

Time Is on My Side, Yes It Is:^{*} The Timing of Class Certification Appeals Pursuant to Rule 23(f)

CASE AT A GLANCE

This case involves a technical issue relating to the timing requirement that a party file a notice of appeal of a judge's class certification order within 14 days of the issuance of the order, pursuant to Federal Rule of Civil Procedure 23(f). A plaintiff allegedly failed to file for permission to appeal a certification order within the 14-day limitation. Nevertheless, the appellate court accepted the petition, and the Ninth Circuit affirmed, applying equitable principles to relieve the plaintiff of the Rule 23(f) timing requirement. The defendant now contends that the Ninth Circuit erred in applying equitable principles to relieve the plaintiff's alleged noncompliance with Rule 23(f).

Nutraceutical Corp. v. Lambert
Docket No. 17-1094

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From: The Ninth Circuit

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ISSUE

Does Federal Rule of Civil Procedure 23(f) set forth a strict, mandatory timing provision for appeal of class certification orders, or may an appellate court apply equitable principles to relieve a litigant of the Rule 23(f) requirement that the litigant file permission to appeal a certification order within 14 days of issuance of the class certification order?

FACTS

This appeal arose from a class action filed by the plaintiff Troy Lambert against Nutraceutical Corp. in March 2013 concerning Nutraceutical's sale of a dietary supplement, its Cobra Sexual Energy pill. Lambert filed the class action in federal court, alleging violations of California's false advertising and unfair competition laws. The district court certified the class action on June 19, 2014. However, after discovery, Nutraceutical asked the court to decertify the class, which the court granted.

At a status conference on March 2, 2015, Lambert requested permission to file a renewed motion for class certification. Under local rules, Lambert could file a motion for reconsideration, and the court set a March 12, 2015, deadline for filing this motion. Although Lambert did not communicate to the court an intention to file an appeal of the decertification order, he filed his motion for reconsideration on March 12, 2015, 20 days after the court's decertification order. On June 24, 2015, the court denied Lambert's motion for reconsideration of the decertification order.

On July 8, 2015, Lambert filed for permission to appeal the court's decertification order. Under a strict reading of Federal Rule of Civil Procedure 23(f), Lambert had 14 days from the date of issuance of the decertification order to petition for permission to appeal. That deadline was March 6, 2015. Thus, Lambert attempted to appeal more than four months after the Rule 23(f) deadline. On July 20, 2015, Nutraceutical filed its opposition to Lambert's Rule 23(f) petition, arguing that it was untimely and time-barred.

On September 16, 2015, a Ninth Circuit motions panel conditionally granted Lambert's Rule 23(f) petition, but asked the parties for additional briefing on the timeliness of the petition. The case was assigned to a Ninth Circuit merits panel which, on September 15, 2017, held that Lambert's petition was timely. The Ninth Circuit then reversed the district court's decertification order and remanded the case to the district court for further class action proceedings.

In its opinion, the Ninth Circuit acknowledged that, under the plain text of Rule 23(f), Lambert's petition was untimely because it was not filed within the 14-day window. Nonetheless, the court allowed Lambert's petition based on equitable considerations that applied to soften Rule 23(f)'s black-letter deadline.

In reaching this conclusion, the court first held that Rule 23(f) was a "claim processing rule." Second, the court held that a motion for reconsideration filed within Rule 23(f)'s 14-day deadline would toll that deadline. And third, the court articulated a set of equitable exceptions to allow a court to consider an untimely appeal. These

^{*}Rolling Stones (for those too young to know)

equitable factors included whether a litigant diligently pursued his rights, whether external circumstances affected the litigant, or “whether [the] litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action.”

The court held that Lambert equitably tolled the Rule 23(f) deadline because he orally informed the court of his intention to seek reconsideration of the decertification order. The court also found that Lambert acted diligently, because Lambert complied with the district court’s dealing for filing his motion for reconsideration.

CASE ANALYSIS

In order for a proposed class action to proceed, a court must certify that the action may be maintained as a class action. The court will consider whether the proposed action satisfies the certification requirements set forth in Rule 23(a) and (b). If the requirements are met, the court will issue a class certification order, which can either certify the class action, or deny certification. In either instance, the losing party may appeal the court’s certification decision pursuant to Rule 23(f). In addition, after certifying a class action, the court subsequently may change its mind and decertify the class certification. When the court decertifies a class action, this generates a new certification order, which the losing party may challenge under Rule 23(f). Thus, here, the district court decertifying its prior class action decision triggered Lambert’s ability to challenge the decertification order.

Rule 23(f) contains a timing provision for when a litigant must file an appeal. 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 permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district court or the court of appeals so orders.”

Prior to 1998, Rule 23 did not contain any provision for appealing class certification orders. The only procedural means for challenging a class certification order were if the judge certified the order under 28 U.S.C. § 1292(b), or if the litigant pursued a mandamus against the judge under 28 U.S.C. § 1651. As the frequency of mandamus appeals proliferated in the early 1990s, the Advisory Committee on Civil Rules decided to amend Rule 23 to provide for interlocutory appeal of class certification orders. Rule 23(f) became effective on December 1, 1998. Prior to December 1, 2009, Rule 23(f) established a deadline of 10 days (rather than 14) for filing for permission to appeal the class certification order. Rule 23(f) does not vest the appealing party with an absolute right to have the appeal heard, because appellate courts retain the discretionary right to grant or deny a hearing.

The 1998 Advisory Committee Note to Rule 23(f) indicates that the Committee intended the window for seeking appellate review to be deliberately small. The Note states that “[t]he 14-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings.”

This appeal concerns whether the Rule 23(f) provision that a litigant file for permission to appeal within 14 days sets forth a mandatory rule based on a plain reading of the text, or whether that timing limitation may be expanded based on equitable considerations. Both Nutraceutical and Lambert agree that Rule 23(f) is a “claim-processing rule.” However, they disagree whether claim-processing rules are mandatory and unalterable or may be subject to equitable exceptions. The Supreme Court has indicated that if a time limit is prescribed in a court-made rule, this constitutes a mandatory claims processing rule. *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). However, the Court in *Hamer* reserved the issue whether claims-processing rules may be subject to equitable exceptions.

Nutraceutical argues that Rule 23(f) is a court-made mandatory rule that may not be altered by equitable considerations and therefore the Ninth Circuit erroneously permitted Lambert’s appeal by applying such equitable factors. While Nutraceutical recognizes the Court reserved that issue in *Hamer*, Nutraceutical nonetheless argues that the Court consistently has recognized that the plain language of timing provisions can preclude equitable exceptions.

Nutraceutical contends that the Advisory Committee, for various jurisprudential and policy reasons, deliberately chose to enact a very short period to appeal a class certification decision, citing the Advisory Committee Note. The purpose of the Rule 23(f) deadline was to reduce the disruption and delay caused by interlocutory appeals. Nutraceutical predicts that, unless the Supreme Court rejects the Ninth Circuit’s liberal reading of Rule 23(f), numerous litigants will take advantage of the ruling to appeal for months after the certification decision, which defeats the Advisory Committee’s intentions in enacting Rule 23(f).

Nutraceutical argues that every other circuit court to consider the Rule 23(f) timing requirement—the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits—have construed the timing provision narrowly. The Ninth Circuit’s equitable approach, therefore, conflicts with these sister circuits. Nutraceutical further bases its arguments on extensive analogies to timing deadlines in other federal rules. Nutraceutical points to a collection of civil, criminal, and appellate rules for the proposition that courts consistently have strictly applied the textual language to decline to apply equitable exceptions to filing deadlines.

For example, Nutraceutical contends that the Supreme Court consistently has held that Federal Rule of Criminal Procedure 54(b) sets forth a strict deadline that precludes equitable exceptions. Similarly, Nutraceutical cites to analogous deadlines in Appellate Rules 2, 5(a)(2), and 26(b), which courts have strictly construed. Nutraceutical contends that these analogies all support the conclusion that Rule 23(f) should be interpreted to preclude liberal application.

Furthermore, Nutraceutical contends that the Ninth Circuit, in reaching its conclusion on Lambert’s appeal, articulated a broad and unprecedented expansion of equitable exceptions that will permit future evasions of the Rule 23(f) 14-day requirement for filing an appeal. Nutraceutical contends that the Ninth Circuit “created considerable uncertainty in the law” by replacing a

simple, bright-line right with impractical, vague standards that will allow appellate courts flexibly to apply the Rule 23(f) timing requirement, leading to inconsistent circuit court decisions.

Nutraceutical points out that the Supreme Court has permitted equitable exceptions to apply only where the circumstances that caused the delay were extraordinary and beyond the litigant's control, citing *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016). Conversely, the Court has refused to apply equitable considerations where no extraordinary circumstances prevented a litigant from filing a timely appeal. On the facts in this case, Nutraceutical argues that Lambert's failure to appeal in a timely fashion was not caused by extraordinary circumstances or circumstances beyond its control.

Nutraceutical suggests that nothing prevented Lambert from filing a timely Rule 23(f) petition; he simply failed to follow the rule. Moreover, Nutraceutical contends that Lambert's motion for reconsideration of the court's decertification decision did not postpone or reset the Rule 23(f) filing deadline—the motion for reconsideration is timely only if it is filed before the deadline to appeal expires. Nutraceutical points out that Lambert's motion for reconsideration was filed after the Rule 23(f) deadline had expired.

Nutraceutical finally argues that there is no need for appellate courts to apply equitable standards to relieve litigants who have missed the 14-day filing deadline. Nutraceutical points out that if a litigant is denied the ability to pursue an interlocutory appeal, the party may always challenge the class certification decision on appeal from a final judgment in the litigation. Therefore, the litigant does not suffer any harsh consequence because a court denies a late-filed Rule 23(f) interlocutory appeal.

Nutraceutical's arguments center on its contention that the Rule 23(f) timing provision is mandatory and not susceptible to equitable tolling. In response, Lambert maintains that Nutraceutical's arguments are based on the incorrect assumption that Lambert's petition for permission to appeal violated Rule 23(f). In contrast, Lambert argues that his Rule 23(f) petition was timely because the 14-day period for filing ran from the date in which the court denied Lambert's motion for reconsideration, June 24, 2015.

Lambert's primary argument stresses that, while the Ninth Circuit's analysis of equitable exceptions was appropriate, the court did not have to reach the issue of equitable exceptions because Lambert's Rule 23(f) petition was timely under the plain language of the rule. Hence, the Supreme Court can affirm the Ninth Circuit's decision on that basis, and the case does not involve any equity-based exception. Lambert contends that, although the Ninth Circuit properly granted Lambert's permission to appeal, there was no need to rely on equitable factors to resolve the alleged timing problem. Therefore, on appeal, it is unnecessary for the Court to decide whether Rule 23(f) is subject to equitable considerations such as equitable tolling. Lambert asks the Court to affirm the Ninth Circuit's holding without further discussion of the propriety of equitable exceptions to Rule 23(f).

Lambert's theory of the timeliness of his Rule 23(f) petition rests on citation to and interpretation of 46 separate federal rules and four statutory provisions, constituting a dizzying array of legal authority to demonstrate Lambert's compliance with timing provisions. Lambert claims that he properly filed all his motions within time periods set forth by all the federal timing rules. Thus, he argues that his March 12, 2015, written motion for reconsideration was filed 20 days after the court's decertification order, well within the 28-day period for filing an appeal under Federal Rule of Civil Procedure 59(e). In Lambert's view, the motion for reconsideration postponed the time to appeal, because a rehearing motion renders a district court's decision not final until it decides the rehearing petition.

Lambert contends that such timely motions for reconsideration cause the Rule 23(f) deadline to run from the date when the district court decides the reconsideration motion, and not from the date of the court's original decision to decertify the class. Lambert suggests that the Court has articulated a long-standing principle that a timely filed motion for reconsideration postpones the time to appeal. In Lambert's view, the court order denying reconsideration was an order granting or denying class certification, which reset the Rule 23(f) clock. Thus, the Rule 23(f) period ran from June 24, 2015, and not from March 2, 2015. Because Lambert filed his Rule 23(f) petition for permission to appeal on July 8, 2015, within 14 days of the court's June 24 order, Lambert's appeal was timely and there was no need for the Ninth Circuit to make recourse to principles of equitable exceptions.

However, if the Court chooses to address the Ninth Circuit's analysis of equitable exceptions to Rule 23(f), Lambert maintains that longstanding federal case law recognizes that claims-processing rules are subject to equitable exceptions such as equitable tolling. At great length, Lambert discusses the historical equity basis for the Federal Rules of Civil Procedure in order to stress that courts consistently have interpreted and applied the federal rules liberally and flexibly. Generally, the federal rules, including Rule 23, are to be interpreted against the historical backdrop of equitable principles. Hence, equitable tolling is a well-established principle of American jurisprudence derived from the old English chancery rule and intended to relieve the harshness of various timing provisions.

Lambert contends that there is nothing in Rule 23(f) to prevent reading the rule to permit equitable tolling. Surveying an array of Supreme Court and appellate decisions, Lambert argues that federal courts traditionally have recognized that claims-processing rules can be subject to equitable exceptions. The most prominent example is the Court's tolling rules when a class action is filed in the first instance. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). In Lambert's case, he contends that equitable tolling stopped the 14-day Rule 23(f) filing period, until the district court resolved his motion for reconsideration.

As a policy matter, Lambert points out that the overarching goal of the federal rules is that they be construed to favor an adjudication of claims on the merits. Thus, timing rules ought not to be given a parsimonious reading that would defeat the ability of a court to adjudicate the merits of a claim.

Furthermore, Lambert contests Nutraceutical's arguments that the Ninth Circuit's decision will cause a multitude of adverse consequences. Lambert notes that appellate courts have discretionary authority to accept or decline to hear Rule 23(f) petitions, and therefore, in most cases a putative appellant will have little incentive to miss the 14-day filing deadline. Moreover, courts need not stay proceedings while a Rule 23(f) petition is pending, so concerns about inefficiency and judicial wastefulness are misplaced.

Instead, Lambert suggests that Nutraceutical's proposed rule would waste party and judicial resources. Moreover, Nutraceutical incorrectly suggests that the availability of an appeal after a final class action judgment is an adequate solution, rather than permitting an interlocutory appeal to be decided on the merits. Finally, Lambert asserts that the availability of equitable considerations in the Rule 23(f) context will not impose an undue burden on the courts any more so than applying equitable exceptions in other cases, such as when the court applies equitable tolling.

SIGNIFICANCE

Among the morass of federal rules the litigants cite in their briefing, it is easy to lose sight of the practical consequences of the Ninth Circuit's decision and the reasons why this appeal is so important to Nutraceutical and Lambert, as well as other class action litigants who might want to appeal a class certification order.

In the underlying litigation, Lambert initially succeeded in convincing the court to certify his class action brought on behalf of consumers of the Cobra Sexual Energy dietary supplement, but Nutraceutical prevailed in persuading the district court to decertify the action. This was a win for the defendant Nutraceutical. Because Lambert desired that his class action proceed, he asked the court to reconsider. After the court declined to reconsider its decertification order, Lambert appealed to the Ninth Circuit.

The Ninth Circuit not only granted the petition to hear Lambert's interlocutory appeal, but determined that the district court erroneously decertified the class, and remanded for further proceedings. Thus, when the dust settled from all the procedural maneuverings, Lambert had snatched victory from defeat, and Nutraceutical will have to defend against Lambert's class action unless the Court decides that Lambert committed a technical but important timing violation in pursuing its appeal.

In a case that is highly reliant on the intersection of dozens of federal timing provisions spread across the civil, criminal, bankruptcy, and appellate rules of procedure, Nutraceutical's appeal might constitute the most boring case on the Court's docket this term. At oral argument, one may expect mind-numbing references to multiple procedural rules, statutes, and provisions, taking the Court down a proverbial rabbit hole of procedural jurisprudence. Only truly dedicated proceduralists could love this case. Nonetheless, timing rules are important and have practical consequences, as illustrated by the circumstances of this litigation.

The Court's resolution of this case will come down to competing views of rule interpretation, especially in the context of timing provisions. There are three possible outcomes. If the Court holds Lambert to a strict, plain reading of Rule 23(f), without more, then Nutraceutical will prevail. On the other hand, if the Court follows Lambert through the labyrinth of rule provisions and concludes that he actually did file his Rule 23(f) petition on time, then the Court will affirm the Ninth Circuit's decision without the need to expand on doctrines of equitable exceptions to timing rules.

However, the nub of the appeal rests on whether the Court will take up the Ninth Circuit's implied invitation to consider the propriety of equitable exceptions to claim-processing rules, an issue left open in prior cases.

The most facile prediction is that the Court's conservative contingent, now a majority, will take a strict rule approach to Rule 23(f), supported by ample prevailing circuit court precedent. A majority might favor a simple black-letter approach to timing rules that discourages litigants from gaming the procedural system. Some justices may be swayed by Nutraceutical's description of the consequences of vague standards governing application of equitable exceptions to Rule 23(f) appeals. At any rate, an outcome-determinative ruling in Nutraceutical's favor might be construed as another decision congruent with the Court's perceived anti-class action, pro-corporate zeitgeist.

It is perhaps no surprise that the judicial system's most liberal Ninth Circuit reached a conclusion favoring flexible application of the Rule 23(f) timing provision, based on equitable considerations—a decision favoring the class action plaintiff in this case. Lambert's lengthy digression into the history of the Federal Rules of Civil Procedure to illustrate the pervasive influence of equity on civil procedure may have great appeal to the Court's leading proceduralist, Justice Ruth Bader Ginsburg.

It remains to be seen whether the Court's liberal wing will sympathize with the Ninth Circuit's reliance on equity to allow class action plaintiffs to pursue appellate relief beyond the time limitation set forth in Rule 23(f). If a majority of the Court proceeds on that basis, then we may expect some guidelines on the application of equitable exceptions to relieve litigants of the Rule 23(f) deadline.

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