

UNITED STATES GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,
LTD.

Appellant,

MICHAEL O. LEAVITT, SECRETARY, U.S.
DEPARTMENT OF HEALTH AND HUMAN
SERVICES; CHARLES GRIM, DIRECTOR,
INDIAN HEALTH SERVICE; UNITED
STATES OF AMERICA

Appellees.

CBCA Nos. 190-ISDA-297-ISDA

IBCA Nos. 4794-4803/06

ISDA Contract No. 243-96-6025

ISDA Compact No. 58G980054

CORRECTED RESPONSE TO APPELLANT'S SURREPLY
IN OPPOSITION TO APPELLEES' MOTION TO DISMISS¹

INTRODUCTION

Appellee Indian Health Service raised three concepts in its December 11, 2006 Reply: (1) tolling under Rule 23 of the Federal Rules of Civil Procedure (Rule 23) does not apply during the Contract Disputes Act (CDA) presentment period; (2) even if it did, Rule 23 tolling is unavailable to litigants that choose to bring an action before a determination on class certification; and (3) equitable tolling does not apply under the CDA, but if it did, the facts of this case do not warrant its application.

In response to the Government's Reply, Appellant Arctic Slope Native Association, Ltd. submitted a twenty-eight page Surreply to explain away its failure to present its claims within the

¹ As noted in Appellee's Surreply, the parties agreed to the filing of an additional brief in response to the Surreply.

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deadlines mandated by Congress. Appellant's Surreply still does nothing more than misapply equitable doctrines to explain away its inaction. Class action tolling has not been recognized under the CDA; it would not apply to presentment; and Appellant's FY 1996, FY 1997, and FY 1998 claims are time barred. Moreover, even though equitable tolling does not apply to the CDA, there is no basis in equity to excuse Appellant from meeting the CDA presentment deadline in this case.

I. Rule 23 tolling does not apply during the Contract Disputes Act presentment period.

Generally, commencement of a class action suspends an applicable statute of limitations for commencing a lawsuit as to all asserted or potential members of class during the pendency of class certification. This tolling doctrine was established by the Supreme Court under Rule 23 in American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974). No court has ever ruled that American Pipe tolling applies to the presentment deadline under the CDA.² Only a few courts have ruled on whether American Pipe tolling applies to administrative deadlines at all. This Appeal involves a presentment deadline that is more analogous to those cases where courts have held that tolling is not applicable to administrative deadlines.

In NuFarm America's, Inc. v. U.S., 398 F.Supp.2d 1338, 1352 (CIT 2005), the Court of International Trade (CIT) refused to apply American Pipe tolling to potential plaintiffs who had not independently exhausted jurisdictional administrative requirements. In NuFarm America's, Inc., a chemical supplier filed a protest with the U.S. Customs and Border Protection Agency

² No court has ruled that the American Pipe applies to any limitations prescribed by the CDA.

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("Customs"), alleging that duties, fees and other charges imposed by the Government were unconstitutional. Customs denied the protest, and the supplier appealed to the CIT, seeking certification of a class action comprised of all entities that had paid similar charges.³ Class certification was denied because no other potential class members had completed the administrative process.⁴ In denying class certification, the CIT noted that the failure of potential plaintiffs to satisfy jurisdictional requirements in a timely fashion would not be excused by American Pipe. Id. at 1353. The CIT went on to note that in some circumstances, administrative requirements could be excused, citing the doctrines of vicarious exhaustion and the single filing rule, which were not applicable to that case. Id.

Similarly, in Coffin v. Bowater Inc., 224 F.R.D. 524 (D. Me. 2004), the court refused to apply tolling doctrines or take any action to affect the administrative exhaustion requirements for hundreds of unnamed potential class members who had not exhausted their contractually-based administrative remedies under the Employee Retirement Income Security Act. The court also noted the doctrine of vicarious exhaustion, but refused to apply it because all potential class members were required to exhaust their contractually-based administrative remedies. Id. 527.

In support of its contention that tolling should be applied to excuse its failure to present timely claims in this Appeal, Appellant offers a few examples of administrative filing deadlines that have been tolled under the doctrine established in American Pipe. All but one of those

³ The CIT has its own class action rule, modeled after Rule 23. See Stone Container Corp. v. United States, 229 F.3d 1345, 1353 (Fed. Cir. 2000).

⁴ The supplier was the only named plaintiff.

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cases involved administrative steps under Title VII of the Civil Rights Act. See, e.g., Sharpe v. Am. Express Co., 689 F. Supp. 294, 300 (S.D.N.Y. 1988). Unlike the administrative requirements discussed in NuFarm America's, Inc. and Bowater Inc., the Supreme Court has long held that claims may be sustained on “a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members.” Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975).⁵ In Sharpe, the court relied on this long standing Title VII “vicarious exhaustion” doctrine to apply American Pipe, finding that “other plaintiffs need not have filed claims with the EEOC in order to join as co-plaintiffs.” Id. at 194 (citation omitted); see also Griffin v. Singletary, 17 F.3d 356 (11th Cir. 1994) (citing Sharpe for the same conclusion); Zapata v. IBP, Inc., No. Civ.A 93-2366, 1998 WL 717621 (D. Kan. Sept. 29, 1998) (unpub’d) (citing Griffin to apply tolling). Additionally, Appellant cites Andrews v. Orr, 851 F.2d 146 (6th Cir. 1988). Orr involved an action subsequent to a federal employment class action. That class action was subject to specific regulations governing the filing of federal employment class actions. The regulations applicable to the class action discussed in Orr specifically provided for agents to bring an action on behalf of a class of federal employees, as follows:

(b) A “class complaint” is a written complaint of discrimination *filed on behalf* of a class by the agent of the class alleging that:

(b)(1) The class is so numerous that a consolidated complaint of the members of

⁵Some courts have referred to this doctrine as “vicarious exhaustion” or the “single filing rule”. See e.g., Hartman v. Duffey, 88 F.3d 1232, 1235-36 (D.C. Cir. 1996); Tolliver v. Xerox Corp., 918 F.2d 1052 (2d Cir. 1990); Foster v. Gueory, 655 F.2d 1319, 1322-23 (D.C. Cir. 1981), International Union v. Clark, 2006 WL 2598046 at 10 (D.D.C. 2006). Of course, these doctrines were held inapplicable in NuFarm America's, Inc. and Bowater Inc..

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the class is impractical;

(b)(2) There are questions of fact common to the class;

(b)(3) The claims of the agent of the class are typical of the claims of the class;

(b)(4) The agent of the class, or his/her representative, if any, will fairly and adequately protect the interests of the class.

(c) An “agent of the class” is a class member who acts for the class during the processing of the class complaint.

29 C.F.R. § 1613.601(b-c) (1985) (emphasis added). Orr is distinct from NuFarm America’s, Inc. and Bowater Inc. because federal employees need not have filed individual complaints with the EEOC during the pendency of class certification.

Appellant also cites one non-Title VII case, the First Circuit’s decision in McDonald v. Sec’y of Health and Human Servs., 834 F.2d 1085, 1091-92 (1st Cir. 1987). In McDonald, the First Circuit applied American Pipe to revitalize disability claims of class members that did not exhaust the administrative process during the pendency of class certification. However, the district court had already ruled that it did not have jurisdiction over individuals who had “not met the nonwaivable presentment requirement of § 405(g) [of the Social Security Act].” McDonald v. Heckler, 612 F.Supp. 293, 299 (D.Mass. 1985); see also Mathews v. Eldridge, 424 U.S. 319, 328 (1976). Thus, the First Circuit only applied American Pipe to class members that had met the requirement of filing a claim. Id. 1092 n. 4. As in Sharpe, the court also applied well established precedent to find that filing a timely administrative appeal, just as a timely judicial appeal under § 405(g), could “be waived and the courts [could] apply to it the ‘traditional tolling principle.’” Id. at 1092 (citations and quotations omitted). Therefore, the court concluded that

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the principles discussed in American Pipe would allow “class members to go forward from the point where they had left off during pendency of the class action.” Id. Indeed, the First Circuit viewed McDonald as an “exceptional case.” Id.

If anything, the above referenced cases suggest that American Pipe tolling is permitted only for deadlines associated with administrative steps that need not be met upon certification of a class. See December 11, 2006 Reply at 6 n. 2. Unlike the administrative steps in Sharp and McDonald, and consistent with the views in NuFarm America’s, Inc. and Bowater Inc., presenting a claim to the Secretary under the CDA is a jurisdictional prerequisite to pursuing an action before this Board or the Federal Courts. See Thoen v. U.S., 765 F.2d 1110, 1116 (Fed. Cir. 1985) (“Congress has determined that submission of a certified claim to the contracting officer in the first instance is a jurisdictional prerequisite to filing a suit in the Claims Court.”); Cf. Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 349 n. 3 (1983) (the Court rejected petitioner’s jurisdictional argument that Title VII time limitations could not be tolled under American Pipe by reaffirming that filing a timely Title VII action is not jurisdictional).

Unlike discrimination charges in Title VII, the CDA has no exception from its presentment requirement for class actions. Therefore, there is no basis to apply American Pipe in the same vein as the courts did in Sharpe, Griffin, and Orr. Moreover, the Board must “not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.” Booth v. Churner, 532 U.S. 731, 741 n.6 (2001) (holding that because Congress mandated exhaustion under the Prison Litigation Reform Act of 1995, it could not be skipped); see also Founding Church of Scientology of Washington, D. C., Inc. v. Director, Federal Bureau

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of Investigation, 459 F.Supp. 748, 756 (D.D.C. 1978) (holding that “even if a single FTCA case raises Title VII-like claims and seems appropriate for the ‘named plaintiff exhaustion’ rule, the analogy to Title VII law fails. Accordingly, each member of the plaintiff class must exhaust his or her administrative remedies.”) (citations omitted). Similar to the FTCA and unlike Title VII, the CDA mandates timely presentment under its administrative scheme. Therefore, the Board may not excuse Appellant’s failure to present a timely claim by invoking American Pipe tolling.

II. Even if Rule 23 tolling is available under the CDA, it is unavailable to litigants that choose to bring an action before a determination on class certification.

American Pipe tolling is not available when a petitioner initiates its own case prior to a determination of class certification. Appellant calls this a “strange and strained exception.” Surreply at 8. On the contrary, it is a plainly stated approach shared by of a majority of the courts that have addressed the issue. Appellant only cites one case (which Appellee included in its brief) that deviates from the majority view. Even that court thought such a rule “might be a good idea”. See Lehman v. United Parcel Service, Inc., 443 F. Supp. 2d 1146, 1151 (W.D. Mo. 2006). Notably, Lehman was expressly rejected by another district court as recently as last month. See In re Enron Corporation Securities, --- F.Supp.2d ---, 2006 WL 3582139 at 22 (S.D.Tex. 2006) (“Because this Court agrees with the reasoning of the majority of courts addressing the issue, it, too, concludes that the American Pipe tolling doctrine applies only to opt-out plaintiffs **after** the district court makes the class certification determination, regardless of whether it denies or grants certification.”).

Even if the Board were to conclude that American Pipe tolling could apply to

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presentment under the CDA, Appellant is still unable to invoke American Pipe because it is not available to a petitioner that initiates its own case prior to a determination of class certification.

III. Equitable tolling does not apply under the CDA and even if it did, the facts of this case do not warrant its application.

No court has ever ruled that equitable tolling applies to presentment under the CDA. Moreover, as submitted by Appellee in its December 11, 2006 Reply, equitable tolling does not apply to the CDA. See id. at 8-11.

Even though equitable tolling does not apply, Appellant cites no facts which would support its application. Appellant's primary tactic is to raise unsubstantiated and unsupported allegations that IHS "made misleading and contradictory suggestions to Tribal contractors about how to proceed over their unpaid CSCs." Surreply at 22. Appellant fails to offer even a single example of such agency action, whether directed specifically toward Appellant, any other ISDA contractor, or all ISDA contractors in general, that could in anyway have been construed as inducing or tricking it into not presenting a timely claim.

Appellant appears to be arguing more for application of the doctrine of equitable estoppel than equitable tolling. See Sur-Reply at 18. "Equitable tolling is distinct from the doctrine of equitable estoppel; equitable tolling prevents the running of a statute of limitations against a plaintiff who is unaware that he has a cause of action because of defendant's fraudulent acts or concealment." Bennett v. U.S. Lines, Inc., 64 F.3d 62, 66 (2d Cir. 1995). Equitable estoppel, on the other hand, generally applies when the petitioner is aware of a claim, yet fails to file in time due to the defendant's conduct. See generally, Glus v. Brooklyn Eastern Dist. Terminal

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359 U.S. 231, 235 (1959) (holding that estoppel applies where a “petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.”); Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 60-61 (2d Cir. 1986); Cerbone v. Int’l Ladies’ Garment Workers’ Union, 768 F.2d 45, 49-50 (2d Cir. 1986). Since ASNA cannot reasonably claim it was unaware of the claims that are the subject of this Appeal, the doctrine of equitable estoppel more aptly describes Appellant’s argument.

Contrary to Appellant’s belief, the Federal Circuit has sharply distinguished the doctrines of equitable estoppel and tolling in the context of “providing relief from the application of a statute of limitation”. Sur-Reply at 21. The Federal Circuit has held that “[t]he requirements for equitable estoppel are even more stringent; equitable estoppel requires affirmative governmental misconduct.” Frazer v. U.S., 288 F.3d 1347, 1354 (Fed. Cir. 2002). Appellant has not argued that it relied on affirmative governmental misconduct here; nor has it even pled any evidence of affirmative governmental misconduct. Therefore, Appellant’s effort to invoke equitable estoppel must fail.

However, to the extent Appellant seeks to apply any equitable doctrine, it relies too much on Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998). The Federal Circuit has backed away from any notion that West compels the application of equitable tolling under circumstances not envisioned by the Supreme Court. See Former Employees of Sonoco Products Co. v. Chao, 372 F.3d 1291, 1297 (Fed. Cir. 2004) (“Nor do we accept the agency’s argument that West rested on the paternalistic relationship between the Veterans Administration and veterans. West did make mention of the ‘particular relationship between veterans and the government,’ but only in the

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context of whether the veteran could have been misled by actions of VA employees, making his case analogous to cases in which equitable tolling would be available in private suits.”). The court’s explanation in Sonoco Products Co. only clarifies that West falls squarely in line with the Supreme Court’s tolling doctrine in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990). In Irwin, the Court held that “making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.” Id. at 457.

Other than to throw out unsubstantiated allegations that ASNA was misled, Appellant’s theory for equitable tolling appears to be that IHS had a trust duty to advise ASNA of its responsibility to file claims within the presentment period. In Sonoco Products Co., the Federal Circuit was unwilling to find that the government agency misled the plaintiff simply because the agency did not take it upon itself, without request, to fully inform the plaintiff with respect to the running of the limitations period. Id. at 1299. The court characterized the petitioner’s argument for equity in Sonoco Products Co. as seeking to “impose upon the state employment office the type of affirmative obligations found in an attorney-client relationship.” Id. Appellant asks the Board to do the same thing here by arguing that a trust duty and the Government’s good faith imposes an affirmative obligation on IHS to advise tribes of their responsibility to file claims within a clearly articulated statutory deadline. As IHS stated in its December 11, 2006 Reply, there is no trust duty in this case. Id. at 14. If the Federal Circuit was unable to imply such an obligation in Sonoco Products Co., the Board should not create one here for Appellant, especially under the guise of the Government’s good faith and a general trust duty.

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Appellant's final argument is that tolling is proper because it relied in good faith on its own erroneous belief that its claims were protected by tolling doctrines. In doing so, Appellant mischaracterizes IHS as departing from "the Ramah class decision"⁶ and altering "its stance on the limitations issue, after years without raising the defense, contrary to its trust responsibility and contrary to its duty of good faith." Surreply at 27. Ramah is an unpublished decision involving a different agency and a prior version of the CDA presentment requirement that did not have a statutory deadline. In Ramah, presentment under the CDA was excused on the grounds of futility and had nothing to do with tolling because, again, the CDA did not contain a presentment deadline. Moreover, Appellant even points out that futility "has nothing whatsoever to do with Rule 23 tolling." Surreply at 14. As such, Appellant had no reasonable basis to rely on Ramah for its belief that presentment would be excused in Zuni, or that its filing deadlines would be tolled. Even the Zuni court, questioning the futility analysis in Ramah for the named plaintiff, recognizes that the unpublished opinion is not binding precedent. Pueblo of Zuni v. United States, --- F.Supp.2d ---, 2006 WL 3788824 at 12 (D.N.M. 2006) ("Plaintiff can hardly be said to rely on the oblique argument that a class certification order in a separate case allows Plaintiff to forego exhaustion of their claims in this case."). Moreover, Appellant offers no evidence that IHS ever intended to disregard a Congressionally mandated presentment deadline; or that IHS tricked Appellant into believing IHS would disregard timely presentment. Thus, Appellant did not diligently preserve any purported legal right.

⁶ See Ramah Navajo Chapter v. Lujan, No. 90-0957, slip op. at -3-4 (D.N.M. October 3, 1993) (attached as Exhibit 14 to ASNA's MPSJ).

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Appellant seeks further discovery but is not clear what purpose such discovery would serve. If Appellant expects to find support for its equitable tolling argument, IHS submits that its request amounts to nothing more than a fishing expedition. Appellant cannot reasonably argue that it detrimentally relied on some governmental action that it seeks to find for the first time through discovery. Alternatively, IHS sees no reason to permit Appellant discovery on other matters when Appellant opposed the very same request by IHS at the outset of this Appeal.

Conclusion

Ultimately, Appellant is asking the Board to excuse its own misreading of Rule 23 and equitable tolling principles. However, Appellant's "[f]ailure to bring the action within the limitations period was a judgment for which the appellants are responsible." Frazer, 288 F.3d 1347, 1353 (Appellant is "responsible for the consequences of [its] judgment, including the risk that it was incorrect."). Appellant's misunderstanding of its responsibility to present a claim, which is essentially what Appellant relies upon, is certainly no excuse for Appellant's failure to present its claims until years after the statutory deadline. Therefore, because Appellant failed to present timely claims under the CDA, this Board can provide Appellant no relief.