTRODUCTION

The Attorney General's amicus brief offers no recommendation on how the Court should rule in this case. AG Amicus Br. at 1. Rather, the Attorney General offers a review of cases in which courts in other jurisdictions have considered collateral due process attacks on class-action settlements. Based on this survey, the Attorney General concludes that "courts adapt the collateral review to the circumstances of the case." *Id.* Liberty agrees.[1] As Liberty noted in its supplemental brief, the "split" sometimes described in the case law and scholarly commentary over the proper scope of collateral due process review disappears where, as here, the due process issue was raised, litigated, and decided in the settlement court. Liberty Supp. Br. at 17.

The Attorney General correctly recognizes that this factor is the key to reconciling the two leading cases on the scope of collateral due process review—the Ninth Circuit's decision in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), and the Second Circuit's decision in *Stephenson v. Dow Chemical Company*, 273 F.3d 249 (2d Cir. 2001), *rev'd in part, Dow Chemical Co. v. Stephenson*, 539 U.S. 111, 123 S. Ct. 2161, 156 L.

[1] Unless otherwise stated, Liberty will use the same shorthand references as in its supplemental brief. Respondents Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company will be referred to collectively as "Liberty," and Petitioner Chan Healthcare Group, Inc. will be referred to as "Chan."

Ed. 2d 106 (2003) (per curiam). Beyond these two cases, however, the Attorney General's analysis falters. Instead of focusing on whether the due process issue was raised, litigated, and decided in the settlement court, the Attorney General attempts to identify other circumstances that might influence the scope of collateral review. In doing so, the Attorney General creates more confusion than clarity.

This confusion infects the Attorney General's advice to the Court. The Attorney General asserts that its survey of cases suggests that the Court has "substantial latitude in assessing the competing interests and determining the proper scope of review in this case." AG Amicus Br. at 1. Liberty respectfully disagrees. The Attorney General fails to cite a single case holding that a court may, on collateral review, re-evaluate a settlement court's due process ruling on an issue that was already fully and fairly litigated. Similarly, no policy interest supports judicial second-guessing on collateral review.

Thus, as Division I correctly held, *in this case* Washington courts must defer to the Illinois courts' decision approving the *Lebanon* settlement and rejecting the adequacy-of-representation argument that Chan raises. *Chan Healthcare Group, PS v. Liberty Mutual Fire Ins. Co.*, 1 Wn. App. 2d 529, 541-42, 406 P.3d 700 (2017) (citing *Lebanon Chiropractic Clinic, Inc. v. Liberty Mut. Ins. Co.*, 2016 WL 546909 (Ill.

App. 2016)). This deference to the judgment of the courts of a sister state—which is the same deference that Washington courts would give the judgment of another Washington court—protects the finality of class settlements and promotes the ability of Washington consumers to secure relief through class actions.

B. ARGUMENT

(1) The Attorney General Agrees with Liberty's Reading of the Two Leading Cases on the Proper Scope of Collateral Due Process Review

The Attorney General correctly notes that there are "two primary approaches" by courts considering collateral attacks on class-action settlements. AG Amicus Br. at 6. One approach involves "a narrow, procedure-focused collateral review." *Id.* The other "appl[ies] a broader collateral review that reevaluates the substance of the originating court's due process determinations." *Id.* As the Attorney General also correctly notes, these competing approaches reflect the accommodation of different interests. *Id.* at 4-5. Narrow review promotes "the efficient use of judicial resources, finality of judgments, and the full faith and credit to be afforded courts in other jurisdictions." *Id.* at 4. Broader review typically reflects "concern about the due process right to have one's day in court." *Id.* Most importantly, as the Attorney General correctly notes, the split between these approaches "may not be as wide as sometimes portrayed,"

as the "reality of collateral review shows flexibility." *Id.* at 11.

These observations echo Liberty's analysis. Liberty Supp. Br. at 14-20. The Attorney General and Liberty both cite the Pennsylvania Supreme Court's decision in *Wilkes ex rel. Mason v. Phoenix Home Life Mutual Insurance*, 902 A.2d 366, 382 (Pa.), *cert. denied,* 549 U.S. 1054 (2006), for the proposition that the cases on this issue represent less a "schism" than a practical recognition that reviewing courts may balance the competing interests differently and thus tailor their approach to the circumstances of each case. AG Amicus Br. at 11; Liberty Supp. Br. at 18-19. Similarly, the Attorney General's discussion of the two leading cases—*Epstein* and *Stephenson*—supports Liberty's argument that the crucial factor in determining the appropriate standard of collateral review is whether the issue was previously raised, litigated, and decided in the settlement court. AG Amicus Br. at 7-10.

In *Epstein*,[2] a divided panel of the Ninth Circuit rejected a collateral attack on a class settlement approved by a Delaware state court. 179 F.3d at 649. The majority opinion, written by Judge O'Scannlain, held that collateral due process review is limited to the narrow issue of whether the settlement court employed the correct procedures. *Id.* at 648-

[2] *Epstein* is referred to as "*Epstein III*" in Liberty's supplemental brief, as it was the third Ninth Circuit decision in the long-running litigation. Following the Attorney General's lead, Liberty will refer to the case as "*Epstein*" in this brief.

49. The dissent, written by Judge Thomas, argued for a broader, substantive review. *Id.* at 652-55 (Thomas, J., dissenting). As the Attorney General notes, Judge Thomas's embrace of a broad standard of review was based on his conclusion "that adequacy of representation was not litigated during the settlement proceedings and that the claims raised in the collateral attack were never addressed in the Delaware court." AG Amicus Br. at 9 (citing *Epstein*, 179 F.3d at 652-55 (Thomas, J., dissenting)). Thus, the difference in these two approaches is that Judge O'Scannlain would *always* conduct a narrow, procedure-focused review, while Judge Thomas would apply a broader, substantive review *if the due process issue was not raised, litigated, and decided in the settlement court.*

The significance of this factor is further illustrated by the third opinion in *Epstein*—Judge Wiggins's concurrence—which the Attorney General does not mention. *Id.* at 650-51 (Wiggins, J., concurring). Judge Wiggins explained that he had initially voted in favor of the plaintiff, concluding that representation was inadequate in the Delaware proceedings and that the issue of adequacy "was not fully and fairly litigated in [Delaware] court." *Id.* at 650 (citing *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997)). On further reflection, however, he changed his mind. While Judge Wiggins "remain[ed] troubled by the substance of the Delaware settlement," he "began to have grave doubts about the

conclusion that the adequacy of representation issue was not fully and fairly litigated in the Delaware courts." *Id.* Judge Wiggins carefully reviewed the Delaware record, noting that two objectors had raised adequacy challenges and that those objections were necessarily rejected when the Delaware court "nonetheless approved the settlement[.]" *Id.* at 651. Accordingly, "[b]ecause the adequacy of representation issue was fully and fairly litigated and necessarily decided in the [Delaware] Court, . . . [other jurisdictions] are required to give preclusive effect to the [Delaware] Court's judgment that class representation was adequate irrespective of whether [they] agree with that determination."[3] *Id.*

This focus on whether adequacy was litigated in the settlement court also explains the different standard of review applied by the Second Circuit in *Stephenson*. As the Attorney General notes, "[t]he Second Circuit declined to apply the limited collateral review from *Epstein*, because no court had yet considered the adequacy of representation as to these plaintiffs." AG Amicus Br. at 10 (citing *Stephenson*, 273 F.3d at 258 n.6). In other words, because the adequacy argument that the *Stephenson* plaintiffs raised on collateral attack had not been raised, litigated, and decided in the settlement court, the Second Circuit deemed

[3] In *Wilkes*, the Pennsylvania Supreme Court cited Judge Wiggins's *Epstein* concurrence and noted that his conclusion was based on the fact "that the Delaware [] Court had already addressed individual class member challenges to the class representative's representation." 902 A.2d at 381.

substantive review appropriate. 273 F.3d at 258 n.6.

Thus, the Attorney General's reading of *Epstein* and *Stephenson*—which are the two leading cases on this issue—supports Liberty's argument. By contrast, there is no support in any of the *Epstein* opinions or in *Stephenson* for Chan's argument that this Court should conduct a substantive re-evaluation of adequacy of representation, where that issue was raised, litigated, and decided in the Illinois trial and appellate courts.

(2) The Attorney General's Survey of Other Cases Understates the Importance of Whether the Due Process Issue Was Raised, Litigated, and Decided in the Settlement Court

Having correctly analyzed *Epstein* and *Stephenson*, the Attorney General then surveys other cases that have considered the proper scope of collateral due process review. AG Amicus Br. at 11-18. The Attorney General summarizes its analysis as follows:

> These decisions show that courts adapt the scope of collateral review to the circumstances of the case. A procedural review of a challenged class action judgment or settlement may be enough to resolve a collateral due process challenge. But where a procedural review reveals a basis for concern, many courts engage in a more substantive review to ensure due process was satisfied before affording full faith and credit to the challenged judgment or settlement. The scope of that review varies with the case.

AG Amicus Br. at 18. As noted above, this summary begins with an

accurate observation: courts frequently tailor the scope of review to the circumstances of the case. But the Attorney General improperly conflates the two standards of review and understates the importance of a single circumstance—whether the due process issue was raised, litigated, and decided in the settlement court.

The Attorney General's assertion that courts apply a substantive due process review "where a procedural review reveals a basis for concern" risks confusion. Any "concern" about the correctness of the settlement court's judgment on due process issues is of no consequence. As *Epstein* demonstrates, procedural review ensures that notice was sufficient and that representation was adequate "*by referencing the [settlement] courts' findings on these matters*, rather than by independently determining whether the requirements were met." 179 F.3d at 649 (citation omitted). If the reviewing court determines that the settlement court already decided the due process issue, its work is done. The court defers to the settlement court's decision regardless of whether it has "concerns" about the decision's substantive merit.

Judge Wiggins's *Epstein* concurrence further illustrates this point. Even though Judge Wiggins stated that he "remain[ed] troubled by the substance of the Delaware settlement[,]" he noted that collateral review was not an appropriate forum for relitigating the substantive merits of the

settlement's approval. *Id.* at 650-51. According to Judge Wiggins, the limited scope of collateral review required deference to settlement court's judgment "irrespective of whether we agree with that determination." *Id.* at 651. Thus, the Attorney General is wrong to suggest that "concern" over the correctness of a settlement court's due process findings is a permissible basis to expand the scope of collateral review.

The Attorney General also creates confusion when it discusses cases that have applied a broader, substantive standard of review. After noting that several jurisdictions apply a narrow, procedure-focused standard,[4] the Attorney General states that "not every originating court carefully follows the civil rules when certifying a class and approving a settlement."[5] *Id.* at 14. The Attorney General then attempts to identify various circumstances that might support broader review. *Id.* at 14-18. But in an effort to be sensitive to these circumstances, the Attorney General again downplays the importance of a single factor that consistently explains why substantive collateral review was deemed appropriate in these cases: the due process issue was *not* already raised,

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[4] *See* AG Amicus Br. at 11-13 (citing *Fine v. America Online, Inc.*, 743 N.E.2d 416 (Ohio 2000); *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611 (S.C. 2004); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569 (N.C. App. 2008)).

[5] The Attorney General's reference to "civil rules" presumably relates to the due process requirements of notice, an opportunity to opt out, and adequate representation. *See Epstein*, 179 F.3d at 648 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

litigated, and decided in the settlement court.

For example, the Attorney General states that one "kind of difficulty" that would create a need for substantive review "arises 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." *Id.* at 14. Again, this statement conflates the two distinct types of review. Under a procedural review, the court merely references the findings and conclusions of the settlement court. A court may consult the record of the settlement proceedings to determine whether a due process issue was raised, litigated, and decided, but it does not ask whether the settlement court's findings are "supported by the record." *Epstein*, 179 F.3d at 650-51 (Wiggins, J., concurring).

The main case that the Attorney General cites in support of its analysis proves this point. In *Wolfert v. Transamerica Home First, Inc.*, the Second Circuit considered an attack on a multistate class settlement that had been approved by a California court. 439 F.3d 165, 172 (2d Cir. 2006). The plaintiff, a New York resident, argued that representation had been inadequate because "New York law afford[ed] her substantial rights beyond those afforded by California law." *Id.* Before addressing the merits of this argument, the Second Circuit reviewed the California record to determine whether it was raised, litigated, and decided:

> [I]f the class action court ruled . . . without any adversarial consideration of the claim now advanced by [the plaintiff] that New York law affords her substantial rights beyond those afforded by California law, it would be manifestly unfair to preclude her collateral attack. *On the other hand, if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to hers, and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling and relegate [the plaintiff] to her direct review remedies. . . .*
>
> [N]o such adversarial presentation occurred with respect to [the plaintiff's] claim that New York law affords her materially more rights than those available under California law. Although the class action court considered and rejected, at the class certification stage, [the defendant's] contention that the contract's choice of law provision specifying New York law should be followed, no one made any claim concerning the content of New York law.

Id. (emphasis added). Thus, *Wolfert* is a perfect example of a court looking to the settlement-court record to determine whether a due process argument had been raised, litigated, and decided, and then conducting substantive collateral review only after determining that it had not. Accordingly, *Wolfert* supports Liberty's argument and Division I's decision, which held that substantive due process review was

inappropriate precisely because Chan's adequacy argument had been fully and fairly litigated in Illinois by another Washington medical provider represented by Chan's counsel.

The Attorney General also states that "[a] second type of difficulty arises where the parties appear to have colluded, or the originating court 'rubber stamps' a settlement or otherwise fails to provide adequate review." AG Amicus Br. at 15. As a purported example of such a "difficulty," the Attorney General cites *Hesse v. Sprint Corporation*, 598 F.3d 581 (9th Cir.), *cert. denied*, 562 U.S. 1003 (2010). But *Hesse* did not involve any alleged "collusion." *Id.* at 588-592. Nor did it involve an allegation that the Kansas court had "rubber stamped" the settlement over any objection like the one raised in the collateral proceeding. *Id.*

As Liberty's supplemental brief demonstrated, the best way to understand *Hesse*'s embrace of substantive collateral due process review, and to reconcile *Hesse* with the Ninth Circuit's prior decision in *Epstein*, is to read *Hesse*'s comments regarding the specificity of the settlement court's findings as an attempt to determine which adequacy arguments had been litigated in the prior proceedings. Liberty Supp. Br. at 19-20. In other words, *Hesse* was not concerned with whether the settlement court explained its reasoning in sufficient detail, but whether the adequacy argument had been raised, litigated, and decided in those proceedings.

Findings can be helpful evidence in determining which issues were litigated in the settlement court, but they are not the only such evidence. The record itself—the filings in the trial court and the briefs on appeal—is also evidence of which arguments were litigated. *Epstein*, 179 F.3d at 651 (Wiggins, J., concurring); *see also, Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of parties' briefs and fairness-hearing transcript in settlement court to determine whether issue was litigated); *Chan*, 1 Wn. App. 2d at 537-540 (reviewing Illinois court record to determine whether adequacy issue was litigated).[6]

Finally, citing *Stephenson* and the Vermont Supreme Court's decision in *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003), the Attorney General states that "[t]here are cases where the record suggests the class representative is unable to adequately represent the class, because

[6] The Attorney General highlights another important aspect of *Hesse*, noting that the court would not invalidate the settlement as to the federal tax claims that had been pleaded and settled in the Kansas action. AG Amicus Br. at 16 n.11 (citing *Hesse*, 598 F.3d at 589 n.5). Rather, it would merely carve out the Washington state-tax claims that were not pleaded and expressly settled in the Kansas action. *Id.* Here, no similar carve-out is possible. The Washington Consumer Protection Act claims that Chan asserts were expressly pleaded and settled in *Lebanon*. Moreover, the Court cannot simply carve out Washington providers from the settlement without interfering with the rights of Washington insureds (policyholders and claimants), who are also parties to the *Lebanon* settlement. Because insureds' PIP benefits are limited, they do not have the same interests as providers in the full payment of medical bills, as payments above the 80th percentile benchmark risk prematurely exhausting those benefits. Thus, the relief Chan seeks would not only resurrect claims that were expressly settled in *Lebanon*, it would interfere with the contractual rights of insureds under that settlement.

of inexperience, conflicting interests within the class, or another reason." AG Amicus Br. at 16-17. But this is not a standard that helps a court decide *whether* to conduct substantive review. It *is* substantive due process review. As noted above, procedural review is limited to referencing the settlement court's findings on notice and adequate representation, not evaluating whether those findings are correct. *Epstein*, 179 F.3d at 649. The propriety of substantive collateral due process review does not depend on the results of the review. It depends on whether the due process issue was raised, litigated, and decided in the settlement court.

In sum, the Attorney General's attempt to identify additional circumstances that might influence the scope of collateral review does not assist the Court in deciding this case. The best way to understand the so-called "split" represented by these cases is to focus on whether the due process issue was raised, litigated, and decided in the settlement court. Because Chan's adequacy-of-representation argument was fully and fairly litigated in Illinois, Division I correctly held that there was no basis for a substantive re-evaluation by a Washington court. *Chan*, 1 Wn. App. 2d at 541-42. That conclusion is consistent with all of the cases analyzed by the Attorney General.

(3) The Attorney General Erroneously Downplays the Significance of Washington Full Faith and Credit Precedent

A focus on whether the due process issue was raised, litigated, and decided in the settlement court also harmonizes Washington's Full Faith and Credit jurisprudence with the class-action decisions from other jurisdictions. As Liberty noted in its supplemental brief, this Court has never considered the application of full faith and credit in a class action. Liberty Supp. Br. at 8. But Washington precedent, including this Court's decision in *OneWest Bank, FSB v. Erickson*, 185 Wn. 2d 43, 367 P.3d 1063 (2016), and Division II's decision in *In re Estate of Tolson*, 89 Wn. 2d 21, 947 P.2d 1242 (1997), is instructive.

One West Bank holds that collateral review is not a forum for relitigation of issues previously litigated in a sister state's courts. 185 Wn. 2d at 57. Moreover, *One West Bank* confirms that the *entire* record of the sister-state proceeding—not just the court's findings—is relevant in determining whether an issue was raised, litigated, and decided. *Id.* at 57-58. *Tolson* holds that full faith and credit bars relitigation of an issue on collateral review, even if the plaintiff did not personally litigate that issue in the sister-state proceeding. 89 Wn. App. at 25-26. It is sufficient that the plaintiff was a party in the sister-state proceeding, was given notice that the issue was being litigated, and was afforded an opportunity to be

heard. *Id.* at 26.

In light of these holdings, the Attorney General's assertion that *One West Bank* and *Tolson* "have no bearing on the present case" because they did not involve class actions is incorrect. AG Amicus Br. at 19 n.13. While these cases do not address the precise issue presented here, they provide important guidance that should inform this Court's decision, just as they properly informed Division I's decision.[7] *Chan*, 1 Wn. App. 2d at 534-36.

(4) Even under the Sixth Circuit's Outlier Decision in *Gooch*, Chan's Collateral Attack Fails

The Attorney General also struggles to find any helpful guidance in the Sixth Circuit's decision in *Gooch v. Life Investors Insurance Co. of America*, 672 F.3d 402 (6th Cir. 2012). As the Attorney General notes, *Gooch* rejects *Epstein* and holds that *Stephenson*'s broader, substantive review is the proper standard for assessing the plaintiff's collateral attack. *Id.* at 421. But while *Stephenson* and other courts *expressly* state that they

[7] The Attorney General struggles to reconcile its analysis of other jurisdictions' Full Faith and Credit class-action decisions with the only such decision in Washington, *Nobl Park, L.L.C. of Vancouver v. Shell Oil Co.*, 122 Wn. App. 838, 95 P.3d 1265 (2004), *review denied*, 154 Wn. 2d 1027 (2005). AG Amicus Br. at 19-20. This is because *Nobl Park* defies easy categorization as a "procedural" or "substantive" decision. Division II first held that the proper standard of review was *Epstein*'s procedure-focused review. *Id.* at 845 n.3. Nevertheless, the court then proceeded to conduct a substantive review of notice and adequacy, finding that the plaintiff's due process challenge was meritless. *Id.* at 847-48. As Liberty explained in its supplemental brief, these are best understood as alternative holdings. Liberty Supp. Br. at 17 n.19. In other words, *Nobl Park* holds that a procedural review is the proper standard *and* that the plaintiff's collateral attack would fail even under a substantive standard of review.

are applying a substantive standard only because the issue raised on collateral review was not raised, litigated, and decided in the settlement court, *Gooch* contains no such *express* explanation.

Rather, as Liberty noted in its supplemental brief, the best evidence as to *why* the Sixth Circuit applied a substantive standard in *Gooch* is the court's cite to the Third Circuit's decision in *In re Diet Drugs Products Liability Litigation*, 431 F.3d 141 (3d Cir. 2005), *cert. dismissed*, 548 U.S. 940 (2006). *Gooch* noted that the procedure-focused standard applied in *Diet Drugs* "was limited to the circumstances in which 'the adequacy of the representation of the absent class member' was 'litigated and determine[d]'" in the settlement court. *Gooch*, 672 F.3d at 421 (quoting *Diet Drugs*, 431 F.3d at 146). In doing so, *Gooch* tacitly suggests it would have followed *Diet Drugs* and applied a narrow, procedural standard of review if adequacy had already been litigated and determined in the settlement court.[8]

Even if this Court were to apply a substantive standard of review

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[8] Moreover, to the extent that *Gooch* stands for the proposition that broad, substantive review is *always* appropriate, it is simply wrong. *Gooch* cites several cases that note the importance of due process review, but fails to acknowledge that these cases involve direct review, not collateral review. 672 F.3d at 420 (citing *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1058 (6th Cir. 1994) and *Shutts*, 472 U.S. at 805). In fact, the availability of due process review in the settlement court and on direct appeal supports a more limited collateral review. *See Hospitality Mgmt.*, 591 S.E.2d at 619. Adequacy need only be decided once, and preferably by the settlement court, with recourse through direct appeal. *Epstein*, 179 F.3d at 648.

and decide adequacy of representation anew, Chan's collateral attack would still fail. On this issue, *Gooch* provides helpful guidance. *Gooch* recognizes that minor differences in class members' claims do not render a named plaintiff inadequate to represent the class:

> Although significant conflicts make a plaintiff an inadequate class representative, differently weighted interests are not detrimental. . . . Because few people are ever identically situated, it is easy to paint an image of the class representative's interests as peripherally antagonistic to the class. That depiction does not make the plaintiff an inadequate representative.[9]

672 F.3d at 429 (citations omitted).

Earlier this month, a federal district court in the Sixth Circuit applied *Gooch* in a case in which the plaintiff, a Michigan medical provider, attempted to mount a collateral attack on *Lebanon*. *See Michigan Head & Spine Institute v. Liberty Mut. Ins. Co.*, 2018 WL 4701709 (E.D. Mich. Oct. 1, 2018) ("*MHSI*"). In *MHSI*, the plaintiff filed suit challenging Liberty's payment of medical bills at the 80th percentile, as determined by FAIR Health. *Id.* at *5. As it did in this case, Liberty moved for summary judgment in *MHSI* on the grounds that the plaintiff's

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[9] This standard mirrors *Nobl Park*'s standard for determining adequacy. *Nobl Park*, 122 Wn. App. at 847 ("The representative party in a class action must adequately protect the interests of the parties it purports to represent. Moreover, there must not be a 'substantial' or 'fundamental' conflict of interest between the parties in the class. But 'minor conflicts' will not defeat class certification." (citation omitted)).

claims were barred by *Lebanon*. *Id.*

Citing *Gooch* as the governing standard in the Sixth Circuit for determining whether a class-action judgment is entitled to full faith and credit, *MHSI* rejected any suggestion that differences in providers' home-state laws rendered representation by an Illinois-based provider inadequate:

> Further, the *Lebanon* trial court heard objections from out-of-state medical providers, who argued that they were not adequately represented because of their home state's unique law. The trial court expressly held that Lebanon and class counsel provided fair and adequate representation for the Settlement class, which included medical providers from Michigan. This finding was affirmed by the Illinois Appellate Court and recognized by another trial court in Massachusetts [*Liberty Mut. Ins. Co. v. Peoples Best Care Chiropractic & Rehab., Inc.*, No. 2017 WL 2427562, at *1 (Mass. Super. Apr. 10, 2017)].

Id. at *10. Accordingly, *MHSI* held that "*Lebanon* is entitled to full faith and credit and precludes [the plaintiff's] argument that Liberty's use of the FAIRHealth database is impermissible." *Id.*

For the same reasons,[10] Chan's collateral attack fails—even under

[10] This case presents an even stronger basis for applying full faith and credit than did *MHSI*, given that a Washington provider (Dr. Kerbs) raised the very same due process/adequacy objections in *Lebanon* that are at issue here, while no Michigan provider filed an objection in *Lebanon*.

Gooch's broad, substantive standard of review. The alleged differences identified by Chan between Washington and Illinois law do not create fundamental conflicts between class members of those states—just as there were no such conflicts with Michigan-based providers in *MHSI* and with Massachusetts-based providers in *Peoples Best Care*. Absent such a fundamental conflict, representation was adequate and subclasses were unnecessary.[11]

(5) Chan's Arguments Would Undermine Washington Class-Action Settlements and Harm Washington Consumers

Finally, the Attorney General's amicus brief is notable for what it does not argue. Chan asserts that Division I's refusal to second-guess the due process rulings of the Illinois trial and appellate courts "jeopardizes the interests of Washington citizens."[12] Chan Supp. Br. at 14-16. Chan

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[11] Chan erroneously suggests that the issue of subclassing is distinct from the issue of adequate representation. Chan Supp. Br. at 18-19. It is not. Under *Amchem Products, Inc. v. Windsor,* subclassing is required to ensure adequate representation. 521 U.S. 591, 627 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997). If no conflicts exist between class members, subclasses are unnecessary.

[12] Chan's attack on the *Lebanon* settlement ignores the similarities between that settlement and Chan's counsel's own settlement in *Kerbs v. Safeco*, which the Ninth Circuit described as "eerily similar" to the *Lebanon* settlement. *See Chan Healthcare Grp., PS v. Liberty Mut. Fire Ins.*, 844 F.3d 1133, 1135 (9th Cir. 2017). Moreover, Chan's attack on the Illinois county where Liberty was sued in *Lebanon* is merely a distraction. Chan. Supp. Br. at 15-16. The determination of whether a sister-state's judgment is entitled to full faith and credit does not depend on the perceived quality of that state's judicial system. Any suggestion that the judgments of certain states' courts are entitled to less deference than others' is anathema to the Full Faith and Credit Clause and to the comity and federalism interests that animate it. Chan forgets that it was not just the St. Clair County trial court that rejected Dr. Kerbs's adequacy objection, but also the Illinois appellate court. *Lebanon*, 2016 WL 546909 at *11-12. And Dr. Kerbs

notes that "Washington has a long history of protecting the interests of Washington consumers and citizens."[13] *Id.* at 15. And Chan argues that the Court can best do that by permitting broad collateral review, including by *always* allowing relitigation of due process issues on collateral review, no matter whether those issues were decided in the settlement court. *Id.*

This argument—that broad collateral review best protects the interests of Washington residents—is noticeably absent from the Attorney General's amicus brief, and for good reason. As the Attorney General recognizes, the due process issues presented in this case are not limited to the enforcement of *out-of-state* class-action judgments. Indeed, *Stephenson* is not a full faith and credit case, as it did not involve a collateral attack on the judgment of another jurisdiction. AG Amicus Br. at 9 n.8. In *Stephenson*, both the settlement approval and the collateral attack were litigated in the Eastern District of New York. 273 F.3d at 252-56. Similarly, the Third Circuit's decision in *Diet Drugs* involved a collateral challenge in the same court that approved the settlement, and thus did not involve an issue of full faith and credit. 431 F.3d at 144-47.

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declined to pursue any further appellate review.

[13] Chan refers repeatedly to "consumers," but ignores the fact that this case involves a class of medical providers, not insureds. Insureds and providers do not necessarily have the same interests in the full payment of medical bills for PIP-covered treatments. Full payment of unusually high medical bills harms insureds by risking premature exhaustion of their limited PIP benefits.

Thus, as the Attorney General tacitly recognizes, this case is not about protecting the interests of Washington citizens and the prerogatives of Washington courts from the impact of out-of-state class settlements. It is about protecting the finality of *all* class settlements. Chan's argument for broad collateral review would apply equally to a Washington court's review of a judgment in a prior Washington class action. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment[.]"). The Court cannot apply different due process standards to the enforcement of out-of-state class-action judgments than to the enforcement of Washington class-action judgments.

Accordingly, Chan's argument for broad, substantive due process review would render Washington class-action settlements equally vulnerable to collateral attack, thereby frustrating the interests of Washington litigants in finality and making it more difficult for Washington consumers to secure classwide relief through settlement. *But see Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn. 2d 178, 190, 35 P.3d 351 (2001) (noting Washington public policy in favor of settlement of class actions). Similarly, Chan's argument that a reviewing court may disregard another court's judgment if the initial court did not speak with sufficient "specificity" is not limited to judgments from foreign

jurisdictions. Washington courts would face the same scrutiny.

Chan's argument would also undermine the efficacy of class actions in another important way. As the Attorney General notes, "courts typically consider representational adequacy both at the time of certification and at the time of settlement[.]" AG Amicus Br. at 4 n.2. The same adequacy standards that apply to class settlement also apply to class certification. As discussed above, *Nobl Park*, *Gooch*, and other cases consistently recognize that only "substantial" or "fundamental" conflicts between class members will defeat adequacy.[14] 122 Wn. App. at 848. Any dilution of the high standard for showing inadequate representation—including any standard that allows minor differences between class members to defeat adequacy—would harm Washington consumers by making it more difficult for plaintiffs to obtain class certification. After all, a finding that representation was inadequate does not just mean that the settlement should not have been approved; it means the class should not have been certified.

Thus, if the Court adopts Chan's arguments, fewer class claims

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[14] The Attorney General asserts that *Nobl Park* did not "identify[] a basis for its conclusion[] that there was no conflict of interest." AG Amicus Br. at 19-20. This is incorrect, as the court did explain why the alleged differences between class members did not rise to the level of substantial or fundamental conflicts. *Nobl Park*, 122 Wn. App. at 847-48. Specifically, *Nobl Park* held that the fact that some class members' claims were stronger and more valuable than others (due to their ownership of multi-unit buildings, not single-unit buildings) did not constitute a major conflict between class members. *Id.*

will be certified and fewer class actions will settle. *See* U.S. Chamber of Commerce Amicus Brief at 12-13 (reviewing studies showing importance of class-action settlements and that class certification spurs settlement of those claims). Neither result remotely serves the interests of Washington consumers and citizens.

C. CONCLUSION

In sum, the Attorney General's amicus brief provides some helpful observations regarding the purported "split" between courts that apply a narrow, procedure-focused collateral due process review and courts that apply a broader, substantive review. But the Attorney General's analysis loses its force when it veers from the most important factor in determining which standard of collateral due process review to apply: whether the issue was raised, litigated, and decided in the settlement court. No case cited by the Attorney General stands for the proposition that a due process issue fully and fairly litigated in the settlement court may be relitigated on collateral review. Thus, the Attorney General's amicus brief lends no support to Chan in this case. Because Chan's adequacy-of-representation argument was already decided by the Illinois trial and appellate courts, Washington courts must defer to those decisions and afford full faith and credit to the Illinois judgment in *Lebanon*. Accordingly, this Court should affirm Division I's well-reasoned opinion.

DATED this 23rd day of October, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Amici Briefs*** and ***Motion for Leave to File Over-Length Answer to Amici Briefs*** in Supreme Court Cause No. 95416-0 to the following:

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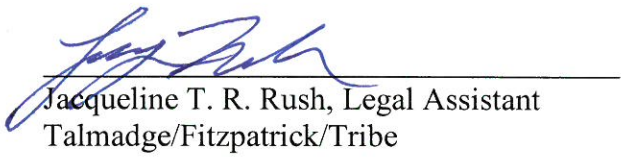
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 23, 2018 at Seattle, Washington.



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