

# Class Certification in California

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SECOND INTERIM REPORT FROM THE  
STUDY OF CALIFORNIA CLASS ACTION  
LITIGATION

FEBRUARY 2010



ADMINISTRATIVE OFFICE  
OF THE COURTS

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## **Executive Summary**

To better understand class action litigation and its impact on the state court system, the Office of Court Research of the Administrative Office of the Courts initiated the Study of California Class Action Litigation in collaboration with the University of California, Hastings College of the Law. The study relied primarily on case file review of a large, random sample of class action cases drawn from courts across California. This summary accompanies the release of the second report from the study which focuses on a pivotal decision in class action litigation: class certification. Prior to this study, empirical data relating to class certification in California was almost non-existent, despite the importance of the decision to the maintenance of a class action case and the debates that often swirl around its impact on litigation.

This report provides the following findings on the subject:

### **Certification Activity**

- Looking at all cases in the database, almost three-quarters of cases *filed* as class actions showed no signs of class certification activity after some sort of class reference was put forth the initial filing;
- The rate of class certification (by any means) decreased by more than 50 percent over the study years;
- Only about 13 percent of study case ever had a motion for class certification filed during the life of the case. Forty-six percent of these motions were granted;
- Most classes are certified as part of a classwide settlement agreement, not through a litigated motion for class certification;

### **Certification by Case Type**

- Employment cases show the highest frequency of class certification activity and have the highest rate of classes that are certified as part of a classwide settlement agreement;
- The higher rate of certification in employment cases may be because the certification inquiry is more straightforward for employee classes, perhaps in part because these classes have characteristics that more easily satisfy the standards for certification. Specifically, employment class action cases are much more likely to specify a precise number in defining the class size thus facilitating the definition and identification of the class;

## **Certification Time Analyses**

- The median time to disposition for all study cases in the sample was just over a year. The overall median time to disposition for certified cases was almost twice as long;
- Cases that are certified through a motion for class certification have the longest median time to disposition, approximately 2.7 years. This is a full year longer than the median time to disposition for those certified as part of a settlement;
- Employment, business tort, and breach of contract cases fall nearest to the overall median time to disposition for certified cases because the median is driven by the most common disposition: settlement. These three case types account for 83 percent of all settlements in certified cases;
- Considering only cases with a certified class, cases that settled had the shortest median time to disposition as compared to all other outcomes. The median time is driven by the large number of settled cases in which the class was certified as part of the settlement itself;

## **Disposition Analyses**

- Eighty-nine percent of cases with a certified class ended in settlement while only 15 percent of cases with no class certification ended in settlement; and
- Only a fraction of those cases that dispose by settlement with a certified class are certified through a litigated motion. Instead, the vast majority are certified as part of a settlement.

Some of the findings in this report contribute to the debates over class certification and settlement pressure. Very few cases can be included in a category in which settlement pressure from class certification may have been a factor in the decision to settle because so many classes are certified as part of the settlement itself. In addition, the study finds that neither overall disposition composition nor time-to-settlement analyses can definitively link certification through litigated motion to inevitable settlement.



## Introduction

The Administrative Office of the Court (AOC), Office of Court Research (OCR) initiated the Study of California Class Action Litigation in collaboration with the AOC's Office of the General Counsel and the University of California Hastings College of the Law in order to better understand the impact that this important area of civil law has on California's court system. The project was designed to establish baseline data on the prevalence and nature of class action lawsuits filed in California.

To collect the type of detailed data not normally available through case management systems and overcome the incompatibility of these systems across courts, the project relied primarily on case file review of a large, random sample of class action cases across the state. In consultation with researchers from the Federal Judicial Center and Hastings Professor Richard Marcus, the Office of Court Research developed a standardized data collection instrument to capture essential data on class action cases. Student interns from Hastings used the data collection instrument to review individual case files, collect relevant data, and report the information to the OCR. Through this process, the OCR compiled case-level information from more than 1,500 cases filed as class actions. The OCR then cleaned and organized the collected information into a database for analysis and reporting.<sup>1</sup>

Specific information collected on both open and closed cases included

- Number of class action cases filed;
- Types of cases and trends in filing over time;
- Sizes of the classes and class definitions;
- Basis of the claims alleged;
- Internal case events, including motions for certification;
- Duration of these cases;
- Types of dispositions;
- Outcome data, including verdict and settlement information; and
- Fees awarded to attorneys.

This is the second of three reports that focus on different aspects of California class action litigation based on analyses of the case database. The first interim report described general trends in filings and disposition of class action cases in California and can be found on the California Courts Web site at [www.courtinfo.ca.gov/reference/caclassactlit.htm](http://www.courtinfo.ca.gov/reference/caclassactlit.htm).<sup>2</sup> This second interim report presents the analysis of data pertaining to class certification in California, including examinations of case type and disposition profiles for certified cases. The final report will focus on case outcome data.

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<sup>1</sup> The full study methodology will be set forth in the final, comprehensive report

<sup>2</sup> Admin. Off. of Cts., *Findings of the Study of California Class Action Litigation, 2000–2006: First Interim Report* (Mar. 2009) (hereinafter *First Interim Report*).

## Background on California Class Certification

Class certification is a pivotal decision in a class action case. In order for a case to be afforded class action treatment the court must certify a class, provided the proposed members satisfy the requirements for certification. Certification thus directs the course of subsequent litigation both in strategy and procedure, and can even extinguish the action altogether if the motion for certification is denied.

The general provisions governing class action litigation and management in California are found in Code of Civil Procedure section 382<sup>3</sup> as well as in case law that has examined the application of the class action statute. In addition, Rule 3.764 of the California Rules of Court specifies that the motion for certification should be brought “when practicable,” and permits establishment of a deadline, in the court’s discretion, for purposes of case management. The decision on class certification does not consider the underlying merits of the case but rather is confined to an examination to determine whether the proposed class satisfies the requirements for certification.<sup>4</sup>

The first requirement for class certification is that the proposed class must be “ascertainable”. To determine this, the court examines the class definition, estimated class size, and the means of identifying class members.<sup>5</sup> The second requirement for class certification is that there is a “well-defined community of interest in the questions of law and fact involved in the case.”<sup>6</sup> This examination turns on three factors, including whether a common question of law or fact exists among all the class members, whether the class representatives present claims that are typical of the class, and whether these representatives will adequately represent all members of the class as a whole.<sup>7</sup> To satisfy this requirement, the plaintiff must also establish that class treatment is superior to alternative methods of proceeding with the case, including individual litigation.<sup>8</sup>

California courts have latitude in interpreting the state authorities that direct class action management and certification and, absent a controlling California source, often examine rule 23 of the Federal Rules of Civil Procedure and its analyses for guidance.<sup>9</sup> Rule 23 sets forth not only the prerequisites for maintenance of a class action, most of which are similar to those listed in Code of Civil Procedure section 382 and rule 3.760 et seq., but also lists the types of class

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<sup>3</sup> California Code of Civil Procedure section 382 specifies that “when the question is one of common or general interest, of many persons, or when 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 all.”

<sup>4</sup> *Lindner vs. Thrifty Oil* (2000) 23 Cal.4th 429 (2000), 435.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.

<sup>8</sup> *Caro v. Procter and Gamble Co.* (1993) 18 Cal.App.4th 644, 654

<sup>9</sup> See e.g. *Daar v. Yellow Cab Co.*, (1967) 67 Cal. 2d 695; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800.

actions that can be maintained and procedures relating to class certification, among other things.<sup>10</sup>

Thus, California certification standards and procedures have evolved to include substantial parallels to those of the federal jurisdiction, with the exception of the option for interlocutory appeal of the certification decision that is available in the federal court. After a class has been certified for purposes of litigation in California, the decision can be challenged through a motion for decertification or a petition for a writ of mandate during the course of litigation or by appeal of the certification decision upon final judgment. Unlike rule 23(f) of the Federal Rules of Civil Procedure, however, California law does not provide for an interlocutory appeal of the certification decision after the court grants class certification. Both jurisdictions do allow for appeal of the denial of class certification if that ruling would be the “death knell” of the action.<sup>11</sup>

The following analyses provide an overview of California class action data as they relate to class certification and this important phase of class action litigation.

### Overview of Certification Activity

Class certification occurs in only a small percentage of the cases that are originally filed as class actions in California state court. Table 1 shows that less than a quarter of disposed cases in the study sample were certified, either through a litigated motion for certification or as part of a classwide settlement agreement. This rate is comparable to the certification rate of 20% in federal court, as reported in a 2006 study published by the Federal Judicial Center.<sup>12</sup>

Certification activity	<i>n</i>	Percent
Not certified after filing of a motion for certification <sup>13</sup>	63	5%
Certified	289	22%
No certification activity	942	73%
Total	1,294	100%

Table 1. Certification activity in disposed cases<sup>14</sup>

<sup>10</sup> See Fed. Rules Civ. Proc., rule 23(a)–(h).

<sup>11</sup> See *Eisen v. Carlisle & Jacquelin*, (1974) 417 U.S. 156 at p.162.

<sup>12</sup> “In both federal and state courts, cases were almost equally unlikely to be certified as class actions.” Thomas E. Willging & Shannan R. Wheatman, “Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?” (2006) 81 Notre Dame Law Review 635.

<sup>13</sup> For purposes of this report, “Not certified after filing of a motion for certification”, “not certified after motion” or “no certification after motion” refers to a case that had a motion for certification that was either denied by the court or was never ruled on prior to disposition and was not certified later as part of a settlement.

<sup>14</sup> Overview analysis is confined to disposed cases only, as open cases may show certification activity after completion of case file review.

In addition, figure 1 shows that the percentage of cases that disposed with a certified class decreased by more than 50% from 2000 to 2005. This finding is also consistent with observations in the federal jurisdiction, which saw a similar decrease in certification rates between 1996 and 2006.<sup>15</sup>

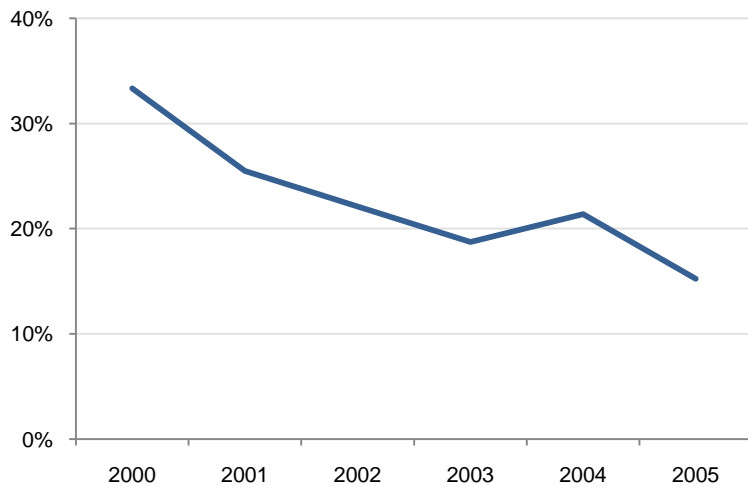


Figure 1. Certified cases as percentage of disposed cases originally filed as class actions<sup>16</sup>

### *Cases with No Certification Activity*

The overall infrequency of class certification is driven by the large number of cases filed as class actions in which there was no class certification activity prior to disposition. For these cases, the only indicators that the case was ever considered a class action were the plaintiff’s selection of the “This is a class action case” checkbox on the *Civil Case Cover Sheet*, inclusion of the words “Class Action” on the face of the complaint, or reference to a class definition in the original filing. These cases had no subsequent court activity in furtherance of class certification after some sort of class claim was posited in the initial filing, and proceeded through litigation without any sign that the class certification decision was ever brought to bear in the case.

The overall rate of disposed cases with unaddressed class action claims in the study sample was 73%. This is significantly higher than the 57% rate found in federal court.<sup>17</sup> Looking at certification activity by year in table 2, the data show that the percentage of California cases with no certification activity was similar to the percentage in federal court in 2000 but rose steadily to over 80% of cases filed in 2005.

<sup>15</sup> “The FJC’s 1996 research . . . reported a class certification rate of 37%. . . . While the study methods were different, comparing data from the current study and the 1992–1994 study suggests that the rate of class certification as a whole most likely had declined in the past decade.” Willging & Wheatman, *supra* note 12, at p. 606, fn. 37.

<sup>16</sup> See appen. A, table A.1 for full data.

<sup>17</sup> Willging & Wheatman, *supra* note 12, at p. 606.

<b>Filed year</b>	<b>Cases with no activity</b>	<b>Total disposed cases</b>	<b>Percent of cases with no activity</b>
2000	96	171	56%
2001	140	208	67%
2002	215	294	73%
2003	198	251	79%
2004	134	173	78%
2005	159	197	81%
Total	942	1,294	73%

Table 2. Disposed cases with no certification activity

Several factors contribute to the high rate of cases with no certification activity found in the study data. First, many of the cases disposed near the beginning of litigation through an early motion, such as demurrer, by a defense motion for summary judgment, or by court-approved dismissal without prejudice, all of which often occur prior to certification activity. However, most importantly, this overall rate is affected by the number of study cases that had an “interim” disposition at the time of the case file review. Interim dispositions include cases that had ended in consolidation, coordination, removal to federal court, or transfer. These dispositions typically occur early in the case, presumably prior to the time when certification activity would occur. Although interim dispositions signal the end of the case for purposes of case review<sup>18</sup>, these cases continue to be litigated as coordinated or consolidated actions, or in federal court.

<b>Filed year</b>	<b>No activity before disposition</b>	<b>No activity before final disposition</b>	<b>No activity before interim disposition</b>
2000	56%	35%	21%
2001	67%	44%	24%
2002	73%	50%	24%
2003	79%	43%	36%
2004	78%	43%	35%
2005	81%	41%	40%
% Increase	+25%	+6%	+19%

Table 3. Disposed cases with no class certification activity, by year, separated by final and interim disposition percentages<sup>19</sup>

Table 3 separates the cases with no certification activity before final dispositions from those with no activity before interim dispositions. This table shows that, on an average, there was no certification activity in 43% of the cases with final dispositions and in 30% of cases with interim

<sup>18</sup> A case that ends in an interim disposition does not reappear in the study as a coordinated, consolidated, or transferred action in a different jurisdiction.

<sup>19</sup> Slight discrepancies in additive totals in any table in the body of this report are due to rounding. See appendix A, table A.2 for data underlying table 3.

dispositions. However, while this rate remained relatively stable over the study years in cases with final judgments, the rate increased significantly among cases with interim dispositions. It is actually the number of interim dispositions, likely entered before commencement of class action activity, which has driven the overall increase in percentage of cases with no certification activity.

The significant rise in the percentage of cases with no class certification activity seen in the interim disposition category may be a result of an effort in California to provide specialized court management to cases involving complex litigation. In 2000, California instituted the Complex Civil Litigation Program in six of the largest California courts, establishing separate departments in each court dedicated to hearing only complex litigation cases. Use of these complex departments increased in the ensuing years as a result of greater program recognition. Cases from all six of these jurisdictions are included in the case review database and represent 81% of all disposed cases in the study (1,048 of 1,294 cases).

The rigorous case management practices employed as part of the Complex Civil Litigation Program, including single assignment to judicial officers who are experienced in handling complex matters, frequent case management conferences and increased interparty communication, allow for early scrutiny of case issues in class actions filed in these courts.<sup>20</sup> This may drive the observed increase in cases with interim jurisdictional (transfer and removal) and management (consolidation and coordination) dispositions prior to class certification activity because these issues are spotted earlier in litigation. Possible evidence in support of this conclusion can be seen in the difference between program courts and nonprogram courts in the rate of cases with no certification activity. In program courts, 75% of cases had no class activity compared to 65% in nonprogram courts, and the rate of cases with interim dispositions doubled in program courts over the study years.

However, the over 40% rate of class action filings that reached a *final* judgment with no certification activity is also an interesting phenomenon. When viewed alongside the steady decline in both the certification rate and the rate of cases with motions for certification, it raises a question regarding the actual scope of the class action litigation in California. (See pages 10-11 for discussion.) There appears to be a significant gap between cases that are simply filed as class actions and those that are ultimately *litigated* as class actions.

### ***Motions for Certification***

Only 12.8% (166 of 1,294) of disposed study cases ever had a motion for certification. In addition, not only was the filing of motions for certification relatively infrequent overall, but the data also show a consistent decrease in the yearly rate of these motions over the study period,

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<sup>20</sup> See [www.courtinfo.ca.gov/programs/innovations/documents/SI\\_Brief\\_ComplexCivLit.pdf](http://www.courtinfo.ca.gov/programs/innovations/documents/SI_Brief_ComplexCivLit.pdf)

declining sharply from 2000 to 2005. As figure 2 illustrates, while over 25% of the cases disposed in 2000 had a motion for certification, this percentage fell to just over 5% by 2005.<sup>21</sup>

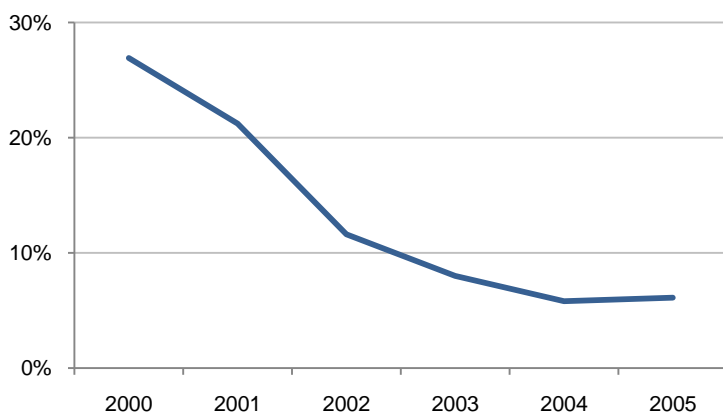


Figure 2. Cases with motions for certification as percentage of all disposed cases<sup>22</sup>

Regarding outcomes of the motions, table 4 shows that, though the largest percentage of motions for certification were granted, the motion was *not* granted almost 40% of the time, either by absence of a ruling on the motion or by explicit denial. However, the fact that the motion for certification was not granted does not preclude later certification as a stipulation of settlement.

	<i>n</i>	Percent
Motion for certification granted	77 <sup>23</sup>	46%
No ruling on motion at time of disposition	31	19%
Denied certification	32	19%
Certified as part of settlement after motion	26	16%
Total	166	100%

Table 4. Outcomes of first motion for certification

Among the 89 cases in which a motion for certification was filed but not granted, almost 30% later reached class certification as part of a settlement agreement itself.<sup>24</sup> Removing the cases in which the class was eventually certified as part of the settlement from the calculation, leaving only cases in which the class was *never* certified after a motion for certification, brings the overall percentage of disposed cases that never achieved certification after a motion to 45% (63

<sup>21</sup> The median time from filing to the first motion for certification is 400 days (mean at 474 days), with 75% of all motions filed within 631 days. This is within the two-year case file review period, so it is not likely that the decrease is related to the sampling structure.

<sup>22</sup> See appen. A, table A.3 for full data

<sup>23</sup> Sixty-five cases were certified by motion only, and 12 cases were certified by motion and later certified in a different form as part of the settlement agreement.

<sup>24</sup> In 5 cases, the class was certified as part of the settlement after explicit denial of the motion for certification. In 21 cases, the class was certified as part of the settlement before there was a ruling on the motion for certification.

of 140 cases), only 10% lower than the overall percentage of cases in which motions for certification were granted (77 of 140 cases, 55% granted under those parameters).

Interestingly, the overall reduction in the number of motions for certification does not seem to have translated into stronger class claims for those cases in which motions were filed. Table 5 shows no discernible pattern in the outcomes of motions for certification, including the percentage of motions granted, suggesting that the steady overall decrease in the number of motions did not represent greater selectivity in regard to the strength of the motions filed.

<b>Filed year</b>	<b>Motion for certification granted</b>	<b>No ruling on motion for certification</b>	<b>Motion for Certification denied</b>	<b>Certified by settlement after motion</b>
2000	47%	9%	29%	16%
2001	57%	21%	11%	11%
2002	47%	27%	12%	15%
2003	30%	20%	25%	25%
2004	55%	27%	0%	18%
2005	25%	17%	42%	17%
Total	44%	20%	20%	17%

Table 5. Outcomes of first motions for certification as a percentage of cases with motion for certification<sup>25</sup>

Regarding overall certification rates and information relating to motions for certification, the data show a significant percentage of cases filed as class actions had no class certification activity prior to disposition, as well as declines in both the number of cases with motions for certification and the number of cases that were eventually certified. The overall decrease in the number of cases in which the class was certified appears primarily attributable not to changes in court rulings on certification, but to an overall absence of litigation activity taken in furtherance of class certification.

Taken together, these results may call into question the actual scope of class action filings in California and could indicate that many of the cases are perhaps not true class action cases for the purposes of litigation. Over half of the cases with no class activity cannot be classified, but a growing minority of the remaining cases without class activity may be more appropriately categorized in the broader “complex” category due the large number of these cases that are ultimately consolidated and coordinated for litigation. This decreasing certification trend is not exclusive to California and follows movement in the federal system as well.<sup>26</sup>

<sup>25</sup> See appen. A, table A.4 for full data.

<sup>26</sup> Willging & Wheatman, *supra* note 12, at p. 606, fn. 37.



The underlying reasons for the decline in motions for certification and large number of abandoned class action claims is unknown, but one possibility is that evolving California and federal case law has narrowed the standards for a class certification so as to constrict the pool of cases that are ever able to satisfy all the requirements for class certification. (See pages 14-17 for discussion of certification by case type.) A second possibility is that attorneys may have included class allegations in the initial complaint, regardless whether the merit of the class claim may likely prove unsupportable during the course of litigation, in an attempt to meet the requirements for assignment into the Complex Civil Litigation Program departments.<sup>27</sup> Yet a third possibility is that the inclusion of class action claims is a tactical decision made to influence the perception of the case in order to leverage greater bargaining power during the course of litigation or settlement. However, these theories cannot be tested using the study database.

### *Means of Certification*

Another significant finding regarding overall certification rates in class action cases is how few classes are actually certified through a litigated motion versus as part of a classwide settlement agreement. Table 6 shows that, in closed cases with a certified class, almost three times as many certified the class as part of a settlement agreement compared to those certified through a litigated motion for class certification. These data relating to *means* of certification in California also diverge from that in the federal system. The rate of certification as part of a settlement is lower in federal court at 58%, with a corollary rate of certification through litigated motion that is higher at 42%.<sup>28</sup>

	<i>n</i>	Percent
Certified as part of a settlement	212	73%
Certified through litigated motion	65	22%
Both by litigated motion and later as part of settlement <sup>29</sup>	12	4%
Total certified cases	289	100%

Table 6. Means of certification for disposed cases with a certified class

In California, the frequency of classes certified as part of a settlement agreement may be another product of the Complex Civil Litigation Program. Close supervision of each case, as well as the

<sup>27</sup> In order to qualify for assignment to the Complex Civil Litigation Program department, a party must move for complex case designation and pass scrutiny under rule 3.400 of the California Rules of Court, which sets forth the factors that establish case complexity. Additionally, because even under rule 3.400 standards there can “still be a significant degree of uncertainty regarding whether a case is truly complex,” rule 3.400(c) also lists actions that are *provisionally* complex—that are conferred an interim presumption of complexity, including “claims involving class actions.”

<sup>28</sup> Willging & Wheatman, *supra* note 12, at pp. 606-607.

<sup>29</sup> The certification for settlement in these 12 cases either amended or expanded upon the class that was originally certified in the granted motion for certification.

accessibility and communication between parties and the judicial officer, can foster a more cooperative process and encourage outcomes that are mutually acceptable.<sup>30</sup> The unique communication techniques and effective judicial management employed through this program may help bring all parties to a position where they can agree on appropriate terms of settlement, thus leading to a higher rate of certification through settlement as opposed to certification through a litigated motion. Support for this hypothesis can be seen in table 7 which compares the means of certification in program courts versus nonprogram courts.

	<b>Nonprogram courts</b>	<b>Program courts</b>
Certified as part of settlement	54%	79%
Certified by motion	40%	17%
Certified by both means	6%	4%
Total certified	100%	100%

Table 7. Means of certification in program courts versus nonprogram courts<sup>31</sup>

The rate of certification reached through a classwide settlement agreement is almost 50% higher in program courts, while the rate of cases certified by motion is less than half that of nonprogram courts.

### ***Objections to Motions for Certification***

The filing of a motion for certification significantly changes the course of litigation, precipitating additional activity by opposing counsel and by the court. Objections to the motion were filed in over 70% of cases with a motion for certification (118 of 166 cases), and they were filed relatively quickly after the motion itself. The median time between filing of the motion and the objection is just 63 days. In addition, the court is much more likely to issue a ruling on the motion for certification if an objection to the motion is filed.

	<b>No objection filed</b>	<b>Objection filed</b>
No ruling on motion	71%	20%
Motion for certification denied	8%	27%
Motion for certification granted	21%	53%
Total	100%	100%

Table 8. Outcome of motions for certification, if objection to motion was filed<sup>32</sup>

Table 8 shows that more than 70% of cases in which an objection was *not* filed were disposed without a ruling on the motion for certification itself. In contrast, only 20% of cases in which an

<sup>30</sup> See [www.courtinfo.ca.gov/programs/innovations/documents/SI\\_Brief\\_ComplexCivLit.pdf](http://www.courtinfo.ca.gov/programs/innovations/documents/SI_Brief_ComplexCivLit.pdf)

<sup>31</sup> See appen. A, table A.5 for full data.

<sup>32</sup> See appen. A, table A.6 for full data.

objection was filed were disposed without a ruling on the motion. Lastly, it should also be noted that the median time to ruling on a motion for certification is 20% shorter in cases in which an objection was filed.<sup>33</sup> The filing of an objection seems to drive case events on some level as it perhaps places more attention to the motion for certification itself, thus leading to more rulings on the motion and in shorter amounts of time.

### ***Challenge of Certification and Decertification***

As noted above, California does not allow for interlocutory appeal of the decision to grant a motion for certification as certification is not considered an appealable final judgment.<sup>34</sup> The only available means of reviewing the certification decision prior to final judgment in California is through filing a petition for a writ of mandate. Only one case in the database had such a mid-litigation appellate review of a court's decision to grant a motion for certification: *Pfizer v. Superior Court (Galfano)* (2006) 141 Cal.App.4th 290. In this case, the petition for writ of mandate sought to overturn a class certification based on the changes in standing requirements brought about by Proposition 64, a voter initiative that limited the use of Business and Professions Code section 17200 et seq., California's Unfair Competition Law (UCL), after widespread allegations of misuse of the law were brought to public attention.<sup>35</sup> The *Pfizer* decision held that, after Proposition 64, all members of the class must show that they suffered injury-in-fact in order to maintain the class status, and the previously certified class was set aside under the new reading of the UCL.<sup>36</sup> This was the only study case in which a court-granted motion for certification was reversed during the course of litigation.

Though California does not offer an option for interlocutory appeal of the granting of certification, parties can file a motion for decertification after a class is certified by the court. Cases are rarely decertified by this means. Of the 65 disposed cases in the study database in

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<sup>33</sup> Median time to ruling on a motion for certification with an objection filed is 131 days. Median time to ruling without an objection filed is 158 days.

<sup>34</sup> *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381.

<sup>35</sup> See *First Interim Report*, *supra* note 2, at pp. 8–9: “The UCL was enacted to protect citizens against ‘unlawful,’ ‘unfair,’ and ‘fraudulent’ business activities, including false advertising. As originally written, the UCL allowed for ‘private attorney general’ actions, as the law conferred the right to sue on behalf of the ‘general public’ without requiring that the plaintiff demonstrate actual harm or seek formal class certification for the representative action. . . . [¶] . . . Proposition 64, which took effect in November of 2004, amended the UCL to include traditional standing requirements as well as imposing mandatory class certification in these representative actions. Post-Proposition 64, a plaintiff bringing a representative UCL claim must show injury-in-fact as well as meeting the procedural requirements of a class action lawsuit.”

<sup>36</sup> This issue was further examined and defined in later in *In Re Tobacco II* (2009) 46 Cal.4th 298. This case involved allegations of deceptive marketing by the tobacco industry. A trial court certified the case as a class action prior to the passage of Proposition 64 but later decertified the class as a result of the changes in the UCL holding that, after Proposition 64, every class member must demonstrate reliance on the misleading advertising to maintain the class action status. The California Supreme Court ultimately overruled and found that “Proposition 64 was not intended to, and does not, impose section 17204’s standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist,” thus applying the injury-in-fact threshold to the named plaintiffs only. *Id.* at p. 28.

which the class was certified through a court-granted motion for certification,<sup>37</sup> only 23% ( $n=15$ ) had a motion for decertification. Of these motions, only 2 were successful. The study data show that though the rate of certification by court-granted motion is relatively low, class certification by this means is seldom undone.

## Certification by Case Type

Certification rates and the frequency of certification activity vary markedly by case type. This section will discuss the two most frequently filed case types, employment<sup>38</sup> and business torts, as well as the somewhat interesting situation of product liability cases in the context of class certification.

Employment class actions demonstrate certification rates and activity that are greater than the overall averages in most categories. Not only do employment cases generally settle more often than most case types,<sup>39</sup> but they also reach this disposition with a certified class more frequently than other case types. As table 9 shows, the rate of certification as part of a settlement is almost twice as common in this case type as compared to the average frequency of this means of certification, overall.

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<sup>37</sup> This does not include the 12 study cases that were certified by both motion and, later, as part of a settlement agreement.

<sup>38</sup> “Employment” cases in this discussion refer to filed cases that designated on the *Civil Case Cover Sheet* the category “employment,” which includes the subcategories “other employment” and “wrongful termination.” Of the 464 employment cases in the database, 454 of them concerned Labor Code violations relating to failure to pay wages. Only 10 employment cases were brought with discrimination claims. The reasons for the increased certification rate in employment cases offered in this section refer to wage-related cases only, as these represent the vast majority of employment cases in the database. The certification rate in employment discrimination cases (only 1 of 10 certified) is lower than that in wage-related employment class action cases in part because these cases inherently require more rigorous analysis to determine class typicality. For discussion of employment discrimination certification issues, see, generally, Richard A. Nagareda, “Class Certification in the Age of Aggregate Proof” (2009) 84 *New York University Law Review*, pp. 97–173.

<sup>39</sup> See *First Interim Report*, *supra* note 2, appen. C, table C.11. Employment cases represent 46.8% of all settlements, second only to construction defect cases at 58.2%. As noted in the report, however, construction defect cases rarely settle as certified class action cases, and most of the settlements are reached with individual subcontractor defendants.

	<b>Certified by motion</b>	<b>Certified as part of settlement</b>	<b>Certified by both means</b>	<b>No certification after motion</b>	<b>Total with certification activity</b>
Employment	6%	29%	1%	4%	40%
Securities litigation	14%	24%	0%	0%	38% <sup>40</sup>
Fraud	2%	16%	0%	12%	30%
Business tort	6%	15%	1%	5%	26%
Breach of contract	2%	15%	2%	5%	24%
Other	6%	11%	0%	7%	23%
Unknown	2%	5%	2%	5%	14%
Antitrust	4%	3%	1%	4%	12%
Construction defect	2%	2%	0%	7%	11%
Product liability	0%	2%	2%	4%	9%
Civil rights	5%	0%	0%	0%	5%
Total	5%	16%	1%	5%	27%

Table 9. Certification rates by case type and means of certification<sup>41</sup>

As discussed previously, the court considers several statutorily enumerated conditions when making the class certification, including whether the class satisfies a numerosity requirement. A greater ability to clearly describe the size of the class may contribute, at least in part, to a more successful class certification effort. Table 10 shows that classes in cases where the plaintiff was able to specifically state the class size in the original class definition were certified more frequently than cases that put forth a class definition that was lesser-defined in scope.

	<b>Certified</b>	<b>Uncertified</b>
Specific class size given	50%	14%
Class size defined as "more than" a specific number	10%	16%
Class with undefined scope	28%	43%
"Unknown" class size	12%	28%
Total	100%	100%

Table 10. Specificity of class definitions in certified versus uncertified classes<sup>42</sup>

<sup>40</sup> Securities litigation has the highest percentage of cases certified by motion and a high percentage of cases with certification activity. However, the overall number of cases filed as securities cases is very low in California, with only 26 filed under this case type over the study years (1.7% of total cases filed, 2000–2005). Only 3 securities cases in the study were certified through a litigated motion. Though it appears that the certification rate for securities cases is notable, the frequency is artificially amplified by the small sample size in this case type.

<sup>41</sup> Disposed cases, only. See appen. B, table B.1 for full data.

<sup>42</sup> “Specific” refers to a class definition that offers a single, definitive figure such as 238 people or 46,648 people, for example. “More than” a specific number refers to classes with definitions such as “more than 300 people” or “more than 2,500 people.” “Undefined” refers to classes with definitions such as “hundreds of thousands of people” or “tens of thousands of people.” See appen. B, table B.2 for full data.

Though underlying substantive law and the ability to resolve the substantive issues on a classwide basis are the controlling determinations that direct the class certification decision, the availability of employment records with which to determine class member status (actual class definition) and the number of eligible employees (numerosity) may help to satisfy the baseline certification requirements and thus facilitate the some aspects of the certification inquiry for employee classes.

	<b>Employment cases</b>	<b>All other case types</b>
Specific class size given	36%	15%
Class size defined as "more than" a specific number	27%	9%
Class with undefined scope	19%	49%
"Unknown" class size	17%	27%
Total	100%	100%

Table 11. Specificity of class definitions in employment cases versus all other case types<sup>43</sup>

Table 11 shows that 36% of the employment cases described the class size in the original class definition with a single, precise number of members as compared to only 15% in all other case types. The higher overall rate of certification in employment cases as shown in table 9 may be to some extent aided by a threshold certification inquiry that is more straightforward for employee classes, in part because this case type can provide more definitional support to satisfy the minimum standards for certification. The specificity of class size in employment class actions may also avoid the complex problem of class size addition—an unpredictable increase in class size after certification—which is another supplementary concern that courts may consider when making the certification decision. (See footnote 66.)

Turning to business torts, in particular cases citing violations the Unfair Competition Law, it should be noted that this case type may soon see a change in the certification profile, either because of an increase in the actual certification rate or an increase in the number of cases filed. Recent court cases have considered the standing requirements for class action suits brought under this statute in light of the passage of Proposition 64. (See page 13 for discussion of Proposition 64.) This may ultimately translate into an increase in the number of UCL class action filings given that rulings on the issue seemingly lowered the threshold for class treatment,<sup>44</sup> which, in turn, could potentially affect the rate of certification for the overall business tort case type. The issue will be ripe for evaluation after an update of the case reviews to include cases filed after May 2009.

<sup>43</sup> See appen. B, table B.3 for full data.

<sup>44</sup> See *supra* note 36.

Lastly, another noticeable aspect of class certification in California is that certification virtually does not exist in products liability cases. Only 2 of 52 products liability cases in the sample were certified. The infrequency of certified products liability cases is a result of several case decisions, primarily in federal court, which limited certification eligibility in this case type.<sup>45</sup> The decisions progressively narrowed the possibility of class certification for various claim bases and class types until most nationwide product liability cases became ineligible for class treatment.

Given that California courts generally look to rule 23 and federal decisions that apply it for guidance in class action matters,<sup>46</sup> the federal decisions have translated into a very low frequency of class certification for products liability cases in California and preclude the possibility of certifying a nationwide class in California. In fact, the two products liability cases in the study with a certified class had California-specific class definitions. The first case involved California consumers of construction goods and the class was certified as part of an eventual settlement. The second case involved California purchasers of a commercial dietary supplement. In this case, the class was certified both by motion and later amended as part of a settlement agreement. The case reviews identified only a single California product liability case with a nationwide class definition, and this case was ultimately stayed in state court pending the resolution of a similar case in the federal jurisdiction.

## **Certification Time Analyses**

Certification changes the time to case disposition to a varying degree depending on how a case is certified, the individual disposition type, and the eventual outcome of the case. This section will discuss the effect that these aspects of class certification have on overall case duration.

The median time to disposition for all class action cases in the study sample was 372 days. The overall median time to disposition for certified cases was almost twice as long, 700 days. However, the median time to disposition for certified cases varies significantly when the analysis is broken out into separate categories of certification activity, as shown in table 12.

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<sup>45</sup> See generally *In the Matter of Rhone-Poulenc Rorer, Inc.* (1995) 51 F.3d 1293; *Castano v. American Tobacco Co.* (1996) 84 F.3d 734; *Amchem Products Inc. v. Windsor* (1997) 521 U.S. 591; *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646; *Lockheed Martin Corp. v. Superior Court*, *supra* 29 Cal.4th at p. 1096.

<sup>46</sup> *Vasquez v. Superior Court*, *supra*, 4 Cal.3d at p. 821.

	<b>Mean (days)</b>	<b>Median (days)</b>
Certified through litigated motion	1,002	993
Certified as part of settlement	720	636
No certification after motion	684	624
No certification activity	384	252
All certified cases	793	700
All study cases	488	372

Table 12. Mean and median days to disposition, by certification category

Cases that are certified by motion have the longest median time to disposition at 993 days, approximately 2.7 years.<sup>47</sup> This is a year longer than the median case length for those certified as part of a settlement (636 days, or 1.7 years) and is for the most part attributable to the added case events introduced by the motion, including objections that are brought in the majority of cases with a motion for certification, as well as additional time necessary for court deliberation and ruling.

Cases with no certification activity have the shortest median time to disposition. Two factors appear to account for this finding. First, more than 40% of these cases end in a disposition that concerns proper jurisdiction or management, outcomes that typically come early in the case life.<sup>48</sup> Second, 37% of these cases resulted in dismissal, either with or without prejudice, both of which have relatively short median times to disposition for uncertified cases.<sup>49</sup>

A simple graphical representation, shown in figure 3 below, provides a useful illustration of these differences between the times to disposition for each of the different certification categories.<sup>50</sup>

<sup>47</sup> See appen. C, figures C.1–C.3 for overview of time analyses related to motions for certification.

<sup>48</sup> See *First Interim Report*, *supra* note 2, at pp. 15–16.

<sup>49</sup> See *id.*, appen. C, table C.16. Median time to disposition for dismissals without prejudice and dismissals with prejudice are 271 and 412 days, respectively.

<sup>50</sup> The density curves below are constructed estimates of the probability that a theoretical observation will fall at any given point in a sample, based on a sample of actual collected data. The graphs are read similar to a histogram, or bar graph. Here, the height of the curve represents the proportion of cases disposed at the length of time indicated on the x-axis.



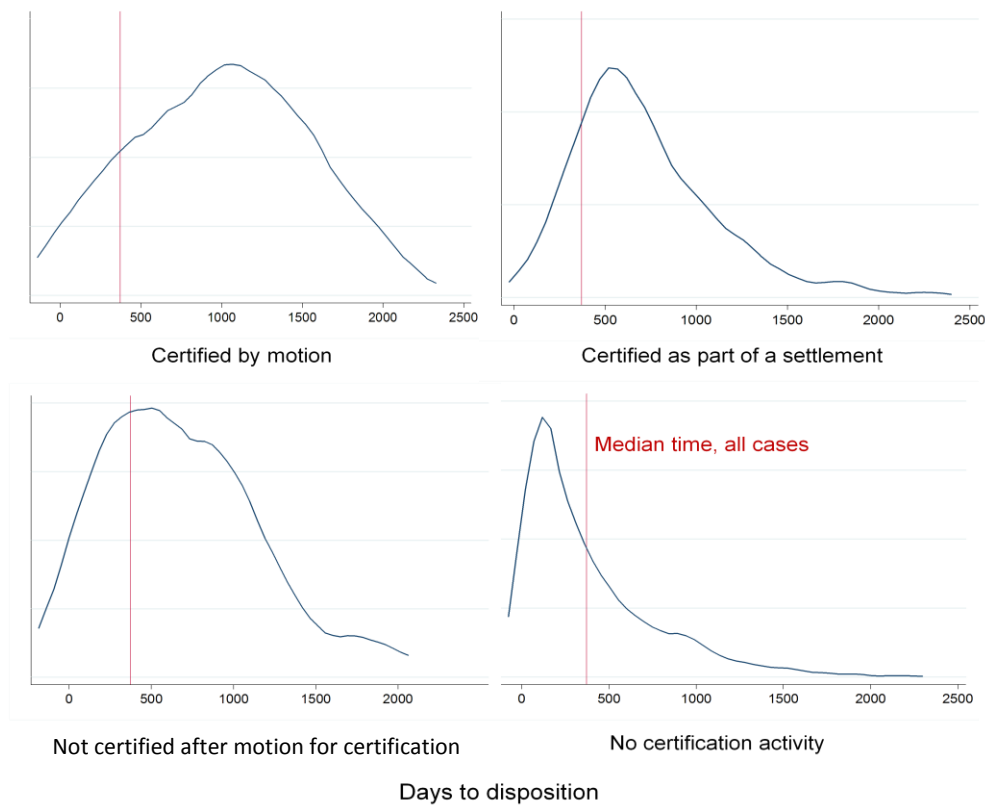


Figure 3. Time to disposition, all certification categories

Cases that are certified by motion show a much wider distribution curve, indicating a greater variance in the case duration for this category. As discussed, this is most likely due to the differences in the amount of time invested in litigating the motions themselves, which can vary on a case-by-case basis depending on many factors including case type, claim base, or even attorney. Cases certified as part of a settlement tend to dispose at case lengths that are more tightly grouped and have a more narrowly predictable window in which the case will reach outcome, perhaps because they avoid the more irregular course taken after motions for certification are introduced into a case.

The distribution curve for cases that have no certification activity is also interesting in that it highlights the speed with which these exit the court, with the majority disposing within about one year of filing. Again, this is due to the most frequent dispositions in this category, dismissals with and without prejudice, as well as the high percentage of these cases that are removed, transferred, or consolidated.

### Case Duration by Case Type

Figure 4 shows that, of the most frequently filed case types, employment, business tort, and breach of contract cases fall nearest to the overall median time to disposition for certified cases.

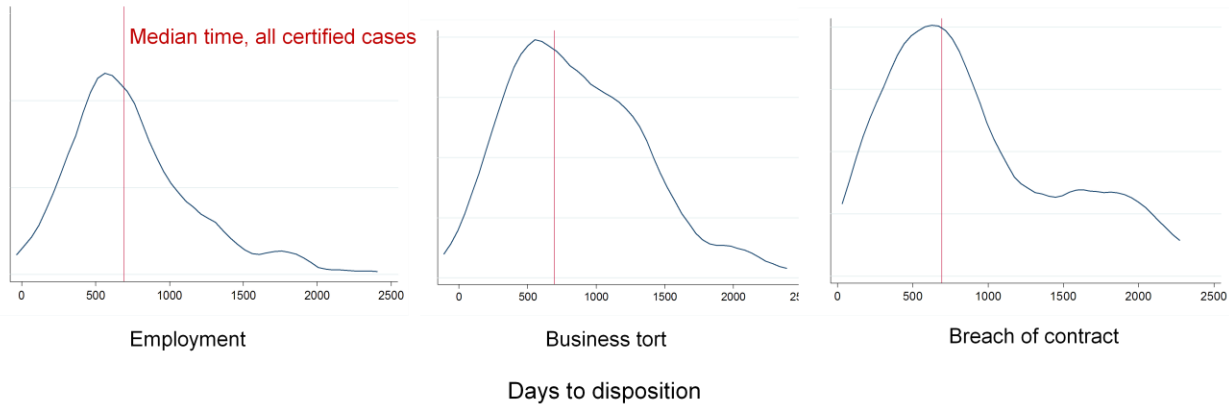


Figure 4. Days to disposition for certified cases

This finding is not surprising as the average and median times to disposition are driven by the most common disposition, settlement, and these three case types account for 83% of all settlements in certified cases (213 of 256 settlement dispositions). However, the distribution profile for time to disposition changes within the different case types depending on how the case is certified. The overall median time to disposition for all cases certified as part of a settlement is 1.7 years;<sup>51</sup> the average is 1.9 years.

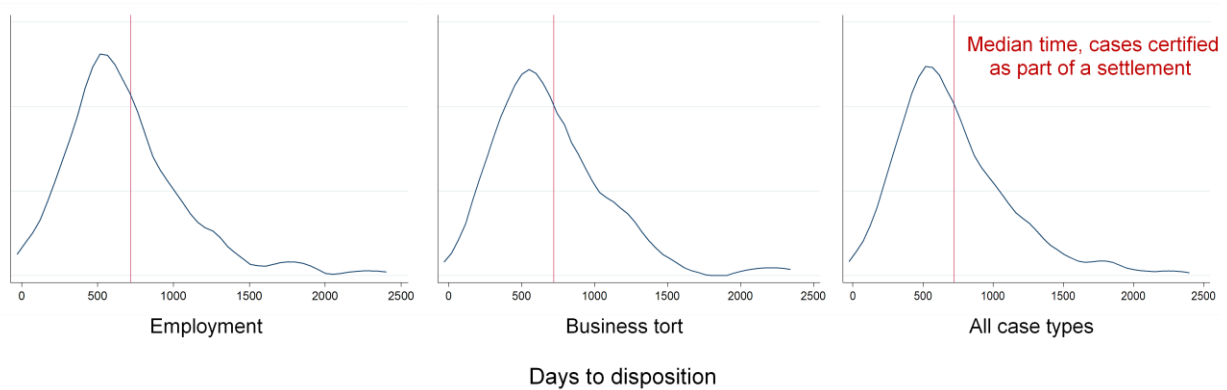


Figure 5. Time to disposition for cases certified as part of a settlement

Time to disposition for employment cases and business torts drive the average in this certification category as they represent more than 75% of cases certified in this manner, as

<sup>51</sup> Median at 636 days; mean at 694 days.

shown in the three almost identical distribution curves in figure 5. Employment cases and business torts have virtually identical median and mean times to disposition when these cases are certified as part of a settlement.<sup>52</sup>

However, as shown in table 12 and in figure 6, cases certified through a litigated motion take longer to reach disposition than cases certified as part of a settlement and are skewed differently according to case type.

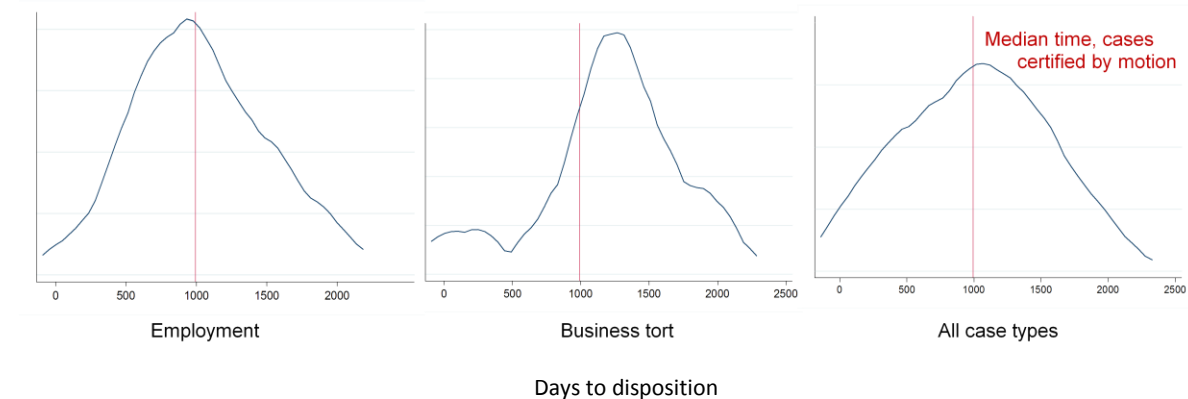


Figure 6. Time to disposition for cases certified through a litigated motion

The variance is particularly notable with respect to the time to disposition in business tort and employment cases. In contrast to figure 5 where the distribution curves for these cases were almost identical, figure 6 shows that they diverge in cases where classes were certified as part of a litigated motion. The median time to disposition for employment cases certified through motion is 2.7 years, 969 days. In contrast, business torts display a slightly more tightly grouped distribution, with a median time to disposition that is 25% longer than that in employment cases, 3.3 years, or 1,213 days. Again, this could be attributable to some of the same inherent characteristics of employment classes that facilitate class certification, including existing case precedent for certification standards and greater class specificity.<sup>53</sup> These qualities of employment classes may more easily satisfy certification requirements, thus abbreviating the litigation and court deliberation time required during the motion process and resulting in a shorter overall time to disposition. This might lead to the variance between the two case types in this certification category, despite having virtually identical time to disposition when certified by means that avoid the motion for certification process, namely certification as part of a classwide settlement agreement.

<sup>52</sup> Employment: median at 605 days; mean at 683 days. Business tort: median at 636 days; mean at 697 days.

<sup>53</sup> See *supra* pp.13-15

### *Case Duration by Disposition*

Considering certified cases only, the median time to disposition is driven by the most common disposition among certified cases: settlement.

	<b>Mean (days)</b>	<b>Median (days)</b>
Settlement	781	686
Dismissed with prejudice	1,019	1,028
Dismissed without prejudice	802	726
Summary judgment	646	990
Overall, certified cases	793	700

Table 13. Mean and median time to disposition for certified cases, by disposition

Of the most common outcomes listed in table 13, settlement had the shortest median time to disposition at 1.9 years, or 686 days. The median is driven by the large number of settled cases that were certified as part of the settlement itself. These cases showed a slightly shorter median time to disposition of 1.7 years (636 days) and made up 81% of all settlements in certified cases.<sup>54</sup> In contrast, the median case life leading to settlement is 59% longer in cases that settle after a court-granted motion for certification.<sup>55</sup> Again, this can be attributed to the case processing requirements introduced by a litigated motion for certification.

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<sup>54</sup> Mean at 745 days.

<sup>55</sup> Median at 1,011 days; mean at 1,023 days.

## Disposition Analysis

The vast majority of cases in which a class is certified end in a classwide settlement disposition. Eighty-nine percent of certified cases ended in settlement, as compared to only 15% in cases with no certification.

	Cases with a certified class	Cases without a certified class
Settlement	89%	15%
Other disposition	3%	8%
Dismissed with prejudice	2%	21%
Dismissed without prejudice	2%	16%
Summary judgment for defendant	2%	4%
Coordinated	1%	13%
Removed to federal court	1%	10%
Verdict for defendant	<1%	<1%
Verdict for plaintiff	<1%	<1%
Consolidated with another case	0%	12%
Total	100%	100%

Table 14. Disposition composition for cases filed as class action, with and without a certified class<sup>56</sup>

The settlement rate for cases with a certified class in California falls within the same spectrum identified in a study examining class action cases in four federal districts in which federal settlement rates for class actions with a certified class “ranged from 62% to 100%.”<sup>57</sup> The settlement rate for cases in which a class was not certified was slightly higher in the federal districts than in California, however, ranging from 20% to 30%.<sup>58</sup>

Cases in which a class is not certified are most frequently disposed through dismissal, both with and without prejudice, which may support the theory that some class action cases are filed with a strategic motive that is not necessarily linked to the underlying merits of the case. Also, unsurprisingly, uncertified cases showed a high percentage of interim dispositions concerning proper jurisdiction and case management (removal, transfer, coordination, consolidation), which, as discussed, are typically rendered early in the case prior to any activity in furtherance of class certification.

<sup>56</sup> See appen. D, table D.1 for full data

<sup>57</sup> Thomas E. Willging et al., *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996), p. 60.

<sup>58</sup> *Ibid.*

## *Settlement after Certification*

The high frequency of settlement among certified class action cases brings up an issue that is regularly discussed in this context: settlement pressure, or the effect that a court certification decision has in steering a case toward settlement. Many observers assert that court-granted certification is the first step in an inevitable path to settlement. Others, however, contend that settlement pressure is overstated in legal commentary, and that certification exerts only an insignificant or, in the alternative, acceptable force within the context of settlement negotiations.<sup>59</sup>

Settlement pressure has been long-discussed within the framework of class certification; particularly the widespread belief that class certification brings about “blackmail settlements” wherein defendants are forced into settlement.<sup>60</sup> The reasons posited for this compulsion to settle rest on several theories. The first was grounded in the idea that defendants would settle in order to avoid an expensive and seemingly interminable litigation process, regardless of the merits of the case.<sup>61</sup> This theory has largely fallen by the wayside in recent years due to the evolution of class action case management that has pushed the idea of the “untriable”<sup>62</sup> case into extinction.

Another theory holds that defendants settle not because class actions threaten “endless litigation,”<sup>63</sup> but because defendants are faced with what are characterized as potentially “catastrophic”<sup>64</sup> consequences should they not prevail at trial, leading to capitulation to a settlement that overcompensates the actual claim value. This premise is perhaps most famously linked to Judge Posner’s decertification of the class in *In the Matter of Rhone-Poulenc Rorer, Inc.*<sup>65</sup> and has been adopted by other judges and commentators who have cited a raft of various underpinnings for the overall motivation to settle under this presumption, including claim addition,<sup>66</sup> liability amplification,<sup>67</sup> and questionable claim merit.<sup>68</sup>

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<sup>59</sup> Charles Silver, “‘We’re Scared to Death’: Class Certification and Blackmail” (2003) 78 *New York University Law Review*, pp. 1413–415, 1429–30. See also Bruce Hay & David Rosenberg, “‘Sweetheart’ and ‘Blackmail’ Settlements in Class Actions: Reality and Remedy” (2000) 75 *Notre Dame Law Review*, pp. 1379–80.

<sup>60</sup> Hay & Rosenberg, *supra* note 59, at pp. 1357–59.

<sup>61</sup> *Id.* at p. 1363.

<sup>62</sup> *Id.* at p. 1364.

<sup>63</sup> *Id.* at p. 1363.

<sup>64</sup> *In the Matter of Bridgestone/Firestone, Inc.* (2002) 288 F.3d 1012, 1016.

<sup>65</sup> “Perhaps in the end, if class action treatment is denied . . . they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than \$125 million altogether. These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs. . . . They might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.” *In the Matter of Rhone-Poulenc Rorer, Inc.*, *supra*, 51 F.3d at p. 1298.

<sup>66</sup> “One mechanism consists of an increase in the absolute number of claims that defendants would face as a result of class certification—what one might dub the ‘addition.’” Richard A. Nagareda, “Aggregation and Its Discontents: Class Settlement, Class-wide Arbitration, and CAFA,” (2006) 106 *Columbia Law Review*, p. 1881. “Addition” refers to the increase in the number of claims that are aggregated after a class has been certified, leading to a hyperbolic

It is outside the scope of this report to address the evolution of theories of settlement pressure or put forth a definitive conclusion about the merits of divergent opinions on the subject in this context. However, given that the study data can add novel information to the ongoing consideration of the issue, the following analyses are offered to contribute to more rounded discussions pertaining to settlement after certification in California.

### *Analysis of California Data*

To begin, it is important to appreciate the scope of circumstances in which settlement pressure from class certification comes into play in relation to the scope of settlements in class actions generally. The sector of cases that might have been subjected to settlement pressure from class certification as theorized in *Rhone-Poulenc* is a small fraction of the total number of cases that settle with a certified class.

Certified settlements	<i>n</i> =256	
Certified as part of settlement	<i>n</i> =208	81%
Certified through litigated motion	<i>n</i> =36	14%
Certified by both motion and as part of settlement	<i>n</i> =12	5%

Table 15. Means of certification for certified settlements, as a percent of total certified settlements

Table 15 shows that, for those cases that dispose by settlement and with a certified class, the vast majority are certified as part of a settlement itself rather than through a litigated motion that, in theory, would introduce the possibility of the kind of settlement pressure debated in most literature. More than 80% of the cases that settled with a certified class reached certification as part of the settlement itself, while only 14% were certified following a litigated motion.

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increase in the overall class size. The alternative to this argument, however, is that the class action mechanism is in place to facilitate precisely this effect, namely, to afford the opportunity for similarly situated plaintiffs to pool resources and bring a claim where it would be economically infeasible to do so individually.

<sup>67</sup> *Id.* at 1887, borrowing from Richard A. Epstein, “Class Actions: Aggregation, Amplification, and Distortion” (2003) *University of Chicago Legal Forum*, p. 475. Operating in conjunction with the theory of addition, amplification is the idea that certification of a class could create a scale of potential liability that is far greater than what could be expected if the claims were litigated individually.

<sup>68</sup> Hay & Rosenberg, *supra* note 59, at p. 1391. “Questionable claim” rests in the theory that claim accumulation induces the defendant into a settlement that overcompensates the class in respect to the actual value of the claim because the risk-averse defendant prefers to settle rather than hazard litigation, even if the overall claims are weak. In addition, the theory holds that certification necessarily results in the grouping of all claims, regardless of individual claim strength, thus allowing members with claims having a lesser likelihood of success to be commingled with members having stronger claims in the same, certified class.

## Disposition by Means of Certification

One possible way to evaluate the theories of pressure to settle created by class certification is to once again look at the disposition data broken down by certification category, as in table 16. This analysis allows for comparison of settlement rates across the categories and examination of the percentage of certified cases that end in settlement according to each means of certification.

	<b>Certified as part of settlement</b>	<b>Certified through litigated motion</b>	<b>Not certified after motion</b>	<b>No certification activity</b>
Settlement	99%	69%	36%	26%
Dismissed with prejudice	<1%	10%	30%	37%
Summary judgment for defendant	-	10%	23%	6%
Dismissed without prejudice	<1%	8%	9%	29%
Verdict for defendant	-	2%	-	1%
Verdict for plaintiff	-	2%	2%	<1%
Total	100%	100%	100%	100%

Table 16. Disposition composition comparison, by certification category<sup>69</sup>

Given the absence of an interlocutory appeal option in California, one may conclude that settlement pressure would exert more effect and more cases would be compelled to settle after the granting of a motion for class certification as compared to federal court.<sup>70</sup> However, the disposition composition for certified cases that reached a final outcome in California does not support this hypothesis. Table 16 shows that the rate of settlement after certification through a court-granted motion for certification is 69%. This is actually slightly lower than the rate of 72% in the federal court. California's lack of intermediate recourse in response to the granting of class certification does not result in a higher rate of settlement in that situation when compared to data from federal court. The California and federal rates of actual settlement after the class was certified for settlement were similar at 99% and 95%, respectively.

Though the overall settlement rate is lower than that found in federal court, the disposition rates for each type of certification status presented in table 16 show that settlement is the most frequent disposition in cases having a class that is certified through a litigated motion in

<sup>69</sup> Calculation of these rates includes final disposition only. Interim dispositions have been removed from this analysis, as have cases that certified both through litigated motion and, later, for purposes of settlement. See appen. D, table D.2 for full data.

<sup>70</sup> See *Prado-Steiman v. Bush* (11th Cir. 2000) 221 F.3d 1266, 1274, explicitly sanctioning the use of the interlocutory appeal option set forth in rule 23(f) in situations where the certification decision may create settlement pressure.



California. These cases also have a higher frequency of settlement than that seen in cases that did not achieve certification after a motion or had no certification activity (36% and 26%, respectively). However, 30% of cases certified through litigated motion concluded in an outcome that could be characterized as favorable to the defendant,<sup>71</sup> including one trial verdict in favor of the defendant and a somewhat surprisingly high percentage of summary judgments. This data indicates that though settlement after certification is the most probable outcome, class certification does not render settlement *inevitable* in California or that defendants are forced without fail into settlement after certification.

### Time to Settlement after Certification

Another analysis relevant to the evaluation of settlement pressure is the time between the ruling on the motion for certification and the settlement disposition. In one of the few empirical studies that address this question, Willging et al. argue that “[u]nless settlement follows reasonably promptly after certification, the settlement would not seem to be directly related to the certification.”<sup>72</sup> In other words, settlement that occurs long after class certification runs counter to the idea that the certification decision forced that disposition.

	Mean (days)	Median (days)
Stayed	770	1,075
Removed to federal court	586	586
Summary judgment	572	609
Settlement	<b>542</b>	<b>479</b>
Verdict for defendant	524	524
Verdict for plaintiff	466	466
Dismissed with prejudice	457	447
Certification status appeal	424	424
Other	354	354
Dismissed without prejudice	178	113
Transferred	50	50
Coordinated	31	4

Table 17. Mean and median days between granting of a motion for certification and disposition

Among the cases in the study, the median time between the granting of a motion for certification and a settlement disposition was 479 days, or 16 months.<sup>73</sup> This falls in the upper half of the spectrum for all dispositions, as seen in table 17, and is higher than the median for all other

<sup>71</sup> This includes cases that disposed by dismissal with prejudice, dismissal without prejudice, summary judgment for defendant, or verdict for defendant.

<sup>72</sup> Willging et al., *supra* note 57, at p. 61.

<sup>73</sup> This falls within the time found in federal districts which ranged from 9.2 to 18.9 months. See *Ibid.*

dispositions combined, which is 13 months.<sup>74</sup> Eight disposition types had a mean time to disposition after certification that was shorter than that for settlement, including two verdicts. Lastly, in 25% of cases settled after certification, almost two years elapsed between the granting of the motion for certification and the settlement disposition.<sup>75</sup>

To the extent that time to disposition provides a useful gauge of settlement pressure, it would be difficult to conclude from these analyses that the certification decision forced settlement. The contrary argument to this conclusion, however, would be that the defendants were in fact forced into settlement, but that the process of settlement negotiation simply was time consuming because of the higher stakes of the outcome, thus decoupling the settlement pressure examination from the time-to-disposition inquiry. However, this theory cannot be tested using the available data. Keeping this possibility in mind, nevertheless, given the time to settlement it is reasonable to conclude that defendants are not forced into instant settlement, and that whatever level of pressure they may be operating under is not enough to compel them to immediately surrender during the negotiation process.

In sum, California data show that very few cases could be included in a category in which the commonly discussed parameters that define settlement pressure from class certification may have been a factor in the decision to settle. Many cases circumvented the issue altogether by including class certification as an element of the settlement itself. In cases with a class certified through a court-granted motion for certification, neither the overall disposition composition nor the time-to-settlement analyses seem to suggest an automatic or immediate progression from certification through motion to settlement which would allow the determination that pressure results in inevitable settlement. The conclusion here is not that the idea of settlement pressure is fabricated, or even altogether negligible, but rather that the pervasive effect of settlement pressure in California does not appear to be supported by the data.

## Conclusion

Prior to this study, empirical data relating to California class certification was almost non-existent, despite the importance of the certification decision to the maintenance of a class action case and the debates that often swirl around its impact on litigation. This initial analysis of systematically collected California certification data has revealed several interesting findings on the subject.

First, the findings supply a new perspective on the considerable growth in the number of class action filings observed over the study period.<sup>76</sup> Though the *filings* data point to a significant

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<sup>74</sup> Mean, 412 days; median, 387 days.

<sup>75</sup> See appen. D, table D.3 for full data.

<sup>76</sup> See *First Interim Report*, *supra* note 2, at pp. 3-4: “Total unlimited civil filings decreased 17.8% between 2000 and 2005 in comparison to a 63.3% increase in class action filings.”

expansion in the class action area, the focused certification analyses show that the perceived scale of the class action landscape may differ according to how one views the data—whether one examines the total number of cases filed as class actions or instead confines the analyses only to cases that actually achieve class certification. Though class certification is integral to continuation of litigation on a class basis, the study shows that certification rates are actually quite low and, despite the large number of cases that are filed as class actions, most proceed to disposition on a nonclass basis. This may lead to conclusions regarding the scope of the class action arena that vary considerably depending on when one applies the “class action” label.

However, while this finding may change the scope of the class action subset of civil litigation in California depending how one defines it, the overall impact on the court exerted by the remaining nonclass cases in the study is likely substantial, as a large portion of these cases are consolidated or coordinated or otherwise qualify and are ultimately litigated as designated *complex* cases. Designated complex cases present comparable intricate issues that require rigorous oversight and organization similar to that required in the management of a class action case.

In addition, the study shows that use of the classwide settlement vehicle increased in California over the study years, and that frequency of certification as part of a classwide settlement resolution far outstripped those certified through a litigated motion certification. This indicates that, in a large percentage of these cases, parties did reach a point at which they agreed to a mutually negotiated settlement agreement that is acceptable to both sides without travelling the more adversarial path of certification through litigated motion. This is perhaps attributable to measures implemented in the California courts that are specifically aimed at improving case management and communication in the complex litigation area overall.

The study findings regarding classwide settlement frequency also indicate that the widely debated settlement pressure effect caused by class certification may not be as pervasive as is generally thought. The low percentage of cases with a certified class reached through a litigated motion for certification indicates that the universe of cases in which settlement pressure may occur is rather small. In addition, the data show that, even within the small subset of cases in which class certification motions are granted, cases do not unavoidably settle after certification. However, a more detailed study of the actual settlement negotiations would be required to make a definitive statement about the role that settlement pressure plays in the ultimate outcome of the those cases.

Lastly, on the subject of settlement pressure, it is important to note that while the debate predominately centers on the deleterious effects of class certification on a defendant’s litigation options, other views assert that there are situations in which certification can be beneficial to the defendant because of the binding effects of judgment or settlement. Certification can present

some advantage to the defendant who, after evaluating the plaintiffs' case, decides they have a greater likelihood of prevailing. Class certification in this instance may offer the defendants the opportunity to dispense with multiple plaintiffs in one efficient case action or to negotiate a reasonable settlement that includes the largest pool of eligible class members, thereby precluding the action from arising again in the future.

The findings and analyses in this first study of California class certification will certainly not put to rest the various, often divergent opinions regarding settlement pressure, but it is hoped that they provide empirical data that can better inform ongoing discussions surrounding not only that issue, but also class action certification as a whole.

## Appendix A: Certification Rates

Table A.1. Certified cases as percentage of disposed cases originally filed as class actions

	Cases with a certified class (%)	Disposed with a certified class	Total disposed cases
2000	33%	57	171
2001	26%	53	208
2002	22%	65	294
2003	19%	47	251
2004	21%	37	173
2005	15%	30	197
Total	22.3%	289	1,294

Table A.2. Disposed cases with no certification activity, by year, separated by final and interim disposition

Filed Year	Total disposed cases	No activity	No activity (%)	No activity before <i>final</i> disposition	No activity before <i>final</i> disposition (%)	No activity before <i>interim</i> disposition	No activity before <i>interim</i> disposition (%)
2000	171	96	56%	60	35%	36	21%
2001	208	140	67%	91	44%	49	24%
2002	294	215	73%	146	50%	69	24%
2003	251	198	79%	108	43%	90	36%
2004	173	134	78%	74	43%	60	35%
2005	197	159	81%	80	41%	79	40%
Total	1,294	942	73%	559	43%	383	30%

Table A.3. Cases with motions for certification as a percent of total disposed cases, by year

Filed Year	Cases with motion for certification	Total cases	%
2000	46	171	27%
2001	44	208	21%
2002	34	294	12%
2003	20	251	8%
2004	10	173	6%
2005	12	197	6%
Total	166	1,294	13%

Table A.4. Outcomes of first motions for certification as a percentage of cases with motion for certification

	Total	Motion for certification granted		No ruling on motion for certification		Motion for certification denied		Certified as part of settlement after motion for certification	
		n	%	n	%	n	%	n	%
2000	45	21	47%	4	9%	13	29%	7	16%
2001	44	25	57%	9	21%	5	11%	5	11%
2002	34	16	47%	9	27%	4	12%	5	15%
2003	20	6	30%	4	20%	5	25%	5	25%
2004	11	6	55%	3	27%	0	0%	2	18%
2005	12	3	25%	2	17%	5	42%	2	17%
Total	166	77	44%	31	20%	32	20%	26	17%

Table A.5. Means of certification in program courts versus non-program courts

	Nonprogram courts		Program courts		Total
	<i>n</i>	%	<i>n</i>	%	
Certified as part of settlement	35	54%	177	79%	212
Certified by motion	26	40%	39	17%	65
Certified by both means	4	6%	8	4%	12
Total certified	65	100%	224	100%	289

Table A.6. Outcome of motions for certification, if objection to motion was filed

	No objection to motion for certification filed		Objection to motion for certification filed		Total
	<i>n</i>	%	<i>n</i>	%	
No ruling on motion	34	71%	23	20%	57
Motion for certification denied	4	8%	32	27%	36
Motion for certification granted	10	21%	63	53%	73
Total	48	100%	118	100%	166

## Appendix B: Certification by Case Type

Table B.1. Certification activity by case type

Case Type	Certified by motion	Certified as part of settlement	Certified by both means	Not certified after motion	No certification activity	Total disposed
Employment	22	108	5	15	222	372
Business tort	23	53	2	16	264	358
Other	8	15	0	10	108	141
Breach of contract	2	18	2	6	91	119
Antitrust	3	2	1	3	66	75
Construction defect	1	1	0	4	49	55
Product liability	0	1	1	2	42	46
Unknown	1	2	1	2	38	44
Fraud	1	7	0	5	30	43
Securities litigation	3	5	0	0	13	21
Civil rights	1	0	0	0	19	20
Total	65	212	12	63	942	1,294

Table B.2. Specificity of class definitions in certified versus uncertified classes

	<i>n</i>	Certified	<i>n</i>	Uncertified
Specific class size given	144	50%	139	14%
Class size defined as "more than" a specific number	29	10%	156	16%
Class with undefined scope	80	28%	431	43%
"Unknown" class size	36	12%	279	28%
Total	289	100%	1,005	100%

Table B.3. Specificity of class definitions in employment cases versus all other case types

	Employment		All other case types	
	<i>n</i>	%	<i>n</i>	%
Specific class size	135	36%	140	15%
Class size "more than" a specific number	100	27%	86	9%
Class with undefined scope	72	19%	450	49%
"Unknown" class size	65	17%	246	27%
Total	372	100%	922	100%

## Appendix C: Certification Time Analysis

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Figure C.1. Days between filing of the class action cases and the filing of the first motion for certification

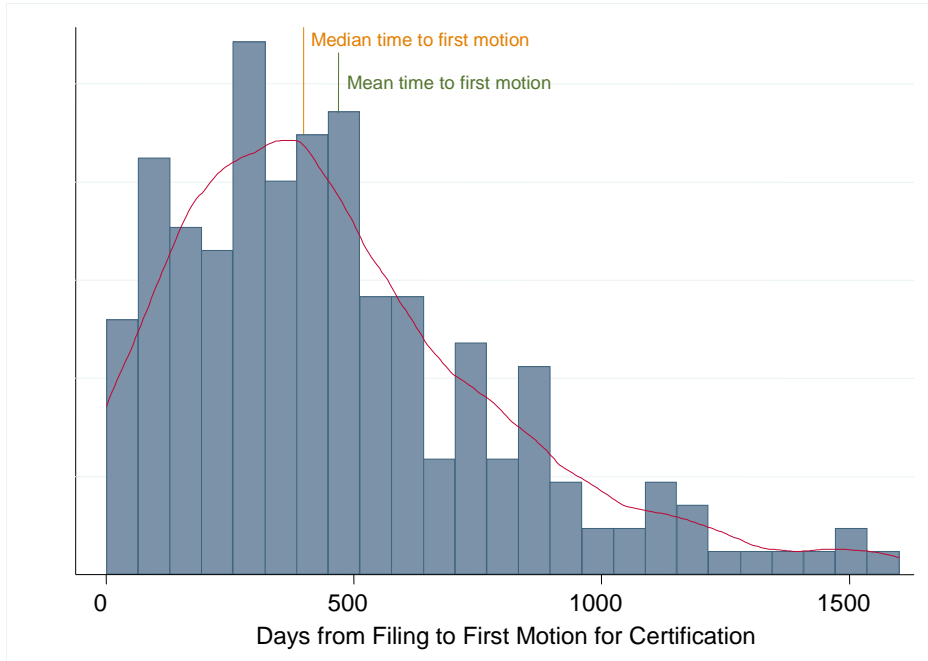


Figure C.2. Days between filing of first motion for certification and objection to that same motion

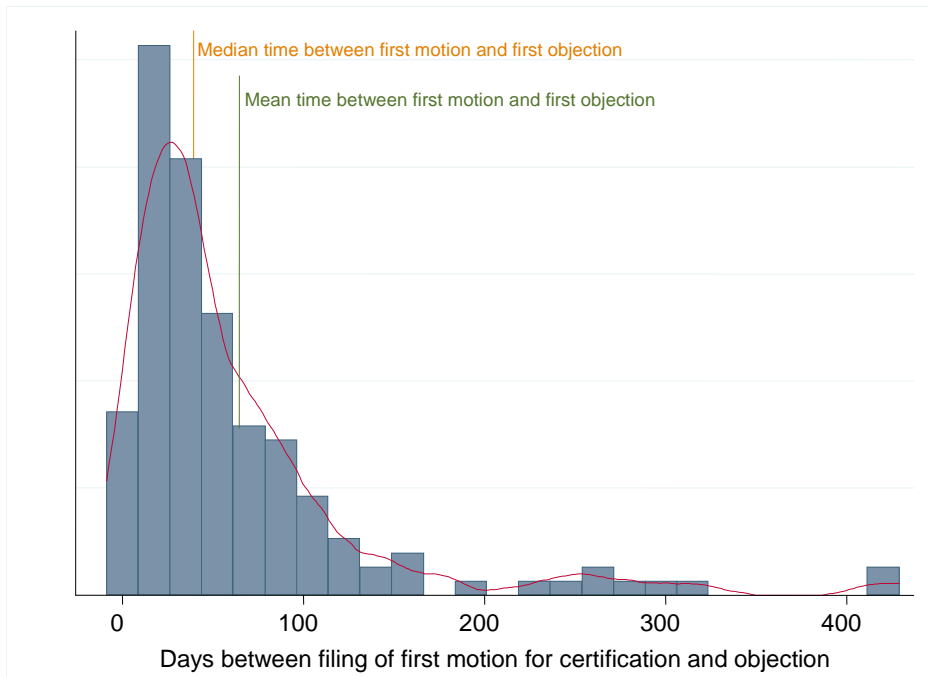
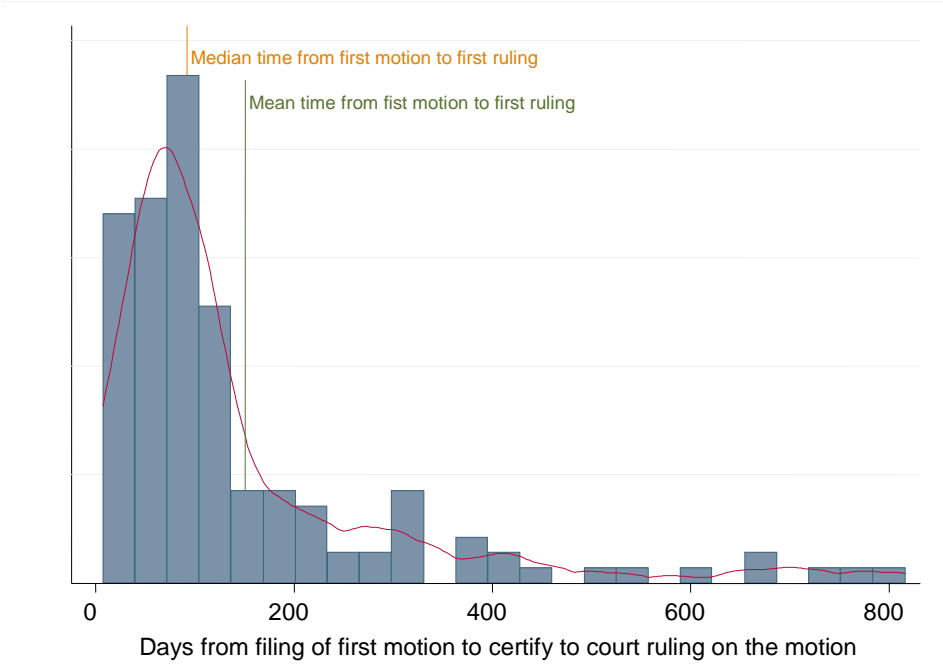




Figure C.3. Days between filing of first motion for certification and court ruling on the motion



## Appendix D: Disposition Analysis

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Table D.1. Disposition breakdown, certified versus uncertified

	Cases with a certified class		Cases without a certified class	
	<i>n</i>	%	<i>n</i>	%
Settlement	256	88.6%	154	15.3%
Dismissed with prejudice	6	2.1%	209	20.8%
Dismissed without prejudice	5	1.7%	157	15.6%
Summary judgment for defendant	5	1.7%	44	4.4%
Coordinated	4	1.4%	135	13.4%
Stayed	3	1.0%	19	1.9%
Certification status appeal	2	0.7%	0	0.0%
Removed to federal court	2	0.7%	105	10.4%
Coordinated for settlement	1	0.3%	0	0.0%
Federal settlement	1	0.3%	0	0.0%
Other	1	0.3%	11	1.1%
Transferred	1	0.3%	37	3.7%
Verdict for defendant	1	0.3%	5	0.5%
Verdict for plaintiff	1	0.3%	2	0.2%
Consolidated with another case	0	0.0%	117	11.6%
Blank	0	0.0%	3	0.3%
Interlocutory appeal	0	0.0%	2	0.2%
Unknown	0	0.0%	5	0.5%
Total	289	100.0%	1,005	100.0%

Table D.2. Disposition composition comparison: class certified as part of settlement, class certified by motion, class not certified after a motion and cases with no certification activity

Disposition	Class certified as part of settlement		Class certified by motion		Class not certified after motion		No class certification activity	
	<i>n</i>	Certified as part of a settlement (%)	<i>n</i>	Certified by motion (%)	<i>n</i>	Not certified after motion (%)	<i>n</i>	Cases with no activity (%)
Settlement	208	99.0%	36	69.2%	17	36.1%	137	26.1%
Dismissed with prejudice	1	0.5%	5	9.6%	14	29.8%	195	37.2%
Summary judgment for defendant	-	-	5	9.6%	11	23.4%	33	6.3%
Dismissed without prejudice	1	0.5%	4	7.7%	4	5.8%	153	29.2%
Verdict for defendant	-	-	1	1.9%	-	-	5	1.0%
Verdict for plaintiff	-	-	1	1.9%	1	2.1%	1	0.2%
Total	210	100.0%	52	100.0%	47	100.0%	524	100.0%

Table D.3. Days between granting of motion for certification and settlement, by percentile

Percentile	Largest	Smallest
1% disposed	38 days	38 days
5%	132	90
10%	170	132
25%	286	133
<b>50%</b>	<b>479</b>	<b>479</b>
75%	732	1,211
90%	1,008	1,214
95%	1,214	1,343
99% disposed	1,464 days	1,464 days