

CIVILIAN BOARD OF CONTRACT APPEALS

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CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)
 LTD.,)
)
 Appellant,)
)
 vs.)
)
 MICHAEL O. LEAVITT, SECRETARY)
 U.S. DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES, *et al.*,)
)
 Appellees.)
)

CBCA 190-ISDA and 289-ISDA
 through 297-ISDA
 (IBCA 4794-4803-2006)

**APPELLANT ARCTIC SLOPE NATIVE ASSOCIATION’S RESPONSE TO
 APPELLEES’ NOTICE OF ADDITIONAL AUTHORITY**

On June 22, 2007 Appellees (hereinafter Indian Health Service or “IHS”) filed a Notice of Additional Authority to bring to the Board’s attention three recent decisions. For the reasons that follow, one is irrelevant, the second is not controlling, and the third relies on an earlier decision cautioning against transposing into the contract law arena principles of appropriations law applicable in the grant context.

1. IHS’s new-found reliance on the class action ‘anti-stacking’ rule discussed in *In re Vioxx Products Liability Litig.*, 478 F. Supp. 2d 897 (E.D. La. 2007) is misplaced.¹ “Stacking” occurs when a litigant seeks to extend the time to file its claims, by stacking the tolling period of a second class action on top of the tolling period associated with a prior class action:

Federal courts have uniformly held that the *American Pipe* rule operates only with respect to the first class action filed for a specific controversy. If class certification has been denied, plaintiffs cannot receive the benefit of tolling in a second,

¹ IHS’s Notice in this respect is improper and should therefore be ignored, since IHS never raised the ‘anti-stacking’ issue in any of its briefs.

subsequently filed class action involving the same proposed class and claims. This limitation is known as the prohibition against “stacking” or “piggybacking” class actions for purposes of tolling.

Id. at 907 (discussing *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974)).

Here, stacking is not at issue. Appellant relies on the mandatory *American Pipe* Tolling Rule in connection with only one putative class action, *Pueblo of Zuni v. United States*, No. 01-1046 (D.N.M.). It does not seek the benefit of any second tolling period associated with any other case. See IHS Notice of Add. Auth. at 2 (citing *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001)). For instance, the limitations period applicable to ASNA’s claim associated with its December 1995 contract ordinarily would have run for six years, to December 2001. The running of that limitations period was unaffected by the Oklahoma *Cherokee* case, which came and went during that period, and which was decided well before ASNA’s limitations period would have run. *Cherokee* did not need to toll the expiration of ASNA’s limitations period for that claim because that period had not yet run out.

In contrast, as of December 2001, the 6-year deadline for ASNA to file its claim, there was then pending the *Zuni* case, filed three months earlier in September 2001. That case, and that case alone, tolled the expiration of ASNA’s December 1996 contract claim until the *Zuni* class certification ruling was issued. Had ASNA not taken any action, it would now have three additional months, from May 22, 2007 (the date class certification was denied in *Zuni*) to August 22, 2007, to file its December 1996 claim. As things stand, however, ASNA filed its claim ahead of time, in 2005. (The same analysis applies to ASNA’s later claims.) In short, and unlike ‘stacking’ cases where the proponent relies on two tolling periods from two cases, ASNA here relies only on the recently decided *Zuni* case.

Since, in so far as tolling is concerned, the Oklahoma *Cherokee* decision on class certification is irrelevant, IHS's new-found reliance on the 'anti-stacking' rule is misplaced.

2. IHS's reliance on *Puttick v. America Online, Inc.*, ___ F. Supp. 2d ___, 2007 WL 1522612 (S.D.N.Y. May 23, 2007) (Slip Copy), a non-controlling district court opinion that is duplicative of earlier cases IHS has already cited from the same district, adds nothing to the analysis. As Appellant has urged elsewhere, the better rule—and the rule that respects the exclusive province of the Supreme Court to alter its own rules of decision—is that a class action tolls the time for a putative class member to file its own claim, regardless of when that individual claim is filed. *See e.g.*, Aplt ASNA's Surreply in Opp. to Aples' Mot. to Dismiss at 8-9 (discussing, *inter alia*, *Lehman v. United Parcel Service, Inc.*, 443 F. Supp. 2d 1146 (W.D. Mo. 2006)).

The weakness of a contrary rule is highlighted by the facts presented here, where the class certification motion has ultimately been denied. *Pueblo of Zuni*, Mem. Op. and Order filed May 22, 2007 (Dkt. No. 352) (attached to Aplt's Notice of Additional Authority filed June 19, 2007). To accept IHS's formulation means that tolling has occurred for claims filed after May 22, 2007, but not for claims filed before that date. The absurdity of the position is heightened by IHS's simultaneous contention that, to be a member of the putative class, a contractor had to first present a claim to a contracting officer—the very action IHS argues removes the contractor from the protection of the *American Pipe* Rule.

This case highlights how the competing view of the *American Pipe* Tolling Rule reflected in IHS's newly-cited case ultimately does not “promote efficiency and economy of litigation.” *Puttick*, Slip Copy at *5 n.2. Whatever the merits of that competing view when, as in *Puttick* and the cases cited therein, the original class action ultimately either is still pending, certified or resolved

by settlement, there is absolutely no rationale for extending it to situations where certification is ultimately denied.

3. IHS's reliance on *Greenlee County, AZ v. United States*, ___ F.3d ___, 2007 WL 1391389 (Fed. Cir. May 14, 2007) suffers from the same defect as does its earlier reliance on *Star-Glo Assoc., LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005). See Aples' Br. in Opp. to Aplt's Mot. for Partial Summ. J. at 32.

As ASNA has previously noted (*see* Reply Mem. in Supp. of Aplt's Mot. for Partial Summ. J. at 11), the Federal Circuit has drawn a sharp distinction between the application of Federal appropriations law in the contract setting, and the application of that same law when dealing with "benefit payments." *Star-Glo*, 414 F.3d at 1355. *Greenlee* did not involve contracts, but rather agency "payments in lieu of taxes" (PILTs), an area where, just as with the citrus tree subsidies in *Star-Glo*, "considerations of predictability are far less significant." *Id.* (distinguishing *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005)). The Circuit made special note of this distinction:

The conclusion that PILT limits the government's liability to the amount appropriated is particularly appropriate because PILT, like the statute in *Star-Glo*, involves a benefits program not a contract, and "there is greater room" in benefits programs to find the government's liability limited to the amount appropriated. *Star-Glo*, 414 F.3d at 1355.

Greenlee at *6. Further comment is unnecessary.

Respectfully submitted this 28th day of June 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by electronic mail and first class mail to the following parties of record this 28th day of June 2007:

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