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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' SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case involves an effort by a Washington chiropractor in an Illinois class action to relitigate in Washington the very same issues raised by another Washington chiropractor in Illinois, represented by the same counsel, and rejected by Illinois courts. The Full Faith and Credit Clause, and this Court's clear precedents, dictate dismissal of this end-run litigation.

In October 2014, the parties in *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, ("*Lebanon*") reached a proposed class settlement resolving any claims relating to Liberty Mutual's ("*Liberty*") use of a database to pay bills for medical treatment covered by Personal Injury Protection ("*PIP*") provisions in auto insurance policies.¹ Liberty's Washington policies were included in the ultimate settlement. The settlement terms were incorporated into the *Lebanon* judgment, approving the settlement. Under that settlement, Chan's claims are barred.

Another Washington chiropractor raised a due process challenge to the adequacy of class representation in Illinois, and that state's courts in

¹ This case is but one of many class actions filed by Chan's counsel against Liberty for the use of a computer data base to process claims. The Ninth Circuit Court of Appeals has described 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). Recently, Division I rejected a class action claiming that Fair Health, the data base provider, violated Washington's Consumer Protection Act, RCW 19.86. *Folweiler Chiropractic, P.S. v. Fair Health, Inc.*, __ Wn. App. 2d __, 2018 WL 2684374 (2018).

Lebanon rejected the challenge. Now, Chan raises the *very same issues* in Washington, hoping to relitigate in yet another class action the very same essential claims that were raised and rejected in Illinois.

In *Chan Healthcare Group, PS v. Liberty Mutual Fire Ins. Co.*, 1 Wn. App. 2d 529, 406 P.3d 700 (2017), Division I faithfully applied this Court’s clear interpretation of the Full Faith and Credit Clause: litigation must come to an end when a sister state’s courts have jurisdiction, they resolve such litigation, and no due process issues attend the resolution of that litigation.² This is especially true as here a due process challenge to the underlying settlement was actually litigated, a judgment rejecting such a challenge was entered by a court of competent jurisdiction in Illinois, and that judgment was affirmed on direct appeal. The Full Faith and Credit Clause requires dismissal of Chan’s effort to collaterally attack that judgment in Washington, as Division I noted. Moreover, as this Court’s clear precedents provide, where jurisdiction or due process issues were litigated in such a sister state’s courts, those determinations may not themselves be relitigated. This Court should affirm Division I’s well-reasoned opinion.

² “[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).

B. STATEMENT OF THE CASE

Chan does not contest certain key factual points confirmed in Division I's opinion. Op. at 2-4. For example, it is *undisputed* that:

- Like Chan, one of the named plaintiffs in *Lebanon*, Lebanon Chiropractic Clinic ("Lebanon"), was a chiropractic clinic, and the factual predicate for the claims in both cases was identical, as essentially were the legal issues;
- Chan was a member of the settlement class in *Lebanon*;
- Chan had notice of the class action settlement in *Lebanon*;
- Chan chose not to opt out of the *Lebanon* settlement; and
- Liberty paid the class settlement.³
- The settlement bars Chan's claims in this case – CP 3493-94;

Below, Chan *persistently* misrepresented the proceedings in Illinois, aggressively contending that the Illinois courts approved the settlement in *Lebanon* without addressing due process objections, or that the *Lebanon* trial court made no findings as to Lebanon's adequacy as a class settlement representative for class members like Chan. Pet. at 3 ("... the Illinois trial court made no such finding in approving the settlement, but instead made a blanket and rote statement of adequacy..."). The record demonstrates that those assertions are *false*.

³ To the extent Chan implies that only Illinois class members were paid in *Lebanon*, Pet. at 5, that is untrue. CP 3494-95 (definition of *Lebanon* settlement class); 3505-07 (payment of class settlement).

In *Lebanon*, another Washington chiropractor, Dr. David Kerbs, represented by Chan's present counsel, objected to the class 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 specifically objected to the settlement because Lebanon was allegedly an inadequate class representative: "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 Lebanon. CP 2604, 4054-67, 4069-76, 4087-4104.

After reviewing all objections and responses, as well as additional evidence and argument presented at a fairness hearing in February 2015, the Illinois trial court entered an order approving the settlement and dismissing objections to it. CP 4148-76 (2015 WL 13134975 (Ill. Cir. Ct. 2015)). In approving the settlement, the Illinois trial court *overruled all objections*, including those relating to lack of notice, the adequacy of representation, and the substantive fairness of the settlement. *Id.* 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 ...”). The court rejected the objections. CP 4156. (“The Court overrules *all* objections to the Stipulation and the proposed Class Settlement” (emphasis added)). That court then 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.”). Simply put, the *Lebanon* trial court found that representation was adequate.⁴

Similarly, the Illinois appellate court’s decision clearly addressed the adequacy of class representation, contrary to Chan’s assertions to the contrary. Pet. at 6-7. When Dr. Kerbs appealed the Illinois trial court judgment, he argued the adequacy of class representation once again and raised other attacks, including whether the settlement was fair to Washington class members like him (or Chan). In a lengthy, detailed opinion, the Illinois Court of Appeals affirmed the trial court’s approval of the settlement, addressing and rejecting each of Dr. Kerbs’ arguments,

⁴ The Illinois trial court stated at the fairness hearing that all objections to the settlement, including those of Dr. Kerbs challenging the adequacy of Lebanon’s representation of Washington class members, were overruled. In so doing, 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).

including the adequacy of class representation. *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 WL 546909 (Ill. App. 2016). See Appendix. In ¶¶ 35-40 of its opinion, that court rejected *in detail* Kerbs' arguments on adequacy of class representation.⁵

In sum, the Illinois trial and appellate courts in *Lebanon* specifically addressed the due process question of adequacy of Lebanon's class representation, *rejecting* objections to it by a Washington provider⁶ as Division I correctly observed. Op. at 7-10.⁷

C. ARGUMENT

The United States Constitution's Full Faith and Credit Clause requires all states to recognize the judgments of their sister states, absent

⁵ Thus, contrary to Chan's assertion that the Illinois appellate court did not address federal due process or the remedies afforded the class under Illinois and Washington consumer laws, pet. at 7, the Illinois appellate court clearly addressed Kerbs' argument on adequacy of class representation and the remedies available at ¶ 40 of its opinion, holding that Kerbs "failed to identify any outcome determinative differences in Washington law and Illinois law." (Liberty specifically advised Division I in its reply on its motion for discretionary review at 4 that this assertion is *false*).

⁶ 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.*, 34 Mass L. Rptr. 198, 2017 WL 2427562 (Mass. Super. Ct. 2017) confirmed this assessment.

⁷ Chan also persists in a baseless argument that Liberty somehow did not preserve its argument on the Illinois courts' decision for appellate review because Liberty did not assign error to the trial court's "findings." But the trial court did not make any "findings." The trial court denied Liberty's motion for summary judgment and granted Chan's motion for declaratory judgment. CP 5243-44, 5248-49. 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).

jurisdictional or constitutional infirmity. *OneWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 55, 367 P.3d 1063 (2016) (citing *State v. Berry*, 141 Wn.2d 121, 128, 5 P.3d 658 (2000)). This mandate applies to a judgment approving a class action settlement, which may be enforced in another jurisdiction against an “absent” class member, unless that party can show that its due process rights were violated in the settlement court. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996); *Nobl Park, L.L.C. of Vancouver v. Shell Oil Co.*, 122 Wn. App. 838, 845, 95 P.3d 1265 (2004), *review denied*, 154 Wn.2d 1027 (2005). In the class action context, due process requires “(1) ‘reasonable notice’ that apprises the party of the pendency of the action, affords the party the opportunity to present objections, and describes the parties’ rights; (2) the opportunity to remove themselves from the action by ‘executing and returning’ an ‘opt out’ or ‘request for exclusion’ form to the court; and (3) a named plaintiff who adequately represents the absent plaintiffs’ interests.” *Id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)).

Chan’s collateral attack on the *Lebanon* settlement presents two issues. First, the Court must decide whether Chan may relitigate a due process attack that was already raised, litigated, and decided in Illinois. As demonstrated below, Washington precedent and policy, as well as

authority from other jurisdictions, confirm that this Court should not second-guess the judgment of the Illinois courts. Second, even if the due process issue could be relitigated, the Court must determine if Chan has demonstrated that there was a substantial conflict between the interests of the class representative and Washington providers. Chan cannot meet that stringent standard.

The Illinois trial and appellate courts correctly concluded that Washington health care providers were adequately represented by Lebanon, an Illinois provider in *Lebanon*. Division I's decision should be affirmed, and Chan's collateral attack on the *Lebanon* settlement should be dismissed.

(1) The Court's Full Faith and Credit Decisions Preclude Relitigation of Issues Decided in Other Jurisdictions.

Although this Court has applied the Full Faith and Credit Clause in various types of cases, it has never considered it in the context of a class action.⁸ Nevertheless, the Court's Full Faith and Credit precedents control. As the Court has recognized, the Full Faith and Credit Clause

⁸ In the specific context of multistate class actions, settlements in such actions resolving large numbers of claims arising from identical factual predicates are routine and do not offend due process principles. *E.g.*, *Shaffer v. Continental Casualty Co.*, 362 Fed. Appx. 627 (9th Cir. 2010) (affirming approval of nationwide class action settlement between insurer and policyholders over long-term care premiums). *See also*, *Froeber v. Liberty Mut. Ins. Co.*, 193 P.3d 999 (Or. App. 2008) (affirming approval of multistate settlement of nearly identical claims as in *Lebanon* and here). Such settlements also serve federal, state and local interests in efficiently providing remedies to consumers without swamping multiple courts with identical litigation.

“provides a means for ending litigation by putting to rest matters previously decided between adverse parties.” *Berry*, 141 Wn.2d at 127; *see also, In re Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997) (“Were it not for this constitutional provision, ‘adversaries could wage again their legal battles whenever they met in other jurisdictions,’” quoting *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S. Ct. 608, 86 L. Ed. 885 (1942)). But finality does not come at the expense of due process, as *some* forum must be available to adjudicate the jurisdictional and constitutional issues that might render the original judgment infirm. *Berry*, 141 Wn.2d at 128.

Guided by these policy considerations, this Court held in *OneWest Bank* that a foreign court’s decision on a jurisdictional or constitutional issue cannot be relitigated on collateral attack. 185 Wn.2d at 57-58.⁹ In

⁹ In *OneWest Bank*, the Washington plaintiff claimed that an Idaho judgment was not entitled to full faith and credit because the Idaho court lacked personal jurisdiction over the Washington plaintiff. *Id.* at 57. The Washington plaintiff argued that this Court should conduct the jurisdictional inquiry anew, but the Court declined. *Id.* Rather than decide the issue itself, the Court looked first to whether the issue had already been decided in Idaho. *Id.* Although the Idaho order was under seal, the Court examined the Idaho docket, finding sufficient evidence that the personal jurisdiction issue had, in fact, been litigated and decided in the prior proceeding. *Id.* at 58. This Court held that it was bound by the Idaho court’s jurisdictional ruling and dismissed the Washington plaintiff’s collateral attack. *Id.*

Chan asserts that *OneWest Bank* “supports” the ability of a Washington court to second-guess the foreign court’s jurisdictional or constitutional decision. Pet. at 15. But Chan’s assertion cannot be reconciled with the Court’s actual holding. *OneWest Bank* “decided” the jurisdictional issue by deferring to the Idaho court’s decision, not by second-guessing it. 185 Wn.2d at 57 (“We agree that we cannot question [the decedent’s] domicile because the personal jurisdiction issue was already litigated and

addition to *OneWest Bank*, Division I relied on *Tolson*, authored by Justice Madsen sitting at Division II, which involved a collateral attack by a Washington plaintiff on a probate judgment rendered by a California court. Division II applied the Full Faith and Credit Clause as this Court did in *OneWest Bank*.¹⁰ Both cases compel dismissal of Chan’s present action.

Chan does not argue that either of these cases was wrongly decided. Instead, Chan contends that *OneWest Bank* and *Tolson* are “factually and legally distinct” because they both involved individual plaintiffs “who had previously fully litigated the same issue in a sister state[.]” Pet. at 10. As to *Tolson*, Chan’s distinction is simply inaccurate. The Washington plaintiff in that case had not actually litigated the jurisdictional issue in the sister state. 89 Wn. App. at 35-36. Instead, he was bound by the sister state’s judgment because he had “received proper notice” of the proceedings and had been “afforded the fair opportunity to be heard in that adjudication.” *Id.* Like the Washington plaintiff in that

decided in the Idaho conservatorship proceedings.”).

¹⁰ The California court had determined that the decedent was domiciled in California, while the Washington plaintiff claimed that the decedent was domiciled in Washington. 89 Wn. App. at 25-26. The Washington plaintiff argued that this issue could be relitigated on collateral review because it was jurisdictional, but Division III rejected this argument, holding that “[w]hile [it] is correct in a general sense, it is also well settled that if the jurisdictional question has been litigated in the rendering court, principles of res judicata attach to the jurisdictional ruling and preclude relitigation.” *Id.* at 32.

case, Chan also received notice of the sister-state proceedings and was given a fair opportunity to be heard there. Thus, Chan’s attempt to distinguish *Tolson* fails on the facts.

Chan’s inability to distinguish *Tolson* also reflects a more fundamental flaw in Chan’s argument. Chan contends that *OneWest Bank* and *Tolson* are inapposite because they apply what Chan describes as “a res judicata-type analysis more than a full, faith and credit analysis – that if the issue was raised, litigated, and decided in a prior litigation it cannot be relitigated[.]” Pet. at 16. Chan argues that such principles are “not at play here” because Chan “was simply an absent class member” in *Lebanon*. *Id.* But the United States Supreme Court has held that *res judicata* and other preclusion doctrines *do* apply to absent class members who have been given notice and an opportunity to opt out. *Shutts*, 472 U.S. at 805, 811-12.¹¹ Thus, Division I’s reliance on these cases and the principles that guide them was entirely appropriate.

Indeed, a collateral review standard that looks first to whether the jurisdictional or constitutional issue was “raised, litigated, and decided” in

¹¹ The Washington case Chan cites, pet. at 16, *King County v. Taxpayers of King County*, 133 Wn.2d 584, 646, 949 P.2d 1260 (1997), *cert. denied*, 522 U.S. 1076 (1998), does not support Chan’s argument. In fact, Chan’s cite is to the *dissent* in that case, and Chan fails to note that the case did not involve a class action under Washington’s CR 23, but rather a special kind of “inverted class action under the authority of RCW 7.25.020, whereby the county government sues each of its taxpayers through the device of naming two representatives to defend the interests of every other county taxpayer.” 133 Wn.2d at 614 (Sanders, J., dissenting).

the foreign court is the only standard that protects the comity and finality interests that animate this Court’s Full Faith and Credit analysis. These same considerations apply with equal, if not greater, force to class actions. This Court has long recognized that efficiency is at the heart of the class action device,¹² and the Court has also recognized that Washington policy strongly supports the *settlement* of class actions. *Pickett*, 145 Wn.2d at 190 (warning that Court should not adopt standards that “would directly stifle litigants’ willingness to settle class action claims, a result contrary to the policy favoring settlements”).

Chan’s argument for broad collateral review of due process objections that were already “raised, litigated, and decided” by a prior court would undermine the effectiveness of the class action device and would frustrate Washington policy favoring the settlement of class actions.¹³

¹² See, e.g., *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 187, 35 P.3d 351 (2001), *cert. denied*, 536 U.S. 941 (2002) (class action device designed to promote “the fair and efficient adjudication of a large number of claims” (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 623 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983))).

¹³ As the *Pickett* court recognized, defendants will be hesitant to explore settlement of class claims if they are apprehensive that the settlement will not extinguish potential liability. 145 Wn.2d at 190-91 (citations omitted). In the context of collateral attacks on class actions, commentators have expressed the same concern. See, e.g., 2 *McLaughlin on Class Actions* § 630 (14th ed. 2017) (“If each class member were free to collaterally attack the adequacy of the representation received in a prior settlement, there could be no finality to judgments entered on class action settlements.”); Marcel Kahan and Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A*

This case proves the point. After all, Liberty settled *Lebanon* on terms that the Illinois trial court determined to be fair. The issue of whether Washington providers were adequately represented was raised, litigated, and decided. The judgment of the trial court was affirmed on appeal, and the appellate court specifically rejected the arguments of Chan’s present counsel raised for Dr. Kerbs. The settlement became effective, and Liberty has since complied with it—including all provisions relating to Washington medical providers.

At Chan’s urging, however, the trial court in this case second-guessed the Illinois courts’ decision on a fully-litigated due process issue and effectively vacated the Illinois courts’ judgment as to Washington providers. If the trial court’s decision is affirmed, Liberty will find itself defending a class claim that it already *paid* to settle, a disincentive to ever settle a case only to see it spring up anew in another jurisdiction.¹⁴

In short, Washington precedent and policy answer the first issue

Critique of Epstein v. MCA, Inc.,” 73 N.Y.U. L. Rev. 765, 779 (1998) (“As long as one collateral attack succeeds, a new class action on the same claims can be brought The potential for double liability will increase the expected liability of defendants of defendants and severely impede the ability to settle a class action to start with.”).

¹⁴ To paraphrase this Court: “This begs the question: If this were procedurally proper, why would a party in [Liberty’s] position ever settle a case?” *Pickett*, 145 Wn.2d at 191; cf. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999) (Posner, J.) (“The defendants have paid out more than \$500 million. Are they now to go around to all 5,200 class members whom they have paid and ask for their \$100,000 back so that this litigation can return to its starting point?”). No defendant would ever enter into a class settlement given such a prospect, making the settlement of such claims elusive for Washington consumers.

presented in this case. Division I got it right, and for the right reasons. The due process attack Chan seeks to litigate on collateral review was already “raised, litigated, and decided” in Illinois. Having received notice of the Illinois proceedings, and having been afforded an opportunity to object or to opt out, once Chan elected to remain in the class, Chan was not free to relitigate the due process issue in Washington on collateral attack.

(2) Other Jurisdictions Have Applied the Same Standards in Rejecting Collateral Attacks on Class Action Settlements

Division I’s decision is further supported by cases from other jurisdictions, which have expressly considered the application of full faith and credit finality principles to judgments approving class action settlements. These courts do not agree on the proper standard of review where a collateral attack presents a due process issue that *was not* decided in the settlement court. But there is no such split on the issue of whether a plaintiff may relitigate on collateral attack a due process objection that *was* decided in the settlement court—especially where the settlement court’s decision was subject to direct appeal. In such circumstances, courts consistently hold that broad collateral review is not available.

As Division I recognized, *op.* at 7-8, the leading Ninth Circuit case on this issue is *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999)

(“*Epstein III*”). *Epstein III* involved a collateral attack on a Delaware state court judgment approving a class settlement. *Id.* at 648-49.¹⁵ In *Epstein III*, the Ninth Circuit held that collateral due process review is limited to the narrow issue of whether “the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a ‘full and fair opportunity’ to litigate the claim or issue.” 179 F.3d at 648-49. This review does not “include reconsideration of the merits of the claim or issue.” *Id.* at 649. The due process rights of absent class members are protected “not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court.” *Id.* at 648.¹⁶

¹⁵ The procedural history of *Epstein III* is complicated, but noteworthy. In *Epstein I*, the Ninth Circuit reversed a district court’s ruling giving full faith and credit to the Delaware judgment. *Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir. 1995). The United States Supreme Court reversed and remanded, but in *Epstein II* the Ninth Circuit again refused to enforce the Delaware judgment. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) (“*Epstein II*”). The *Epstein II* panel noted that the issue of adequacy had not been “actually litigated” in Delaware and held that an absent class member has a due process right to litigate that issue on collateral review, as long as the class member did not actually appear in the settlement court. *Id.* at 1241-42. But *Epstein II* did not survive. The Ninth Circuit granted rehearing, withdrew its opinion, and reconsidered the Full Faith and Credit issue. 179 F.3d at 643-44.

¹⁶ Since *Epstein III*, several other federal appellate courts and state supreme courts have held that due process issues, such as adequacy of representation, may not be relitigated on collateral attack. For example, the Third Circuit’s decision in *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141 (3d Cir. 2005), *cert. dismissed*, 548 U.S. 940 (2006) and *In re Metropolitan Life Ins. Co. Sales Practices Litigation*, 537 Fed. Appx. 106 (3d Cir. 2016) support *Epstein III*’s standard. *See also, Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 618-19 (S.C. 2004), *cert. denied*, 543 U.S. 916 (2004) (concurring with *Epstein III* that collateral due process review is limited to examination of procedures employed in settlement court).

Some courts, however, have rejected *Epstein III* in favor of a broader, merits-based collateral review. For example, Chan argues that the Court should follow the Second Circuit's decision in *Stephenson v. Dow Chem. Co.*, 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. Ed. 2d 106 (2003) (*per curiam*). Pet. at 13.¹⁷

But *Stephenson* highlighted a critical fact that distinguishes that case from this one: On direct review, neither the settlement court nor the appellate court had considered whether class members whose injuries would arise after depletion of the settlement funds were adequately represented. *Id.* at 257-58 (“[T]here has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund.”). Thus, unlike this case, *Stephenson* did not involve a due process issue that had been “raised, litigated, and decided” by the settlement court.¹⁸

¹⁷ In *Stephenson*, two Vietnam veterans sought to avoid a 1984 class action settlement of claims relating to Agent Orange exposure. 273 F.3d at 252-53. Although both plaintiffs had been exposed to the chemical during the war, their injuries did not manifest until the late 1990's, after the settlement funds had been depleted. *Id.* at 255. The district court dismissed their suit, finding that it was an impermissible collateral attack on the 1984 settlement. *Id.* The Second Circuit reversed, agreeing with the plaintiffs that they had not been adequately represented in the settlement proceedings. *Id.* at 258. In doing so, the Second Circuit held that a broad, merits-based review of adequacy could be proper on collateral review. *Id.*

¹⁸ The Second Circuit also doubted that the plaintiffs had received adequate notice of the settlement. *Id.* at 261 n.8.

The importance of this distinction cannot be overstated. While some courts have referred to a “split” between *Epstein III* and *Stephenson*,¹⁹ *Hospitality Mgmt.*, 591 S.E.2d at 618-19 (noting “open, and hotly litigated” split), that “split” disappears under the circumstances presented here, where the due process argument being raised on collateral review was already litigated and decided in the settlement court and where direct appellate review was available. In such circumstances, there is *no tension* between the interest in finality (which is protected by limiting the scope of collateral review) and the interest in ensuring that due process requirements are satisfied (which is protected by the settlement court and by the availability of direct appellate review). By contrast, broad collateral review where the due process objection has already been litigated and decided only encourages gamesmanship and further litigation, thus undermining “the class action goals of efficiency and finality” and “violat[ing] the spirit of full faith and credit.” *Id.*

This focus on whether the due process objection was “raised,

¹⁹ Chan argues that Division II’s decision in *Nobl Park* supports the application of a broader standard of collateral review. Pet. at 11-12. But Division II actually held that the appropriate standard is the narrow standard, citing *Epstein III* in support of that holding. 122 Wn. App. at 85 n.3 (“[A] party’s right to due process is protected by the court certifying a class action and the court’s reviewing subsequent appeals in the state issuing the judgment in such action; it is not the obligation of the courts of another state to collaterally review due process challenges.” (citing *Epstein III*, 179 F.3d at 648)). As Chan notes, Division II nevertheless considered and rejected all of the due process arguments made by the Washington plaintiff on collateral attack. *Id.* at 85. This is probably best understood as an alternative holding—essentially, that the plaintiff’s collateral attack was meritless, even if it were not barred entirely by *Epstein III*.

litigated, and decided” also reconciles seemingly divergent case law on full faith and credit in the class action context. The cases that embrace the limited *Epstein III* standard generally do so on facts like those presented here, where the due process objection was already litigated and decided. *See, e.g.*, 591 S.E.2d at 619 (citing *Fine v. America Online, Inc.*, 743 N.E.2d 416, 421 (Ohio App. 2000)). *See also, Lamarque v. Fairbanks Capital Corp.*, 927 A.2d 753, 765 (R.I. 2006). And courts that embrace *Stephenson* generally do so where the collateral attack raises a due process concern that was not litigated and decided in the settlement court.

Indeed, the Supreme Court of Pennsylvania made the same observation. *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins.*, 902 A.2d 366, 382 (Pa. 2006), *cert. denied*, 549 U.S. 1054 (2006) (In rejecting the proposition that there is a “schism” in the law, the court noted: “In *Epstein*, the settlement court had already reviewed specific challenges to class counsel’s representation, but in *Stephenson* the certifying and direct appeal courts had not previously addressed the interests of class members who became injured following the exhaustion of the 1984 settlement funds.”).²⁰

²⁰ The Pennsylvania Supreme Court embraced *Stephenson*’s broader standard only because it found the case before it to be more factually analogous to *Stephenson* than to *Epstein III*. *Id.* at 382-83; *cf. Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 429 (D.S.C. 2011) (broader *Stephenson* review appropriate because settlement court’s decision was not subject to direct appellate review).

The Second Circuit’s more recent Full Faith and Credit precedent further supports this analysis. In *Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 172 (2d Cir. 2006), *cert. denied*, 549 U.S. 882 (2006), the plaintiff alleged that she had been inadequately represented in the settled California litigation because her claim arose under New York law, which she characterized as giving her more rights than California law. *Id.* The Second Circuit considered the merits of this attack, but only because the objection was not litigated and decided in the California proceedings. *Id.* It expressly warned that it would not be unfair to preclude collateral review if “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[.]” *Id.* at 172.

This focus on whether an objection was litigated and decided in the settlement court also reconciles *Epstein III* and the case on which Chan relies most heavily, *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010).²¹ There, the issue of whether the named plaintiffs, whose claims were based on federal taxes, could adequately

²¹ *Hesse* involved a Washington plaintiff’s collateral attack on a class settlement that had been approved by a Kansas court. *Id.* at 587-88. The Kansas litigation involved allegations that Sprint impermissibly passed on the costs of *federal* taxes to consumers. *Id.* at 585-86. It did not involve claims that Washington *state* taxes had been impermissibly passed on to consumers. *Id.* at 585 n.1.

represent absent Washington class members whose claims were based on state taxes, *was never litigated or decided in the settlement court.*²² *Id.* at 588. Because the issue was being addressed for the first time, the Ninth Circuit held that the merits of the Washington plaintiff’s adequacy argument could be considered on collateral review. *Id.*²³

Chan also argues that the Court should adopt the broad collateral review standard announced by the Sixth Circuit in *Gooch v. Life Insurance Investors Co.*, 672 F.3d 402 (6th Cir. 2012). Pet. at 14-15. But, like *Hesse*, *Gooch* acknowledged that the standard is different where the due process challenge was “litigate[d] and determine[d]” in the settlement court, even citing *Diet Drugs* for this proposition. 672 F.3d at 421. Thus,

²² To make this determination, *Hesse* looked to the Kansas court’s “findings.” *Id.* at 588. Seizing on this reference, Chan argues that the specificity of a settlement court’s findings—not whether the objection was litigated and decided—determines the appropriate collateral review standard. Pet. at 13. This argument is wrong. Where the record is clear that an objection was litigated and decided, there is no need to evaluate the specificity of the settlement court’s findings. Notably, in *OneWest Bank*, the foreign court order was not available for review because it was under seal in Idaho. 185 Wn.2d at 58. Accordingly, the Court looked to the Idaho docket for confirmation that the jurisdictional issue had been litigated and decided. *Id.* Similarly, in *Reyn’s Pasta Bella*, the Ninth Circuit took judicial notice of the parties’ briefs in the settlement court and of the transcript of the settlement court’s fairness hearing to determine what issues were litigated and decided. 442 F.3d at 746 n.6.

²³ But the Ninth Circuit was careful to make clear that a merits-based collateral review would have been unavailable under *Epstein III* if the issue had already been litigated and decided in the settlement court. *Id.* And that is precisely why the court in its later decision in *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005 (9th Cir. 2012) applied *Reyn’s Pasta Bella* and upheld the dismissal of an action where a due process issue was litigated in the settlement court.

even if *Gooch* was correctly decided (which it was not),²⁴ the Sixth Circuit’s opinion suggests that it would have viewed this case—where Chan’s objection was “litigated and determined” in the settlement court—through a different lens and under a different standard.²⁵ 672 F.2d at 421-22.

In sum, a close reading of the main cases on both sides of the supposed “split” affirms the wisdom of Division I’s careful analysis here. Division I correctly sidestepped that so-called “split,” given the relevant facts of this case: Chan’s adequacy-of-representation attack on the *Lebanon* settlement was “raised, litigated, and decided” in Illinois, and the

²⁴ *Gooch* is analytically flawed in any event. The Sixth Circuit held that its “prior precedent” supported broad collateral review. 672 F.3d at 420 (citing *Shults v. Champion Int’l Corp.*, 35 F.3d 1056, 1058 (6th Cir. 1994)). But the prior precedent it cited, *Shults*, involved a direct appeal of a district court’s approval of a class settlement, not a collateral attack on that settlement. 35 F.3d at 1058-59. Thus, *Shults*’s substantive due process review was entirely appropriate—and noncontroversial—under established United States Supreme Court precedent. *Id.* (citing *Shults*, 472 U.S. 797). *Gooch* ignores this critical distinction between direct review and collateral review, assuming incorrectly that the standards must be the same. In fact, as noted above, the availability of broad due-process review on direct appeal actually militates against, not in favor of, broad due-process review on collateral attack. See *Hospitality Mgmt.*, 591 S.E.2d at 619 (due process protected by settlement court and “thereafter, the merits of the certifying court’s determinations are subject to direct appellate review” (citing *Epstein III*, 179 F.3d at 648)).

²⁵ Chan’s reliance on the Fifth Circuit’s decision in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), is similarly misplaced. *Gonzales* did not involve a class action settlement, but a judgment that granted relief for the named plaintiff and denied the same relief to the class. *Id.* at 71. The named plaintiff then declined to appeal the judgment on behalf of the class. *Id.* Moreover, the absent class members in *Gonzales* did not receive notice and an opportunity to opt out. *Id.* at 71-72. Accordingly, *Gonzales* stands only for “the limited proposition that a federal court may review a prior federal judgment for due process violations that could not have been presented to the rendering court prior to the entry of judgment.” 2 *McLaughlin on Class Actions*, § 630 (14th ed. 2017).

Illinois trial court's determination of that issue was subject to direct appellate review. Op. at 8-13. In such circumstances, the broad collateral review that Chan advocates is simply not available.

(3) Even under a Broad Collateral Review Standard, Chan's Adequacy-of-Representation Attack Fails

Even if this Court were to address the adequacy issue anew, Chan's collateral attack fails. The standard for determining adequacy of representation on a collateral attack against a class action settlement is well established. As Division II recognized in *Nobl Park*:²⁶

The representative party in a class action must adequately protect the interests of the parties it purports to represent. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). Moreover, there must not be a "substantial" or "fundamental" conflict of interest between the parties in the class. *Id.* at 1189. But "minor conflicts" will not defeat class certification. *Id.*

122 Wn. App. at 847. As *Nobl Park* noted, representation has been found

²⁶ *Nobl Park* involved claims relating to alleged corrosion of polybutylene plumbing used in residential buildings. The claims were settled on a multistate basis in a Tennessee class action. 122 Wn. App. at 840-41. The settlement class included owners of single-unit residences and owners of multi-unit structures. *Id.* at 842-43. After the settlement was approved, a Washington owner of a multi-unit complex filed suit in Washington state court. *Id.* at 843. The trial court entered summary judgment for two of the defendants, finding that the plaintiff's claims were barred by the Tennessee settlement. *Id.* at 844. On appeal, the Washington plaintiff argued that it had been inadequately represented by single-unit owners. *Id.* at 847-48. The thrust of this argument was that multi-unit owners had stronger claims than single-unit owners, specifically that their damages were larger. *Id.* But Division II held that such a distinction failed to constitute a sufficiently substantial or fundamental conflict. *Id.* Both sets of plaintiffs were pursuing the same basic relief—"replacement costs and damages[.]" *Id.* at 848.

to be inadequate only rarely,²⁷ for example, when “there are concerns as to future plaintiff’s recovery, such as an expired settlement or depleted funds. *Id.* (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)).²⁸

Applying the substantial or fundamental conflict standard, Chan’s argument does not even come close to establishing a lack of adequate representation. Chan is a chiropractic provider, based in Washington. CP 2. Chan seeks payment of its full billed charges, claiming that the full billed amount is a “reasonable” amount for medical treatments covered by its patients’ auto insurance policies. CP 2, 19. According to Chan, Liberty improperly reduced the reimbursement for these covered treatments by relying on a computerized database. CP 2.

Like Chan, the named plaintiff in *Lebanon* was also a chiropractic

²⁷ Notably, adequacy is not just a basis on which to attack a class settlement; it is also an element of class certification. For example, *Valley Drug*—the case from which *Nobl Park* borrows its standard for determining adequacy of representation—involved class certification, not a class settlement. 350 F.3d at 1188. Thus, if the Court were to adopt a more stringent test of adequacy, such as one that found inadequate representation based on minor differences in claims of class members, it would have the unintended effect of making class actions more difficult to certify. As with its argument on the collateral review standard, Chan’s argument on adequacy would benefit Chan in this case, but would undermine class actions in Washington.

²⁸ See also, *Valley Drug*, 350 F.3d at 1189 (“A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class.”); *Epstein II*, 126 F.3d at 1256 (“The reality of the matter is that it is the rare exception for representation in a class action even to approach the point where an absentee will have a colorable claim for inadequacy. The small handful of cases that have come to our attention in which absentees have successfully challenged adequacy of representation bears this observation out.”).

provider. CP 3476. Like Chan, Lebanon sought payment of its full billed charges claiming that full billed amount was a “reasonable” amount for medical treatments covered by its patients’ auto insurance policies. CP 3475-86. And, according to Lebanon, Liberty improperly reduced the reimbursement for these covered treatments by relying on a computerized database. *Id.*

Thus, there is no appreciable difference—much less a *substantial* or *fundamental* difference—between Chan’s claim and Lebanon’s claim. Both chiropractors seek the same relief—payment of their full billed charges—and have the same incentive to pursue their claims. The fact that their claims were pled under different states’ consumer-protection laws does not create any fundamental conflict. Indeed, Washington and Illinois consumer laws share core features:

- 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; and
- both statutes allow recovery of attorney fees.

It is no surprise, therefore, that the Illinois appellate found that Chan’s counsel had “failed to identify any outcome determinative differences in

Washington and Illinois law.” ¶ 40. *See generally*, Br. of Appellants at 26-34.

In sum, even if this Court were to decide anew the issue of adequate of representation, it should reach the same conclusion as the Illinois courts. Any minor differences between the claims of Illinois providers like Lebanon and Washington providers like Chan and Dr. Kerbs did not create any *fundamental* conflict, as all providers had the same motivation to vigorously prosecute their claims for payment of their full billed charges. This is certainly not the rare exception where a class action judgment is rendered infirm by inadequate representation.²⁹

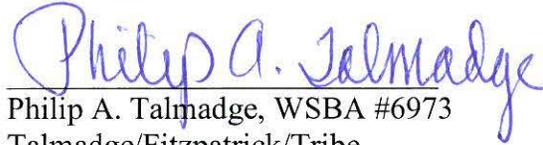
D. CONCLUSION

This Court should affirm Division I’s well-reasoned opinion that fully implements this Court’s precedents on the application of the Full Faith and Credit Clause. Costs on appeal should be awarded to Liberty.

²⁹ Chan’s assertion that the *Lebanon* settlement should have had a separate subclass for Washington providers is meritless. Pet. at 19-20. The *Lebanon* settlement already contained subclasses. There was no need for additional subclassing, absent a genuine concern of fundamental conflicts between class members of different states. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (requiring subclassing where members of class were competing for limited funds). As demonstrated above, no such conflicts were present here.

DATED this 24th day of June, 2018.

Respectfully submitted,



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APPENDIX

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

CHAN HEALTHCARE GROUP, PS,
a Washington professional services
corporation,

Respondent,

v.

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

Petitioners.

No. 75541-2-1

PUBLISHED OPINION

FILED: December 11, 2017

VERELLEN, C.J. — This appeal turns on the standard governing a due process collateral attack on a sister state's resolution of a multistate class action. Under full faith and credit principles, a collateral attack in Washington fails if that same due process challenge was raised, litigated, and decided in the sister state. Under these circumstances, Washington courts do not second guess the analysis and resolution by the trial and appellate courts in the sister state.

Because the substance of respondent's due process claim of inadequate representation was raised, litigated, and decided in Illinois, the Illinois settlement is entitled to full faith and credit.

Therefore, we reverse.

FACTS

This appeal concerns use by Liberty Mutual Insurance Company (Liberty) of a computerized database to determine the amounts payable for treatments covered by personal injury protection (PIP) coverage under automobile insurance policies. Washington's PIP statute requires automobile insurers to pay all reasonable and necessary medical expenses incurred by the insured.¹ Insurers must "conduct[] a reasonable investigation" before refusing to pay claims.² Liberty sets the benchmark reasonable medical charges payable using the FAIR Health database, reflecting other healthcare provider charges in the same geographic area.

Liberty's use of the FAIR Health database was previously challenged in Lebanon Chiropractic Clinic v. Liberty Mutual Insurance Company, a multistate class action lawsuit litigated in Illinois.³ The class included Washington providers. The lawsuit alleged that Liberty's use of the FAIR Health database was unfair under the Illinois Consumer Fraud and Deceptive Business Practices Act⁴ and other states' equivalent acts, including the Washington Consumer Protection Act.⁵ Chan, a Lebanon class member, received reasonable notice and did not opt out.

¹ RCW 48.22.095(1), .005(7).

² WAC 284-30-330(4).

³ No. 5-15-0111, 150111, 2016 IL App (5th) 150111-U, 2016 WL 546909 (Feb. 9, 2016) (unpublished).

⁴ 815 ILL. COMP. STAT. ANN. 505/1 (2007).

⁵ Ch. 19.86 RCW.

In October 2014, the parties in Lebanon reached a proposed class settlement. In January 2015, class member Dr. David Kerbs, a Washington chiropractor, filed an objection to the proposed settlement asserting, among other things, "Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interests with Washington providers."⁶ Dr. Kerbs argued the conflict of interest was the result of differences between Illinois and Washington's consumer protection statutes.

In February 2015, following a fairness hearing, the Illinois court entered a final order and judgment approving settlement and dismissing the case. In the order, the court acknowledged Dr. Kerbs' objection, overruled all objections to the proposed settlement, and determined the named plaintiff was an adequate representative.⁷

Dr. Kerbs appealed the judgment to the Appellate Court of Illinois. He specifically challenged the adequacy of representation resulting from conflict between the Illinois and Washington's consumer protection and PIP statutes. In February 2016, the Illinois appellate court affirmed the trial court in an unpublished opinion.⁸

In September 2015, while Dr. Kerbs' appeal was still pending in Illinois, Chan Healthcare Group, PS (Chan) filed the current case against Liberty in King

⁶ Clerk's Papers (CP) at 4042.

⁷ See CP at 4155-56.

⁸ Lebanon Chiropractic, 2016 WL 546909, at *15.

County Superior Court. Chan alleged Liberty's reliance on the FAIR Health database constituted an unfair practice under the Washington Consumer Protection Act.

Chan moved for a declaratory judgment that Lebanon did not preclude the claims because the class representative was an inadequate representative. Liberty moved for summary judgment seeking dismissal of the case. The superior court declined to give full faith and credit to the Lebanon settlement and found the named plaintiff in Lebanon did not adequately represent the interests of Washington providers. The trial court granted Chan's motion and denied Liberty's motion.

We granted Liberty's motion for discretionary review.

ANALYSIS

Liberty contends the trial court erred when it failed to give full faith and credit to the Lebanon settlement.

We review a court's refusal to accord full faith and credit to a foreign judgment de novo.⁹ The full faith and credit clause of the United States Constitution requires states "to recognize judgments of sister states."¹⁰ A state court judgment in a class action is "presumptively" entitled to full faith and credit

⁹ OneWest Bank, FSB v. Erickson, 185 Wn.2d 43, 56, 367 P.3d 1063 (2016).

¹⁰ Id. at 55 (citing U.S. CONST. art. IV, § 1).

from the courts of other jurisdictions.¹¹ “[P]arties can collaterally attack a foreign order ‘only if the court lacked jurisdiction or constitutional violations were involved.’”¹² Specifically, “a foreign state is not required to give full faith and credit to a judgment against an affected party who did not receive due process when the judgment was entered.”¹³ Due process in a class action requires (1) “‘reasonable notice’ that apprises the party of the pendency of the action, affords the party the opportunity to present objections, and describes the parties’ rights,” (2) the opportunity to opt out, and (3) “a named plaintiff who adequately represents the absent plaintiffs’ interests.”¹⁴

Here, there is no dispute Chan had adequate notice and did not exercise the right to opt out. The sole dispute is whether Chan can collaterally attack the Lebanon settlement for lack of adequate representation. We must decide, under full faith and credit, the standard for a collateral attack asserting lack of due process in a sister state’s class settlement approval.

In In re Estate of Tolson, Division Two of this court considered whether a Washington court was bound in a probate proceeding to a prior determination by a California court that decedent was domiciled in California at date of death.¹⁵

¹¹ Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 374, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996).

¹² OneWest Bank, 185 Wn.2d at 56 (quoting State v. Berry, 141 Wn.2d 121, 128, 5 P.3d 658 (2000)).

¹³ Nobl Park, L.L.C. of Vancouver v. Shell Oil Co., 122 Wn. App. 838, 845, 95 P.3d 1265 (2004).

¹⁴ Id.

¹⁵ 89 Wn. App. 21, 32, 947 P.2d 1242 (1997).

Division Two concluded that while “enforcement of a judgment under [the full faith and credit clause] can be challenged by a showing that the court rendering judgment lacked jurisdiction[,] . . . it is also well settled that if the jurisdictional question *has been litigated* in the rendering court, principles of res judicata attach,” and that question cannot be relitigated on collateral attack.¹⁶

Our Supreme Court adopted a similar approach in OneWest Bank, FSB v. Erikson when considering “whether a Washington court must give full faith and credit to an Idaho court order encumbering Washington property.”¹⁷ “This case arose through OneWest Bank FSB’s attempted foreclosure of Washington property based on a reverse mortgage that an Idaho court ordered through [the decedent’s] conservatorship proceeding.”¹⁸ The decedent’s daughter “challeng[ed] the foreclosure, claiming the reverse mortgage [was] void because she was the actual owner of the property and the Idaho court had no jurisdiction to affect Washington property.”¹⁹

Our Supreme Court concluded, “[W]e cannot question [the decedent’s] domicile because the personal jurisdiction issue was *already litigated and decided* in the Idaho conservatorship proceedings.”²⁰ The court was persuaded the issue of jurisdiction was already litigated and decided because the record, chiefly the

¹⁶ Id. (emphasis added).

¹⁷ 185 Wn.2d 43, 55, 367 P.3d 1063 (2016).

¹⁸ Id. at 47-48.

¹⁹ Id.

²⁰ Id. at 57 (emphasis added).

Idaho court's docket entries, revealed the decedent "objected to personal jurisdiction in the Idaho court, but the court denied his objection and exercised jurisdiction over him."²¹

Although we do not have the particular Idaho court order at issue, we have sufficient evidence that the Idaho court *considered* challenges to [the decedent's] domicile and *ruled* that it had jurisdiction to appoint a conservator over him. . . . There was enough evidence for the Idaho court to conclude it had sufficient contacts to exercise jurisdiction over [the decedent]. If [the daughter] wanted to challenge this determination, the Idaho court was the proper forum for doing so. She cannot collaterally attack that determination here.^[22]

Limited collateral review of a sister state court's finding of jurisdiction as provided by Tolson and OneWest Bank is consistent with nonbinding federal authority addressing the scope of collateral review in the context of a due process challenge to a foreign court's class settlement approval.

In Epstein v. MCA, Inc., the Ninth Circuit addressed the effect of a Delaware state court judgment that approved a class action settlement releasing exclusively federal claims.²³ The Ninth Circuit rejected a broad, merit-based collateral review and held that collateral review is limited to "whether the *procedures* in the prior litigation afford the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue."²⁴ Due process

²¹ Id. at 58.

²² Id. (emphasis added).

²³ 179 F.3d 641, 643 (9th Cir. 1999).

²⁴ Id. at 649 (emphasis added).

“does not require collateral *second-guessing* of those determinations and that review.”²⁵

Consistent with Tolson, OneWest Bank, and Epstein, we hold Washington courts do not relitigate questions of due process previously *raised, litigated, and decided* by a sister state court when approving a class settlement. To determine whether a due process issue has been previously raised, litigated, and decided, we consider (1) whether the specific due process objection was before the sister state court, (2) whether the parties presented briefing on the objection, and (3) whether the sister state court ruled on the objection. If, after conducting this limited collateral review we are reassured the sister state court litigated and decided the same due process objection currently raised, we will not second guess the determination of that court.²⁶

Here, Chan reargues Dr. Kerb’s contention that the class representative in Lebanon inadequately represented Washington providers, noting

there are fundamental differences between the Washington and Illinois consumer protection acts (including the public interest impact prong in Washington and the more restrictive requirement in Illinois of intent); between the remedies available in Washington and Illinois (e.g. treble damages versus punitive; rates of interest in judgments); and most importantly in the substantive laws underlying the

²⁵ Id. at 648.

²⁶ The parties disagree about the significance of the Ninth Circuit decision in Hesse v. Sprint Corporation, 598 F.3d 581, 588 (9th Cir. 2010). At most, the Hesse decision recognizes that in the absence of any determination of adequate representation by the forum state, a collateral attack review of adequate representation is permissible. But here, the question of adequate representation of Washington class members was raised, litigated, and decided in both the Illinois trial and appellate courts.

[consumer protection act] claims of Washington and Illinois providers.^[27]

But the same objection concerning lack of adequate representation was before the Illinois trial court in Lebanon. Dr. Kerbs objected to the proposed settlement because, among other things, “Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interests with Washington providers.”²⁸

The parties in Lebanon presented briefing on that specific conflict of interest. In his written objection, Dr. Kerbs argued:

Washington providers have rights and causes of action for relief under the Washington Consumer Protection Act not possessed or available to Lebanon as an Illinois provider. Lebanon could not adequately represent Washington providers and had a conflict of interests in obtaining benefits that benefited Lebanon but not Washington providers who get nothing under the Lebanon settlement and see key benefits and rights taken away from them.^[29]

The court also received responses from Liberty and the class representative rebutting Dr. Kerbs’ various objections. The class representative specifically addressed Dr. Kerbs’ argument concerning differences between Illinois and Washington law:

While [Dr. Kerbs and another objector] claim that a conflict exists, neither has specified one. Objector Kerbs fails to identify how rights under the Washington Consumer Protection Act are different. . . . In the end, there is no material difference or conflict, and both

²⁷ Resp’t’s Br. at 20.

²⁸ CP at 4042.

²⁹ CP at 4049-50.

Objectors simply argue that providers from their respective states have done or could do better.³⁰

The record of the arguments made to the Illinois trial court is more detailed than the docket entries relied on in OneWest Bank.³¹

And the issue of adequate representation was decided by the Illinois trial court. In the written order approving class settlement, the court “overrule[d] all objections to the Stipulation and the proposed Class Settlement and approve[d] all provisions and terms of the Stipulation and the proposed Class Settlement in all respects.”³² The Illinois trial court also determined “Plaintiff Lebanon Chiropractic Clinic . . . and Class Counsel will fairly and adequately protect the interests of the Settlement Class.”³³ In context, this was not a mere boilerplate finding of adequate representation.

Dr. Kerbs appealed, and the Illinois appellate court considered the same issue of inadequate representation stemming from alleged conflicts between Illinois and Washington law.³⁴

In his brief to the Illinois appellate court, Dr. Kerbs renewed his specific argument concerning differences in available relief under Illinois and Washington

³⁰ CP at 4073.

³¹ OneWest Bank, 185 Wn.2d at 58.

³² CP at 4156.

³³ CP at 4154.

³⁴ See CP at 4671 (notice of appeal to appellate court of Illinois) (“Lebanon Chiropractic Clinic is an inadequate class representative for Washington providers and has a conflict of interest with Washington providers because Lebanon does not possess a Washington CPA claim and cannot obtain the broader relief available to Washington health care providers.”).

law.³⁵ He argued the class representative had a conflict of interest with Washington providers because

the Washington Act provides for treble damages, attorneys fees and litigation costs and prejudgment interest at the rate of 12% per annum on the award of actual damages. Lebanon did not have claims that would provide such relief. It was therefore in Lebanon's interests to negotiate a settlement with Liberty in which Washington providers got nothing.^[36]

In response, Liberty Mutual claimed

Dr. Kerbs' argument that the damages available under the Washington Consumer Protection Act are marginally greater than those available under the Illinois Consumer Fraud Act is legally irrelevant. Even if his damages calculations are correct, Dr. Kerbs fails to explain how such a difference creates antagonistic interests between Plaintiff and Washington providers.^[37]

The class representative similarly argued, "Objector Kerbs has never identified any relief that Lebanon Chiropractic sought that is antagonistic to the interests of the Washington provider class members. . . In the end, Objector Kerbs simply argues that Washington providers *might* 'do better.'"³⁸

The Illinois appellate court's unpublished opinion addressed Dr. Kerbs' adequate representation objection, described the appropriate legal standards for analyzing adequate representation, and rejected the claims:

³⁵ See CP at 4354 (Lebanon "has no claim that Liberty's reductions made to Washington provider bills using the FAIR Health database violated Washington insurance regulations, the Washington PIP or CPA.").

³⁶ CP at 4354-55 (emphasis omitted).

³⁷ CP at 349 (emphasis omitted).

³⁸ CP at 1738.

Kerbs argues the trial court abused its discretion in approving the settlement where Lebanon did not fairly and adequately protect the interests of the class members. . . . When evaluating whether the class representative can provide fair and adequate representation, the court must determine that the representative party is not seeking relief which is potentially antagonistic to the members of the class. . . .

Here, in support of his objection filed with the trial court, Kerbs identified the following relief that was sought by Lebanon that was antagonistic to the interests of the Washington providers: . . . that Washington law requires payment of all reasonable charges[,] and that Washington providers receive nothing under the Lebanon settlement.^[39]

It is clear the Illinois appellate court was aware of and rejected Dr. Kerbs' argument concerning material differences between Washington and Illinois law.⁴⁰ The court observed that Kerbs had not demonstrated any "outcome-determinative differences in Washington law and Illinois law."⁴¹

Dr. Kerbs did not seek review by the Illinois Supreme Court. The Illinois state court system was the appropriate avenue for continuing to challenge the certifying court's determination of adequate representation.⁴²

³⁹ Lebanon Chiropractic, 2016 WL 546909, at *13-14.

⁴⁰ Id. at 11 ("[I]n his appellate briefs, Kerbs notes that Illinois is an at-fault state where Washington is a no-fault state, Illinois has no comparable PIP statute requiring the payment of all reasonable medical expenses submitted, and Illinois has no comparable insurance regulation requiring insurers to investigate a PIP claim before refusing to pay a claim.")

⁴¹ Id.

⁴² See Nobl Park, 122 Wn. App. at 845, n.3 ("[A] party's right to due process is protected by the court certifying a class action and the court's reviewing subsequent appeals in the state issuing the judgment in such action; it is not the obligation of the courts of another state to collaterally review due process challenges.").

In essence, Chan asks this court to take on the role of the Illinois trial court deciding the issue of adequate representation. But we do not review de novo whether we would have found adequate representation as the Illinois trial court. Neither do we decide whether we would have affirmed the trial court determination of adequate representation sitting as the Illinois appellate court. And we do not consider whether we would have affirmed the appellate court's decision if we were the Illinois Supreme Court.

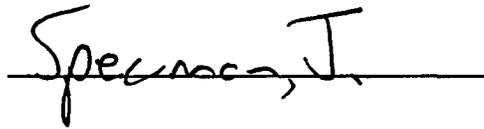
In conducting a full faith and credit analysis, we do not dwell on the precise rationale and analysis used by the sister state to resolve the due process claim. To allow an automatic de novo review by collateral attack whenever lack of due process is alleged would be contrary to full faith and credit principles emphasizing the importance of finality.

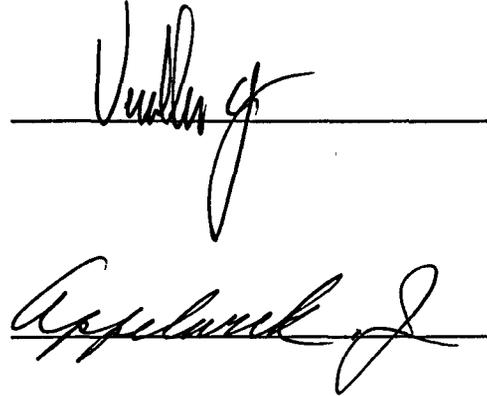
The scope of collateral attack is narrow. Our consideration of the argument and materials before the Illinois court is limited to whether the issue at hand was raised, litigated, and decided by that court. Chan contends the issues litigated in Illinois are completely different than the issues raised in Washington. But in Illinois, Dr. Kerbs argued the Lebanon plaintiff was an inadequate representative because differences between the consumer protection and PIP statutes in Washington and Illinois created a conflict of interest. Chan now attempts to revive those same claims that were raised, litigated, and decided in the Illinois trial and

appellate courts.⁴³ Chan's collateral attack fails. The Lebanon settlement is entitled to full faith and credit.⁴⁴

Therefore, we reverse.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Spencer, J.", written over a horizontal line.

Two handwritten signatures in cursive script, one above the other, both written over horizontal lines. The top signature is more stylized and difficult to decipher, while the bottom one appears to read "Appellate J.".

⁴³ To the extent Chan suggests Washington class action standards are different than Illinois, he provides no authority that the due process standards applicable to class action settlements vary.

⁴⁴ We deny Liberty's motion to strike Chan's statement of additional authorities.

FACTS

Washington's personal injury protection (PIP) statute requires automobile insurers to pay all reasonable and necessary medical expenses incurred by the insured.¹ Insurers must conduct a reasonable investigation before refusing to pay claims.² Liberty reviewed and paid PIP healthcare provider bills at the 80th percentile benchmark for specific treatment in relevant geographic areas as reflected in computer databases maintained by a non-profit firm FAIR Health.

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

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

¹ See RCW 48.22.005(7), .095.

² See WAC 284-30-330(4).

³ App. 142.

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

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

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

⁴ App. 245-56.

⁵ App. 246 (Grounds for Objections 1, 3, 4).

⁶ App. 257-73.

⁷ App. 257-73.

⁸ App. 311; Hesse v. Sprint Corp., 598 F.3d 581 (9th Cir. 2010).

⁹ Lebanon Chiropractic Clinic v. Liberty Mutual Ins. Co., 2016 WL 546909 (Ill. Ct. App. 2016) (unpublished).

¹⁰ Lebanon, 2016 WL 546909, at *13 ¶ 48.

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

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

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

¹¹ Lebanon, 2016 WL 546909, at *14 ¶ 49.

¹² Lebanon, 2016 WL 546909, at *14 ¶¶ 49, 50.

¹³ App. 85-86.

¹⁴ App. 88.

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

DECISION

Liberty seeks discretionary review of the trial court's grant of declaratory judgment and denial of summary judgment on the effect of the Lebanon settlement.

Liberty seeks review under RAP 2.3 (b)(1) and (2), which set forth the following criteria:

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

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

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

¹⁵ App. 91.

¹⁶ App. 94.

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

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

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

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

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

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

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

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

²² Answer to Motion for Discretionary Review at 9.

were exclusively within the federal court jurisdiction.²³ But the United States Supreme Court reversed, holding that a federal court must look to the law of the rendering state to determine the preclusive effect of the state court judgment releasing such claims.²⁴ On remand, the federal court plaintiffs argued that the state court plaintiffs did not adequately represent their interests as to their federal claims. The Ninth Circuit rejected their argument, stating, “Simply put, the absent class members’ due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court.”²⁵ Due process “does not require collateral second-guessing of those determinations and that review.”²⁶ The court rejected a broad, merit-based collateral review and held that collateral review is limited to “whether the *procedures* in the prior litigation afforded the party against whom the earlier judgment is asserted a ‘full and fair opportunity’ to litigate the claim or issue.”²⁷

Division Two in Nobl Park cited Epstein for the proposition that “a party’s right to due process is protected by the court certifying a class action and the court’s reviewing subsequent appeals in the state issuing the judgment in such action; it is not the obligation of the courts of another state to collaterally review due process challenges.”²⁸ The trial court rejected Liberty’s reliance on Nobl Park, stating that Nobl Park addressed “adequacy of notice,” not representation.²⁹ Nobl Park appears to address the adequacy

²³ Epstein v. MCA, Inc., 50 F.3d 644, 663-66 (9th Cir. 1995), reversed, Matsushita, 516 U.S. 367 (1996).

²⁴ See Matsushita, 516 U.S. at 374-75.

²⁵ Epstein, 179 F.3d at 648.

²⁶ Id. at 648.

²⁷ Id. at 649 (emphasis added).

²⁸ Nobl Park, 122 Wn. App. at 845 n.3.

²⁹ App. 80.

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

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

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

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

³² Id.

³³ Id.

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

Chan argues that the "Illinois court made no findings that the Illinois and Washington providers possessed the same legal claim, or that Illinois provider Lebanon was an adequate representative of Washington providers."³⁴ Citing the Sixth Circuit's Gooch decision,³⁵ the trial court stated that it was not required to defer to the Illinois court's "passing rubber stamp reference to the adequacy of the representation" or "conclusory findings of adequate representation."³⁶ In Gooch, the Sixth Circuit engaged in a merit-based collateral review of the notice and adequacy of representation before giving full faith and credit to an Arkansas court class action judgment. The Sixth Circuit noted Diet Drugs, where the Third Circuit said: "Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated."³⁷ But the Sixth Circuit distinguished Diet Drugs by stating that "passing rubber-stamp reference in the opinion of the Arkansas circuit court—and the silence by the Arkansas Supreme Court—hardly meets this standard."³⁸

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

³⁴ Answer to Motion for Discretionary Review at 4.

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

³⁶ App. 89.

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

³⁸ Gooch, 672 F.3d at 421-22.

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

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

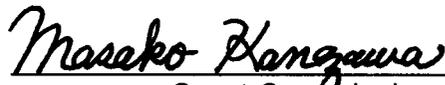
Liberty argues that the trial court erred in concluding that the differences between Washington and Illinois laws prevented an Illinois plaintiff from adequately representing Washington providers. Because review is warranted on the scope of collateral review, in the interests of judicial economy, review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

CONCLUSION

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

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

Done this 25th day of October, 2016.



Court Commissioner

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

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

2015 WL 13134975 (Ill.Cir.Ct.) (Trial Order)
Circuit Court of Illinois.
Twentieth Judicial Circuit
St. Clair County

LEBANON CHIROPRACTIC CLINIC, P.C., Individually and on behalf of all others similarly situated, Plaintiff,
v.

LIBERTY MUTUAL INSURANCE COMPANY, Liberty Mutual Fire Insurance Company,
Safeco Insurance Company of America, and Safeco Insurance Company of Illinois, Defendants.

No. 14-L-521.
February 23, 2015.

Final Order and Judgment Approving Settlement and Dismissing this Action with Prejudice

*1 This matter came before the Court on the 17th day of February, 2015, on Plaintiff's Motion for Final Approval of Class Action Settlement, requesting final approval of the proposed Class Settlement memorialized in the corrected Stipulation of Settlement filed of record on October 30, 2014, and preliminarily approved by the Court on October 31, 2014. Having reviewed and considered all timely submissions made in connection with the proposed Settlement, having reviewed and considered the files and records herein, and having previously handled MedPay class actions presenting similar issues, the Court finds and concludes as follows:

1. The Court has jurisdiction over the subject matter of this Action, the Plaintiff, the members of the Settlement Class, and Liberty.
2. All capitalized terms used herein shall have the same meaning as set forth in the Stipulation, which is incorporated herein by reference.
3. The Complaint filed on June 25, 2014, alleges, among other things, that Liberty improperly used an undisclosed cost-containment program involving computerized bill-review systems and other elements to cap the amounts paid to medical providers and/or reimbursed to injured parties for medical treatments covered by the Medical Payments ("MedPay") coverage and/or Personal Injury Protection ("PIP") coverage provided by certain automobile policies issued by Liberty. The Complaint further alleges that Liberty's use of computerized bill-review systems to determine the usual, customary, or reasonable charge payable under the PIP and/or MedPay coverage provided by Liberty's personal automobile policies breached the terms of those policies, violated various consumer-protection statutes, and unjustly enriched Liberty.
4. Liberty has denied that it has acted improperly or fraudulently and has raised several affirmative defenses, including (without limitation) defenses based on (1) applicable statutes of limitations, (2) a prior class settlement of similar claims in a lawsuit styled *Froeber v. Liberty Mutual Insurance Company*, No. 00C15234 in the Circuit Court of Marion County, Oregon ("*Froeber*"), (3) a prior class settlement of similar claims in *Kerbs v. Safeco Insurance Company of America*, No. 10-2-17373-1 SEA in the Superior Court of King County, Washington (the "*Kerbs*"), and (4) settlements and judgments reached in individual disputes presenting similar claims in Illinois and other states ("Individual Disputes").
5. On or about October 30, 2014, Plaintiff and Liberty entered into a corrected Stipulation of Settlement, which Plaintiff promptly filed with the Court the same day. The Stipulation provides for the settlement of this Action between Liberty and a proposed Settlement Class, subject to Court approval.

6. October 31, 2014, the Court held a hearing to consider preliminary approval of the Stipulation and the proposed Class Settlement and granted such preliminary approval.

7. For purposes of determining whether the terms of the proposed Settlement should be finally approved as fair, reasonable and adequate, the Court conditionally certified a Settlement Class consisting of the following Policyholder, Claimant, and Provider Subclasses:

*2 A. The “Policyholder Subclass” is defined as every person who, on October 31, 2014, named as an insured in a “Subject Policy” that was in force on that date; “Subject Policy” means a personal auto policy:

(i) issued by “Liberty,” which means Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, The First Liberty Insurance Corporation, Liberty Personal Insurance Company, Liberty Insurance Corporation, Liberty Lloyds of Texas Insurance Company, LM General Insurance Company, LM Personal Insurance Company, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, Safeco Insurance Company of Indiana, Safeco Insurance Company of Oregon, Safeco National Insurance Company, Safeco Surplus Lines Insurance Company, General Insurance Company of America, First National Insurance Company of America, American States Insurance Company, American States Preferred Insurance Company, and/or American Economy Insurance Company;

(ii) delivered by Liberty or one of its agents to a policyholder in a “Settlement State,” which means Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin and/or Wyoming; and

(iii) providing MedPay and/or PIP coverage;

B. The “Claimant Subclass” is defined as every person who, at any time during the Class Period,

(i) received “Covered Treatment,” which means any medical treatment, medical service, medication, or prosthesis covered by the MedPay and/or PIP coverage provided by a Subject Policy,

(ii) submitted (or allowed another to submit on his or her behalf) a “Subject Claim,” which means an insurance claim seeking payment under the MedPay and/or PIP coverage provided by a Subject Policy for Covered Treatment rendered during the Class Period, and

(iii) received from Liberty as payment or reimbursement for at least one Covered Treatment (through payments to himself, to herself, or to others on his or her behalf) an amount that was less than the charge billed for that treatment because Liberty or one of its agents determined through the use of a computerized bill-review system that the charge billed for that treatment exceeded the usual, customary, or reasonable allowance for that treatment.

C. The “Provider Subclass” is defined as every person who, during the Class Period,

(i) provided Covered Treatment to a member of the Claimant Subclass for a Covered Injury,

(ii) sought payment for that Covered Treatment under the MedPay and/or PIP coverage provided by a Subject Policy, and

(iii) received from Liberty as payment for that Covered Treatment an amount that was less than the charge billed for that treatment because Liberty or one of its agents determined through the use of a computerized bill-review system that the charge billed for that treatment exceeded the usual, customary, or reasonable allowance for that treatment;

D. Provided, however, that the Settlement Class excludes all Class Counsel, all Released Persons, all Neutral Evaluators, all Illinois judges, and all persons who timely opt out of the Settlement Class in accordance with the Court's orders.

*3 See Order Preliminarily Approving Class Settlement (entered October 31, 2014). In addition, the Court conditionally appointed Lebanon Chiropractic Clinic, P.C., as representative of the Settlement Class and the following attorneys as Class Counsel:

Robert W. Schmieder II

Bradley M. Lakin

SL Chapman LLC

330 North Fourth Street, Suite 330

St. Louis, MO 63102

Phone: 314-588-9300

Id. The Court also approved the form of the parties' proposed Class Notice and the parties' proposed methods for distributing the Class Notice, directed that the Class Notice distributed in accordance with the terms of the Stipulation and the Court's orders, and scheduled a hearing to consider the fairness of the Settlement. *Id.*

8. On or about December 2, 2014, the Court entered an Order Modifying Class Settlement Schedule, which modified the schedule for distributing the Class Notice and rescheduled the fairness hearing to 9:00 am, Thursday, February 5, 2015. Then, on February 3, 2015, the Court issued an order granting the motion of Leon Demond to intervene as an additional Plaintiff and Class Representative and re-setting the fairness hearing to 10:00 am, Tuesday, February 17, 2015, to allow more time for consideration of opt-out requests arriving from areas of the country where recent snows delayed the mails.

9. On or about February 5, 2015, the Court considered the Notice of Objector's Effort to Obstruct and Joint Motion for Expedited Entry of Order Addressing Same (filed Feb. 4, 2015). Upon reviewing that Notice and Motion, the Court issued an Order Addressing Effort by Objector [David Kerbs] to Obstruct Proceedings in this Court (entered Feb. 5, 2015).

10. On or about February 10, 2015, Class Counsel applied to the Court for final approval of the terms of the Proposed Settlement and for the entry of this Final Judgment. In support of that application, Class Counsel submitted, among other things, evidence concerning the dissemination and adequacy of Class Notice, evidence regarding the names of potential Class Members who have submitted requests for exclusion from the Settlement Class, evidence regarding the negotiation of the Proposed Settlement, and evidence regarding the fairness, reasonableness, and adequacy of the substantive terms of the Proposed Settlement.

11. Pursuant to the Class Notice and the orders described above, a hearing was held before this Court, on February 17, 2015, to consider the motion for final approval and to determine whether the Proposed Settlement should be approved as fair, reasonable, and adequate and whether the Court should enter this Final Judgment approving the Settlement and dismissing the Action on the merits, with prejudice, and without leave to amend.

12. During the hearing, the parties provided additional evidence that the Class Notice was disseminated in accordance with the Court's orders. In addition, the parties provided additional evidence regarding the adequacy of the notice so

given, the negotiation of the proposed Class Settlement, the substantive fairness, reasonableness, and adequacy of its terms, and the identities of Potential Class Members who submitted timely Requests for Exclusion from the Settlement Class. The parties also presented evidence concerning objections filed by Dr. Gregory Gordon, Dr. David Kerbs, Ms. Kathleen Lipscombe, and Mr. Brian McNiff. And the parties also provided evidence that counsel of record for Dr. Gordon (and perhaps others) engaged in a coordinated effort to interfere with the Court's approved Class Notice plan by making misleading statements to potential members of the Provider Subclass in Massachusetts to induce them to opt out of the proposed Settlement.

*4 13. The Court previously found and now reaffirms that dissemination of the Class Notice in accordance with the terms of the Order constitutes the best notice practicable under the circumstances. The evidence confirming dissemination and content of the Class Notice, including the testimony of the nationally recognized notice expert, Todd Hilsee, demonstrates that the parties complied with this Court's orders regarding class notice, that the notice given informed members of the Settlement Class of the pendency and terms of the proposed Settlement, of their opportunity to request exclusion from the Settlement Class, and of their right to object to the terms of the proposed Settlement, that the notice given was the best notice practical under the circumstances, and that it constituted valid, due and sufficient notice to members of the Settlement Class. The Court further finds and concludes that the notice program described in the Order and completed by the parties complied fully with the requirements of due process, the Illinois Rules of Civil Procedure, and all other applicable laws.

14. The Court also finds that the Proposed Settlement is the result of good-faith, arms-length negotiations by the parties thereto. In addition, the Court finds that approval of the Stipulation and the Settlement embodied therein will result in substantial savings in time and resources to the Court and the litigants and will further the interests of justice.

15. The Court finds, for settlement purposes only, that the Settlement Class meets the requirements of [735 ILCS 5/2-801](#), because: (1) the Settlement Class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact - *i.e.*, whether and how Liberty should disclose its bill-review practices - that are common to the Settlement Class and predominate over any questions affecting only individual members of the Settlement Class; (3) Plaintiff Lebanon Chiropractic Clinic, P.C., Plaintiff-Intervenor Leon Demond, and Class Counsel will fairly and adequately protect the interests of the Settlement Class; and (4) the proposed Class Settlement is an appropriate method for the fair and efficient resolution of this controversy in light of: (a) the risk that prosecution of separate actions by individual members of the Settlement Class might establish incompatible standards of conduct for Liberty and (b) the propriety of an agreed injunction as a principal form of relief. Further, the Court finds that the Proposed Settlement is fair, reasonable and adequate as to the Settlement Class Members, the Plaintiff, and the Plaintiff-Intervenor as a result of discovery, due diligence, and the absence of material objections sufficient to deny approval.

16. In making the findings stated in paragraph 15, above, the Court incorporates and reaffirms the findings previously made in the Order Addressing Effort by Objector to Obstruct Proceedings in this Court (entered Feb. 5, 2015). In addition, the Court notes several important differences between the relief to be provided to members of the Settlement Class under the proposed Class Settlement (and the procedures prescribed by the Stipulation for providing that relief) and the relief sought in similar cases in which class certification has been denied or reversed. For example, the Stipulation includes an agreement by Liberty to make payments to certain members of the Settlement Class without any finding (a) that Liberty breached any duty owed to any member of the Settlement Class or (b) that any member of the Settlement Class suffered any legally cognizable injury as a result of any such breach. Accordingly, the Stipulation eliminates the need to resolve the individualized issues of fact and law that lead the Appellate Court of Illinois to reverse the certification of a litigation class in a similar case in Madison County. *See Bemis v. Safeco Ins. Co. of America*, 948 N.E.2d 1054, 407 Ill. App. 3d 1164 (Ill. App. Ct.—5th Dist. 2011), appeal denied, 955 N.E.2d 468, 353 Ill. 1 (Ill. 2011). In addition, the Stipulation provides for prospective relief in the form of an agreed injunction (a) allowing Liberty to continue to use its computerized bill-review system and (b) requiring Liberty to make certain disclosures concerning its use of that system. These terms eliminate the potential conflict of interest cited by an Oregon court in finding that a medical provider had

failed to establish its adequacy to represent the litigation class proposed in another similar action. *See Froeber v. Liberty Mutual Ins. Co.*, No. 00C15234, slip. op. at 4-7 (Cir. Ct. Marion Cty, Or. Feb. 26, 2004).

*5 17. The Court finds that the Potential Class Members listed in Exhibits 1-4 hereto submitted timely Requests for Exclusion.

NOW, THEREFORE, GOOD CAUSE APPEARING THEREFOR, IT IS ORDERED, ADJUDGED AND DECREED THAT:

18. The Court hereby affirms the definition of the Settlement Class for purposes of this Final Judgment and certifies this Action, for settlement purposes only, as a Class Action.

19. The persons listed on Exhibits 1-4 are excluded from the Settlement Class. Except as provided in paragraphs 39-40, below, Plaintiff, Plaintiff-Intervenor, all objectors, and all Potential Class Members other than those listed on Exhibits 1-4 are adjudged to be Settlement Class Members and are bound by this Final Judgment and by the Stipulation of Settlement incorporated herein, including the releases provided for in the Stipulation and in this Final Judgment.

20. The Court overrules all objections to the Stipulation and the proposed Class Settlement and approves all provisions and terms of the Stipulation and the proposed Class Settlement in all respects. The Court specifically finds that the proposed Class Settlement is fair, adequate, and reasonable for the Settlement Class. Liberty and the Settlement Class are ordered to consummate the Class Settlement in accordance with the terms of the Stipulation and this Final Judgment.

21. In light of the covenant in paragraph 28 of the Stipulation, the representations in the Notice of Objector's Effort to Obstruct and Joint Motion for Expedited Entry of Order Addressing Same (filed Feb. 4, 2015), the findings and conclusions stated in the Order Addressing Effort by Objector to Obstruct Proceedings in this Court (entered Feb. 5, 2015), the arguments and evidence presented and considered at the hearing on February 17, 2015, and the entire record before the Court, it is hereby ordered, adjudged, and decreed that Liberty shall:

A. implement the following measures concerning Future Claims, ***except as otherwise required by the final judgment entered in Kerbs on August 24, 2012:***

(i) for a period beginning on the Effective Date and extending five years after the Effective Date, Liberty shall pay or reimburse a Medical Provider's usual and customary charge for a Covered Treatment (subject to applicable Policy Limits) at the lowest of (a) the charge billed by the Medical Provider (the "Billed Charge"), (b) the eightieth percentile charge for that Covered Treatment in the geozip area where the provider is located, as determined through the use of a FAIRHealth medical-charge database or another similar database (the "Eightieth Percentile Charge"), (c) the amount authorized by a state mandated fee schedule or by another applicable law or regulation (the "Fee-Schedule Charge"), or (d) the amount authorized by a written PPN or PPO agreement to which the Medical Provider is a party (the "PPO Charge");

(ii) for a period beginning on the Effective Date and extending five years after the Effective Date, Liberty shall publish on the website libertymutual.com and safeco.com that Liberty will pay or reimburse a Medical Provider's usual and customary charge for a Covered Treatment (subject to applicable Policy Limits) at the lowest of (a) the Billed Charge, (b) the Eightieth Percentile Charge, (c) the Fee-Schedule Charge, or (d) the PPO Charge;

*6 (iii) for a period beginning on the Effective Date and extending five years after the Effective Date, Liberty shall inform Settlement State policyholders in writing at the time of their initial purchase or renewal of a personal auto policy that Liberty will pay or reimburse a Medical Provider's usual and customary charge for a Covered Treatment (subject to applicable Policy Limits) at the lowest of (a) the Billed Charge, (b) the Eightieth Percentile Charge, (c) the Fee-Schedule Charge, or (d) the PPO Charge; and

(iv) for a period beginning on the Effective Date and extending five years after the Effective Date, Liberty shall inform Medical Providers in Settlement States who contact Liberty to confirm coverage of medical treatment under a personal auto policy that Liberty will pay or reimburse a Medical Provider's usual and customary charge for a Covered Treatment (subject to applicable Policy Limits) at the lowest of (a) the Billed Charge, (b) the Eightieth Percentile Charge, (c) the Fee-Schedule Charge, or (d) the PPO Charge; and

B. pay the amounts described in paragraphs 37, 44-47, 55, 57, and 59-61 of the Stipulation, including payments to Class Members and the fees described in paragraph 36, below.

22. In light of the covenant in paragraph 29 of the Stipulation, the representations in the Notice of Objector's Effort to Obstruct and Joint Motion for Expedited Entry of Order Addressing Same (filed Feb. 4, 2015), the findings and conclusions stated in the Order Addressing Effort by Objector to Obstruct Proceedings in this Court (entered Feb. 5, 2015), the arguments and evidence presented and considered at the hearing on February 17, 2015, and the entire record before the Court, it is further ordered, adjudged, and decreed that, *except as otherwise provided by the final judgment entered in Kerbs on August 24, 2012*, Liberty's payment of Future Claims in accordance with paragraph 21(A)(i), above, does not breach any duty or obligation under any applicable law or contract requiring Liberty to pay or reimburse usual, customary, or reasonable charges for Covered Treatments.

23. It is further ordered, adjudged, and decreed that, *except as otherwise provided by the final judgment entered in Kerbs on August 24, 2012*, each and every Settlement Class Member is forever barred and permanently enjoined from asserting, initiating, filing, commencing, prosecuting, or maintaining in any action or proceeding of any kind, whether before any court, agency, or arbitrator, any challenge of any kind to Liberty's payment of Future Claims in accordance with paragraph 21(A)(i), above.

24. And it is further ordered, adjudged, and decreed that, *except as otherwise provided by the final judgment entered in Kerbs on August 24, 2012*, each and every member of the Provider Subclass is forever barred and permanently enjoined from (a) disparaging or criticizing as "unlawful- or unfair Liberty's conduct concerning Future Claims in accordance with paragraph 21(A)(1), above; and/or (b) discouraging any person from purchasing insurance from Liberty because of its conduct concerning Future Claims in accordance with paragraph 21(A)(i).

25. Except as provided in paragraphs 39-40, below, this Action is dismissed in its entirety, on the merits, with prejudice and without leave to amend, and each and every Settlement Class Member is forever barred and permanently enjoined from starting, continuing, litigating, participating in, or receiving any benefits or other relief from any other lawsuit, arbitration, or administrative or regulatory proceeding or order based on or relating to the Released Claims.

*7 26. Upon the entry of this Final Judgment, each Settlement Class Member shall be conclusively deemed to have fully released and discharged, to the fullest extent permitted by law, all of the Released Parties from all of the Released Claims.

27. "Released Claims" means and includes any and all claims, rights, demands, actions, causes of action, suits, debts, liens, contracts, liabilities, agreements, interest, costs, expenses or losses arising from or in any way related to any acts which have been alleged or which could have been alleged in the Action by the Plaintiff, the Settlement Class, and/or any Class Member concerning any Subject Claim, whether at law, in equity, or under any statute or regulation, and including without limitation:

A. any and all claims, demands, actions, causes of action, and/or suits for breach of contract, fraud, misrepresentation, consumer fraud, unfair trade practices, unfair insurance practices, unjust enrichment, and/or bad faith arising from or in any way relating to any Subject Claim,

B. any and all claims, demands, actions, causes of action, and/or suits for direct damages, indirect damages, actual damages, consequential damages, punitive damages, and/or exemplary damages, declaratory or injunctive relief, prejudgment interest, post-judgment interest, costs, expenses, and/or attorneys' fees, whether statutory or non-statutory, arising from or in any way relating to any Subject Claim, and

C. any and all Unknown Claims arising from or in any way relating to any Subject Claim;

provided, however, that the Released Claims do not include (i) any claim for enforcement of the Stipulation and/or this Final Judgment or (ii) *any claim preserved by paragraph 6 on pages 11-12 of the final order and judgment entered in Kerbs on August 24, 2012*. Further, the Released Claims do not include any individual (i.e., non-class) claims—other than the individual claim of Plaintiff Lebanon Chiropractic Clinic, P.C.—that were pending before any court, administrative agency, or arbitration panel on October 31, 2014.

28. “Unknown Claim” means any claim arising out of newly discovered facts and/or facts found hereafter to be other than or different from the facts now believed to be true. The Released Claims defined in paragraph 27 (and released through this Final Judgment as provided in paragraph 26) include Unknown Claims arising from or in any way related to any acts which have been alleged or which could have been alleged in the Action by the Plaintiff, by the Settlement Class, and/or by any Class Member. The Court finds and concludes that Plaintiff and Plaintiff-Intervenor, on behalf of themselves and all members of the Settlement Class, have expressly, knowingly, voluntarily, and validly waived the provisions of any state, federal, municipal, local or territorial law or statute (including, but not limited to, that of the District of Columbia) providing in substance that releases shall not extend to claims, demands, injuries, and/or damages that are unknown or unsuspected to exist at the time a settlement agreement is executed and/or approved by a court. Without limiting the foregoing in any way, the Court finds and concludes that Plaintiff and Plaintiff-Intervenor, on behalf of themselves and all members of the Settlement Class, have expressly, knowingly, voluntarily, and validly waived all rights under [Section 1542 of the California Civil Code](#), which provides as follows:

***8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.**

29. “Released Persons” means (a) Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, The First Liberty Insurance Corporation, Liberty Personal Insurance Company, Liberty Insurance Corporation, Liberty Lloyds of Texas Insurance Company, LM General Insurance Company, LM Personal Insurance Company, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, Safeco Insurance Company of Indiana, Safeco Insurance Company of Oregon, Safeco National Insurance Company, Safeco Surplus Lines Insurance Company, General Insurance Company of America, First National Insurance Company of America, American States Insurance Company, American States Preferred Insurance Company, and American Economy Insurance Company, (b) all of the past and present officers, directors, agents, attorneys, employees, vendors, stockholders, divisions, subsidiaries, and parents of any of the insurers listed in subparagraph 29(a), including without limitation Liberty Mutual Holding Company, Inc., LMHC Massachusetts Holdings, Inc., and Liberty Mutual Group, Inc., and (c) all of the successors, assigns, and legal representatives of any of the entities listed in subparagraph(s) 29(a) and/or 29(b).

30. The names, addresses, policy numbers, and other data concerning Potential Class Members compiled by Liberty in effectuating the Proposed Settlement, the electronic data processing and other record keeping procedures and materials to be utilized by Liberty in identifying the Potential Class Members and effectuating Liberty's other obligations under the Stipulation and/or the Proposed Settlement, and all documents produced by Liberty to Class Counsel and/or other attorneys for plaintiff in this Action constitute highly confidential and proprietary business information. The

confidentiality of all such information (the “Proprietary Information”) shall be protected from disclosure as provided in paragraphs 31-32, below.

31. Except as permitted by paragraph 32, below, no persons other than Liberty's counsel and clerical personnel employed by Liberty's counsel, Class Counsel and clerical personnel employed by Class Counsel, and such other persons as the Court may order after hearing on notice to all counsel of record shall be allowed access to any Proprietary Information.

32. Within 30 days after the Effective Date, Class Counsel shall return to Liberty all Proprietary Information in their possession, custody, or control and any other documents (exclusive of documents filed with the Court) provided by Liberty to Class Counsel or anyone they employed or retained in this Action or any other similar action, and all copies thereof. Within 45 days after the Effective Date, Class Counsel shall deliver a letter to Liberty confirming their compliance with this paragraph. In the event that any Proprietary Information or documents have already been destroyed, Class Counsel will include in that letter the name and address of the person(s) who destroyed the Proprietary Information and/or documents.

*9 33. Class Counsel have stipulated, and the Court agrees, that any representation, encouragement, or solicitation of any person seeking exclusion from the Settlement Class or any person seeking to litigate any Released Claim with Liberty might place Class Counsel in an untenable conflict of interest with the class. Accordingly, Class Counsel shall not engage in any such representation, encouragement, or solicitation.

34. In discovery in this and other matters and in negotiation and review of the Stipulation, Class Counsel have received confidential information regarding Liberty's internal practices and procedures and Liberty's confidential financial information, including financial information compiled solely for purposes of negotiating and implementing the Stipulation and the Settlement. Class Counsel shall keep such information confidential and shall not use it or, unless ordered by a court after notice to Liberty, allow it to be used in any other litigation.

35. The Stipulation, the Settlement and this Final Judgment are not to be deemed admissions of liability or fault by Liberty, or a finding of the validity of any claims in the Action or of any wrongdoing or violation of law by Liberty. The Stipulation and Settlement are not a concession by the parties and, to the extent permitted by law, neither this Final Judgment nor the Stipulation of Settlement or any other documents, exhibits or materials submitted in furtherance of the settlement, shall be offered or received in evidence in any action or proceeding in any court, administrative panel or proceeding, or other tribunal, as an admission or concession of liability or wrongdoing of any nature on the part of Liberty or any other person.

36. Class Counsel shall receive attorneys' fees and costs in the total amount of \$1,200,000.00. In addition, Plaintiff and Plaintiff-Intervenor shall receive an incentive fee in the total amount of \$3,000.00 each. Liberty shall pay these amounts as provided in the Stipulation.

37. Matt Young, Matt Zittel, and Shane Moskop are appointed as Neutral Evaluators to carry out the duties and responsibilities set forth in paragraphs 39-40 and 54 of the Stipulation, the terms and conditions of which are hereby adopted and incorporated herein by reference. The Neutral Evaluators shall be discharged upon the Court's approval of the Final Report of Distribution. Neither Plaintiff, nor Liberty, nor the parties' counsel shall be liable for any act or omission of any of the Neutral Evaluators.

38. As soon as reasonably possible after the completion of all payments to Eligible Class Members pursuant to paragraphs 54-55 of the Stipulation, the parties shall file with the Court a Final Report (together with a proposed order approving such report and discharging the Neutral Evaluator) indicating that distribution in accordance with the terms of the Stipulation and the Court's prior Order has been completed.

39. This judgment finally adjudicates and dismisses with prejudice all claims that were asserted or could have been asserted herein on behalf of any of the persons or entities adjudged to be Settlement Class Members in paragraph 19, above, except the medical providers listed on Exhibits F and G of the Supplemental Affidavit of Kim Schmidt (filed Feb. 13, 2015) with mailing addresses in Massachusetts (the “Massachusetts Provider Subgroup”). Pursuant to [Illinois Supreme Court Rule 304\(a\)](#), the Court finds that there is no just reason for delay and expressly directs that this judgment be entered forthwith, without prejudice to the rights of the Massachusetts Provider Subgroup.

*10 40. Without in any way affecting the finality of this [Rule 304\(a\)](#) Final Judgment as to Settlement Class Members other than the Massachusetts Provider Subgroup, this Court shall retain continuing jurisdiction over this Action for purposes of:

A. Enforcing the Stipulation, the Class Settlement, and this Final Judgment;

B. Hearing and determining any application by any party to the Stipulation for a settlement bar order; and

C. Any other matters related or ancillary to any of the foregoing, including (without limitation) any dispute concerning the meaning or enforcement of any provision of this Final Judgment and any actual or alleged conflict between any terms of this Final Judgment and any terms of the final judgment entered in *Kerbs* on August 24, 2012.

In light of the evidence (described in paragraph 12, above) of a coordinated effort to induce Massachusetts providers to opt out of the Settlement Class, the Court retains plenary jurisdiction over all claims that were asserted or could have been asserted herein on behalf of any of the members of the Massachusetts Provider Subgroup, including (without limitation) jurisdiction to address the validity of requests for exclusion submitted by or on behalf of such members.

Dated: February 23, 2015.

<<signature>>

CIRCUIT COURT JUDGE

2016 IL App (5th) 150111-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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

LEBANON CHIROPRACTIC CLINIC, P.C., Individually and on Behalf of All Others Similarly Situated, Plaintiff–Appellee, v.

LIBERTY MUTUAL INSURANCE COMPANY, Liberty Mutual Fire Insurance Company, Safeco Insurance Company of America, and Safeco Insurance Company of Illinois, Defendants–Appellees (Dr. David Kerbs, Objector–Appellant).

No. 5 - 15 - 0111 Feb. 9, 2016.

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

ORDER

Justice WELCH delivered the judgment of the court:

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

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

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

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

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

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

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

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

¶ 8 In 2008, Safeco became part of Liberty. Thereafter, Lebanon filed the present class action, which was a continuation of the previous *Safeco* litigation. The four-

count class action complaint alleged that Liberty and Safeco had engaged in the systematic reduction in payments for treatments covered under MedPay and PIP coverage even though the submitted charges were the usual and customary medical charges.

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

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

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

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

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

any applicable law or contract requiring Safeco to pay or reimburse the UCR charge for covered treatment.

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

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

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

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

¶ 18 On February 17, 2015, a fairness hearing was held where the trial court heard evidence of testimony from Todd Hilsee, an expert in class notice issues, about the dissemination and adequacy of the class notice. In addition, the court reviewed affidavits, submissions, and objections, and heard arguments from those who attended. Kerbs did not attend the hearing. Thereafter, the court entered a final order and judgment approving settlement and dismissing the action with prejudice. The court found that the notice given was the best notice practicable under the circumstances, that it constituted valid, due, and sufficient notice to members of the settlement class, and that the parties had fully complied with the requirements of due process, the Illinois rules of civil procedure, and all other applicable laws. The court concluded that the proposed settlement was the result of good-faith, arms-length negotiations by the parties and that final approval of the proposed settlement would result in substantial savings

in time and resources to the court and the litigants and would further the interests of justice. The court concluded that, for settlement purposes only, the settlement class met the four statutory prerequisites for the maintenance of a class action claim set forth by section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 2014)). In addition, the court found that the proposed settlement was fair, reasonable, and adequate. Thus, the court entered a final order approving the class settlement. Kerbs appeals.

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

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

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

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

¶ 22 *Chan v. Safeco* collaterally attacks¹ the settlement that was approved in this case by seeking a judicial declaration that the Lebanon settlement is not entitled to full faith and credit in Washington and therefore does not apply to Washington providers. In support of this motion, Kerbs made the same arguments that he has made on appeal here. During the hearing on the motion for declaratory judgment, the Washington court noted that the Lebanon court “appears to have lacked the subject matter jurisdiction to approve a nationwide class for consumer fraud, or breach of contract even under Illinois law.” The court indicated that it was not an expert on Illinois law, but stated that “it looks to me like *Avery v. State Farm Mutual Ins. Co.* seems to require Illinois courts to show that the insurer's acts took place in Illinois and that the insurance policy had identical language in all states,” requirements that cannot be met in the Lebanon case.

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

*7 ¶ 24 The appellees argue that the Washington order was an “advisory order,” and therefore not binding or persuasive authority on this court, noting that the court's discussion about Illinois's lack of subject matter jurisdiction was “prefaced * *

* with the candid acknowledgment that [it was] ‘not an expert on Illinois law’ “ and that the Washington court did not have the benefit of the full briefing by all parties of the present case as this appellate court does. Accordingly, the appellees argue that “speculation about how ‘Illinois courts applying Illinois law’ might rule in this case was clearly not meant as an authoritative statement of Illinois law or applicable federal law.”

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

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

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

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

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

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

¶ 30 Similarly, the United States Supreme Court held that a class representative may file a class action in a jurisdiction that would not otherwise have jurisdiction over absent class members as long as the absent plaintiffs are provided with minimal procedural due process protection. *Phillips*

Petroleum Co. v. Shuts, 472 U.S. 797, 811 (1985). The Court stated as follows:

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

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

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

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

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

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

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

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

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

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

¶ 39 Kerbs also bases his argument on the differences between Illinois and Washington law. Specifically, in his appellate briefs, Kerbs notes that Illinois is an at-fault state where Washington is a no-fault state, Illinois has no comparable PIP statute requiring the payment of all reasonable medical expenses submitted, and Illinois has no comparable insurance regulation requiring insurers to investigate a PIP claim before refusing to pay a claim that is reasonable, even if the amount of the claim is above the 80th percentile of a database of charges. In his objection filed with the trial court, Kerbs noted the following differences between the two states' laws: “Washington providers have rights and causes of action for relief [namely, injunctive relief for future violations of the Insurance Code,] under the Washington Consumer Protection Act not possessed or available to Lebanon as an Illinois provider” and that the “Washington Insurance Code” requires the payment of all reasonable and necessary medical expenses incurred as a result of a covered accident.

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

simply divide the class into subclasses); see also *Purcell or Wardrobe Chartered v. Hertz Corp.*, 175 Ill.App.3d 1069, 1074–75 (1988) (a class action may still be maintained despite conflicting or differing state laws as the court may simply choose to divide the class into subclasses).

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

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

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

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

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

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

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

further the interests of justice. Thus, the procedural *Korshak* factors weighed in favor of approving the class settlement.

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

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

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

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

*14 ¶49 Here, in support of his objection filed with the trial court, Kerbs identified the following relief that was sought by Lebanon that was antagonistic to the interests of the Washington providers: that there was no consideration paid for the future waiver provision; that the future waiver was contrary to Washington public policy; that Washington law requires payment of all reasonable charges; and that Washington providers receive nothing under the Lebanon

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

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

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

¶ 52 Kerbs argues that the settlement was against the public policy of Washington. Specifically, he argues that the inclusion of the future claims was contrary to the Washington Insurance Code and the Washington Consumer Protection Act. A settlement agreement may include a waiver of future claim provision even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590

(9th Cir.2010); *Froeber*, 193 P.3d at 1005. Thus, claims not alleged in the underlying class action complaint can be properly released where those claims depended on the same set of facts as the claims that gave rise to the settlement.

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

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

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

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

¶ 57 Affirmed.

Presiding Justice SCHWARM and Justice MOORE concurred in the judgment.

All Citations

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

Footnotes

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

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Respondents' Supplemental Brief* in Supreme Court Cause No. 95416-0 to the following:

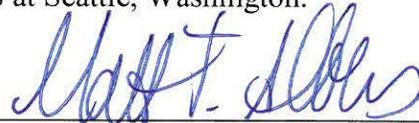
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 29, 2018 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

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Superior Court Case Number: 15-2-21662-7

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