## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-60217 Summary Calendar

NORRIS WOODARD and LOIS WOODARD,

Plaintiffs-Appellants,

versus

LIBERTY NATIONAL LIFE INSURANCE COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court For the Southern District of Mississippi (1:93-CV-440)

(August 25, 1994)

Before JOLLY, WIENER, and STEWART, Circuit Judges.
PER CURIAM:\*

Plaintiffs-Appellants Norris and Lois Woodard appeal the district court's dismissal without prejudice of their suit for monetary damages against Defendants-Appellees Liberty National Life Insurance Co.; its parent, Torchmark Corporation; and its

<sup>\*</sup>Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

agent, Willard Mason (collectively, Liberty National). Finding no abuse of discretion, we affirm and dismiss the appeal.

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## FACTS AND PROCEEDINGS

Norris Woodard became insured under a family cancer policy with Liberty National in the early 1970s. In June 1990, Plaintiffs were persuaded to update their cancer policy with Liberty National. Plaintiffs state that they were led to believe that if they did not change policies, they would lose all of their cancer insurance coverage. After "updating" his cancer insurance policy, Mr. Woodard was diagnosed as suffering from Hodgkin's disease. He asserts that he has expended \$90,000 of his own funds for medical expenses that would have been covered expenses under his previous insurance policy with Liberty National.

In October 1992, Charlie Robertson filed a class action, individually and on behalf of class members, against Liberty National<sup>1</sup> in state court in Barbour County, Alabama. Robertson alleged fraud, misrepresentation, and other tortious conduct by Liberty National in the process of convincing him and others like him to switch to the new cancer insurance policy.<sup>2</sup> Robertson

<sup>&</sup>lt;sup>1</sup>Again, Liberty National refers collectively to Liberty National Life Insurance Co., Torchmark Corporation, and Willard Mason. The class action lawsuit named another defendant, Liberty National Insurance Co., which is not a named defendant in this action.

<sup>&</sup>lt;sup>2</sup>Specifically, Robertson alleged that Liberty National misrepresented the benefits afforded by the new policy, failed to disclose the monetary limits and exclusions imposed by the new

sought 1) certification of the class under Alabama Rule of Civil Procedure 23(b)(2), 2) declaratory and injunctive relief requesting that the new policies afford benefits available under the previous policies, and 3) reimbursement of back premiums.

The court issued an order certifying the class pursuant to Alabama Rule 23(b)(2) with respect to claims for 1) declaratory relief, 2) injunctive relief for policyholders who had not suffered from cancer-related expenses, and 3) monetary damages for policyholders who had suffered from cancer-related expenses. Robertson, who had not been diagnosed with cancer and had made no claims under either cancer insurance policy at the time the suit was filed, was named the sole class representative.

In June 1993, the court entered an order on a proposed settlement in the Robertson class action. The order clarified the definition of the class, preliminarily approved a settlement, and enjoined class members from commencing or prosecuting other actions involving claims that were proposed to be released pursuant to the settlement agreement. The class was defined to include all persons who had been insured under a Liberty National cancer insurance policy issued on or before August 29, 1986, paid and in force after that date, that provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits. The proposed settlement included all claims relating to

policy on some benefits, and failed to inform policyholders that such benefits were provided without monetary limits or exclusions under the old policy.

allegations of fraud, misrepresentation, and other tortious conduct by Liberty National. The order required any class member who objected to 1) the maintenance of the action as a class action under Rule 23(b)(2), 2) the findings and orders of the court, 3) the settlement, or 4) the binding effect of the settlement on class members, etc., to intervene and to file objections before October 10, 1993, or be barred from doing so or relitigating claims in any other action or proceeding.

Late in June 1993, the court also permanently enjoined Liberty National from taking any action in any other proceeding filed by a class member other than filing appropriate motions and notices to inform the courts and parties of the pending <u>Robertson</u> class action and proposed settlement.

In August 1993, Plaintiffs filed this action in Mississippi state court in contravention of the <u>Robertson</u> court's order enjoining class members from filing suit against Liberty

National, alleging the same claims that had been asserted and were then pending in the Alabama class action. Shortly thereafter, Plaintiffs filed objections and petitioned to intervene in the <u>Robertson</u> class action. Liberty National timely removed Plaintiffs' case from Mississippi state court to the United States District Court for the Southern District of Mississippi, alleging fraudulent joinder of the resident agent and asserting diversity jurisdiction. Liberty National filed a notice))consistent with the court order in Alabama))of the prior pending class action, injunction, and orders entered therein.

Liberty National also moved to dismiss or to stay the suit, asserting that Plaintiffs' claims were included in and duplicative of claims asserted by class members in the <u>Robertson</u> class action then pending in Alabama state court.

The district court dismissed the suit without prejudice in March 1994. Its decision was in part based on comity, given the injunctions in the <u>Robertson</u> class action, but rested primarily on abstention principles enunciated in <u>Colorado River Water</u>

<u>Conservation District v. United States</u> and <u>Moses H. Cone</u>

<u>Memorial Hospital v. Mercury Construction Corp.</u>

Plaintiffs timely appealed, raising several claims. They first assert that the district court erred by basing the dismissal on the Robertson class action, urging that that action violated Plaintiffs' due process rights by not allowing them to opt out of the class. Plaintiffs argue that the maintenance of the Robertson class action as a Rule 23(b)(2) class action is improper because it contains a sub-class of individuals who seek monetary rather than equitable relief. Accordingly, Plaintiffs insist that the "sub-class" of which they are members should have been certified as a Rule 23(b)(3) class, which would allow class members to opt out. Moreover, Plaintiffs argue that Robertson, the sole class representative in the state suit, had not suffered cancer-related expenses and thus was not an adequate class representative for members seeking monetary damages. Plaintiffs

<sup>&</sup>lt;sup>3</sup>424 U.S. 800 (1976).

<sup>&</sup>lt;sup>4</sup>460 U.S. 1 (1983).

ask this court to hold unconstitutional the order certifying the class under Rule 23(b)(2) and to allow them to press their claim in federal court. These assertions are not new. Plaintiffs raised these arguments before the district court in response to Liberty National's motion to dismiss or stay. Before that, Plaintiffs also objected to the <u>Robertson</u> orders and sought intervention in that action based precisely on these rationales.

In May 1994, subsequent to the dismissal of this action, the Alabama state court entered a final judgment, including findings of fact and conclusions of law, confirming its Rule 23(b)(2) certification and approving the settlement as modified in the Robertson class action. In addition, the court entered Rule 23(b)(1)(A) and 23(b)(1)(B) certifications))but not a Rule 23(b)(3) certification. Class action members who objected and intervened in Robertson))which group presumably includes Plaintiffs))have appealed the Robertson court's decision.

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## ANALYSIS

Plaintiffs ask this court to hold that the Alabama state court's Rule 23(b)(2) class certification violated their constitutional due process rights. Plaintiffs do not contest the district court's findings or conclusions; neither do Plaintiffs

<sup>&</sup>lt;sup>5</sup>As the class action judgment became final after this case was dismissed in federal district court, the defendants did not assert below)) and the district court did not determine)) that the present action is barred by res judicata.

assert that the court abused its discretion<sup>6</sup> when, in deference to then-pending parallel state court litigation, it dismissed Plaintiffs' suit after applying the exceptional circumstances test for absention outlined in <u>Colorado River</u> and augmented in <u>Moses H. Cone</u>.<sup>7</sup> Accordingly, we find no abuse of discretion and affirm the dismissal.

To the extent that Plaintiffs, in this appeal, ask us to consider a collateral attack on the class certification order under Alabama Rule of Civil Procedure 23(b)(2) or the appointment of the sole class representative, we decline their invitation. We perceive it to be a classic effort to fit a square peg in a round hole. Plaintiffs' proper recourse is an appeal to the Alabama Supreme Court, a course of action that they appear to be pursuing. Accordingly, their appeal to this court is

<sup>&</sup>lt;sup>6</sup>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Allen v. Louisiana State Bd. of Dentistry, 835 F.2d 100, 104 (5th Cir. 1988).

 $<sup>^{7}</sup>$ Cf. Allen v. Louisiana State Bd. of Dentistry, 835 F.2d 100, 104-05 (5th Cir. 1988).

<sup>\*</sup>We note that federal courts lack subject matter jurisdiction to review final judgments of a state court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 482 (1983); Chrissy F. v. Mississippi Dep't of Pub. Welfare, 995 F.2d 595, 598 (5th Cir. 1993), cert. denied, 114 S.Ct. 1336 (1994). As the constitutional claim presented by Plaintiffs is inextricably intertwined with the state court judgment in the Robertson class action by which Plaintiffs are bound, see Feldman, 460 U.S. at 483 n.16, Plaintiffs essentially are mounting a collateral attack on a state court judgment, and this court will not entertain such an action. Chrissy F., 995 F.2d at 599; Reed v. Terrell, 759 F.2d 472, 473 (5th Cir.), cert. denied, 474 U.S. 946 (1985).

<sup>9</sup>Chrissy F. at 599; Reed at 473; accord Nottingham Partners
v. Trans-Lux Corp., 925 F.2d 29, 32-33 (1st Cir. 1991).

DISMISSED.