LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

WEDNESDAY, MARCH 13, 2019

PERSPECTIVE

So will a Martian invasion extend the Rule 23(f) deadline?

By Jeremy Smith and Chris Chorba

In an unanimous decision penned by Justice Sotomayor, the U.S. Supreme Court held in *Nutraceutical Corp. v. Lambert*, 2019 DJDAR 1473 (Feb. 26, 2019), that the Court of Appeals may not equitably toll the deadline to file a petition for permission to appeal the grant or denial of class certification under Federal Rule of Civil Procedure 23(f).

After entertaining us with hypotheticals at oral argument about whether there might be an exception for a "Martian invasion," the written opinion was straightforward. All of the justices agreed that the Federal Rules do not allow for equitable flexibility in the deadline. Specifically, Rule 23(f) has a mandatory 14-day rule, and Rule 5(a)(2) reiterates that "a petition for permission to appeal 'must be filed within the time specified.'" And "[w]hile Appellate Rule 2 authorizes a court of appeals for good cause to 'suspend any provision of these rules in a particular case,'" Rule 26(b)(1) includes a "carveout" for "'a petition for permission to appeal.'" Thus, the Rules "express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist."

None of this is particularly surprising. In the order under review, the 9th Circuit had sanctioned tolling in circumstances it recognized "other circuits would likely not toll." *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1179 (9th Cir. 2017). And the justices seemed skeptical at oral argument that an equitable tolling exception could fit within the textual confines of the Rules or the Supreme Court's previous precedent, as we explained in a December article discussing this case.

But what is worthy of your attention if you litigate class actions or interlocutory appeals, is what the Supreme Court *declined* to decide.

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First, and most importantly, the Supreme Court declined to consider whether a motion for reconsideration filed within the initial 14-day deadline extends the deadline to file a Rule 23(f) petition. As the court noted, "every Court of Appeals to have considered the question … accept[s] a Rule 23(f) petition filed within 14 days of the resolution of a motion for reconsideration that was itself filed *within* 14 days of the original order." But as we pointed out last December, Rule 23(f) does not have a tolling provision for motions for reconsideration and no rule suggests that a litigant must file the reconsideration motion within 14 days, as the Courts of Appeals have concluded. The Supreme Court explained why such a rule does not qualify as tolling: "A timely motion for reconsideration filed within a window to appeal does not toll anything; it 'renders an otherwise final decision of a district court not final' for purposes of appeal." But whether the rule itself is valid, the Supreme Court did not give any clues, other than Justice Ruth Bader Ginsberg's and Justice Brett Kavanaugh's skepticism about the rule at oral argument.

Second, the Supreme Court declined to address what happens if a district court misleads a litigant about the deadline for filing an appeal. The court explained that Mr. Lambert had not been misled by the district court, and thus there was "no occasion to address" that issue. But given the court's conclusion that the Rules "express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline," reliance on a district judge's statements is unlikely to provide sufficient cover.

Finally, the Supreme Court saw "no occasion to address whether an insurmountable impediment to filing timely might compel a different result." Thus after all that, we still don't know if a Martian invasion is enough to extend the deadline!

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