

# U.S. Supreme Court: Rule 23(f)'s Deadline to Petition for Interlocutory Appeal of Class Certification Rulings Cannot Be Equitably Tolled

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## Supreme Court and Appellate Alert

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### Key Points

- The United States Supreme Court held that Federal Rule of Civil Procedure 23(f)'s 14-day deadline for parties to seek permission for interlocutory review of class certification decisions is not subject to equitable tolling.
- Parties who lose a class certification decision should preserve their right to seek permissive appeal by filing a timely Rule 23(f) petition, even if they intend to move for reconsideration of the certification decision.
- Parties who win a class certification decision should object to any untimely Rule 23(f) appeals to preserve their objection.

### Summary

On February 26, 2019, the U.S. Supreme Court in *Nutraceutical Corp. v. Lambert*, No. 17-1094, unanimously held that Federal Rule of Civil Procedure 23(f)'s 14-day deadline for allowing parties to seek permission for interlocutory review of decisions granting or denying class certification is not subject to equitable tolling.

### Background

Troy Lambert filed a putative class action alleging false advertising. The Central District of California initially certified the class, but later decertified it on February 20, 2015. Under Rule 23(f), Lambert had 14 days to petition the Ninth Circuit Court of Appeals for permission to appeal the order. At a status conference on March 2, 2015, Lambert informed the district court he intended to seek reconsideration of the decertification. The district court told Lambert that he could do so within 10 days of the conference. On March 12, 2015, Lambert filed a motion for reconsideration of the decertification order, which the district court denied on June 25, 2015. Fourteen days later, on July 8, 2015, Lambert filed his Rule 23(f) petition for permission to appeal the decertification order. The Ninth Circuit held that Rule 23(f)'s deadline should be tolled because Lambert informed the trial court of his intention to seek reconsideration within 14 days and because he "otherwise acted diligently." The U.S. Supreme Court granted certiorari.

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## Opinion

Justice Sotomayor, writing for a unanimous court, reversed the Ninth Circuit's decision. The Court ruled that Rule 23(f)'s deadline for a party to petition for permission to appeal is not subject to tolling. The Supreme Court acknowledged that, while Rule 23(f) is a non-jurisdictional claim-processing rule that is subject to waiver and forfeiture, some claim-processing rules are "mandatory" and not susceptible to equitable tolling. Here, the Supreme Court found that Rule 23(f)'s deadline is mandatory and not subject to equitable tolling.

First, the Court noted that Rule 23(f) itself conditions the possibility of appeal on the filing of a petition "within 14 days" of an order granting or denying class-action certification. Second, while Federal Rule of Appellate Procedure 2 authorizes an appellate court for good cause to "suspend" any provision of the rules, it expressly carves out the requirements of Rule 26(b). Appellate Rules 5(a)(2) and 26(b) mandate that a petition for permission to appeal must be filed within the time specified and that the deadline may not be extended. The Supreme Court held that, because the Rules express a clear intent to rigorously enforce Rule 23(f)'s deadline, it is not subject to equitable tolling even where good cause might otherwise exist.

Lambert argued that Rule 26(b)'s prohibition on extending time to file a petition for permission to appeal should be understood to prohibit granting extensions in advance, but "leave[s] courts free to excuse late filings on equitable grounds after the fact." The Supreme Court rejected this argument based on precedent holding that a court's acceptance of a late filing under Criminal Rule 45(b) impermissibly "enlarged" a filing period. The Court also rejected Lambert's argument based on the 1998 Advisory Committee Notes to Rule 23(f), which recognize judicial discretion to grant or deny a petition for review "on the basis of any consideration that the court of appeals finds persuasive." The Court held that the Advisory Committee Notes' language concerns whether to review a particular class-certification decision, not to the timeliness of the petition. Lastly, the Court found inapt Lambert's argument that most appellate courts would accept 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 certification order. The Court responded that the motion for reconsideration affects the "antecedent issue" of when the 14-day period for seeking appeal begins to run, not the availability of tolling.

The Supreme Court declined to consider the effect of a motion for reconsideration filed within 14 days of the certification decision or the effect of a court misleading a party about the filing deadline.

## Impact

*Nutraceutical* requires parties who lose at the class certification stage to act quickly to preserve their right to seek permission to appeal. Because the Court did not address whether a motion for reconsideration filed within the 14-day period extends the Rule 23(f) deadline (on the basis that the class certification order is not "final"), the safest approach is to file the petition within 14 days of the certification decision. Parties who prevail at the class certification stage should be sure to object to Rule 23(f) petitions that are not filed within 14 days of the certification ruling.

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