EXHIBIT F

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOY ANN GARDNER and ROBERT BLANGERES, individually and on behalf of a class of persons similarly situated, Respondents, v. STIMSON LUMBER COMPANY, an Oregon corporation, Petitioner.	No. 48826-1-I DIVISION ONE ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

This is a class action brought by residents of Washington, Idaho, Oregon, California, Colorado, Utah, and Hawaii against defendant Stimson Lumber. Plaintiffs allege that the hardboard siding sold by Stimson was defective, and that Stimson's product marketing violated the Washington Consumer Protection Act. Stimson seeks discretionary review of the trial court's order granting class certification. Given the current posture of the case, we decline to accept review.

FACTS

Between 1985 and 1996, Stimson Lumber distributed a composite hardboard siding known as "Forestex." Forestex was marketed as being waterproof. Stimson's brochures represented that the siding "shed water like a duck." Plaintiffs allege that this claim was false, and that the siding in fact absorbed water causing it to buckle.

In 1995, an initial suit was filed in Idaho. The plaintiffs in that case sought certification covering all 50 states. The Idaho court denied the plaintiffs' motion for class certification, and the plaintiffs took a voluntary non-suit in 1997. In 2000, this suit was filed in Washington. The plaintiffs' claims were initially based on fraudulent non-disclosure and omission and on the Consumer Protection Act of Washington. The plaintiffs sought, and were granted, class certification for:

> All persons in the states of Washington, Oregon, California, Idaho, Utah, Colorado, and Hawaii who own or have owned buildings clad with Stimson Series 400 or Series 500 siding ("Forestex hardboard siding") installed after January 1, 1985.

Stimson sought discretionary review. After the motion was filed, the plaintiffs voluntarily dismissed their common law claims, leaving only claims under the Washington Consumer Protection Act.

This matter was initially set before a commissioner of this court, who referred the case to a panel to be heard without oral argument. That panel reset the case for oral argument and requested further briefing.

DISCUSSION

Petitioner/defendant Stimson Lumber seeks discretionary review of the trial court's grant of class certification. Stimson argues that the trial court committed probable error in granting certification, and that the court's decision substantially altered the status quo. RAP 2.3(b)(2). Arguably, any order granting class certification substantially alters the status quo, particularly in a case of this magnitude. The issue, then, is whether the trial court committed probable error.

Stimson's primary arguments are that choice of law concerns render the proposed class unmanageable, and that individual issues of law and fact predominate over common questions. Stimson also argues that judicial comity requires the Washington court to defer to the Idaho court's refusal to grant class certification.

CR 23 establishes the following four prerequisites to a class action:

> 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.

CR 23(a). In addition, a class action must satisfy one of the following three requirements:

> An action may be maintained as a class action if the prerequisites of section (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 interest; 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 likely to be encountered in the management of a class action.

CR 23(b).

The trial court certified the class under CR 23(b)(3). Its decision to certify a class is discretionary and will not be disturbed on appeal absent an abuse of discretion. Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). The party seeking class certification bears the burden of establishing that all requirements of CR 23 have been met. Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 609 (W.D. Wash. 2001) (citing Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Circ. 1992)).

Stimson argues that the class as certified is not manageable because of the choice of law issues, and that a class action is therefore not the most efficient method of determining the plaintiffs' claims as required by CR 23(b)(3). In order to determine whether choice of law concerns render the class unmanageable, the court must first determine whether there is in fact a choice of law issue. Plaintiffs/respondents argue that the Washington Consumer Protection Act applies to the claims of all the plaintiffs and there is no choice of law issue.

We determine whether the forum state's law applies to out of state plaintiffs using a two-part analysis. Under Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), the court first must determine

whether the forum state's law conflicts in any material way with any other law that could apply. "There can be no injury in applying [the law of the forum state] if it is not in conflict with that of any other jurisdiction connected to this suit." Shutts, 472 U.S. at 816. If there is a conflict, then applying the law of the forum state would violate the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1 if the out of state plaintiffs do not have significant contacts or aggregation of contacts with the forum state. Therefore, Shutts requires that the court also determine whether the out of state plaintiffs have significant contacts with Washington.

There are several differences among the consumer protection laws of Washington and of the other six states. For example, Washington's Consumer Protection Act does not require an intent to deceive on the part of the defendant. Under Utah and Colorado's comparable acts, the defendant's conduct must be knowing and intentional. See Utah Code Ann. § 13-11-19; Colo Rev. Stat. § 6-2-103. Under Oregon's applicable statute, the plaintiff must prove that the defendant's acts were willful. Oregon Rev. Stat. § 646.638(1). And its Business Practices Act does not allow for a private cause of action for damages. Utah's statute appears to require a judicial or agency determination that a defendant's actions violate the law before a class action may be maintained. Washington requires a showing that the acts complained of are harmful to the public interest. RCW 19.86.920. Arguably, Washington requires a showing of reliance on the part of the plaintiff. See discussion in Pickett v. Holland Am. Line-Westours, Inc., 145 Wn.2d 178, 196-198, 35 P.3d 351 (2001). There are also differences in the

damages available under the various states' statutes. In sum, Washington's Consumer Protection Act differs enough from the other states' laws to require an inquiry into the second prong of the Shutts test.

X Because there are conflicts between the laws of Washington and the laws of the other states whose plaintiffs seek to be included in the class, the court must determine whether applying the law of Washington would be arbitrary and unfair, and would violate the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1. The forum state must have a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [forum state] law is not arbitrary or unfair." Shutts, 472 U.S. at 821-822 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)).

It is impossible to tell from the record whether the claims of the out of state plaintiffs are sufficiently connected with Washington to create a state interest for Washington. As discovery progresses, the trial court will be in a better position to determine whether Washington has a state interest in the claims of the out of state plaintiffs which would justify applying Washington law to the entire class.

Should the trial court determine that application of Washington law would exceed constitutional limitations, the court must then determine what law should apply to the out of state plaintiffs, and whether class certification is still warranted if it applies the law of other state(s).

Washington has adopted the most significant relationship rule to determine which state's substantive law should be applied to a claim. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 580, 555 P.2d 997 (1976). For example, if the trial court determined it should apply Oregon law, the home state of the defendant, it would have to analyze "the desirability or undesirability of concentrating the litigation of the claims in the particular forum[.]" CR 23(b)(3)(C). While Washington cases have not analyzed this factor, in other states, the courts have looked to whether class certification would benefit both the parties and the court. See, e.g., Osborne v. Subaru of Am., Inc., 198 Cal. App. 3d 646, 243 Cal. Rptr. 815 (1988) (because certification of a nationwide class would require application of non-California law, the suit would not promote judicial economy in California courts, and California did not have any special obligation to assume the burden of adjudicating the nationwide action, because the defendant was not a California corporation).

Should the trial court decide to apply the law of each plaintiff's home state, it would have to determine whether this would render the class unmanageable, or whether difficulties with manageability could be resolved through subclasses. At this early stage in the proceedings, this court is not in a position to determine whether the trial court committed probable error in determining that conflict of laws issues could be resolved that way. Of course, should the trial court determine that subclasses are appropriate, it would also need to determine whether the named plaintiffs remain representative of the class as a whole. Again, given that discovery has just begun in this case, we are not able to say

that the trial court committed probable error in making a preliminary determination that the named plaintiffs were representative of the class.

Stimson also argues that variations in the seven states' statutes of limitations render the class unmanageable. Washington and Hawaii have four-year statutes of limitations. In California, Idaho, and Colorado, the limitations period is three years. Idaho and Utah have two-year statutes of limitations, and in Oregon it is one year. But Washington has adopted the Uniform Conflicts of Law – Limitations Act. RCW 4.18.010 et seq. RCW 4.18.020 provides:

> (1) Except as provided by RCW 4.18.040, if a claim is substantively based:
> (a) Upon the law of one other state, the limitation period of that state applies; or
> (b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies.
> (2) The limitation period of this state applies to all other claims.

RCW 4.18.040 provides:

> If the court determines that the limitation period of another state applicable under RCW 4.18.020 and 4.18.030 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies.

Therefore, under Washington law, if more than one states' laws were to apply, the limitation period of *one* of those states would apply. This would be chosen by conflicts of law analysis. As discussed above, Washington has adopted the "most significant relationship" rule to determine which law to apply. If the trial court decided that one of the shorter statutes of limitation applied, it

would then have to decide if Washington's four-year statute could be applied. To make that decision, the trial court would have to evaluate whether plaintiffs were given a fair opportunity to sue under the shorter limitation period. RCW 4.18.040. In any event, the differences between the seven states' statutes of limitations would not cause difficulties in managing of the class.

More troubling is whether individual issues relating to the "discovery rule" and the statute of limitations predominate over common questions of fact and law. CR 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . ." Stimson began manufacturing and distributed Forestex from 1985 until 1996. This suit was not brought until 2000. Necessarily, then, many or most of the plaintiffs will need to rely on the "discovery rule," regardless of which state's statute of limitations applies. (The statute of limitations was tolled for the period that the Idaho suit was pending, between December 1995 and July 1997. But this would not serve to revive stale claims. See, e.g., Pickett, 145 Wn.2d at 195 (citing Anderson v. Unisys Corp., 47 F.3d 302, 308 (8th Cir.), cert. denied, 516 U.S. 913 (1995)).)

The statute of limitations will normally begin to run at the time an act or omission occurs. In re Estates of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992). The discovery rule is an exception to this general rule. Under Washington's discovery rule, a cause of action does not accrue until the plaintiff knew or should have known the essential elements of his or her cause of action. Green v. A.P.C. (American Pharmaceutical Co.), 136 Wn.2d 87, 95, 960 P.2d

912 (1998); McLeod v. N.W. Alloys, Inc., 90 Wn. App. 30, 36, 969 P.2d 1066 (1998). "The discovery rule requires a plaintiff to use due diligence in discovering the basis for the cause of action." Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). The discovery rule will postpone the running of a statute of limitations until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. A cause of action will accrue on that date even if actual discovery did not occur until later. Allen, 118 Wn.2d at 758.

> The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.

Allen, 118 Wn.2d at 758 (citations omitted).

Although there is no Washington case directly on point, some courts have found that a statute of limitations defense, particularly when based on the discovery rule, precludes class certification. Other courts have found that a statute of limitations defense must be considered by the trial court in granting or denying a motion for class certification.

> Some courts have denied class certification on the ground that the limitations defense made class treatment inappropriate. See Barnes v. The American Tobacco Co., 161 F.3d 127, 149 (3d Cir.1998); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 342 (4th Cir.1998). Many other courts, including some of the courts in cases cited by Plaintiffs, have taken into consideration a limitations defense in evaluating a certification motion. Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 296-97 (1st Cir.2000); Cook, 181 F.R.D. at 480; Lamb v. United Security Life

> Co., 59 F.R.D. 25 (S.D. Iowa 1972) (cited by Plaintiff); Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D.Pa.1975) (cited by Plaintiff) overruled by 531 F.2d 1211 (3d Cir.1976); accord In re Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 853 (9th Cir.1982) (noting that consideration of affirmative defenses such as statute of limitations should be considered in class certification determination). Thus, "statute-of- limitations defenses are appropriate for consideration in the class certification calculus." Waste Management, 208 F.3d at 295.

O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404 (C.D. Cal. 2000). See also Hurd v. Monsanto Co., 164 F.R.D. 234, 240 (S.D. Ind. 1995) ("defendants have asserted several defenses that will further infuse the proceedings with individual issues. For example, the claims of some putative class members may be barred by the statute of limitations. As plaintiffs note, Indiana courts follow the so-called discovery rule, meaning that the limitations period begins to run from the date that the plaintiff knows of or should have discovered that she suffered an injury. (Citation omitted.) Individual hearings would thus be necessary to discover when each class member first learned that she had been injured . . . .").

A statute of limitations defense does not necessarily preclude class certification, but it is an appropriate factor for the trial court to consider in granting or denying class certification. In many cases, determining when each plaintiff knew or in the exercise of reasonable diligence should have known the facts giving rise to their claims could potentially overwhelm the litigation. Here, the question of when a given plaintiff knew or should have known of the damage to their siding, and when or whether a particular plaintiff knew or should have known that these problems were related to caused by Stimson's allegedly deceptive conduct, are questions of fact. As plaintiffs argued in response to

Stimson's motion for summary judgment on the statute of limitations defense, "Determination of whether and when plaintiffs knew or should have known all of the elements of their cause of action is uniquely within the province of the finder of fact and must be decided at trial." Pet. 2nd Supp. App. at 1011. The fact that the class includes plaintiffs who owned homes clad with Forestex siding back to 1985 could potentially create additional barriers to trying this case as a class action.

Nonetheless, we are unable to say that the trial court abused its discretion and committed probable error in granting class certification. As the litigation progresses, plaintiffs will be required to develop a more detailed plan for dealing with the statute of limitations issue. Should they be unable to do so, the trial court could decertify the class. But it is simply too early in the process to determine whether the statute of limitations defense and application of the discovery rule will overwhelm the common issues of fact and law.

Finally, Stimson argues that the trial court committed probable error in failing to give preclusive effect to the Idaho trial court's denial of class certification. A final judgment in one state, if rendered by a court with jurisdiction, must be recognized by other states. For claim and issue preclusion purposes, a judgment entered in one state has nationwide force. See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373, 116 S. Ct. 873, 878, 134 L. Ed. 2d 6 (1996); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 485, 102 S. Ct. 1883, 1899, 72 L. Ed. 2d 262 (1982). But an order denying class certification is not a final

judgment. Moreover, the issues presented in the Idaho case were not identical, as the proposed class consisted of plaintiffs from all 50 states.

CONCLUSION

A trial court's decision regarding class certification rests within the discretion of the trial court. Class certification in this case doubtless will present numerous challenges. But at this stage in the proceedings, it is not clear that these challenges will render the class unmanageable. Because the trial court did not commit probable error in granting class certification, the standard for discretionary review has not been met. Now, therefore, it is hereby

ORDERED that the motion for discretionary review is denied.

Agid, J.

Becker, C.J.