

Class Actions—Washington Style: A Look at Washington Superior Court Rule 23

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I. INTRODUCTION

This Article focuses on class actions in the Washington State courts. It compares and contrasts the Washington experience with practice under the federal class action rule,¹ and places particular emphasis on the differences between state and federal practice.

Not all of Washington's divergences from federal class action practice are commendable. For example, the seemingly common practice of deferring class certification rulings until after the merits of the case are resolved makes the class action device less useful than it could otherwise be² and raises potential problems with the fairness of the class action process.³ Most of the differences between Washington and federal class action practice, however, reflect positively on Washington's experiences. In contrast to the mixed experience with class actions in the federal courts,⁴ class actions in Washington seem to be working, and working well. Perhaps, therefore, this Article will serve a useful function, not only for Washington practitioners, but also for federal judges and practitioners who wish to find ways of maximizing the potential of the class action device as a useful procedural tool for resolving complex litigation.

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1. FED. R. CIV. P. 23; WASH. SUP. CT. CIV. R. 23.

2. See *infra* text accompanying notes 101-02.

3. See *infra* text accompanying notes 103 & 175.

4. See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lombard, C.J., dissenting) (referring to the class action device as a "Frankenstein Monster"), *vacated*, 417 U.S. 156 (1974).

II. BACKGROUND

Historically, the State of Washington has experimented with at least three different class action rules. In 1854 Washington adopted the so-called Field Code version of the class action rule.⁵ That provision, for reasons not clear to this author, has never been explicitly repealed, although no modern cases refer to or rely on it.⁶ In 1960 Washington adopted the language of the then existent federal rule 23,⁷ under which the federal courts

5. The Field Code derives its name from its principal author, David Dudley Field. C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 22 (1947). It was known more officially as the New York Code of 1848 and was the pattern used by many other states, including Washington, for their own procedural codes. *Id.* at 24. *See* WASH. REV. CODE chs. 4.04, .08 (1983). The Washington class action provision, which is virtually identical to the New York Code provision, is headed: "One or more may sue or defend for others similarly situated." The provision reads as follows: "When the question is one of common or general interest to many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." WASH. REV. CODE § 4.08.70 (1983). *See infra* note 6. The federal courts adopted a similar class action rule in 1912 but substituted a conjunctive connector for the disjunctive "or" between the "common question" and "numerosity" requirements. Fed. Equity R. 38, 226 U.S. 649, 659 (1912).

6. The Washington Superior Court Civil Rules are generally quite explicit about whether they supersede or supplement prior code provisions on the same subject. For example, a comment following Washington Superior Court Civil Rule 20 (CR 20) explains that "[t]ogether with Rules 19 and 21, Rule 20 supersedes RCW 4.08.130." WASH. SUP. CT. CIV. R. ANN. 20 (1977). CR 22 provides that "[t]he remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by RCW 4.08.150 to 4.08.180, inclusive." WASH. SUP. CT. CIV. R. 22(b). Although there is no apparent reason why CR 23, the class action rule, would not supersede the prior code provision (otherwise the very specific and exacting prerequisites of CR 23 would easily be undermined by the more general requirements of the code provision), there are no comments, either in the rule itself or elsewhere, about the effect of the rule on the prior code provision.

7. The pertinent provisions of the then existing federal rule, which Washington adopted as rule 23 of its Rules of Pleading Practice and Procedure, were as follows:

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(c) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be

had labored since 1938.⁸ In 1966 federal rule 23 was amended to eliminate some of its perceived inadequacies,⁹ and in 1967 the Washington Supreme Court adopted those amendments verbatim in its new Superior Court Civil Rules.¹⁰

Not surprisingly, the Washington courts have indicated that they would look to federal precedents for guidance in construing the Washington class action rule.¹¹ The emphasis, however, should be on the word guidance; the Washington courts do not feel “bound” by federal class action precedents.¹² And while divergences from federal precedent are few in number, they illustrate a significantly “looser” view of the class action device than is found in federal practice.¹³

enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

J. MOORE & H. FINK, MOORE'S FEDERAL PRACTICE RULES PAMPHLET 529-30 (1968).

8. The word “labored” may be an understatement. See *infra* note 9.

9. The problems that courts had applying the provision of the original federal rule 23 were immense. In the Advisory Committee notes to the 1966 amendments the first section is headed: “Difficulties with the original rule.” The section takes up one page of a five-page note. See FED. R. CIV. P. 23 advisory committee note. Professor Kaplan, who was the reporter to the Advisory Committee that produced the 1966 amendments to federal rule 23, described the process the committee went through in amending rule 23. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386-400 (1967).

10. WASH. SUP. CT. CIV. R. 23.

11. See, e.g., *Johnson v. Moore*, 80 Wash. 2d 531, 536, 496 P.2d 334, 337 (1972) (court used federal precedent to construe CR 23(a)(2) questions of fact or law common to the class; plaintiffs were persons held in city jail “on suspicion” suing for unlawful seizure); *Brown v. Brown*, 6 Wash. App. 249, 254, 492 P.2d 581, 585 (1971) (court cited federal cases construing federal rule 23(a) in a case in which an electric company’s consumers sought class action certification because they could not afford individual lawsuits).

12. See, e.g., *Darling v. Champion Home Builders Co.*, 96 Wash. 2d 701, 706, 638 P.2d 1249, 1251 (1982) (“Although we may look to federal decisions for guidance in interpreting our civil rules, . . . we are by no means bound by those decisions.”). While state courts are free to interpret their own class action rule any way they wish, subject only to whatever constitutional limitations might be superimposed on their judicial system, see *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (states may attach whatever labels they choose and whatever consequences they deem appropriate to litigation brought in their courts, subject only to the requirements of the Constitution of the United States), some state courts give a great deal of weight to federal interpretations of the federal class action rule, citing federal cases almost interchangeably with their state precedent. See, e.g., *Borwick v. Bober*, 34 Colo. App. 423, 428, 529 P.2d 1351, 1353-54 (1974) (court cited both federal and state cases as precedent requiring the denial of class certification for failure to meet the prerequisites of rule 23(a)).

13. For example, the Washington courts appear to take a significantly more liberal

III. THE REQUIREMENTS FOR CLASS CERTIFICATION

A class action is maintainable under Washington Superior Court Civil Rule 23 (CR 23) only if all four prerequisites of subdivision (a) are met, along with any one of the alternative requirements of subdivision (b).

A. CR 23(a) Prerequisites

CR 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The requirement of "numerosity" in CR 23(a)(1) is rarely mentioned by the Washington courts. When numerosity is mentioned, it is only discussed in passing. *Zimmer v. City of Seat-*

position on the appealability of orders denying class certification. Compare *Brown v. Brown*, 6 Wash. App. 249, 254, 492 P.2d 581, 584 (1971) (writ of mandamus is an appropriate remedy to review lower court grant or denial of class action status) with *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978) (neither collateral order exception nor death knell doctrine supports appellate jurisdiction; an interlocutory order denying class status is not a final judgment within 28 U.S.C. 1291). On the availability of defendant class actions, compare *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wash. 2d 783, 790, 613 P.2d 769, 774 (1980) (use of standing and venue requirements to deny certification of a CR 23(b)(2) defendant class action was inappropriate) with *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 462 (9th Cir. 1973) (use of standing requirement to deny certification of a defendant class action appropriate) and *Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980) (en banc) (defendant class action not permitted under rule 23(b)(2)), *cert. denied*, 449 U.S. 129 (1981). For further discussion of these problems, see *infra* notes 199-206 & 219-31 and accompanying text.

The Washington courts seem to agree with the federal courts that class certification questions should be decided at an early stage in the lawsuit, ordinarily before the merits are reached. See, e.g., *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wash. 2d 783, 790, 613 P.2d 769, 773 (1980) (CR 12 motions ordinarily should not be determined before class status). See also *Jiminez v. Weinberger*, 523 F.2d 689, 697-98 (7th Cir. 1975) (trial court judge should determine class at earliest practicable time), *cert. denied*, 427 U.S. 912 (1976). However, the Washington appellate courts do in practice tolerate a less stringent view of the timing requirements for class certification. See, e.g., *Arment v. Henry*, 98 Wash. 2d 775, 777, 658 P.2d 663, 664 (1983) (disciplinary hearing for inmates may proceed before class status is determined); *Hillis Homes, Inc. v. Snohomish County*, 32 Wash. App. 279, 280, 647 P.2d 43, 45 (1983) (summary judgment granted before class status determined). For further discussion of this problem, see *infra* notes 87-103 and accompanying text.

*tle*¹⁴ contains the most extensive discussion of numerosity: two short paragraphs conclude that numerosity is satisfied when some potential class members are unidentifiable because joinder of the unidentifiable members is inherently impracticable.¹⁵

The requirement of “typicality” in CR 23(a)(3) has also received little attention from the Washington courts. The lower federal courts have long been divided on the intended meaning and significance of the typicality prerequisite.¹⁶ Some federal courts have concluded that the typicality requirement substantially overlaps with the commonality requirement,¹⁷ or the adequacy of representation requirement,¹⁸ or both.¹⁹ Other federal

14. 19 Wash. App. 864, 578 P.2d 548 (1978).

15. *Id.* at 868, 578 P.2d at 550. Generally, the federal cases are in agreement with Washington cases on this point. *See, e.g., Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir.) (employment discrimination action in which members of class included future and deterred applicants who were necessarily unidentifiable and thus made joinder impracticable), *cert. denied*, 456 U.S. 960 (1982); *Holland v. Steele*, 92 F.R.D. 58, 63 (N.D. Ga. 1981) (smaller numbers are less objectionable when plaintiff seeks relief for future members as well as past and present members). However, in making numerosity determinations, the federal courts look at a number of other factors as well. *See, e.g., Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 F.R.D. 168, 174-75 (D. Del. 1982) (classes of more than 100 members presumptively meet the numerosity requirement; geographic distribution of the class is relevant to impracticability of joinder); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (W.D. Mo. 1979) (smaller damage claims make joinder less practicable).

16. *Duncan v. Tennessee*, 84 F.R.D. 21, 30-31 (M.D. Tenn. 1979) (citing several cases that treat rule 23(a)(3) as identical to rule 23(a)(2): *Presseisen v. Swarthmore College*, 71 F.R.D. 34, 42-44 (E.D. Pa. 1976); *Grogan v. American Brands, Inc.*, 70 F.R.D. 579, 581 (M.D.N.C. 1976); *Piva v. Xerox Corp.*, 70 F.R.D. 378, 385 (N.D. Cal. 1975); *Mack v. General Elec. Co.*, 329 F. Supp. 72, 76 (E.D. Pa. 1971); also citing several cases that treat rule 23(a)(3) as synonymous with rule 23(a)(4): *Capaci v. Katz & Besthoff, Inc.*, 72 F.R.D. 71, 76-77 (E.D. La. 1976); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 291-92 (D. Del. 1975); *Richmond Black Police Officers Ass'n v. City of Richmond*, 386 F. Supp. 151, 158 (E.D. Va. 1974)). The law review commentators have chronicled the controversy on several occasions. *See, e.g., Comment, Federal Rule of Civil Procedure 23(a)(3) Typicality Requirement: The Superfluous Prerequisite to Maintaining a Class Action*, 42 OHIO ST. L.J. 809 (1981); *Note, Federal Civil Procedure—Class Actions—Rule 23(a)(3) Typicality Requirement Has Independent Meaning*, 25 U. KAN. L. REV. 126 (1976).

17. *See, e.g., Presseisen v. Swarthmore College*, 71 F.R.D. 34, 42-44 (E.D. Pa. 1976) (when an “across the board” or permeating policy is alleged, both requirements are satisfied); *Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div.*, 50 F.R.D. 242, 247 (D. Conn. 1970) (absence of specification of grievances similar to plaintiff’s by other members of the class was evidence of lack of commonality and typicality).

18. *See, e.g., Capaci v. Katz & Besthoff, Inc.*, 72 F.R.D. 71, 76-77 (E.D. La. 1976) (typicality and adequacy of representation requirements were sufficiently related in the context of this case for the court to discuss them together).

19. *Duncan v. Tennessee*, 84 F.R.D. 21, 31 (M.D. Tenn. 1979) (only consistent principle in discrimination cases is that the plaintiff’s claim cannot be unique to plaintiff; this principle applies to commonality, typicality, and adequacy of representation).

courts have insisted that the typicality requirement must have some meaning independent of the other rule 23(a) requirements, although they have not always agreed on what that meaning should be.²⁰ Washington courts have avoided the problem so far by essentially ignoring the typicality requirement.²¹

The "adequacy of representation" requirement of CR 23(a)(4) has received some attention from the Washington courts, but thus far only on a rather superficial level.²² Washington courts, like the federal courts,²³ look at the qualifications of both the representative party and the attorney for that party. On the question of qualifications of the attorney representing the class, the Washington court of appeals held in *Marquardt v. Fein*²⁴ that the attorney must be an experienced and effective

20. See, e.g., *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982) (typicality provision requires something more than the general conclusory allegations that unnamed blacks have been discriminated against), *cert. denied*, 460 U.S. 1083 (1983); *Taylor v. Safeway Stores*, 524 F.2d 263, 269-70 (10th Cir. 1975) (typicality provision requires a comparison of claims or defenses of the representative with the claims or defenses of the class); *White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971) (typicality provision requires plaintiff to demonstrate that other members of the class he purports to represent have suffered the same grievances of which he complains). In *Green v. Cauthen*, 379 F. Supp. 361 (D.S.C. 1974), the court said that it agreed with the rationale and holding of *White v. Gates Rubber Co.*, *supra* this note, even quoting approvingly from *White. Green*, 379 F. Supp. at 372-73. However, by taking language from *White* out of context, the *Green* court actually ended up reaching the opposite conclusion.

21. See, e.g., *Johnson v. Moore*, 80 Wash. 2d 531, 533, 496 P.2d 334, 335 (1972) ("Nor can there be any doubt that the claims and defenses of the representatives are typical of those of the class which they represent . . ."); *Zimmer v. City of Seattle*, 19 Wash. App. 864, 867-70, 578 P.2d 548, 550 (1978) (court did not even mention typicality requirement before holding that class status was appropriate). Some federal courts have taken a similar position. See, e.g., *Eisen v. Carlisle & Jacqueline*, 391 F.2d 555, 562 (2d Cir. 1968) (court merely stated conclusively that plaintiff's claim was "typical of the claims . . . of the class"), *vacated*, 417 U.S. 156 (1974).

22. E.g., *DeFunis v. Odegaard*, 84 Wash. 2d 617, 529 P.2d 438 (1974); *Marquardt v. Fein*, 25 Wash. App. 651, 612 P.2d 378 (1980). The Washington courts have not had to address a number of complex and sensitive issues concerning the adequacy of representation requirements that the federal courts have struggled to resolve. For instance, to what extent should the financial status of the class representative be a factor in determining adequacy of representation? Compare *Sanderson v. Winner*, 507 F.2d 477, 479-80 (10th Cir. 1974) (in an antitrust action against a foreign manufacturer, plaintiffs were not required to prove their ability to pay litigation costs), *cert. denied*, 421 U.S. 914 (1975) with *Rode v. Emery Air Freight Corp.*, 76 F.R.D. 229, 231 (W.D. Pa. 1977) (court noted that while class certification had not been denied solely because of plaintiffs' financial circumstances, plaintiffs' ability to pay litigation costs was a relevant factor in determining whether plaintiffs could adequately represent the class).

23. See, e.g., *Esler v. Northrop Corp.*, 86 F.R.D. 20, 36-37 (W.D. Mo. 1979); *Folding Cartons, Inc. v. American Can Co.*, 79 F.R.D. 698, 701 (N.D. Ill. 1978).

24. 25 Wash. App. 651, 656-57, 612 P.2d 378, 381 (1980).

representative, must have no interest in the litigation that would potentially conflict with the interests of the class, and must act ethically at all times in representing the class. The court upheld the disqualification of all three attorneys representing a class of defendants in a mortgage foreclosure proceeding. The lead counsel was disqualified because of his representation of other groups with interests that potentially conflicted with the class interests and because his representation of the class to date had been confusing, careless, and unethical.²⁵ The other two attorneys were disqualified for their lack of experience, although the court did not specify what experience would have qualified them to represent the class.²⁶ The court did suggest, however, that the two less experienced attorneys could stay on the case to assist more experienced counsel.²⁷

On the question of qualifications of the representative party, the Washington appellate courts have spoken twice. In *DeFunis v. Odegaard*,²⁸ on remand from the United States Supreme Court's determination that plaintiff's reverse discrimination claim was moot,²⁹ the plaintiff sought to re-ignite his claim by seeking class certification.³⁰ The Washington Supreme Court refused certification, in part because of possible conflicts between plaintiff and the class. The court noted that in view of the limited number of seats available in the law school entering class, plaintiff might, at least potentially, become a competitor with the proposed class rather than its representative.³¹

The Washington Supreme Court also found that the mootness of plaintiff's individual claim removed him from membership in his proposed class and, therefore, that the plaintiff could not adequately represent a group to which he no longer

25. *Id.* at 657, 612 P.2d at 382. Among other things, the trial court noted that lead counsel had written a private letter to the court marked "personal and confidential," attempting to persuade the court to adopt counsel's view of the case, and had submitted voluminous, tardy, and unintelligible pleadings and documents tending to obfuscate rather than clarify the facts and issues in the case. *Id.* at 654, 612 P.2d at 380.

26. The other attorneys had each been in practice for three years or less. It would appear from the court's discussion that the attorneys were disqualified for their general lack of experience, rather than for lack of specific class action experience. *Id.*

27. *Id.* at 656, 612 P.2d at 381.

28. 84 Wash. 2d 617, 529 P.2d 438 (1974).

29. *DeFunis v. Odegaard*, 416 U.S. 312, 319-20, *on remand*, 84 Wash. 2d 617, 529 P.2d 438 (1974).

30. *DeFunis*, 84 Wash. 2d at 619, 621, 529 P.2d at 439, 441.

31. *Id.* at 622-23, 529 P.2d at 441-42.

belonged.³² The court admitted, however, that a more timely application for certification might have led to a different result.³³ Thus, the court left open the possibility that mere conjecture about future conflicts that might develop between the plaintiff and the class he sought to represent would not alone suffice to defeat class certification.³⁴

The *DeFunis* court did not address the possibility that some members of the proposed class might not share the plaintiff's goal of challenging affirmative action.³⁵ However, in *Zimmer v. City of Seattle*,³⁶ the court of appeals stated explicitly that the possibility that some class members would prefer the challenged statute to be upheld would not preclude class certification.³⁷

32. *Id.* at 623, 529 P.2d at 442.

33. *Id.*

34. Some federal courts have taken this position, but there has been disagreement on the issue. Compare *Edmondson v. Simon*, 86 F.R.D. 375, 382 (N.D. Ill. 1980) (conjecture about possible future conflicts does not suffice to defeat class certification) with *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 452-53 (M.D. Ga. 1975) (conjecture about possible future conflicts may suffice to defeat class certification). On the one hand, any possibility that the class will not be adequately represented should cause the courts to examine more seriously the propriety of class certification. On the other hand, very few cases would be appropriate for class certification if mere speculation about the possibility of future conflicts developing between the class and its representative were enough to justify denying certification. The question is a difficult one. See, e.g., *Gill v. Monroe County Dep't of Social Servs.*, 95 F.R.D. 518, 521 (W.D.N.Y. 1982) (alleged antagonisms among members of class of black and Spanish-surnamed employees were not sufficiently serious to decertify class in employment discrimination action).

35. This concern about potential conflicting remedial objectives should be distinguished from the problem of competitor conflicts within the class, which the court in *DeFunis* did address. A possibility always exists that some class members might not desire the relief sought by the class representative, particularly in an action for injunctive relief raising questions of broad public interest. That possibility has generally not been thought to justify denial of class certification. Competition leading to potentially antagonistic interests among the class members has always been viewed more seriously. See, e.g., *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 810-11 (5th Cir.) (black woman asserting that men were favored over women for certain jobs could not represent a class of all black men and women in an employment discrimination suit), *cert. denied*, 459 U.S. 1038 (1982).

36. 19 Wash. App. 864, 578 P.2d 548 (1978).

37. *Id.* at 870, 578 P.2d at 551. In *Zimmer*, the class representatives sought to enjoin the enforcement of a statute authorizing the police to take into custody, without process, "any child . . . whose surroundings are such as to endanger his health, morals, or welfare, unless immediate action is taken." *Id.* at 866, 578 P.2d at 549. The defendant argued that because some members of the class would probably prefer that the statute be enforced, plaintiff could not adequately represent the class. The court rejected the argument out of hand. *Id.* at 870, 578 P.2d at 551. Federal cases addressing the question have agreed. See, e.g., *Davis v. Weir*, 497 F.2d 139, 146 (5th Cir. 1974) (class action requirement that "the party opposing the class has acted or refused to act on grounds generally applicable to the class" does not mandate that all members of the class be

Presumably, the possibility of intervention under CR 24 suffices to protect those persons' interests.³⁸

The Washington courts have focused most of their attention, with respect to the prerequisites for class certification on the "commonality" requirement of CR 23(a)(2). Washington appellate courts have urged trial courts to characterize class action pleadings liberally to find common questions. For example, in *Johnson v. Moore*,³⁹ one of the more frequently cited class action precedents, the trial court had refused class certification, characterizing the plaintiffs' claim as one for habeas corpus relief, which would require individualized factual determinations of the reasonableness or necessity of detention of each class member.⁴⁰ The supreme court refocused on plaintiffs' claim for injunctive and declaratory relief, which allowed it to concentrate on the more generalized issue of whether the police can constitutionally detain individuals for an unreasonable period of time without arraignment, thus finding a common question of law.⁴¹

Another example of the attitude of the Washington Supreme Court toward the common-question requirement is found in *Brown v. Brown*,⁴² in which plaintiffs challenged the defendant city Department of Public Utilities' practice of terminating utility services for disputed arrearages.⁴³ The trial court had found commonality lacking because termination of services might be justified under some factual circumstances but not under others.⁴⁴ The supreme court again reversed, finding that a common question did exist: whether termination of service based on a disputed unpaid bill was permitted under any circumstances.⁴⁵ The court concluded that CR 23 should be construed liberally, not restrictively, to avoid multiplicity of litigation and promote the remedial purpose behind the rule.⁴⁶

aggrieved by or desire to challenge the defendant's conduct).

38. See, e.g., *Horton v. Goose Creek Indep. School Dist.*, 677 F.2d 471, 491 (5th Cir. 1982) (federal rule 23 gives district judges great flexibility to adopt and issue appropriate orders and to invite intervention), cert. denied, 103 S. Ct. 3536 (1983).

39. 80 Wash. 2d 531, 496 P.2d 334 (1972).

40. *Id.* at 532-35, 496 P.2d at 335-36.

41. *Id.*

42. 6 Wash. App. 249, 492 P.2d 581 (1971).

43. *Id.* at 250, 492 P.2d at 582.

44. *Id.* at 254-55 n.2, 492 P.2d 584-85 n.2.

45. *Id.* at 254-55, 492 P.2d at 584-85.

46. *Id.* at 256-57, 492 P.2d at 586. The Washington courts have also said, however, that class actions must be maintained "in strict conformity with the requirements of CR

This same technique was used by the court of appeals to justify class certification in *Zimmer v. City of Seattle*.⁴⁷ The intermediate appellate court reversed the denial of class certification by the trial court, noting that an action challenging a statute as *facially* unconstitutional on grounds of vagueness meets the common-question requirement of CR 23(a)(2) because the action would not turn on the particular facts of individual cases.⁴⁸

*Panorama Residential Protective Association v. Panorama Corp.*⁴⁹ is the only case in which the Washington appellate

23." *DeFunis v. Odegaard*, 84 Wash. 2d 617, 622, 529 P.2d 438, 441 (1974). While this "strict conformity" language seems to contradict the "liberal construction" language of *Brown*, what it really represents is the conflicting pull of several competing policies. First, there is the efficiency concern of *Brown*, which attempts to ensure that as many persons as possible are bound by the class action judgment to avoid repetitive litigation. Second, there is the remedial policy, also recognized in *Brown*, of making the courts more accessible to groups of small claimants who would not be able to afford individual litigation. Both of these policies support a liberal construction of CR 23. A third policy, however, underlies the class action prerequisite of CR 23: ensuring that the class action process adequately protects the interests of absent class members. This third policy points the other way, dictating careful and strict compliance with the CR 23 prerequisites.

47. 19 Wash. App. 864, 578 P.2d 548 (1978).

48. *Id.* at 868-69, 578 P.2d at 550-51. The federal courts have not always been as willing to characterize broadly the issues raised by a plaintiff's claim in order to meet the common-question requirement. *See, e.g., Hayes v. Board of Regents*, 495 F.2d 1326, 1329 (6th Cir. 1974). In *Hayes*, the plaintiff challenged a state practice of refusing to recognize claims of Kentucky residence for tuition purposes that were based solely on the student's registration to vote in Kentucky. *Id.* at 1327. The court refused class certification on the ground that each class member's residency status would turn on the individual facts of that student's case. *Id.* at 1329. Yet, the plaintiff was not basing his own claim or the class claims on the individual factors in each case. If anything, he was asserting just the opposite: that once a student's voter registration in Kentucky was established, other factors should be deemed irrelevant. Thus, under the Washington approach to the common-question requirement demonstrated in *Johnson*, *Brown*, and *Zimmer*, a common question should also have been found in *Hayes*: namely, whether voter registration in Kentucky should be considered conclusive evidence of Kentucky residence for student tuition purposes.

One reason the Sixth Circuit Court of Appeals refused to find a common question in *Hayes* may have been because its answer to the common question proposed here was no: voter registration in Kentucky is not conclusive evidence of Kentucky residence for student tuition purposes. That is why the court concluded that each claim of Kentucky residence would turn on its individual facts.

The problem with the court's apparent approach in this case is that, as indicated above, no one was making a claim of Kentucky residence based on individual factors. Once the court decided against the plaintiff the only question raised by him, the case was over. There were no other questions. Therefore, because the plaintiff's claim did raise a common question, the court should have certified the class requested by plaintiff and entered a judgment against plaintiff and the class on that claim.

49. 28 Wash. App. 923, 627 P.2d 121 (1981), *aff'd*, 97 Wash. 2d 23, 640 P.2d 1057

courts have found a common question lacking. In *Panorama*, the trial court had certified a class action on behalf of two distinct subclasses of tenants residing in a large retirement community.⁵⁰ The trial court eventually granted summary judgment in favor of one subclass, but against the other.⁵¹ With respect to the losing subclass, one issue remained outstanding, a question of promissory estoppel. The trial court decertified the class on this issue, concluding that the questions of whether promises had been made, to whom they were made, and whether or not they were relied upon to the detriment of the promisee all presented individual rather than common questions.⁵² The court of appeals quite correctly affirmed on this point.⁵³

B. *The Alternative Requirements of CR 23(b)*

Very few Washington cases discuss the alternative requirements of CR 23(b).⁵⁴ Almost all that do are civil rights actions

(1982).

50. *Id.* at 925, 627 P.2d at 124.

51. *Id.* at 928, 627 P.2d at 125.

52. *Id.* at 934, 627 P.2d at 129.

53. *Id.* The Washington court's position on this point is quite consistent with the federal precedents on the question. *See, e.g.*, *Burnett v. Local 381 Pension Fund*, 29 Fed. R. Serv. 2d 1050, 1052 (E.D.N.Y. May 8, 1980) (holding that questions of reliance must be determined on an individual basis).

54. WASH. SUP. CT. CIV. R. 23(b) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties

for injunctive relief that clearly fit within the parameters of CR 23(b)(2), making extensive discussion of the alternative requirements of CR 23(b) unnecessary.⁵⁵

The most complete discussion of the alternative CR 23(b) requirements is found in *Dore v. Kinneer*,⁵⁶ a non-civil rights case in which the majority found a (b)(2) class action appropriate,⁵⁷ although the dissent argued the action ought to have been certified under CR 23(b)(3).⁵⁸ The plaintiffs sought to enjoin the defendant King County taxing authorities from placing on the property assessment rolls for the year 1971 the revalued assessment of plaintiffs' properties. The representative plaintiffs argued that the revaluations were not in compliance with a statutorily mandated four-year cyclical reassessment program.⁵⁹ The noncompliance allegedly resulted in the imposition of higher taxes on plaintiffs' properties for a disproportionately longer period of time than for other property owners, in violation of the uniformity of taxation clause of the state constitution.⁶⁰ The defendants lost on the merits, but argued that relief should run only to the named plaintiffs because notice of the pendency of the class suit was never given to the members of the class as required by CR 23(c)(2).⁶¹

likely to be encountered in the management of class action.

55. See, e.g., *Robinson v. Peterson*, 87 Wash. 2d 665, 666-67, 555 P.2d 1348, 1350 (1976) (class action by inmates seeking to compel promulgation of prison rules and provision of facilities); *Hanson v. Hutt*, 83 Wash. 2d 195, 202-05, 517 P.2d 599, 603-05 (1973) (permitting class action on behalf of pregnant unemployment insurance applicants); *Johnson v. Moore*, 80 Wash. 2d 531, 532-35, 496 P.2d 334, 335-36 (1972) (allowing class action for individuals held in jail without bringing them promptly before a magistrate); *Zimmer v. City of Seattle*, 19 Wash. App. 864, 867-69, 578 P.2d 548, 550-51 (1978) (holding that class action was appropriate for "dependent children"); *Brown v. Brown*, 6 Wash. App. 249, 256, 492 P.2d 581, 585-86 (1971) (permitting class action by residential utility users).

56. 79 Wash. 2d 755, 489 P.2d 898 (1971).

57. *Id.* at 767, 489 P.2d at 905.

58. *Id.* at 783-86, 489 P.2d at 914-15 (Stafford, J., dissenting).

59. The statute required that approximately 25% of the property within a county be revalued each year, resulting in a revaluation of each owner's property every four years. In 1970 only 6% of the property in King County was reassessed. *Id.* at 756-57, 489 P.2d at 899.

60. *Id.* at 756-57, 489 P.2d at 899-90.

61. *Id.* at 765, 489 P.2d at 904. WASH. SUP. CT. CIV. R. 23(c)(2) provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not

The majority characterized the suit as a (b)(2) class action because injunctive relief was sought and because the primary issue in the case affected all class members in common.⁶² Noting that the mandatory class notice provisions of CR 23(c)(2) applied only in actions brought under CR 23(b)(3), the majority concluded that notice to the class was not required by the rule.⁶³

Justice Stafford, in dissent, asserted that the suit was a (b)(3) class action primarily because the pleadings below and the statements made by the trial court suggested that a (b)(3) action was contemplated.⁶⁴ He concluded, therefore, that the mandatory notice provisions of CR 23(c)(2) applied and that the judgment in favor of the class could not stand because of the failure to give the requisite notice.⁶⁵ Justice Stafford also noted that some members of the described class could be hurt financially by the court's decision because their challenged revaluations resulted in lower tax liabilities.⁶⁶ He reasoned, therefore,

request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

62. *Dore*, 79 Wash. 2d at 766, 489 P.2d at 904. It is not entirely clear that the majority was correct in its characterization of the case as a (b)(2) class action. While the plaintiffs did seek injunctive relief, thus seeming to bring the case within CR 23(b)(2), the class they sought to represent was not a typical "cohesive" (b)(2) class. It appeared, for example, that some members of the class stood to gain financially from the actions of defendant challenged by the named plaintiffs. In similar circumstances some federal courts have refused to certify a (b)(2) class. See, e.g., *Pendleton v. Trans Union Sys. Corp.*, 76 F.R.D. 192, 196 (E.D. Pa. 1977) (a class must be homogeneous and cohesive in order to meet the requirement of rule 23(b)(2)).

63. *Dore*, 79 Wash. 2d at 766, 489 P.2d at 904. The rule itself is clear on this point. See *supra* note 61. See also *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1260 (5th Cir.) (holding that rule 23(c)(2) only requires notice to the class in actions brought under rule 23(b)(3)), *cert. denied*, 434 U.S. 822 (1977).

64. *Dore*, 79 Wash. 2d at 781, 489 P.2d at 912 (Stafford, J., dissenting). Actually, the trial court never certified a class on the issues in question. *Id.* at 765, 489 P.2d at 904. It deferred class certification until trial, a technique that contravenes the spirit, if not the letter, of CR 23(c)(1), and then never ruled on the matter. *Id.* The majority upheld class-wide relief anyway, *id.* at 767, 489 P.2d at 905, apparently adopting a practice similar to that of the Fifth Circuit Court of Appeals of allowing class actions to proceed even though not formally certified. See *Johnson v. General Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979) (recognizing that a class action may exist even in the absence of formal, explicit class determination).

65. *Dore*, 79 Wash. 2d at 786, 489 P.2d at 916 (Stafford, J., dissenting).

66. *Id.* Apparently, no one raised the question whether a (b)(1) action would be appropriate. If the dissent was correct, however, in asserting that some class members would be harmed financially by the class action judgment, CR 23(b)(1) would seem to be the correct categorization. Separate actions by individual class members might result in inconsistent judgments, creating incompatible standards of conduct for defendants and thus meeting the requirements of CR 23(b)(1)(A). Furthermore, to the extent that a first individual judgment, as a practical matter disposed of later litigation, the requirements

that notice would be constitutionally required, even if the suit were a proper (b)(2) action.⁶⁷

Two other problems that have arisen in the context of (b)(2) class actions in the federal courts have been dealt with rather summarily by the Washington courts. First, in cases in which the class representative seeks to enjoin the enforcement of a facially unconstitutional statute, some federal courts have taken the position that a class action is not needed because injunctive relief on behalf of the individual representative will inure to the benefit of the class, even without class certification.⁶⁸ In *Zimmer v. City of Seattle*,⁶⁹ by contrast, the Washington Court of Appeals took the opposite position. The court noted that, because the trial court declined to certify the proposed class, the defendant city's failure to appeal from a ruling on the merits in favor of the individual plaintiff would result in a final judgment beneficial only to the plaintiff.⁷⁰ The court of appeals therefore concluded that the suit should have been certified as a class action to ensure that all members of the class would benefit by the determination that the statute was facially unconstitutional.⁷¹

The second problem concerns the extent to which damage relief is available in a (b)(2) class action. A number of federal

of CR 23(b)(1)(B) would be met. Only one Washington appellate decision refers to CR 23(b)(1). *Johnson v. Morris*, 87 Wash. 2d 922, 930, 557 P.2d 1299, 1305 (1976). The *Johnson* court declined to review the trial court's refusal to certify a (b)(1) class for reasons having nothing to do with the propriety of bringing the action under CR 23(b)(1). *Id.* See *infra* note 71. In fact, the action should probably have been brought under CR 23(b)(2). Although characterized as an action for habeas corpus relief, the practical effect of the action was to enjoin the state from retroactively applying a statute designed to expand juvenile court jurisdiction.

67. *Dore*, 79 Wash. 2d at 785, 489 P.2d at 915 (Stafford, J., dissenting). Some federal cases have suggested that notice may, at times, be constitutionally required, even when not mandated by rule 23. See, e.g., *Johnson v. General Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979) (noting the due process requirement).

68. See, e.g., *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976), *aff'd*, 436 U.S. 1 (1978); *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 571 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972). But see *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir. 1976) (reversing district court denial of motion for class certification when denial was based on fact that injunctive relief would "redound to the benefit of all the persons the plaintiffs were seeking to represent").

69. 19 Wash. App. 864, 578 P.2d 548 (1978).

70. *Id.* at 870, 578 P.2d at 551-52.

71. *Id.* But in *Johnson v. Morris*, 87 Wash. 2d 922, 930, 557 P.2d 1299, 1305 (1976), the Washington Supreme Court declined to overturn the trial court's denial of class certification because the supreme court assumed that defendant would abide by the trial court's ruling on the merits as to putative class members.

courts have taken the position that although rule 23(b)(2) speaks to actions in which injunctive or declaratory relief is appropriate, a (b)(2) action that includes a request for monetary relief is not precluded unless it is the predominant form of relief sought by the class.⁷² The Washington Supreme Court in *Hanson v. Hutt*⁷³ agreed, permitting retroactive monetary relief in the form of unemployment insurance benefits to be awarded to the class in a (b)(2) class action in which the primary relief sought was an injunction.⁷⁴ It is noteworthy that had *Hanson* been brought in the federal courts,⁷⁵ retroactive benefits, which would be drawn from state coffers, would have been barred by the eleventh amendment to the United States Constitution.⁷⁶

The *Hanson* court also refused to require exhaustion of administrative remedies by each individual class member when the representative plaintiff had exhausted her remedies and the defendant had misled absent class members as to steps necessary to complete the agency claims process.⁷⁷ This holding is not as liberal as the position taken by the federal courts in Title VII class litigation, although that position has been specially justified by the broad remedial purpose of Congress in enacting Title VII.⁷⁸

72. *Dyer-Neely v. City of Chicago*, 101 F.R.D. 83, 87 (N.D. Ill. 1984); *Edmondson v. Simon*, 86 F.R.D. 375, 383 (N.D. Ill. 1980); *Washington v. Walker*, 75 F.R.D. 650, 654 (S.D. Ill. 1977). The Advisory Committee notes on federal rule 23 support this position, stating that subdivision (b)(2) "does not extend to cases in which the appropriate final relief related exclusively or predominantly to money damages." FED. R. CIV. P. 23 advisory committee note.

73. 83 Wash. 2d 195, 517 P.2d 599 (1973).

74. *Id.* at 204, 517 P.2d at 604-05. The result, although not explained by the court, could be justified by the rationale utilized by federal courts in permitting equitable back-pay awards in Title VII actions brought under federal rule 23(b)(2). See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 256-57 (5th Cir. 1974) ("final injunctive relief or corresponding declaratory relief" language of rule 23(b)(2) does not exclude monetary relief), *cert. denied*, 439 U.S. 1115 (1979). Rule 23(b)(2) does not require that only injunctive or declaratory relief be sought, but simply that it be appropriate.

75. In *Hanson*, the plaintiffs challenged, on equal protection grounds, the termination of unemployment insurance benefits to pregnant women who qualified for benefits before their pregnancy. 83 Wash. 2d at 197, 517 P.2d at 601. Thus, jurisdiction in the federal courts clearly would have been available.

76. See *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974) (federal courts are barred by the 11th amendment from granting retroactive equitable relief that results in a liability to be paid from public funds in the state treasury when the state has not waived its sovereign immunity).

77. *Hanson*, 83 Wash. 2d at 202-03, 517 P.2d at 604.

78. Exhaustion of administrative remedies by absent class members is not required in a Title VII action. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). The same position has not been adopted with regard to other federal statutory schemes under

IV. CLASS ACTION PROCEDURE

CR 23(c)-(e) outline the procedure for handling class actions at the trial court level. CR 23(c) focuses primarily on the certification process and on the impact of class certification;⁷⁹ CR 23(d) focuses on the trial court's role in guiding the conduct of class actions;⁸⁰ and CR 23(e) is concerned with the problem of

which class-wide relief may be sought. *See, e.g., Price v. Maryland Casualty Co.*, 561 F.2d 609, 610-11 (5th Cir. 1977) (Age Discrimination in Employment Act class members must file required notices with the Secretary of Labor and affirmatively opt in to the class).

79. WASH. SUP. CT. CIV. R. 23(c) provides:

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under paragraph (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under paragraph (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

80. WASH. SUP. CT. CIV. R. 23(d) provides:

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

settling class actions.⁸¹

A. CR 23(c)—Certification Procedure

CR 23(c) requires the trial court to make a formal determination at an early stage in the proceedings whether a class action should be allowed.⁸² As has been noted earlier, if the action is “certified” under CR 23(b)(3), notice to the class and an opportunity to “opt out” must be provided.⁸³ Class actions may be certified as to particular issues, or by subclasses,⁸⁴ and the certification may be conditional, subject to later modification or withdrawal.⁸⁵ In any certified class action, the final judgment must adequately describe the class for or against which the judgment is being rendered.⁸⁶

1. Early Class Determination

CR 23(c)(1) provides that “[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.”⁸⁷ On two different occasions, Washington appellate courts have reminded trial judges of the importance of this requirement.

In *Say v. Smith*,⁸⁸ the trial court had dismissed an action, filed as a class action, for lack of subject matter jurisdiction without ruling on the propriety of bringing the suit as a class action.⁸⁹ The court of appeals declined to address the class action issue, but noted that if the case were remanded on the jurisdiction question, a decision by the trial court on class certification should be made “‘as soon as practicable.’”⁹⁰

In *Washington Education Association v. Shelton School District No. 309*,⁹¹ the supreme court discussed the importance

81. WASH. SUP. CT. CIV. R. 23(e) provides: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”

82. WASH. SUP. CT. CIV. R. 23(c)(1).

83. WASH. SUP. CT. CIV. R. 23(c)(2).

84. WASH. SUP. CT. CIV. R. 23(c)(4).

85. WASH. SUP. CT. CIV. R. 23(c)(1).

86. WASH. SUP. CT. CIV. R. 23(c)(3).

87. WASH. SUP. CT. CIV. R. 23(c)(1).

88. 5 Wash. App. 677, 491 P.2d 687 (1971).

89. *Id.* at 680, 491 P.2d at 689-90.

90. *Id.* at 680, 491 P.2d at 690 (quoting WASH. SUP. CT. CIV. R. 23(c)(1)).

91. 93 Wash. 2d 783, 613 P.2d 769 (1980).

of early class certification, holding that while class certification "need not *always* be undertaken before other pretrial motions are considered," it must be considered before any other matters are decided that might adversely affect the question of class certification.⁹² Furthermore, the court noted that class certification should not be influenced by the trial court's view of the merits of plaintiffs' claim.⁹³

However, despite these reminders that early determination of the class certification question independent of the merits is important, Washington trial courts seem to take a more lax view of CR 23(c)(1), with the tacit approval of the appellate courts. In *Scannell v. City of Seattle*,⁹⁴ the trial court expressly deferred a decision on plaintiff's motion for class certification pending its decision on the question of defendant's liability. The trial court then granted defendant's summary judgment motion and dismissed plaintiff's claims on the merits.⁹⁵ The supreme court reversed and remanded for a determination of the damages owed to each named plaintiff without any further mention of the class certification question.⁹⁶ On at least two other occasions, the supreme court has observed, without additional comment or criticism, that trial courts have deferred ruling on class certification, granting summary judgment for defendant instead.⁹⁷ Fur-

92. *Id.* at 788, 613 P.2d at 773 (emphasis in original). This suit was brought as a class action by a class of parents of school age daughters and women public school coaches against a defendant class of local school districts. The trial court transferred claims against certain defendants to their home counties on venue grounds. The Washington Supreme Court noted that these venue transfers could be justified only by assuming the inappropriateness of certification of the proposed defendant class, an assumption the trial court could not make without first considering the class certification question. *Id.* at 788-89, 613 P.2d at 772-73.

93. *Id.* at 790, 613 P.2d at 773. This is consistent with the position generally taken by the federal courts. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

94. 97 Wash. 2d 701, 648 P.2d 435 (1982).

95. *Id.* at 703, 648 P.2d at 437.

96. *Id.* at 706, 648 P.2d at 438. It is unclear from the supreme court's opinion whether the plaintiffs raised the class certification question on appeal. If they did not, that would explain the supreme court's failure to address the issue. The important point, however, is that the ultimate impact of the trial court's deferral of class certification was to deny class certification sub silentio without ever having considered its appropriateness.

97. *Arment v. Henry*, 98 Wash. 2d 775, 777, 658 P.2d 663, 664 (1983); *MacLean v. First N.W. Indus. of Am.*, 96 Wash. 2d 338, 340, 635 P.2d 683, 684 (1981). In *Dore v. Kinnear*, 79 Wash. 2d 755, 489 P.2d 898 (1979), the supreme court went a step further. The trial court had deferred its certification ruling on certain issues in the case until trial, but then never ruled on certification of those questions, finding instead in favor of the defendant on the merits. *Id.* at 782, 489 P.2d at 913 (Stafford, J., dissenting). The

thermore, in *Emwright v. King County*,⁹⁸ the supreme court reversed the grant of summary judgment for plaintiff and then declined to rule on plaintiff's cross-appeal from the denial of class certification on the ground that a decision on class certification was no longer necessary.⁹⁹

For trial courts, the clear implication of these decisions is that in cases in which a plaintiff's individual claim might be dismissed on the merits before trial, deferral of class certification decisions until the merits are resolved is an appropriate way to avoid needless procedural battles. This apparently common practice of deferring class certification questions pending review of the merits is certainly contrary to at least the recommended federal practice. The *Manual for Complex Litigation* suggests that summary judgment or other motions directed toward weeding out unmeritorious claims should not be resolved before class certification issues, except in the clearest cases when a claim is "wholly lacking in merit."¹⁰⁰

More significantly, the Washington practice of deferring class certification questions creates several problems that undermine important policies behind CR 23. First, one of the primary purposes of the class action device is the avoidance of multiplicity of litigation.¹⁰¹ If a class action is appropriate under CR 23(a) and (b), and the court decides in favor of defendant on the merits, CR 23(c) contemplates that a judgment for the defendant should bind the whole class and prevent future litigation on the same subject.¹⁰² The practice of granting summary judgment for defendant before ruling on class certification defeats this important objective.

Second, deferring class certification questions may hide serious adequacy of representation problems. When the plaintiff's

supreme court reversed on the merits and ordered class-wide relief, treating the case as if it had been fully certified all along. *Id.* at 767, 489 P.2d at 905.

98. 96 Wash. 2d 538, 637 P.2d 656 (1981).

99. *Id.* at 545-46, 637 P.2d at 660.

100. MANUAL FOR COMPLEX LITIGATION § 2.11, at 97 (5th ed. 1982).

101. Z. CHAFFEE, SOME PROBLEMS IN EQUITY 280 (1950). See also *Brown v. Brown*, 6 Wash. App. 249, 253, 492 P.2d 581, 586 (1971) (a primary function of the class suit is to avoid multiplicity of litigation).

102. WASH. SUP. CT. CIV. R. 23(c)(3) requires that the judgment in any class action, "whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class." Furthermore, the Advisory Committee's notes following the identical federal rule state specifically that "[t]he judgment in a class action maintained as such to the end will embrace the class . . . whether it is favorable or unfavorable to the class." FED. R. CIV. P. 23(c)(3) advisory committee note.

claims appear weak on the merits, the plaintiff may seem to be an inadequate representative of the class whose claims he seeks to raise. Thus, a dismissal of the named plaintiff's claim, without addressing the class' claims, may seem like a more equitable solution to the class action problem. The adverse determination of plaintiff's claim, however, can still have a precedential effect on the class' claims, even though those claims may never have been adequately presented.¹⁰³ A better solution to this concern would be to determine class certification directly, early in the litigation. If the plaintiff cannot adequately represent the class, the court should so find. If the plaintiff can adequately represent the class, and the other requirements of class certification are met, the court should certify the class. Then, if the claims later prove to be without merit, the court should enter a judgment for the defendant that fully binds the class.

2. *Necessity of Moving for Class Certification*

Some federal courts have taken the position that determination of whether class certification is proper should be made *sua sponte* if the class representative does not move for certification.¹⁰⁴ The *Manual for Complex Litigation* suggests that judges should affirmatively raise the question of whether class certification will be sought, so that the class action issues can be promptly determined.¹⁰⁵ While the Washington experience on this point is limited, at least one trial court, with tacit approval from the state's supreme court, took a contrary position, dismissing a class action without prejudice because of plaintiff's failure to seek certification pursuant to CR 23(c)(1).¹⁰⁶

Normally, when a party seeks certification of a class action,

103. For example, in both *Arment v. Henry*, 98 Wash. 2d 775, 658 P.2d 663 (1978), and *MacLean v. First N.W. Indus. of Am.*, 96 Wash. 2d 338, 635 P.2d 683 (1981), the end result of the litigation was a judgment by the supreme court on questions of law that, as a practical matter, would foreclose future litigation on the same subject by other members of the proposed classes. However, because the class certification question was deferred and ultimately ignored, no court ever made a determination that the named plaintiffs or their attorneys adequately represented the class on the litigated issues.

104. See, e.g., *White v. Local 942, Laborers' Int'l Union of N. Am.*, 90 F.R.D. 368, 371 (D. Alaska 1981) (question of certification is always susceptible to *sua sponte* ruling by court), *aff'd in part by mem.*, 688 F.2d 850 (9th Cir. 1982); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 80 (M.D. Pa. 1974) (rule 23(c)(1) does not require plaintiff to seek certification: court may act *sua sponte* or defendant may move to have court rule action not maintainable as class action).

105. MANUAL FOR COMPLEX LITIGATION § 1.40, at 21 (5th ed. 1982).

106. *Oliver v. Harborview Medical Center*, 94 Wash. 2d 559, 618 P.2d 76 (1980).

it will be the plaintiff seeking to certify a plaintiff class.¹⁰⁷ Occasionally, however, a defendant not wanting to defend a multitude of claims may seek class certification of an action brought by an individual plaintiff. In *Murphy v. Huntington*,¹⁰⁸ this occurred in an unusual procedural posture. Several individual plaintiff property owners brought an action to enjoin county officials from proceeding with certain public improvements. The defendant county and county officials defended on statute of limitations grounds and impleaded as third-party defendants a class composed of certain organizations and individuals opposed to the public improvement challenged by the plaintiffs.¹⁰⁹ The defendants' purpose, in other words, was to ensure that all persons and groups opposed to the public improvements, not just the original named plaintiffs, were parties to the lawsuit.

The use of third-party practice to achieve the defendants' objectives was peculiar since the third-party defendants hardly fit the classic mold of impleaded parties.¹¹⁰ However, the end result was essentially the same as though defendants had moved for certification of a plaintiff class to be represented by the named plaintiffs and any other appropriate class members. The claims of original plaintiffs and the "claims" of the third-party defendant class were held time-barred.¹¹¹ Thus the defendants achieved their objective of extinguishing all potential claims of any class members in one lawsuit.

3. *Partial or Provisional Certification*

The Washington appellate courts have consistently empha-

107. Although CR 23 contemplates the possibility of both plaintiff and defendant class actions, the overwhelming number of class actions are brought on behalf of plaintiff classes rather than against defendant classes. Furthermore, defendants generally oppose certification of plaintiff classes on the theory that certification makes defense of the litigation more complex and potential liability more onerous. A defendant who wins a plaintiff class suit, however, may benefit in the long run by having more effectively foreclosed future litigation on the subject.

108. 91 Wash. 2d 265, 588 P.2d 742 (1978).

109. *Id.* at 266-67, 588 P.2d at 744.

110. The impleading of third parties into a lawsuit has generally been limited to circumstances in which the defendant seeks indemnity, contribution, or subrogation from the third party. C. WRIGHT, LAW OF FEDERAL COURTS 510 (4th ed. 1983). The third-party claim in *Murphy* did not fit into any of these categories. The defendants were essentially seeking a declaratory judgment against the third-party class that any claims the class might have against defendant were time-barred along with the plaintiffs' claims.

111. *Murphy*, 91 Wash. 2d at 266-67, 588 P.2d at 744.

sized the need for flexibility in class certification proceedings and the power of the trial judge to mold class action orders to meet the needs of individual cases. For example, a class action that seems inappropriate because of differing factual or legal questions among the class members may be resurrected under CR 23(c)(4)(B) by dividing it into appropriate subclasses along the lines of the differing questions presented by each subgroup.¹¹² Furthermore, a class action that seems appropriate for certification on some issues, but not on others, may be certified "with respect to particular issues" under CR 23(c)(4)(A).¹¹³ By subclass or issue certification, the sometimes conflicting concerns of fairness to the litigants and efficiency can be more easily accommodated.¹¹⁴

Finally, as the Washington appellate courts have occasionally noted in passing, should it later become apparent that a case certified as a class action is not appropriate for class action treatment, the certification order may be altered or amended under CR 23(c)(1).¹¹⁵ Greater emphasis on the modifiability and conditional nature of class action orders by the appellate courts could result in less frequent reliance by trial courts on the practice of deferring class certification decisions until after determinations on the merits have been made. This, in turn, would help avoid some of the multiplicity of litigation and representation problems that are caused by delayed certification.¹¹⁶

4. *Effect of Failure to Certify Class*

On at least two occasions, the Washington appellate courts

112. See, e.g., *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wash. 2d 680, 688, 586 P.2d 830, 834 (1978) (when certified class is not drawn to precision, this flaw is not fatal to class action; instead the court can divide the class into subclasses for treatment of particular issues); *Brown v. Brown*, 6 Wash. App. 249, 256, 492 P.2d 581, 585 (1971) (appropriate to divide class into subclasses rather than to deny the class action altogether).

113. See, e.g., *Panorama Residential Protective Ass'n v. Panorama Corp.*, 28 Wash. App. 923, 934-35, 627 P.2d 121, 129 (1981) (decertifying a class as to a particular issue that was not appropriate for class litigation), *modified*, 97 Wash. 2d 23, 640 P.2d 1057 (1982); WASH. SUP. CT. CIV. R. 23(c)(4)(A).

114. For some suggestions on how rule 23(c)(4) can be used to assist in the handling of complex mass tort litigation, see Williams, *Mass Tort Class Actions*, 98 F.R.D. 323 (1983).

115. *Panorama Residential Protective Ass'n v. Panorama Corp.*, 28 Wash. App. 923, 934-35, 627 P.2d 121, 129 (1981), *modified*, 97 Wash. 2d 23, 640 P.2d 1057 (1982); *Brown v. Brown*, 6 Wash. App. 249, 256, 492 P.2d 581, 585-86 (1971) (quoting *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)).

116. See *supra* notes 87-103 and accompanying text.

have rejected efforts to give class action effect to cases never certified as such. In *State Department of Ecology v. Pacesetter Construction Co.*,¹¹⁷ the plaintiffs neither attempted to meet the requirements of CR 23(a) and (b) nor moved for formal certification. The plaintiffs asserted that neither was necessary in an action brought under the Shoreline Management Act,¹¹⁸ which provided that “[p]rivate persons shall have the right to bring suit . . . on their own behalf and on behalf of all persons similarly situated.”¹¹⁹ The supreme court disagreed, holding that because plaintiffs had never sought formal certification of a class or otherwise established that they met the requirement of CR 23, the judgment awarding damages against defendant was correctly limited to the named plaintiffs.¹²⁰

In *Fairwood Greens Homeowners Association v. Young*,¹²¹ the plaintiff asserted that defendants were bound by a judgment in a prior action to which they were not formal parties. Those defendants were aware of the prior case and of efforts to certify it as a class action, as the defendants had expressly opposed class certification during proceedings in that case.¹²² The court of appeals in *Fairwood Greens* held that since the provisions of CR 23 had never been followed in the prior case, it was not a class action and could not bind the present defendants. A class had never been formally certified as required by CR 23(c)(1). No orders were ever entered to ensure protection of the interests of absent class members, and the judgment entered in the prior case made no reference to any class as it should have under CR 23(c)(3).¹²³

On other occasions, however, the Washington courts have permitted cases to be treated as class actions on the basis of less than the full compliance with the certification requirement of CR 23(c). In *Dore v. Kinnear*,¹²⁴ for example, the trial court deferred class certification on certain issues until trial, but never ruled on the certification question during or after trial. The supreme court, nevertheless, in reversing the trial court on the

117. 89 Wash. 2d 203, 571 P.2d 196 (1977).

118. *Id.* at 214, 571 P.2d at 202.

119. WASH. REV. CODE § 90.58.230 (1983).

120. *Pacesetter*, 89 Wash. 2d at 215, 571 P.2d at 202-03.

121. 26 Wash. App. 758, 614 P.2d 219 (1980).

122. *Id.* at 763-64, 614 P.2d at 223.

123. *Id.*

124. 79 Wash. 2d 755, 489 P.2d 898 (1971).

merits, ordered class-wide relief because it concluded that the case was a classic (b)(2) class action.¹²⁵ In *Darrin v. Gould*,¹²⁶ the supreme court criticized the trial court's failure to comply with the requirements of CR 23(c) but, nevertheless, accepted the trial court's after-the-fact treatment of the case as a class action in its final judgment, noting only that the class should have been defined with more precision.¹²⁷

The message that the supreme court is sending by these seemingly conflicting decisions is unclear. In *Darrin* and *Dore*, however, the relief sought on behalf of the class was injunctive only.¹²⁸ The litigation posture of the defendants in those cases would not have changed significantly had they been made aware, in advance, that the cases would be treated as class actions.¹²⁹ In *Fairwood Greens*, by contrast, the persons affected by the question of whether the original litigation should be treated as a class action, after the fact, were not even parties to that litigation.¹³⁰ Consequently, binding those persons to the judgment by after-the-fact certification would be unfair. In *Pacesetter*, the plaintiffs sought damages on behalf of a class for which they had never sought certification.¹³¹ Upholding the request would have been unfair since it would impose upon the defendant a liability he did not know he was contesting. Perhaps the court is saying in these cases, "When the failure to address certification

125. *Id.* at 766, 489 P.2d at 904-05. The majority asserted that the case had been certified as a class action by the trial court. *Id.* However, as Justice Stafford's dissent made perfectly clear, the trial court's original conditional certification order was withdrawn as to all but one issue in the case, and certification as to the remaining issues was deferred until trial and then never taken up again. *Id.* at 782, 489 P.2d at 913 (Stafford, J., dissenting).

126. 85 Wash. 2d 859, 540 P.2d 882 (1975).

127. *Id.* at 862-63, 540 P.2d at 885. The supreme court did not make clear the precise manner of noncompliance with CR 23(c), except to say that "there had been no compliance" with those provisions. *Id.* at 863, 540 P.2d at 885. The only corrective measure taken by the court, however, was to narrow the class definition from all high school girls who desired to play football to all *otherwise qualified* high school girls who desired to play football. *Id.*

128. *Darrin*, 85 Wash. 2d at 862, 540 P.2d at 884; *Dore*, 79 Wash. 2d at 756, 489 P.2d at 899.

129. The defendants in *Darrin* and *Dore* were clearly aware that their cases might be treated as class actions because the suits were pleaded as class actions. *Darrin*, 85 Wash. 2d at 862, 540 P.2d at 884; *Dore*, 79 Wash. 2d at 756, 489 P.2d at 899. Furthermore, the trial court in *Dore* explicitly deferred class certification until trial, thus leaving open the possibility that even at that late date the case could be converted to a class action. *Dore*, 79 Wash. 2d at 782, 489 P.2d at 913 (Stafford, J., dissenting).

130. *Fairwood Greens*, 26 Wash. App. at 764, 614 P.2d at 223.

131. *Pacesetter*, 89 Wash. 2d at 214, 571 P.2d at 202.

problems at the right time can be fixed without substantial prejudice to anyone, we will do so, but when prejudice cannot otherwise be avoided, we will refuse to treat the case as a class action.”

B. CR 23(d)—Supervisory Powers of the Trial Court

In a class action suit, the trial court has broad supervisory powers granted by CR 23(d) that are designed to help streamline what might otherwise be complex and prolonged proceedings and to protect the rights of absent class members.¹³² The only Washington appellate court decisions that have examined closely the use of these supervisory powers by the trial court are *Johnston v. Beneficial Management Corp. of America*¹³³ and *Darling v. Champion Home Builders Co.*,¹³⁴ both of which involved the troublesome issue of attorney communication with absent class members.

In *Johnston*, the trial court entered an order severely limiting communications by the parties or their counsel with absent class members.¹³⁵ This order followed closely a Sample Pretrial

132. MANUAL FOR COMPLEX LITIGATION § 1.43, at 33 (5th ed. 1982).

133. 96 Wash. 2d 708, 638 P.2d 1201 (1982).

134. 96 Wash. 2d 701, 638 P.2d 1249 (1982).

135. *Johnston*, 96 Wash. 2d at 710, 638 P.2d at 1202. The pertinent provisions of the order were as follows:

All parties hereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule include, but are not limited to, (a) solicitation, directly or indirectly, of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under sub-paragraph (b)(3) of CR 23; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes, and effects of the action, and of actual or potential court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal, and equitable obligations are unaffected by this rule.

This order does not forbid (1) communications between an attorney and his client or a prospective client who has, on the initiative of the client or

Order suggested for prevention of potential abuse in federal class actions by the 1977 edition of the *Manual for Complex Litigation*.¹³⁶ A dispute arose concerning the no-communication order when, after the case was partially settled, plaintiff's attorney wrote a letter to class members reminding them of the procedure and deadline for filing claims.¹³⁷ Because the letter was sent without the approval of the court, as required by the no-communication order, defendants objected to the letter and plaintiff's attorney was found in contempt of court.¹³⁸ The attorney appealed, asserting first that the letter did not fall within the prohibition of the no-communication order and second that if it did, the order violated the attorney's first amendment rights.¹³⁹ The court of appeals affirmed, holding that counsel had clearly violated the spirit, if not the letter, of the order by his unapproved class communication. The court of appeals found that the need to preserve an atmosphere conducive to a fair trial by limiting communication with the class outweighed whatever first amendment interests of the attorney might be affected by

prospective client, consulted with, employed, or proposed to employ the attorney; or (2) communications occurring in the regular course of business or office which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes, or effect of the action and orders therein.

When appropriate, the Court may approve the substance of permitted communications and general descriptions of the circumstances under which the communication is approved, and general descriptions of the parties to whom it may be sent, and the parties who may send the communication.

96 Wash. 2d at 711, 638 P.2d at 1202.

136. The 1977 edition of the *Manual* discussed many of the potential abuses connected with class action litigation. *MANUAL FOR COMPLEX LITIGATION* § 1.41 (4th ed. 1977). This earlier edition recommended that trial courts use a pretrial order almost identical to the order entered in *Johnston*, save for the following paragraph, not included in the *Johnston* order:

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

MANUAL FOR COMPLEX LITIGATION § 1.41 app., at 188-89 (4th ed. 1977).

137. 96 Wash. 2d at 711, 638 P.2d at 1202-03. Under the settlement agreement, defendants were permitted to seek reimbursement from the settlement fund of any amount left over after the payment of all reasonable claims. Plaintiff's attorney wrote the challenged letter to the class about two weeks before the deadline for filing claims, and one month after the official notice to the class concerning settlement procedure had been sent with court approval. *Id.*

138. *Id.* at 712, 638 P.2d at 1203.

139. *Id.* at 709, 638 P.2d at 1202.

the court's order.¹⁴⁰

The Washington Supreme Court reversed, without reaching the constitutional question, holding that in light of the purpose of the no-communication order, the letter in question could not be found to violate the order.¹⁴¹ The purpose for limiting communication with the class, the court stated, was to avoid abuses such as fomenting litigation, soliciting funds to support an action, and exercising undue influence over or misrepresenting facts to the class.¹⁴² The supreme court found that the letter was not contemptuous because a settlement and notice to the class about the settlement had already been approved by the court, because the challenged letter was designed only to remind class members of the deadline on claims contained in the notice they had already received and of the necessity for filing claims, and because the challenged letter generated legitimate claims in furtherance of the aims of the court-approved settlement.¹⁴³

In *Darling*, the trial court entered an order limiting communication with the class that was virtually identical to the *Johnston* order¹⁴⁴ The dispute over the no-communication order arose when the order was amended at defendant's request. The amended order added an expert associated with the plaintiffs to the group of persons barred from communicating with the class. The plaintiffs petitioned the supreme court for direct review of the amended order, asserting that the order was an abuse of the trial court's power under CR 23(d) and a violation of the first amendment.¹⁴⁵ Between the entry of the trial court's amended order and the Washington Supreme Court's decision on appeal, the United States Supreme Court decided *Gulf Oil Co. v. Bernard*,¹⁴⁶ which raised similar questions concerning the no-communication order recommended by the *Manual for Complex*

140. *Johnston v. Beneficial Management Corp. of Am.*, 26 Wash. App. 671, 677, 614 P.2d 661, 664-65 (1980), *rev'd*, 96 Wash. 2d 708, 638 P.2d 1201 (1982).

141. *Johnston*, 96 Wash. 2d at 714-15, 638 P.2d at 1204.

142. *Id.* at 713, 638 P.2d at 1203.

143. *Id.* at 714-15, 638 P.2d at 1204.

144. *Darling*, 96 Wash. 2d at 704-05, 638 P.2d at 1250-51. The order in *Darling* was based on KING COUNTY SUP. CT. LOCAL R. 23(f), which was adopted after the trial court in *Johnston* issued its order.

145. 96 Wash. 2d at 702-03, 638 P.2d at 1250.

146. 452 U.S. 89 (1981). The trial court's amended order in *Darling* was entered on May 28, 1981. 96 Wash. 2d at 704, 638 P.2d at 1250. *Gulf Oil* was decided on June 1, 1981. 452 U.S. at 89. The Washington Supreme Court's decision in *Darling* was handed down on January 14, 1982. 96 Wash. 2d at 701, 638 P.2d at 1249.

*Litigation.*¹⁴⁷

In *Gulf Oil*, the plaintiffs had brought an employment discrimination class action in federal court at the same time that the defendant in that action, Gulf Oil, was trying to convince employees to accept a settlement offered by the company through the auspices of the Equal Employment Opportunities Commission.¹⁴⁸ Because of the no-communication order, plaintiffs and their counsel were precluded from advising members of the proposed class to seek legal advice before accepting Gulf's settlement offer.¹⁴⁹ The United States Supreme Court declined to reach the first amendment questions raised by plaintiffs because the Court concluded, on the facts before it, that the trial court clearly abused its supervisory power under federal rule 23(d) by entering the no-communication order.¹⁵⁰ For the future, the Court suggested that communication bans should not be imposed without an initial determination, on a clear and complete record, with specific findings in support of the determination, that the need to restrict communication with the class outweighs the potential interferences with the rights of the parties that might flow from the restriction.¹⁵¹

The circumstances before the Washington Supreme Court in *Darling* were not nearly as dramatic as those present in *Gulf Oil*. The *Darling* case was still in the earliest stages of litigation,¹⁵² and no settlement was imminent.¹⁵³ The Washington

147. MANUAL FOR COMPLEX LITIGATION § 1.41 app., at 188-89 (4th ed. 1977). See *supra* note 136.

148. *Gulf Oil*, 452 U.S. at 91-92.

149. *Id.* at 94-95. However, communication by Gulf to the class members of its settlement offer was excluded from the communication ban. *Id.* at 95.

150. *Id.* at 103-04.

151. *Id.* at 101-04. After *Gulf Oil* was decided, the authors of the *Manual for Complex Litigation* withdrew their earlier recommendation that no-communication orders be entered as a matter of course in class actions and substituted recommendations along the lines of the position taken by the Supreme Court in *Gulf Oil*. Compare MANUAL FOR COMPLEX LITIGATION § 1.41, at 27 (4th ed. 1977) ("In order to guard against unapproved [solicitation], it is recommended that each court adopt a local rule forbidding unapproved direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members who are not formal parties . . .") with MANUAL FOR COMPLEX LITIGATION § 1.41, at 28 (5th ed. 1982) ("All local rules providing for automatic judicial control of communications with action and potential class members should be revoked.").

152. Indeed, the no-communication order was entered before the class was even certified. *Darling*, 96 Wash. 2d at 702, 638 P.2d at 1250.

153. Thus, in contrast to *Johnston* and *Gulf Oil*, in *Darling* there was no specific need for immediate communication with the class.

Supreme Court, while declining to find a specific abuse of power as the United States Supreme Court had found in *Gulf Oil*, nevertheless decided that *any* communication bans in class actions, because they *could* create potential difficulties for the parties or their lawyers, should be entered only after the trial court makes specific findings of fact and conclusions of law concerning the need for a communication ban. Therefore, the Washington Supreme Court remanded the case to the trial court for reconsideration of the communication ban in light of the need for specific findings to support it.¹⁵⁴ Because of its holding, the Washington Supreme Court, like the United States Supreme Court in *Gulf Oil*, was able to avoid the first amendment issues raised by the petitioner.¹⁵⁵

One point in particular should be noted about the *Darling* case. The *Darling* court took great pains to say that it was not going as far as the United States Supreme Court did in *Gulf Oil* because *Darling*, unlike *Gulf Oil*, did not determine that the communication ban in question was unreasonable.¹⁵⁶ In fact, the practical impact of *Darling* is the same. Both *Darling* and *Gulf Oil* require findings on the record, before the ban can be entered, that the dangers of abuse of the class action device justify the potential interference with the rights of the parties that a communication ban may cause.

C. CR 23(e)—Class Action Settlements

While countless federal decisions have been handed down by both trial and appellate courts on the special problem of settling class action litigation,¹⁵⁷ the Washington appellate courts have not yet heard an appeal raising settlement issues.¹⁵⁸ The brevity of CR 23(e) is probably one reason for the lack of Washington precedent on the question of class action settlements. CR 23(e) is short and to the point, stating simply that “[a] class

154. 96 Wash. 2d at 708, 638 P.2d at 1252.

155. *Id.* at 703 n.1, 638 P.2d at 1250 n.1.

156. *Id.* at 706, 638 P.2d at 1251-52.

157. *See, e.g.*, cases cited in SECTION OF LITIGATION, AMERICAN BAR ASS'N, DYNAMICS AND PROCEDURES IN THE SETTLEMENT OF CLASS ACTIONS (1983).

158. *Johnston v. Beneficial Management Corp. of Am.*, 96 Wash. 2d 708, 638 P.2d 1201 (1982), discussed *supra* notes 132-43 and accompanying text, in the context of the supervisory powers of the trial court, was a settled class action. The appeal in *Johnston*, however, did not raise any questions about the settlement itself. The appeal was from an order holding plaintiff's attorney in contempt of court for violating a prior order banning unauthorized communication with the class. 96 Wash. 2d at 709, 638 P.2d at 1201-02.

action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court dictates."¹⁵⁹ There just isn't much in the rule to fight about. The rule requires court approval of both settlements and notices to the class of the proposed settlement. It doesn't take a Sherlock Holmes to figure out that "notice of the proposed . . . compromise"¹⁶⁰ means notice before the compromise is approved. Furthermore, if flagrant abuse of class action procedure is to be avoided, the notice itself ought to be approved by the court before it is sent.¹⁶¹ Finally, for the notice to have any meaning at all, it must be followed by an opportunity for class members to present their objections to the proposed settlement.¹⁶²

It is not surprising, therefore, that there is almost universal agreement in the federal courts on a four-step procedure for reviewing proposed class action settlements. Initially, the court reviews the settlement proposed by the parties (including the proposed notice to be sent to the class) and decides whether to give tentative approval to the settlement.¹⁶³ If the court tentatively approves the settlement and the proposed notice, the notice is sent to the class members, explaining the terms of the settlement and telling them when, where, and how they can object.¹⁶⁴ A final hearing on the proposed settlement is then

159. WASH. SUP. CT. CIV. R. 23(e).

160. *Id.* (emphasis added).

161. When settlement of a class action is proposed, the potential for conflicts among counsel, the named plaintiffs, and class members is heightened. *Simer v. Rios*, 661 F.2d 655, 665 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). Because of those potential conflicts, it becomes particularly important that any notice to the class of a proposed settlement be scrutinized carefully to ensure that it fairly and adequately describes the settlement. *Id.*

162. There is not much point, after all, in being notified of the *proposed* settlement before its final approval if there is no opportunity to object to the settlement's terms.

163. *See, e.g., Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 79 (S.D. Tex. 1977) (a court should make a tentative determination that the proposed compromise and dismissal is reasonable before sending notice to the class and holding a full hearing); *Mungin v. Florida E. Coast Ry.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970) (it was not necessary to give individual class members notice of a hearing concerned only with preliminary approval of a proposed settlement), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971). *See* MANUAL FOR COMPLEX LITIGATION § 1.46, at 52 (5th ed. 1982).

164. *See, e.g., Airline Stewards & Stewardesses Ass'n, Local 550 v. American Airlines*, 455 F.2d 101, 108 (7th Cir. 1972) (notice fairly apprised class members of a proposed compromise and of options open to dissenting class members when the notice summarized proceedings to date, informed class members of the significance of judicial approval of the proposed agreement, told class members that the agreement provided for

held, at which all objections that have been properly raised are presented.¹⁶⁵ The last step is final approval or disapproval of the settlement.¹⁶⁶ The Washington appellate courts would undoubtedly adopt a similar review process if questions concerning settlement procedures were raised.

The class action settlement questions causing the most controversy in the federal courts deal with the settlement of cases that have not yet been certified as class actions¹⁶⁷ and the inclusion of attorneys' fees as part of a settlement package.¹⁶⁸ Both of these problems pose a real dilemma because they force courts to choose between the desirability of encouraging settlements and the undesirability of permitting potential conflicts of interest to influence the settlement process. For example, when attorneys' fees become part of the settlement package, the attorney whose fees are being settled must balance his or her interests against those of the client in assessing the value of the proposed settlement, which raises an obvious ethical dilemma.¹⁶⁹ Excluding attorneys' fees from the settlement process, however, as some federal courts have done,¹⁷⁰ reduces the likelihood of settlement because it prevents the defending party from achieving a settle-

their placement on a "preferential hiring list" subject to their acceptance, and informed would-be dissenters that they might appear in person or by counsel to register their objections and present evidence in support thereof); *Milstein v. Werner*, 57 F.R.D. 515, 518 (S.D.N.Y. 1972) (in a shareholder's derivative suit, ample notice was provided by an eight-page printed brochure, sent 38 days in advance of the hearing, that identified the actions being terminated, detailed the course of the litigations, and adequately and reasonably presented the terms of the settlement). See *MANUAL FOR COMPLEX LITIGATION* § 1.46, at 52 (5th ed. 1982).

165. See, e.g., *Greenfield v. Villager Indus.*, 483 F.2d 824, 833 (3d Cir. 1973) (it is "elemental" that an objector at a hearing on a proposed settlement is entitled to an opportunity to develop a record in support of his contentions by means of cross-examination and argument to the court).

166. See, e.g., *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975) (decision whether to give final approval to a proposed settlement of a class action should not be made until the class members are given adequate opportunity to object to the proposal).

167. Precertification settlements may involve all or part of the class on whose behalf suit was brought. See, e.g., *Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc.*, 607 F.2d 167, 173, 180 (5th Cir. 1979) (permitting temporary and permanent settlement classes), *cert. denied*, 452 U.S. 905 (1981). Or such settlements may involve only the named plaintiffs. See, e.g., *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1301 (4th Cir. 1978) (class representatives settled their individual claims before class was certified; trial court should have considered putative class members' interests).

168. See, e.g., *Jeff D. v. Evans*, 743 F.2d 648, 651-52 (9th Cir. 1984) (in the absence of unusual circumstances, attorneys' fees should not be included as part of the settlement of the claims of the class).

169. *Id.* at 652.

170. *Id.* at 651-52.

ment that fully defines the extent of its liability.¹⁷¹

Precertification settlements raise a host of problems that are well beyond the scope of this Article. The *Manual for Complex Litigation* discourages them because of the high potential for unfairness to the putative class.¹⁷² Yet, the majority of federal courts have approved precertification settlements when fairness could be demonstrated.¹⁷³ Obviously, the problem of precertification settlement is far less likely to arise if careful attention is paid to the requirement of early class certification.¹⁷⁴ This is another reason why the Washington practice of deferring class certification decisions beyond the early pretrial stages should be discouraged.¹⁷⁵

V. MISCELLANEOUS PROBLEMS

Four other class action or class action related problems have received at least some attention by the Washington courts. Only one of these problems, the availability of the class action device for use against a defendant class, raises questions concerning interpretation of the class action rule. The other three problems are not unique to class actions and do not directly involve the class action rule, but, nevertheless, raise special concerns in the context of class actions. These three problems are the appealability of non-final orders, mootness, and attorneys' fees.

171. In cases in which attorneys' fees come out of the class recovery fund, defendant's incentive to settle may not be affected by leaving the question of attorneys' fees open. However, when attorneys' fees are to be paid by defendant, over and above any contribution to a settlement fund, as is the practice in many federal civil rights actions, the defendant will have far less incentive to settle the class claims if the question of attorneys' fees must be left open. Furthermore, in either case, class members may have a more difficult time judging the adequacy of the settlement proposal if the question of attorneys' fees remains unresolved.

172. *MANUAL FOR COMPLEX LITIGATION* § 1.46, at 60-61 (5th ed. 1982).

173. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982) (whether a proposed precertification settlement is fair is determined by "compar[ing] the terms of the compromise with the likely rewards of litigation" and by examining the negotiation process), *cert. denied*, 104 S. Ct. 77 (1983); *Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc.*, 607 F.2d 167, 174 (5th Cir. 1979) ("Temporary settlements are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable . . ."), *cert. denied*, 452 U.S. 905 (1981); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 465 (2d Cir. 1974) (precertification settlement posed less danger of unfairness when negotiated after almost four years of litigation and when all class representatives were represented by the same counsel).

174. WASH. SUP. CT. CIV. R. 23(c)(1) requires that the determination whether to proceed with a class action be made "[a]s soon as practicable after the commencement of an action."

175. See *supra* notes 87-103 and accompanying text.

A. Defendant Class Actions

Defendant class actions are rare, but troublesome. Although CR 23 contemplates the availability of defendant class actions, providing, for example, in CR 23(a) that “[o]ne or more members of a class may sue or *be sued* as representative parties[,]”¹⁷⁶ the rule was clearly written with the more common plaintiff class action primarily in mind. Thus, for example, the rule permits members of a (b)(3) class action to opt out of the action, with no apparent regard for the fact that the availability to *defendant* class members of this option makes a (b)(3) defendant class action virtually unworkable.¹⁷⁷

Four cases in which defendant class actions have been pleaded have reached the Washington appellate courts. In two of these four cases, the defendant class was certified below. In *Marquardt v. Fein*,¹⁷⁸ the receiver of an insurance company mortgagee brought a mortgage foreclosure proceeding against a defendant class of some 800 mortgagors.¹⁷⁹ The propriety of the trial court’s certification of the defendant class was not, however, an issue on appeal. The appeal was concerned only with the propriety of the trial court’s removal of counsel for the defendant class on the ground of inadequate representation.¹⁸⁰ *Murphy v. Huntington*,¹⁸¹ although characterized and certified by the court as a class action by a defendant against an impleaded class of third-party defendants,¹⁸² was in reality a plaintiff class action, certified at the request of defendant.¹⁸³ The supreme court in *Murphy* did not address the class action status of the case.¹⁸⁴

In one of the remaining two cases, *Gellantly v. Chelan*

176. WASH. SUP. CT. CIV. R. 23(a) (emphasis added).

177. Rare will be the defendant class member who, when given a choice in the matter, does not opt out. Even if every defendant class member does not opt out, the odds are substantial that enough would opt out to negate a finding of numerosity under CR 23(a)(1). An additional problem with defendant class actions is that the defendant becomes an involuntary representative party and is, therefore, more likely to have adequacy of representation problems under CR 23(a)(4).

178. 25 Wash. App. 651, 612 P.2d 378 (1980).

179. *Id.* at 651, 612 P.2d at 378.

180. *Id.* at 652, 612 P.2d at 379.

181. 91 Wash. 2d 265, 588 P.2d 742 (1978).

182. *Id.* at 266, 588 P.2d at 744.

183. *See supra* notes 107-11 and accompanying text.

184. The appeal in *Murphy* was directed only to the correctness of the trial court’s ruling on the merits. 91 Wash. 2d at 267, 588 P.2d at 744.

County,¹⁸⁵ the action was brought as a plaintiff and defendant class action by a class of all real property taxpayers in Washington against a class of all the counties and appropriate county officials in the State of Washington.¹⁸⁶ However, it is unclear whether the trial court ever ruled on class certification. The supreme court did no more than describe without comment the nature of the classes that the plaintiffs sought to represent and sue before going on to affirm the trial court's dismissal of the action on the merits.¹⁸⁷

The only case in which the Washington appellate courts have actually discussed the question of certifying a defendant class action is *Washington Education Association v. Shelton School District No. 309*.¹⁸⁸ Plaintiffs brought suit on behalf of a class of all parents of school-age daughters in Washington and all female Washington public school coaches. They sued a defendant class of all Washington local school districts and alleged sex discrimination in athletic programs.¹⁸⁹ The trial court denied certification of both a plaintiff and a defendant class, and the supreme court reversed and remanded for further consideration of the class certification questions.¹⁹⁰ The major stumbling blocks to certification of the defendant class were the trial court's determinations, first, that the named plaintiffs lacked standing to sue local school districts with whom they had no direct dealings and, second, that venue was inappropriate as to defendants outside the forum county.¹⁹¹ At least one federal court had taken a position similar to the trial court on the standing question.¹⁹² The supreme court in *Washington Education Association* avoided the standing problem, however, by holding that the allegations of a conspiracy among the defendant class members gave the individual plaintiffs standing to sue all members of the defendant class and that in any event the associational plaintiff, whose members came from every school district in the state, had standing to sue the entire defendant

185. 85 Wash. 2d 314, 534 P.2d 1027 (1975).

186. *Id.* at 315, 534 P.2d at 1028.

187. The supreme court did not indicate in its opinion whether certification was granted or deferred. *Id.* at 314, 534 P.2d at 1028.

188. 93 Wash. 2d 783, 613 P.2d 769 (1980).

189. *Id.* at 783, 613 P.2d at 769.

190. *Id.* at 785, 613 P.2d at 771.

191. *Id.* at 790-91, 613 P.2d at 774-75.

192. *La Mar v. H & B Novelty Loan Co.*, 489 F.2d 461, 464 (9th Cir. 1973) (no standing to bring a class action against defendants with whom plaintiffs had no dealing).

class.¹⁹³ The supreme court further held that the venue question should not have been considered until after the class certification question had been resolved. The court, therefore, remanded the case for reconsideration of class certification.¹⁹⁴

Although the supreme court in *Washington Education Association* declined to express its views on the propriety of class certification, it left little doubt that certification of a plaintiff and a defendant class action would be appropriate.¹⁹⁵ In light of the allegations of sex discrimination in salaries, working conditions, and facilities, and the obvious appropriateness of declaratory or injunctive relief if those allegations proved accurate, a (b)(2) class action would have been entirely proper.¹⁹⁶ Some federal courts have held, however, that defendant class actions are not permitted under the literal wording of federal rule 23(b)(2), because a finding would be required that the *plaintiff's* actions or inactions made injunctive relief against the *defendant* class appropriate.¹⁹⁷ It does not appear that the Washington Supreme Court is prepared to give CR 23(b)(2) so narrow a reading.¹⁹⁸

193. 93 Wash. 2d at 790-91, 613 P.2d at 773-74. This position is not necessarily inconsistent with *La Mar v. H & B Novelty Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973), which suggested in dictum that the presence of a conspiracy among the defendant class members would change the nature of the standing inquiry.

194. 93 Wash. 2d at 791, 613 P.2d at 774.

195. The supreme court said that it was not expressing any opinion on the appropriateness of class certification, but at the same time it chided the trial court for basing its decision not to certify a class on only one of the alternative requirements of CR 23(b) without having considered the other three alternatives under CR 23(b) or the "minimal" prerequisites of CR 23(a). *Id.* at 793, 613 P.2d at 775.

196. CR 23(b)(2) permits a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief . . ." WASH. SUP. CR. CIV. R. 23(b)(2).

197. *See, e.g., Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980) (suit brought on behalf of all pregnant public school teachers seeking monetary, declaratory, and injunctive relief against class of all members of Virginia school boards between 1969 and 1975 could not be maintained as a class action under rule 23(b)(2)), *cert. denied*, 449 U.S. 1129 (1981). *But see Marcera v. Chinlund*, 595 F.2d 1231, 1238 (2d Cir. 1979) (rule 23(b)(2) is an appropriate vehicle for injunctive relief against defendant class when relief is sought against identical behavior), *vacated sub nom., Lombard v. Marcera*, 442 U.S. 915 (1979); *Thompson v. Board of Educ.*, 519 F. Supp. 1373, 1376-77 (W.D. Mich. 1981), *rev'd*, 709 F.2d 1200, 1203-04 (6th Cir. 1983) (although district court allowed certification of defendant class under rule 23(b)(2) on the theory that the practices in question were functionally identical, the court of appeals reversed because the rule does not contemplate certification of a defendant class and no state statute or general administrative policies were involved).

198. The supreme court in *Washington Educ. Ass'n* gave no indication that consid-

B. Appealability of Class Action Orders

The Washington courts have taken a notably more liberal view of the appealability of orders granting or denying class certification than have their federal counterparts. In federal court the grant or denial of a motion to certify a class action is not considered a final judgment and, therefore, is not considered an appealable order.¹⁹⁹ The so-called death knell doctrine was once thought to permit an appeal from the denial of class certification when the effect of that denial was the termination of the litigation for economic unfeasibility.²⁰⁰ This view has since been rejected, however, by the United States Supreme Court.²⁰¹ Therefore, interlocutory appeals from class action orders in the federal district courts are virtually nonexistent.²⁰²

Washington, by contrast, has permitted interlocutory review of class action orders by writ of mandamus, even in cases that would not have fallen within the old federal death knell doctrine. In *Brown v. Brown*,²⁰³ for example, the trial court denied

eration of a (b)(2) defendant class would be precluded by the very wording of the rule. The court left open further consideration of class certification only on the facts of the case as they developed during pretrial discovery. 93 Wash. 2d at 793-94, 613 P.2d at 775.

199. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). As a result, the decision by a trial court whether or not to let a case proceed as a class action will ordinarily not be reviewable on appeal until after the termination of all proceedings at the trial level. *Id.* at 469-70.

200. *See, e.g., Hartmann v. Scott*, 488 F.2d 1215, 1223 (8th Cir. 1973) (order refusing to permit class action that is not death knell of action is not appealable as a final or interlocutory order); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 121 (2d Cir. 1966) (court of appeals allowed interlocutory review of trial court's dismissal of class action allegations because dismissal of class action would terminate litigation for all practical purposes), *cert. denied*, 386 U.S. 1035 (1967).

201. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978).

202. The only alternative basis for an interlocutory appeal from a class action order is under the Interlocutory Appeals Act of 1958, which requires the trial court to certify, and the appellate court to agree, that the order from which an appeal is sought, though not final, "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1976). Such appeals are rarely accepted on class action issues. *See, e.g., Link v. Mercedes-Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir.) (rule 23(c) determination whether to certify a class action does not involve a "controlling question of law" that can be certified to this court under § 1292(b)), *cert. denied*, 431 U.S. 933 (1977); *Holt Constr. Co. v. Alside, Inc.*, 538 F. Supp. 45, 49 (D. Minn.) (interlocutory appeal would not promote underlying policies of statute), *vacated*, 696 F.2d 613 (8th Cir. 1982). *But see Board of Educ. v. Climatemp, Inc.*, 91 F.R.D. 245, 251 (N.D. Ill. 1981) (appeal warranted when controlling question of law is involved, substantial ground exists for differences of opinion as to question of law, and appeal will materially advance ultimate termination).

203. 6 Wash. App. 249, 492 P.2d 581 (1971).

certification of a class of residential utility users who were challenging the defendant's practice of cutting off services for alleged arrearages in payments.²⁰⁴ Since the plaintiffs planned to proceed with their individual claims whether or not the class was certified, the federal death knell doctrine would not have permitted an appeal from the denial of certification.²⁰⁵ Furthermore, the order denying certification was clearly not a "final judgment." Yet, the court of appeals found that the remedial purposes behind the class action rule were sufficiently important that a writ of mandamus was an appropriate vehicle for review of trial court orders either denying or granting class certification.²⁰⁶

C. Mootness

The Washington courts, not being confined by the jurisdictional strictures of article III of the United States Constitution, take a decidedly more liberal approach to mootness problems than do the federal courts.²⁰⁷ Nevertheless, there are some similarities between the Washington and federal approaches to the mootness question. Thus, the Washington and federal courts have recognized that certification of a class action will excuse later mootness problems for the named plaintiffs.²⁰⁸ Further-

204. *Id.* at 250, 492 P.2d at 582.

205. The court of appeals in *Brown* noted the then existent death knell doctrine, but concluded that it would not apply to the facts before the court of appeals. *Id.* at 253, 492 P.2d at 584.

206. *Id.* at 253-54, 492 P.2d at 584. More recently, the Washington Supreme Court has also granted interlocutory review. *Darling v. Champion Home Builders Co.*, 96 Wash. 2d 701, 702, 638 P.2d 1249, 1250 (1982) (review of trial court order prohibiting communications by the parties, their counsel, and agents); *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wash. 2d 783, 787, 613 P.2d 769, 772 (1980) (review of trial court's refusal to certify the plaintiff or defendant classes). The federal courts have generally rejected mandamus as an avenue for review of interlocutory class action orders. *See, e.g., Oswald v. McGarr*, 620 F.2d 1190, 1195 (7th Cir. 1980) (no mandamus when claimed constitutional error can be adequately corrected through normal appeals process). *But see In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 (6th Cir. 1984) (court issued writ of mandamus vacating certification order because district court failed to make fact-finding inquiry on existence of limited fund); *Pan Am. World Airways v. United States Dist. Court*, 523 F.2d 1073, 1076 (9th Cir. 1975) (district court's order to notify potential plaintiffs subject to interlocutory review by mandamus).

207. The article III "case or controversy" requirement is the constitutional source of the mootness and other justiciability doctrines that limit the judicial power of the federal courts. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 52-53, 62 (1978).

208. *See, e.g., Robinson v. Peterson*, 87 Wash. 2d 665, 667, 555 P.2d 1348, 1351 (1976) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Sosna v. Iowa*, 419 U.S. 393 (1975)). The courts hold that any mootness problem with the named plaintiff's claim can

more, the Washington and federal courts agree that class certification can cure already existing mootness problems if certification was originally sought and improperly denied at a time when the class representative's claims were still alive.²⁰⁹ Finally, neither the Washington courts, nor the federal courts have permitted a plaintiff whose claims have already become moot to thereafter, for the first time, seek class certification to avoid the mootness problem.²¹⁰

The Washington courts also seem to recognize the traditional, federally recognized exception to mootness for controversies "capable of repetition, yet evading review,"²¹¹ although the Washington courts do not use that same catch-phrase to describe the problem. Thus, in *Johnson v. Moore*,²¹² an action on behalf of a class of prearrestment detainees was certified even though the named plaintiffs were assumed to have been arraigned or released by that time. Otherwise, the defendants could avoid any challenge to their prearrestment detention practices by simply arraigning anyone who brought such a challenge.²¹³

The big difference between Washington and federal practice on mootness questions becomes apparent only in those cases that the federal courts would dismiss on mootness grounds because class certification was not sought in a timely fashion and the controversy was not "capable of repetition, yet evading

be ignored because there are still class members with live claims to preserve the case or controversy before the court. *Gerstein*, 420 U.S. at 110 n.11.

209. *Robinson v. Peterson*, 87 Wash. 2d 665, 667, 555 P.2d 1348, 1351 (1976). The federal courts have held likewise. See, e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (when class certification was sought and improperly denied before claims became moot, claims would be heard on the merits).

210. *DeFunis v. Odegaard*, 84 Wash. 2d 617, 623, 529 P.2d 438, 442 (1974). On the federal level, see *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975) (court refused to allow plaintiffs to seek class certification after their claims had become moot).

211. The phrase originates in *Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). For a more recent application of the doctrine, see *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), in which a decision on the merits was permitted even though the named plaintiff's claims had become moot before the class was certified; the nature of the plaintiff's claim (challenging prearrestment detention) was such that it could not possibly remain live long enough to be heard on the merits unless an exception to the mootness doctrine was recognized.

212. 80 Wash. 2d 531, 496 P.2d 335 (1972).

213. *Id.* at 532-33, 496 P.2d at 335. Ironically, the factual circumstances presented in *Johnson* were almost identical to those presented three years later in *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the United States Supreme Court resolved the mootness problem in the same fashion.

review.”²¹⁴ The Washington courts, because they are not limited by the article III case or controversy requirement, recognize an additional significant exception to the mootness doctrine that is unavailable in the federal courts. When a controversy was alive at the time the action was commenced and matters of continuing and substantial public interest are involved, the Washington appellate courts will consider the matter on the merits, even if it is by then moot, even if class certification was not sought before it became moot, and even though the controversy was not “capable of repetition, yet evading review.”²¹⁵

In *Johnson v. Morris*,²¹⁶ for example, a plaintiff challenged an ex post facto expansion of juvenile court jurisdiction. The Washington Supreme Court was able to ignore the mootness of the named plaintiff’s individual claim, rule in his favor on his legal challenge to the statute in question, and then decline to review the trial court’s denial of class certification on the ground that it did not matter because the court was granting plaintiff all the relief that he sought.²¹⁷ Had the case been brought in a federal court, by contrast, the ability of the court to reach the merits of plaintiff’s moot claim would have depended on whether class certification was sought in a timely fashion and whether it was improperly denied.²¹⁸

D. Attorneys’ Fees

Washington follows the “American rule” on attorneys’ fees²¹⁹—absent statutory authority to the contrary, attorneys’ fees are generally not awardable as part of the prevailing party’s costs.²²⁰ When statutory authority provides for an award of fees, however, the status of the case as a class or individual suit

214. See, e.g., *Indianapolis School Comm’rs v. Jacobs*, 420 U.S. 128, 129-30 (1975) (Court dismissed plaintiffs’ claims as moot when no efforts had been made to formally certify the class and the issues raised were not “capable of repetition, yet evading review”).

215. 80 Wash. 2d at 532-33, 496 P.2d at 335.

216. 87 Wash. 2d 922, 557 P.2d 1299 (1976).

217. *Id.* at 930 n.4, 557 P.2d at 1305 n.4.

218. *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980).

219. *Soper v. Clibborn*, 31 Wash. App. 767, 768, 644 P.2d 738, 738 (1982). For an extensive discussion of the origins of the “American rule,” see *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247-60 (1975).

220. *Tommy P. v. Board of County Comm’rs*, 97 Wash. 2d 385, 401, 645 P.2d 697, 705 (1982).

should not affect the availability of fees.²²¹ Furthermore, when a federal claim is being enforced in the Washington State courts and federal law provides for attorneys' fees to the party prevailing on that claim, Washington will enforce the attorneys' fee provisions.²²²

The only circumstances in which the class action status of a case might affect the availability or calculation of attorneys' fees are in cases falling into the so-called "common fund" and "private attorney general" categories.²²³ When the named plaintiff's attorney produces or preserves through successful litigation a common fund of money for the benefit of a large group of persons, the common fund doctrine permits an award of attorneys' fees out of the entire fund. As a result, the named plaintiff does not bear the whole burden of the fees incurred in procuring a benefit for the group.²²⁴ While the Washington courts have not yet faced a common fund class action involving attorneys' fees questions, they have recognized the doctrine in other contexts.²²⁵

The private attorney general doctrine permits an award of fees against the defendant, whether or not a fund is generated by the litigation, in cases in which the plaintiffs have prevailed in litigation of broad societal importance that could only be brought through private action.²²⁶ While Washington has in the past rejected the private attorney general doctrine,²²⁷ it has

221. *See, e.g., Berry v. Burdman*, 93 Wash. 2d 17, 24, 604 P.2d 1288, 1292 (1980) (attorneys' fees in action brought against the Department of Social and Health Services authorized by state statute), *cert. denied*, 451 U.S. 1021 (1981).

222. *Duranceau v. City of Tacoma*, 37 Wash. App. 846, 851, 684 P.2d 1311, 1315 (1984) (federal statute authorizing attorneys' fees in civil rights action enforceable in state court by reason of supremacy clause).

223. Cases falling into the common fund or private attorney general categories are more likely than other cases to be class actions because of the broader spectrum of society affected by such litigation.

224. The common-fund doctrine is often referred to as an exception to the normal "American rule" on attorneys' fees. *See, e.g., Serrano v. Priest*, 20 Cal. 3d 25, 35, 569 P.2d 1303, 1307, 141 Cal. Rptr. 315, 319 (1977). However, it is not really an exception since the fees awarded come out of the class recovery in a manner more analogous to a contingency fee.

225. *See, e.g., Peoples Nat'l Bank of Wash. v. Jarvis*, 58 Wash. 2d 627, 632-33, 364 P.2d 436, 439-40 (1961) (holding that attorneys' fees may be awarded under the common fund doctrine when plaintiff preserved or created a monetary fund for benefit of himself and others).

226. *Serrano v. Priest*, 20 Cal. 3d 25, 42-43, 569 P.2d 1303, 1312-15, 141 Cal. Rptr. 315, 324 (1977).

227. *Swift v. Island County*, 87 Wash. 2d 348, 362, 552 P.2d 175, 184 (1976). The federal courts have also rejected the private attorney general doctrine. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (only Congress can authorize

more recently treated the question as open.²²⁸

When attorneys' fees are awarded, factors that should be considered in the trial court's determination of fees include "the time and labor required, novelty and difficulty of questions, required skill, values involved and results obtained, fees customarily charged, and experience, reputation and ability of the attorney."²²⁹ Mechanistic formulas should be avoided²³⁰ and, when otherwise appropriate, fees may even exceed the amount recovered by plaintiff.²³¹

VI. CONCLUSION

Many questions concerning class action litigation in the Washington courts remain open.²³² This is not surprising because litigation of class actions in the state courts is, in general, much less common than it is in the federal courts.²³³ What is perhaps surprising is the number of issues concerning class action litigation that the Washington courts have resolved. It is quite evident that Washington attorneys do not shy away from class action practice in the state courts.²³⁴ From the perspective of plaintiffs' attorneys, there is no good reason not to bring class actions in the state courts.

The Washington courts have not hesitated to exercise judgment independent of the federal courts when interpreting and applying the class action rule, and that judgment quite often favors maintenance of the class action. For example, the Wash-

an exception to the "American rule" forbidding fees under private attorney general doctrine).

228. *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 540 & n.20, 585 P.2d 71, 106 & n.20 (1978).

229. *Olsen Media v. Energy Sciences, Inc.*, 32 Wash. App. 579, 586, 648 P.2d 493, 498 (1982). The guidelines for fee awards in federal court are similar. See *MANUAL FOR COMPLEX LITIGATION* § 1.47, at 66 (5th ed. 1982), and cases cited therein.

230. *Olsen Media v. Energy Sciences, Inc.*, 32 Wash. App. 579, 586-87, 648 P.2d 493, 498 (1982).

231. See, e.g., *Beeson v. Atlantic-Richfield Co.*, 88 Wash. 2d 499, 511-12, 563 P.2d 822, 829 (1977) (award of \$3600 in attorneys' fees allowed even though amount in controversy was only \$1000).

232. For example, questions concerning the CR 23(a)(3) typicality requirement, *supra* notes 16-21 and accompanying text, the requirements of CR 23(b)(2) and (3), *supra* notes 56-78 and accompanying text, or the settlement requirement of CR 23(e), *supra* notes 157-75 and accompanying text.

233. 1 H. NEWBERG, *CLASS ACTIONS* 294 (1977).

234. Presumably the class action cases that reach the Washington appellate courts are only a small percentage of the total number of class actions actually litigated in Washington.

ington courts consistently give a broad interpretation to the CR 23(a)(2) requirement of common questions, unlike many federal courts.²³⁵ Furthermore, immediate appellate review of the denial of class certification is more readily available in the Washington courts than it is in the federal courts.²³⁶ Also, there seems to be much less hostility toward actions brought against defendant classes in the Washington courts, which can make more feasible the litigation of constitutional claims against classes of local-level governmental entities engaged in similar challengeable activities.²³⁷

There is a very real sense in which the Washington courts have been able to use the class action device as it was intended, as a useful procedural tool for managing litigation problems rather than the "Frankenstein Monster" so often portrayed in federal litigation.²³⁸ Perhaps this is, in part, because the class actions that are brought in state court are necessarily smaller and more manageable than those occasionally brought in federal court. For whatever reason, however, the Washington courts have not exhibited any of the hostility to class actions sometimes seen in the federal courts.²³⁹ The federal courts could certainly learn something from the primarily positive experience of the Washington courts.

235. See *supra* notes 39-48 and accompanying text.

236. See *supra* notes 199-206 and accompanying text.

237. Without the defendant class action device, either every local governmental entity would have to be joined as a named defendant or separate suits would have to be initiated in each county of the state. See *supra* notes 176-98 and accompanying text. Another advantage to bringing civil rights class actions in the Washington courts, at least when the state, or its agencies, or officials are defendants, is that monetary relief, barred in the federal courts by the eleventh amendment, will often be available in the Washington courts. See *supra* notes 72-76 and accompanying text.

238. The class action device was first dubbed a "Frankenstein Monster" in Chief Judge Lombard's dissenting opinion in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lombard, C.J., dissenting), *vacated*, 417 U.S. 156 (1974). See generally Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979).

239. Compare *White v. Gates Rubber Co.*, 53 F.R.D. 412, 413 (D. Colo. 1971) (suggesting that an allegation of a general practice of race discrimination does not present a common question because its ultimate resolution will turn on the facts of each individual's case) with *Johnson v. Moore*, 80 Wash. 2d 531, 532-33, 496 P.2d 334, 335-36 (1972) (finding a common question concerning the propriety of defendant's general policy of detention without hearings even though the legality of individual instances of detention might turn on particular facts of each case).