

U.S. Supreme Court Holds Federal Rule of Civil Procedure 23(f) Is Not Subject to Equitable Tolling

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In a decision important to class action practice, the U.S. Supreme Court has held that Federal Rule of Civil Procedure 23(f), which establishes a 14-day deadline to seek permission to appeal an order granting or denying class certification, is not subject to equitable tolling. [Nutraceutical Corp. v. Lambert](#), No. 17-1094 (Feb. 26, 2019).

Equitable tolling is a legal doctrine providing that a statute of limitations will be suspended or temporarily stopped based on principles of equity. For example, when a plaintiff does not discover an injury until after the statute of limitations has expired, despite reasonable care and diligent efforts, equitable tolling of the statute of limitations would allow that plaintiff to bring his action even though it was untimely.

Rule 23(f) provides that a “court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.” The Supreme Court has been examining the dividing line between jurisdictional rules and non-jurisdictional claim-processing rules over the last decade. Jurisdictional rules cannot be equitably tolled because, absent jurisdiction, a court has no power to issue any holding in a case.

In this case, plaintiff Troy Lambert filed a putative class action taking aim at Nutraceutical Corp.’s sale and marketing of dietary supplements, alleging violations of California’s false advertising, consumer fraud, and unfair competition laws. After the district court first certified and then decertified the class, Lambert asked the court to recertify the class. At that point, Lambert had 14 days to file a Rule 23(f) petition with the U.S. Court of Appeals for the Ninth Circuit for permission to appeal the order. Instead of filing with the Ninth Circuit at that point, he told the district court he wanted to file a motion for reconsideration, and the district court gave him 10 days to do so — no later than March 12th. Lambert filed the motion on March 12th, the district court denied it, and 14 days later, Lambert filed a Rule 23(f) petition with the Ninth Circuit to appeal the decertification order. By then, more than four months had passed since the district court’s initial order decertifying the class, so the Rule 23(f) petition was untimely.

The Ninth Circuit held the Rule 23(f) petition was timely because Rule 23(f)'s time limitation was not jurisdictional, and equitable tolling should apply under the circumstances. Nutraceutical petitioned the U.S. Supreme Court for review based on the existing circuit split.

In a unanimous decision penned by Justice Sonia Sotomayor, the Supreme Court agreed that Rule 23(f)'s time limitation is not jurisdictional; however, it held that the Rule 23(f) is *not* subject to equitable tolling.

The Court held that Rule 23(f) is a non-jurisdictional claim-processing rule because it is found in a procedural rule rather than a statute. However, the Court wrote, "The mere fact that time limit lacks jurisdictional force ... does not render it malleable in every respect." The Court drew a distinction between "mandatory" claim-processing rules, which are "unalterable" if properly raised by an opposing party, and procedural rules where the text "leaves room for flexibility." Mandatory claims-processing rules are not susceptible to equitable tolling. The Court held, "Where the pertinent rule or rules invoked show a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving."

This decision will prevent a party from filing a tardy Rule 23(f) motion, and the bright line drawn provides clarity for plaintiffs and defendants alike.

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