



CLASS ACTION BLOG

# Surprise, Surprise, Rule 23(f)'s Fourteen Day Limit Can't Be Equitably Tolled

AUTHOR: ANTHONY MARTIN

The United States Supreme Court declared that courts of appeals cannot equitably toll the fourteen-day limit for parties to file a petition for leave to appeal once district courts grant or deny a class certification motion. The Supreme Court reversed and remanded with instructions for the Ninth Circuit to determine whether the plaintiff's alternative timeliness arguments saved its appeal.

Justice Sotomayor delivered the opinion for the unanimous court. The analysis was based primarily on the language of Civil Rule 23(f) which the Court found was supported by Appellate Rules 5(a)(2) and 26(b) as well as Supreme Court precedent. Justice Sotomayor agreed that Rule 23(f) is "non-jurisdictional," but disagreed that the Rule was subject to equitable tolling. The reason why Rule 23(f)'s time limitation was not jurisdictional was because it was found in a procedural rule rather than a statute. The Supreme Court had previously referred to such a rule as "non-jurisdiction claim-processing rule." Accordingly, it was subject to waiver or forfeiture by an opposing party.

Nevertheless, whenever the rules "show a clear intent to preclude tolling, courts are without authority to make exceptions" no matter the merit of the litigant's position in requesting such tolling. The Ninth Circuit itself had recognized "that other circuits would likely not toll the Rule 23(f) deadline." Slip op. at 2-3. In fact, the Second, Third, Fourth, Fifth, and Seventh Circuits had adopted a contrary position. Slip op. at 3, n. 1. Supporting the court's position that Rule 23(f) clearly shows equitable tolling is not allowed, the court relied on two appellate procedure rules, Rule 5(a)(2) and Rule 26(b). Appellate Rule 5(a)(2) states that petitions for permission to appeal "must be filed within the time specified." Rule 26(b) generally allows extensions of time to be allowed, but then specifically adds that a court of appeals "may not extend the time to file ... a petition for permission to appeal."

Justice Sotomayor also looked to earlier Supreme Court cases interpreting similar rules in the Federal Rules of Criminal Procedure which parallel Appellate Rule 26(b). Those earlier cases were *Carlisle v. United States*, 517 U.S. 416, 419-423 (1996) and *United States v. Robinson*, 361 U.S. 22, 224, 229 (1960). Those cases “both centered on Federal Rule of Criminal Procedure 45(b), an extension-of-time provision that parallels Appellate Rule 26(b).” In light of the holdings in *Carlisle* and *Robinson* that courts cannot allow equitable tolling where the rules “show a clear intent to preclude tolling,” and the parallel construction of Criminal Rule 45(b) and Appellate Rule 26(b), equitable tolling was not allowed.

The defendant’s multiple arguments seeking an exception did not withstand scrutiny. In fact, the court found that interlocutory appeals are an “exception to the general rule that appellate review must await final judgment- which is fully consistent with a conclusion that Rule 23(f)’s time limit is purposefully unforgiving.” The court looked to earlier cases standing for the proposition that there had to be a “sufficiently strong” reason to “overcome the usual benefit of deferring an appeal until litigation concludes.” Slip op. at 8. Furthermore his argument that his motion to reconsider essentially extended the time for him to timely file a Rule 23(f) petition rested on a false premise because it was factually questionable in his case plus, filing a motion for reconsideration tolled nothing. Rather filing a motion to reconsider simply extends “when the fourteen day limit begins to run, not the availability of tolling.” Slip op. at 9.

Even so, the defendant had raised alternative timeliness arguments in the Ninth Circuit, but which that court had not addressed. Rather than reach those issues, the Court remanded them to allow the Ninth Circuit to “address [those issues] in the first instance on remand,” assuming those arguments had been properly preserved.

The lesson for class action practitioners seems to be that the Rule 23(f)’s fourteen day limit means exactly what it says. File the petition for interlocutory appeal within fourteen days or jeopardize losing that opportunity for interlocutory review.