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NO. 95416-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, INC.,

Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY
and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This appeal asks this Court to determine the standard Washington courts employ to examine, on collateral attack, the sufficiency of the due process procedures used by sister courts in reviewing and approving class action settlements that purport to release claims of Washington residents. This is an issue of first impression for this Court.

The Court of Appeals in this case adopted and applied an unduly narrow scope of review on collateral attack. If affirmed, this standard would put Washington on the far end of the spectrum of cases with among the most restrictive interpretations of the review permitted on collateral attack. The Court of Appeals should be reversed because the standard it adopted conflicts with binding U.S. Supreme Court precedent and with the persuasive, well-reasoned decisions of many circuit courts, including the Ninth Circuit in *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010).

The stakes of this question are significant. At issue are the due process rights of Washington citizens and the due process clause as an important check on the various states' codifications and applications of Rule 23, which governs class actions and sets the parameters for the courts' review and approval of class settlements which bind and release important claims and rights of absent class members.

This present matter is an illustrative example of the stakes of this

issue for Washington citizens. It involves a collateral attack of a nationwide class action settlement, titled *Lebanon Chiropractic v. Liberty Mutual Insurance Co.* (“*Lebanon*”) that was entered into in one of a small number of counties and state courts that has been documented as a “magnet” for multi-state and nationwide class actions because of the ease of settlement approval. *See infra* n. 17.

The *Lebanon* settlement, entered into only four months after the case was filed, contains a broad release of claims for reductions made by Liberty Mutual and its subsidiary Safeco to any bill of any healthcare provider anywhere in the country using a database to automatically limit payments on Personal Injury Protection (“PIP”) or MedPay claims. The nationwide class was represented by a single Illinois healthcare provider, Lebanon Chiropractic. The settlement released the claims of providers across the country without *any* analysis by the parties or the court of the various states’ substantive laws, including the Washington PIP statute and regulation which uniquely require payment of “all reasonable” bills and investigation of a bill before failing to pay it in full. Washington providers were not represented by a Washington provider or subclass in the settlement, even though they were subject to a unique carve-out that gave them nothing under the terms of the settlement for their Safeco reductions.

Under either a narrow or broader scope of review on collateral

attack, this Court should affirm the rulings of the trial court that 1) the Illinois trial court did not *expressly and specifically* consider and enter findings deciding that the Illinois class representative was an adequate representative of Washington providers on their legal claims under Washington law, therefore collateral review of the due process protections of the settlement process was appropriate; and 2) the Illinois representative was not in fact an adequate representative of Washington providers and therefore the release of claims approved by the Illinois courts could not be applied to Washington providers consistent with due process.

II. ISSUES PRESENTED ON REVIEW

This Court granted review on two sets of issues: 1) whether the Commissioner erred in granting discretionary review using an overly expansive interpretation of RAP 2.3; and 2) whether the Court of Appeals adopted and applied an improperly narrow scope of review for collateral attack asserting lack of due process in a sister state's class settlement approval process. This supplemental brief focuses on the latter issues.

III. STATEMENT OF THE CASE

Chan filed this class action in 2015 alleging an unfair practice

under the Washington Consumer Protection Act. CP 1-31.¹

About one year prior to Chan filing suit against Liberty, Liberty and its subsidiary Safeco entered into a nationwide settlement in Illinois state court with an Illinois chiropractor, Lebanon Chiropractic. In the October 2014 settlement, Lebanon tried to settle all claims of nearly every health care provider in the nation for reductions made to their medical bills by Liberty or Safeco under any auto policy issued in any state for a period going back seven years and forward five years. CP 1456-1490. Lebanon's attorneys were paid over \$1 million in the settlement, which was entered into four months after the case was filed.

Under the settlement, Liberty and Safeco agreed to pay 50% of the reductions to class members' bills prior to 2011 using the Ingenix database.² CP 1474. But Washington providers got nothing for their Safeco reductions based on a prior settlement in Washington. CP 1475. Even though the *Lebanon* settlement released past claims until October 31, 2014, Liberty and Safeco paid *nothing* for any reductions to providers'

¹ The Washington Personal Injury Protection (PIP) statute requires that auto insurers pay "all reasonable" bills for medical treatment incurred by a covered person. RCW 48.22.095; 4.22.005(7). The Washington Administrative Code requires that insurers reasonably investigate a claim before refusing to pay the claim in full. WAC 284-30-330. Instead of paying all reasonable bills, *see Durant v. State Farm Mut.*, 2018 Wash. LEXIS 355, No. 94771-6 (June 7, 2018), Liberty automatically reduces providers' bills, using a computer, to no more than the 80th percentile of a database of provider charges. Chan alleges that this practice is unfair under the Washington CPA.

² Liberty used Ingenix until 2011 when it began using a successor database, FAIR Health.

bills between 2011 and 2014 using the FAIR Health database. *Id.*

In January 2015, Dr. David Kerbs, a Washington provider who was the plaintiff and class representative in the *Kerbs v. Safeco Ins. Co. of Ill. et al*, King Co. Sup. Ct. Case No. 10-2-17373-1, class settlement in Washington, filed an objection in the Illinois state court. The Illinois trial court approved the settlement without specifically addressing Dr. Kerbs' objections and made no specific factual findings that Lebanon was an adequate representative of *Washington* providers. CP 1654, 1656. The Illinois court simply added language to the agreement that it would not be interpreted to conflict with the *Kerbs* agreement. CP 1648-1676.³

Kerbs appealed and the Illinois Court of Appeals affirmed the trial court's approval of the settlement. But the appeals court also failed to address the adequacy of representation of Washington providers or the significant differences in substantive law between the Washington and Illinois PIP statutes. CP 4178-4188. The court "note[d]" that Kerbs allegedly failed to identify outcome-determinative differences between Washington law and Illinois law. CP 4185 (¶ 40). But then the appeals court stated that under Illinois law it does not matter whether there are

³ In its Answer to Petition for Review ("Answer"), as in the proceedings below, Liberty does not (and cannot) point to any findings by the Illinois trial court addressing the *specific* objections or legal claims of *Washington* providers. Rather, Liberty points only to the court's generic statements that all objections are overruled and Lebanon "will fairly and adequately protect the interests of the Settlement Class." Answer at 4-5 & n.3.

conflicting or differing state laws at issue. Instead, it concluded that a class action may be maintained under Illinois law *in the face of* conflicting state laws, and all that matters is the settlement overall was fair, adequate and reasonable. *Id.* Concerningly, the court cited Illinois cases holding that subclasses are necessary in the face of conflicting state laws, *id.*, but then failed to scrutinize that there was no Washington subclass or class representative here or whether subclasses were necessary.⁴

In June 2016, the Hon. Catherine Shaffer held in this case, in a detailed and well-reasoned decision, that the *Lebanon* release did not bar Chan’s claims in Washington. The trial court emphasized that the Illinois court decisions lacked the specific factual findings regarding adequacy of representation under the due process clause required in *Hesse* and that it was therefore engaging in a “narrow” review under *Hesse*, *Epstein II*, and *Matsushita*⁵, which is limited to “assessing the adequacy of the procedural due process protections in the prior litigation.” (6/24/16) RP at 78-79.

The trial court concluded that the legal claims of Washington and

⁴ Even if a class settlement can be approved under Illinois law in the face of conflicting states’ laws (although the Illinois Court of Appeals itself cited cases requiring subclasses in that instance), Washington cannot give full faith and credit to a constitutionally infirm judgment. *Kremer infra*. The U.S. Supreme Court has ruled that class counsel cannot adequately represent groups of class members with divergent interests and claims, and that at a minimum under due process, subclasses with individual representatives must be created to represent the divergent interests of the class members. *Amchem, infra*.

⁵ *Epstein v. MCA, Inc. (Epstein II)*, 179 F.3d 641 (9th Cir. 1999); *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873 (1996).

Illinois providers were materially different⁶; the Illinois trial court failed to analyze or account for these differences by creating subclasses; and the *Lebanon* plaintiff did not adequately represent Washington providers and, therefore, the settlement's release could not be applied to bar the claims of Washington providers. RP (6/24/16) at 186-201.⁷

The Court of Appeals reversed and held the settlement is entitled to full faith and credit. This Court granted Chan's Petition for Review.

IV. ARGUMENT

A. The Court of Appeals adopted an improperly narrow standard for collateral attack of a class action settlement entered in a sister state based on lack of due process

The Full Faith and Credit Clause of the U.S. Constitution requires a Washington court to enforce the judgment entered in a foreign state's

⁶ See RP (6/24/2016) at 198 (reasoning that Washington PIP statute mandates auto insurers pay "all reasonable and necessary" bills and insurers are required to reasonably investigate a claim before refusing to pay in full, and that "it really doesn't seem to be disputed that Illinois does not have a comparable requirement.") It is these underlying substantive laws that give meaning to what an "unfair practice" is in Washington and shape the strength and specifics of Washington providers' CPA claims. These substantive laws do not have equivalents in Illinois. See *Hesse*, 598 F.3d at 591 (superficial similarity between the two class actions is not enough). As the trial court correctly found, "This is key to the plaintiffs' claims here and in *Lebanon*, because the requirements of reasonable investigation and the existence of a database, which is the sole method of determining whether or not a claim is reasonable, really are at odds with each other in a way that they are not in Illinois." RP (6/24/2016) at 199.

⁷ Liberty cites to a Massachusetts trial court decision which held, contrary to the trial court here, that the Illinois courts addressed the due process issues raised here. Answer at 6. Liberty provides this Court with no reason why it should defer to a Massachusetts trial court over the detailed reasoning and findings of a Washington trial court.

court, *unless* doing so would violate federal procedural due process.⁸ In the context of class actions, procedural due process has three requirements: 1) notice; 2) opportunity to opt out; and 3) adequate representation.⁹

The Court of Appeals here held that under full faith and credit principles, the scope of collateral review of a sister state’s class settlement approval is exceedingly narrow and limited to whether the “same due process challenge was raised, litigated, and decided in the sister state.” Op. at 1. If so, “Washington courts do not second guess the analysis and resolution by the trial and appellate courts in the sister state.” *Id.*

Petitioners respectfully argue that the Court of Appeals adopted the wrong standard. The standard the Court of Appeals adopted is *not* mandated by applicable Washington precedent, is contrary to U.S. Supreme Court authority and the persuasive reasoning of other circuit courts and the trial court here, and does not sufficiently protect the important due process rights of Washington citizens.

1. Tolson and OneWest Bank are inapplicable here

In concluding that Washington courts do not second guess the analysis of the courts of the sister state if the issue was “raised, litigated,

⁸ See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 102 S.Ct.1883 (1982).

⁹ *Phillips Petroleum v. Shutts*, 472 U.S. 797, 808, 105 S.Ct. 2965 (1985).

and decided in the sister state,” Op. at 1, the Court of Appeals looked almost exclusively to two factually and legally distinct Washington state cases. See *In re Estate of Tolson*, 89 Wn.App. 21, 947 P.2d 1242 (1997); *OneWest Bank FSB v. Erickson*, 185 Wn.2d. 43, 367 P.3d 1063 (2016).¹⁰

Tolson and *OneWest Bank*, which involved single plaintiffs who personally litigated issues previously in a foreign court, have little applicability to situations like the instant case involving an absent plaintiff collaterally attacking a class action settlement approved by a sister court, and do not speak at all to the proper scope of review on collateral attack of the more nuanced due process protections of a class settlement.¹¹

¹⁰ In *Tolson*, a decedent’s son had been a party to a California case that fully litigated the issue of decedent’s domicile. The son later collaterally attacked the domicile decision in Washington and the Court of Appeals held that “principles of res judicata attach to the jurisdictional ruling...[A] judgment regarding domicile cannot be collaterally attacked...by one who was a party to the proceeding.” 89 Wn.App. at 32. In *OneWest Bank*, a decedent’s daughter, who had been party to an action in Idaho where the issues of the Idaho court’s jurisdiction over her father and the determination of his domicile were litigated and decided, collaterally challenged the Idaho court’s determination. 185 Wn.2d at 57. This Court ruled that because the decedent’s daughter herself had litigated jurisdiction in Idaho, she was barred by res judicata from re-litigating in Washington. *Id.*

¹¹ The most factually and legally similar case in Washington is *Nobl Park, L.L.C. v. Shell Oil Co.*, 122 Wn. App. 838, 95 P.3d 1265 (2004), a Division II case involving a collateral attack of a class action settlement. *Nobl Park* held that “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.” *Id.* at 845. (emphasis added). In *Nobl Park*, the court undertook collateral review to determine whether notice was proper and the plaintiff was an adequate representative. *Nobl Park* stands *for*, not against, the right to collaterally review the due process protections of the sister state’s approval process.

2. Binding U.S. Supreme Court and persuasive circuit court authority holds that only a meaningful analysis of adequacy of representation can preclude collateral attack

Instead of relying on the factually and legally dissimilar *Tolson* and *OneWest Bank*, the Court of Appeals should have relied on binding authority from the U.S. Supreme Court and persuasive authority from multiple circuit courts involving collateral attacks of class action settlements approved in a sister state based on lack of due process.

Liberty and the Court of Appeals insist that as long as the issue of adequacy of representation was “raised, litigated, and decided” in the sister court, a Washington court may not second guess that decision, *regardless* of whether the issue was “decided” in a meaningful fashion or whether, instead, the objection was summarily overruled.¹² But Supreme Court precedent and persuasive Ninth and other circuit authority holds that this standard is too narrow and that only a *meaningful analysis* of the requirements of due process can preclude later collateral attack.

The Supreme Court has held that “[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.”¹³ The Ninth Circuit in *Epstein*, 179 F.3d at 641

¹² Op. at 8 (issue has been “decided” if “the sister state court ruled on that objection.”).

¹³ *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482, 102 S. Ct. 1883, 1898 (1982).

(*Epstein II*), following instruction and remand from the Supreme Court in *Matsushita, supra*, reiterated *Kremer's* holding that a constitutionally infirm judgment is not entitled to full faith and credit, and held that “limited collateral review...[is] appropriate, therefore, to consider 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 649. This narrow collateral review does not include reconsideration of the merits, but *does* examine whether the procedures provided satisfy procedural due process requirements, which in a class action settlement includes adequacy of representation (at issue here). *Id.* The Ninth Circuit noted that the Supreme Court, in conducting this review in *Matsushita*, had satisfied itself that due process had been met by referencing the sister court’s findings on these issues. *Id.* at 649. But that does not mean, as the Court of Appeals determined here, that *any findings at all*, no matter how conclusory, suffice.

In *Hesse* – which post-dates *Epstein II* (on which the Court of Appeals focused) – the Ninth Circuit explained in more detail when a sister court’s due process findings are sufficient to preclude later collateral review. *Hesse* held that when the foreign court made *specific and express* findings regarding adequacy of representation “as to the relevant... claims,” such express findings should generally satisfy the court on

collateral review that due process was met. 598 F.3d at 588. But when the sister court did *not* make *specific* findings as to the *specific* class members and claims at issue in the collateral attack, it is appropriate to review the sister court’s judgment “to determine whether, in the absence of a specific finding by the court, its judgment satisfies due process as to the claims at issue here.” *Id.* Faced with this clear and sensible standard, Liberty has gone to great lengths to distinguish and limit *Hesse*, but none of its critiques are founded.¹⁴

The Second Circuit has similarly held that collateral review is permissible, even under a limited review, where the approving court did

¹⁴ Liberty argues (Answer at 13), and Division I stated (Op. at 8), that *Hesse* held collateral review is only permissible in the absence of *any* due process determinations. That is not what *Hesse* says; *Hesse* states that in the absence of *specific* findings about *particular* claims at issue, limited collateral review is appropriate. 598 F.3d at 588 (“The Kansas court...did not make an explicit finding that the *Benney* 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. Because that question was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review.”).

Liberty also argues that *Hesse* is “inapposite” because the federal claims in *Hesse* were never mentioned in the sister state’s litigation, whereas, Liberty contends, the Washington CPA claims were “expressly pled” in *Lebanon*. But the only reference to Washington law and the claims of Washington providers during the *Lebanon* proceedings was a single footnote in the Complaint alleging that claims of non-Illinois insureds were being brought under the consumer protection statutes of their various states. CP 4586.

Finally, Liberty argues that *Skilstaf Inc. v. Caremark Corp.*, 669 F.3d 1005, 1024 (9th Cir. 2012), limited *Hesse*. This is incorrect. As the trial court correctly analyzed (RP (6/24/16) at 79-80), *Skilstaf* did not limit or create exceptions to *Hesse*, it simply distinguished *Hesse* as inapplicable in that case because Skilstaf himself had objected and appeared at the Massachusetts fairness hearing and the court had issued an opinion with specific findings regarding Skilstaf’s objections. 669 F.3d at 1014. Therefore, he was barred by collateral estoppel, which is not present here. *Id.* at 1025 (noting that the issue of a collateral attack by an absent class member was *not* before the court).

not address adequacy of representation *as to a specific subset of a class*.

Stephenson v. Dow Chem. Co., 273 F.3d 249, 258 & n.7 (2d Cir. 2001):

Here, neither the district court nor this Court has determined the adequacy of representation with respect to these plaintiffs whose injuries did not arise until after the settlement expired. Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard.

The Fifth and Sixth Circuit have adopted an even broader standard, which recognizes that it is incumbent upon the *reviewing* court, not the certifying court, to determine whether the rights of absent class members were protected by sufficient due process procedures.¹⁵ In *Gooch*, the Sixth Circuit held:

We conclude that...we may review the substance of whether that settlement complied with the Due Process Clause...It is incumbent upon us to apply the same scrutiny to state-court judgments that the Supreme Court would apply. Even though reconsidering whether the class judgment complied with the due process clause may not promote judicial "efficiency" or protect the "finality" of the original judgment...it is a due-process imperative that we are not free to ignore.

672 F.3d at 420-422. *Gooch* also aptly noted that a standard such as the one adopted by the Court of Appeals here or by the Third Circuit¹⁶ that bars collateral review if adequacy of representation was "raised, litigated, and decided" does *not apply* if the reviewing court's reference to adequacy

¹⁵ See *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Gooch v. Life Investors Ins. Co. of Am.* 672 F.3d 402 (6th Cir. 2012).

¹⁶ See *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141 (3d Cir. 2005).

was merely a “passing rubber-stamp reference.” 672 F.3d at 421-22.

This Court should not allow generic or “rubber-stamp” findings on the elements of due process to preclude Washington courts from analyzing whether a sister court’s procedures *in fact* comported with due process.

3. The narrow standard adopted by the Court of Appeals harms the public interests of Washington citizens

The narrow standard adopted by the Court of Appeals – which precludes all collateral review of the due process protections of a sister state’s settlement approval if the sister state “decided” the constitutional issue at hand, even if that “decision” was a general “rubber-stamp” of the settlement – jeopardizes the interests of Washington citizens.

This case involves a collateral attack of a nationwide class action settlement that was entered into in St. Clair County, Illinois, one of a small number of counties and state courts that is a “magnet” for multi-state and nationwide class actions.¹⁷ As the Senate noted in passing the Class Action Fairness Act of 2005 (“CAFA”),

current law enables lawyers to “game” the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class

¹⁷ See generally, Beisner & Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2001); *Litigation Imbalance III, Madison County Strikes Back: Revealing Trends in Court Dockets Demonstrate Lawsuit Abuse in Select Counties*, Civil Justice Study, April 2015 (available at http://www.instituteforlegalreform.com/uploads/sites/1/ICJL_Litigation_Imbalance_III_Study.pdf?phpMyAdmin=ixWosBsjNazOMF-nz%2CnxfwkrbH2).

member interests. In this environment, consumers are the big losers: In too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel.¹⁸

The Supreme Court in *Shutts* warned that the certifying court is not in the position to adjudge the constitutionality and res judicata effect of its decisions. 472 U.S. at 805. And the risk of granting automatic full faith and credit to the decision of a sister state without evidence that the sister state granted reasoned consideration to the requirements of due process is especially acute in settlements arising from counties known to “rubber stamp” broad settlement agreements.

Washington has a long history of zealously protecting the interests of Washington consumers and citizens. This Court can best protect Washington citizens by adopting a standard, like *Hesse*, that only precludes collateral attack if the sister court made *specific and express findings* regarding the requirements of due process such that the Washington court is satisfied that the sister court, in fact, adopted procedures that afforded absent class members due process. This Court could go further – in keeping with the Fifth and Sixth circuits – and find that Washington courts are permitted to review anew on collateral attack

¹⁸ *The Class Action Fairness Act of 2005*, Sen. Rpt. 109-14 at 4.

whether the sister state's procedures comported with due process and whether the sister court considered the interests of absent class members.

Liberty argues that allowing collateral attack undermines finality. But "[e]ven though reconsidering whether the class judgment complied with the due process clause may not promote judicial "efficiency" or protect the "finality" of the original judgment... it is a due-process imperative that we are not free to ignore." *Gooch*, 672 F.3d at 420-422.

B. The Court of Appeals erred in determining that the *Lebanon* release is entitled to full faith and credit

Even under the limited review that the Court of Appeals adopted, the court erred in its conclusions. The Illinois trial court *did not* "decide" the issue of the adequacy of Illinois provider Lebanon to represent *Washington* providers, given that it 1) made no *specific* findings as to adequacy for *Washington* providers; and 2) did not address the need, nor provide for, subclasses, as required under Supreme Court precedent.

1. The Illinois trial court did not "decide" adequacy of representation for Washington providers.

The Illinois trial court *did not* "decide" the issue of the adequacy of Lebanon to represent *Washington* providers, and collateral review should not have been precluded. The trial court simply made a generic conclusion that all objections are overruled and "Plaintiff Lebanon... will fairly and adequately protect the interests of the Settlement Class." CP at

4154. This finding did not address the specific interests or unique claims of Washington providers, or Lebanon’s adequacy to represent them.¹⁹

The Court of Appeals should be reversed and the trial court affirmed. The trial court was in the best position to decide whether “in context” (Op. at 10) the Illinois trial court’s decision was or was not sufficient to satisfy the court that the Illinois court adopted procedures that comported with due process.²⁰ The trial court determined that the findings were insufficient and this ruling should not have been disturbed.

Liberty and the Court of Appeals rely heavily on the argument that the Illinois trial court necessarily adjudicated Dr. Kerbs’ objections in summarily rejecting them. Answer at 5 n.3. But Judge Shaffer thoroughly considered and dismissed this argument.²¹ As the trial court concluded, the

¹⁹ *Cf. Hesse*, 598 F.3d at 588 (because the question of whether the *Benney* Plaintiff was an adequate representative as “as to the B&O Tax Surcharge claims...was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review.”).

²⁰ Before the trial court concluded that the Illinois court *did not* make sufficient express findings regarding Lebanon’s adequacy to represent Washington providers, the trial court reviewed a voluminous record of documents from the *Lebanon* case, multiple sets of briefings from the parties, and heard three different oral arguments on the issue, including the details of the *Lebanon* trial court proceedings and Dr. Kerbs’ objection and appeal. *See Appellee’s Resp. Brief to Court of Appeals* at 6-10.

²¹ *See RP (6/24/2016)* at 195-96:

Dr. Kerbs didn't raise the same arguments being raised here... He did argue that Lebanon Clinic had a conflict of interest with Washington members. But the problem with looking at that argument as being somehow an indication that the Illinois court addressed these objections is that the Illinois court didn't address that objection that the Lebanon Clinic had a conflict of interest with Washington providers. Rather the Illinois court just carved the *Kerbs* class out of the Lebanon settlement...

issues Chan raises on collateral attack were not actually “litigated and determined.” *Id.* There was “at best, a passing rubber stamp reference to the adequacy of representation in the final order approving settlement.” *Id.* This conclusory finding is insufficient to require deference. The trial court must make *express and specific* findings regarding the adequacy of representation under the due process clause, or else the Washington court must be permitted to engage in limited collateral review to protect the important interests of Washington citizens.

Nor did the Illinois Court of Appeals remedy the Illinois trial court’s lack of specific and express findings as to the adequacy of Lebanon to represent Washington providers, as discuss *infra* at 5-6.²²

2. The Illinois courts did not conduct the required analysis of whether subclasses were required

The Illinois courts’ analysis and procedure was also constitutionally deficient under the due process clause because they did not conduct the required analysis of whether subclasses would be necessary in light of differences in the legal claims of class members.

Subclasses are *mandatory* when a class settlement includes distinct

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

²² In any event, a court of appeals is not a fact-finding body and cannot remedy the lack of factual findings by the trial court prior to approving the class settlement with factual findings of its own.

groups of class members.²³ “Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups.”²⁴

As Judge Shaffer found here, the Illinois appellate court even cited to cases requiring subclasses, but then failed to analyze whether subclasses would be required to protect the interests of Washington providers. RP (4/15/2016) at 107-108:

I find it very disquieting that the Illinois appellate court cites to cases requiring subclasses and yet never addresses why it is that subclasses are required. Surely, it is not too much to ask a sister court to appoint a class representative from the group of Washington claimants, who can actually represent what Washington law requires.²⁵

The Court of Appeals left this important consideration out of its analysis entirely, and ignored Judge Shaffer’s finding that subclasses were

²³ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627, 117 S. Ct. 2231 (1997) (rejecting “global compromise” that included two distinct groups of class members affected by current or future asbestos-related medical issues because the settlement had no subclasses and therefore “no structural assurance of fair and adequate representation for the diverse groups and individuals affected”).

²⁴ *Id.* (citing *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F.2d 721, 742-743 (2nd Cir. 1992)).

²⁵ Even the existence of the *Kerbs v. Safeco* settlement and the fact that, because of that settlement agreement, Lebanon agreed that Washington providers would get *no* additional consideration for any Safeco reductions, illustrates that Washington providers were differently situated, with unique claims and concerns, and needed an appointed representative to represent their interests.

necessary for the *Lebanon* settlement procedures to comport with due process. The lack of subclasses alone is reason enough to find that the settlement did not comport with due process and that its release cannot bar the claims of Washington providers.²⁶

V. CONCLUSION

This Court has not yet spoken on the proper scope of a collateral review, based on lack of due process, of a sister state's class action settlement approval process. Petitioners ask that this Court adopt a standard that values due process protections over finality and ensures that Washington citizens are only bound by class action settlements entered into in sister courts if the sister court *meaningfully* addressed their interests and claims through procedures that comported with due process.

²⁶ Liberty argues that Chan failed to preserve this issue on appeal because it “was not the central thrust of Chan’s argument to Division I.” Answer at 18. This is not the legal standard for preservation of issues and Liberty cites no authority; its argument must be disregarded. In any event, Chan *did* raise this issue on appeal. *See* Resp. at 8, 10, 22-23.

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

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