

Better Late Than Never? Not So For Class Cert. Appeals

By **Emily Field**

Law360 (February 26, 2019, 10:44 PM EST) -- The U.S. Supreme Court put tardy attorneys on notice Tuesday when it ruled that an appellate court may not overlook a missed deadline to appeal a class certification order.

The unanimous opinion, authored by Justice Sonia Sotomayor, makes clear that attorneys must adhere to a strict 14-day deadline for petitioning an appeals court to review an order on class certification. Reversing a Ninth Circuit ruling, the high court said there was no basis for the appellate court to take up a late petition over an order decertifying a class of consumers alleging that Nutraceutical Corp. falsely advertised its Cobra Sexual Energy "aphrodisiac" supplement.



The justices of the U.S. Supreme Court were unanimous in an opinion Tuesday that enforced a strict deadline. (AP)

The justices disagreed that named plaintiff Troy Lambert deserved an extension of the deadline to appeal because he had unsuccessfully asked the lower court to reconsider its ruling. As a result, attorneys would be wise to immediately begin an appeals process before asking a district court to reconsider a ruling, experts said.

Axinn Veltrop & Harkrider LLP partner Thomas Rohback said the opinion is a "great example" of an issue a practitioner might face when a court gives a certain time frame for filing a motion to reconsider and there is also the 14-day deadline at the appellate level.

"Does the one cancel out the other? And if not, then the safer course of action would be to make sure that you file your notice to appeal or at least request to file your request to appeal within the 14 days," Rohback said. "There are some situations when you're faced with two different timelines. One has a 14-day trigger; one has a 20-day trigger. Which one do you need to comply with and what's the consequences of not complying with the shorter one?"

The Ninth Circuit had held that the 14-day deadline under Rule 23(f) of the Federal Rules of Civil Procedure should be tolled because Lambert told a district court that he would seek reconsideration of the Feb. 20, 2015, decertification order on March 2, 2015, within the two-week deadline after the order, and that he met the deadline for filing a motion for reconsideration on March 12, 2015.

Following the denial of his motion for reconsideration, Lambert then asked the Ninth Circuit for permission to appeal the decertification order, four months after it came down.

"People who do class action work will read this decision and will understand that it would be perilous not to file a 23(f) petition within 14 days if they believe they have a petition that's worth filing," said Evan Tager of Mayer Brown LLP. "For those who like having the Rule 23(f) arrow in their quiver, they need to shoot it within 14 days."

The high court left open the question of whether the deadline for seeking appeal of a class certification order might start to run on a later date if the motion for reconsideration is filed within the 14-day window for filing a notice of appeal, Tager said.

"My prediction is that practitioners will not take any chances and will file the 23(f) petition within the 14 days of the order granting or denying class certification," Tager said.

The court's strict view in this ruling should also be a factor in weighing whether there's flexibility under other rules, whether it's the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure, Tager said.

"This kind of approach, which was unanimous of course, suggests that the court is going to be a close reader of the rules and attempt to determine what the intent was of the drafters and then enforce it and not allow for judicial glosses or judicial exceptions," Tager said.

The high court left it for the Ninth Circuit to rule on Lambert's arguments that the order denying reconsideration is in itself an order on class certification.

"If there's some life left, it might be on remand as to one of those arguments, but that's not what is before the court," Rohback said.

And although the justices discussed if something like a Martian attack would constitute the type of unique situation that would create an exception to the deadline, the high court stopped short of addressing whether "an insurmountable impediment" to filing on time would have yielded a different result.

Max Kennerly of Kennerly Loutey LLC said the decision illustrates a trend in rulings over the past several years to get lawyers started on the appeals process sooner, including through the enforcement of deadlines.

Attorneys often want to file a motion for reconsideration if they believe there is a genuine error that could be corrected or to avoid the time and expense of an appeal, Kennerly said.

"There's an impulse by lawyers to do these motions for reconsideration, but the trend ... as represented by this case, that motion for reconsideration is not going to preserve all of your appellate rights and you need to just get the appeal in," Kennerly said.

--Editing by Jill Coffey and Michael Watanabe.