

# Daily Journal

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## How strict are appellate deadlines in class actions?

By Andrew J. Trask

Deadlines are a fact of life for lawyers. We spend inordinate amounts of time (and, with the advent of calendaring software, money) calculating deadlines so we don't accidentally miss the time to file a critical motion or response. Few deadlines cause as much anxiety as deadlines for appeal. And few appellate deadlines are stricter than Rule 23(f)'s deadline for appealing class certification decisions. At least, until now. In the recent case *Lambert v. Nutraceutical Corp.*, the 9th U.S. Circuit Court of Appeals, defying the decisions of other federal Courts of Appeal, held that equitable tolling of Rule 23(f)'s deadline was appropriate. As the case travels to the U.S. Supreme Court this term — set to begin the first Monday of October — we will get a clearer view of just how difficult it will be to appeal class certification decisions.

In *Lambert*, the named plaintiff bought an aphrodisiac dietary supplement called “Cobra Sexual Energy” from the defendant. The supplement was apparently not as potent as advertised, so the plaintiff filed a putative class action accusing the defendant of violating various California consumer fraud statutes. Originally, the district court certified a class seeking damages, but things turned against the plaintiff. The original district judge retired. The new judge decertified the class, expressing skepticism that the plaintiff could actually apply his damages model consistently across the proposed class.

At that point, the 14-day clock for a Rule 23(f) petition began ticking. Ten days later, at a status conference, the plaintiff told the judge he intended to file a motion for reconsideration. The judge set a 10-day deadline for the motion. For those watching the clock, this meant the reconsideration motion would arrive six days

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after the deadline for a Rule 23(f) petition had expired, a fact that the plaintiff seemed not to notice. The plaintiff filed his motion on time. The court took the motion under consideration, and, three months later, denied it. Fourteen days after that denial, the plaintiff filed a Rule 23(f) petition.

The motions panel that reviewed the petition accepted it, but also asked the 9th Circuit panel hearing the appeal to consider whether it was timely filed. The 9th Circuit held that it was. It noted that Rule 23(f) was “silent as to the effect of motions for reconsideration on this deadline.” That meant that, unless an exception existed, the plain text of the rule would dictate rejecting the appeal. Determining whether an exception existed required deciding whether the appeal was jurisdictional or procedural. If the appeal were jurisdictional, the court had no power to authorize any exception; if it were procedural, exceptions might exist. After reviewing both Supreme Court and other circuits’

precedent, the panel held that the appeal was procedural, and so “equitable remedies softening the deadline are therefore generally available.”

At this point, the 9th Circuit departed from its sister circuits. While all courts facing the issue had held that a motion for reconsideration filed *within*

the 14-day deadline tolled the deadline for a 23(f) appeal, none had extended that reasoning to a motion filed *after* the appellate deadline had passed. In fact, the 9th Circuit noted that several had explicitly held the opposite. Nonetheless, the 9th Circuit chose to extend the deadline, reasoning that the concerns other circuits had expressed (“that Rule 23(f) petitions slow down litigation, are disruptive, and inject uncertainty into class action litigation”) did not describe actual problems arising in class action litigation.

Having accepted the appeal, the 9th Circuit then reversed the decertification. The defendant filed a petition for certiorari to the Supreme Court, which has placed the case on its docket for the upcoming term to determine the proper calculation of Rule 23(f)'s 14-day deadline. The high court should issue its decision by next summer.

So the question arises: Why do we care about this opinion? Every litigator has wished they had a few

extra days to file something, and every litigator has wanted to hold their adversary to their deadlines. So this is not a question of either plaintiffs or defendants gaining a structural advantage in the ongoing battle over class action procedure.

Instead, this appeal challenges how we view the integrity of the Federal Rules of Civil Procedure. When Rule 23(f) was enacted 20 years ago, it was with the understanding that interlocutory appeal of class actions would remain comparatively rare. One of the tools for ensuring that this remained true was giving the appellate courts wide discretion to not hear appeals. But the other tool was a strict deadline. Each of the circuit courts of appeals that has faced this issue has held that the benefits of this strict deadline outweighed any potential difficulty from not hearing a particular interlocutory appeal.

In taking this case, the Supreme Court will inevitably rule on which of these views of class action procedure — that it is a carefully considered balance between competing interests, or that it is a set of guidelines that can be modified as the court sees fit — ought to control.

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