

UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS

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ARCTIC SLOPE NATIVE ASSOCIATION,)
LTD.,)
)
 Appellant,)
)
 vs.)
)
 DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES,)
)
 Respondent.)
)
)

CIVILIAN BOARD OF)
 CONTRACT APPEALS)
 CBCA 1953 (190-ISDA)-REM,)
 CBCA 1954 (289-ISDA)-REM,)
 CBCA 1955 (290-ISDA)-REM,)
 CBCA 1956 (291-ISDA)-REM,)
 CBCA 1957 (292-ISDA)-REM, and)
 CBCA 1958 (293-ISDA)-REM)

**REPLY MEMORANDUM OF ARCTIC SLOPE NATIVE ASSOCIATION
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
ON THE ISSUE OF EQUITABLE TOLLING**

In opposing ASNA’s motion for partial summary judgment on the issue of equitable tolling, IHS makes two arguments. First, IHS argues that ASNA’s claim for equitable tolling is an improper effort to seek class action tolling by another name, and therefore fails under the Federal Circuit’s ruling in *Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009). Second, IHS argues that, in any event, ASNA does not meet the equitable tolling standard because ASNA’s reliance on the filing of the *Zuni* class action as the means to pursue ASNA’s claims was “risky,” rather than reasonable. We respond to both arguments below.

ARGUMENT

I. THE EQUITABLE TOLLING WHICH ASNA SEEKS IS DIFFERENT AS A MATTER OF LAW FROM CLASS ACTION TOLLING.

IHS first argues that ASNA seeks “nothing more than an end run around” the Federal Circuit’s rejection of class action tolling here by “characterizing class tolling as equitable tolling.” IHS Opp. Br. at 10. For this argument to be right, IHS’s implicit contention must be

that the Federal Circuit has directed this Board to waste its time by going through the empty motions of a remand proceeding, the result of which the Circuit Court preordained at the outset. That is an implausible reading of the Circuit's opinion and of its remand order.

1. The Federal Circuit rejected the application of class tolling under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), because such tolling applies only to “potential members of the plaintiff class,” *Arctic Slope*, 583 F.3d at 793, and because “a party that has not exhausted administrative remedies is not eligible to be a class member.” *Id.* at 794. Since the class could include only timely presenters, and since ASNA had not timely presented its claims, the Circuit reasoned that ASNA could not have been a member of any class that might have ultimately been certified in *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). Therefore, the Circuit concluded that ASNA could not invoke the automatic tolling that would apply as a matter of law to putative *Zuni* class members.

But, as the Circuit also held, the same is not true for equitable tolling. The Circuit concluded that equitable tolling does “appl[y] to the six-year time limitation set forth in section 605(a).” 583 F.3d at 798. It is precisely because section 605(a) is susceptible to equitable tolling that the court “remand[ed] for the Board to determine whether, on the facts of these cases, the appellants have established their entitlement to suspension of the limitations period.” *Id.* (emphasis added). The Federal Circuit then repeated its mandate: “We remand for a determination as to whether, under the circumstances of these cases, the limitation period should be tolled.” *Id.* at 800 (emphasis added).

There are no “facts” and “circumstances” that the Federal Circuit could have been referring to other than the history of the prior class actions which the Circuit repeatedly discussed in recounting ASNA's attempts to press its contract support cost claims. *Id.* at 789

(discussing *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001)); *id.* (discussing *Zuni*, *supra*); *id.* at 789-790 (discussing both *Cherokee* and *Zuni*); *id.* at 793 (same); *id.* at 795 (same); *id.* at 796 and n.3 (same and discussing *Ramah Navajo Chapter v. Lujan*, No. Civ 90-0957 D.N.M. Oct. 1, 1993)). There is thus no sensible way to read the Circuit's remand order other than as a direction for this Board to consider whether the history of ASNA's actual reliance on the *Zuni*, *Cherokee* and *Ramah* class cases, collectively, warrants the invocation of equitable tolling. There are no other "facts" or "circumstances" at issue. If the government is right that the Federal Circuit ruling on class action tolling automatically forecloses any finding of equitable tolling, then the Circuit Court would have simply ruled that equitable tolling does not apply. There would have been no point to a remand.

2. But a remand was ordered, and a remand was appropriate, because the two tolling doctrines are analytically distinct. IHS's insistence that equitable tolling cannot, by definition, apply to a party's actual reliance on the filing of a class complaint misapprehends the Circuit's controlling law. As the Federal Circuit put it in a decision issued after *Arctic Slope*:

The two concepts are different. Equitable tolling is a principle that permits courts to modify a statutory time limit and "extend equitable relief" when appropriate. Class action statutory tolling, on the other hand, does not modify a statutory time limit or "extend equitable relief." Rather, it is a procedure that suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations.

Bright v. United States, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010) (internal citations omitted). Class action tolling under Fed. R. Civ. P. 23 is "statutory rather than equitable," and it is therefore mandatory. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000). It is a part of Rule 23 and applies as a matter of law. It serves "to facilitate the objectives of the class action procedure," especially the "efficiency and economy" of class litigation.

Bright, 603 F.3d at 1288 (quoting *American Pipe*, 414 U.S. at 553). It does not “turn on ‘equities’ because such tolling is not triggered by equitable considerations.” *Id.* For that reason, it does not turn on reliance on, or even knowledge of, the filing of the class action lawsuit. *American Pipe*, 414 U.S. at 552.

By contrast, equitable tolling turns entirely on the particular equities of the “facts” and “circumstances” presented in each case. *Arctic Slope*, 583 F.3d at 798, 800. See, e.g., *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959). It is a type of tolling that is intended to “ameliorate the inequities that can arise from strict application of a statute of limitations.” *Chung v. U.S. Dep’t of Justice*, 333 F.3d 273, 275 (D.C. Cir. 2003).

This difference is best illustrated by the fact that legal class action tolling applies whether or not a putative class member is even aware that a class complaint has been filed, much less has relied on the filing. *American Pipe*, 414 U.S. at 552 (applying class tolling to “asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings”) (emphasis added). Equitable tolling, by contrast, applies only as a matter of equity, and therefore depends not only on the absent class member’s actual awareness that the class suit was filed, but also on his reasonable and demonstrable reliance on it. These are different doctrines, with different standards. One does not depend on the other; nor does the absence of one preclude establishing the other.

The Circuit’s approach here confirms this distinction. For instance, ASNA’s claim of actual reliance on the filing of the *Zuni* class complaint, based on the prior class certification in the *Ramah* case, played no part in the Federal Circuit’s rejection of class tolling. The Federal Circuit did not even consider reliance. Instead, it rejected class tolling simply because a non-

presenter like ASNA could not be a part of any certified class in *Zuni*. Whether or not ASNA knew that the *Zuni* class complaint had been filed, whether or not ASNA thought that a *Zuni* class would be certified, whether or not any such belief was reasonable based on ASNA's actual experience in the *Ramah* case, whether or not ASNA otherwise acted diligently to protect its interests—all these questions were irrelevant to the Circuit's decision that legal, automatic Rule 23 class tolling could not, as a matter of law, protect ASNA. But these "facts" and "circumstances" are at the core of whether the equitable tolling standard has been met—an issue which the Federal Circuit expressly remanded to this Board to consider in the first instance.

IHS's objection notwithstanding (IHS Opp. Br. at 11), the Ninth Circuit decision in *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009) perfectly illustrates the distinction. There, the Circuit found that class action tolling did not apply as a matter of California law. (The court so ruled because the defective class complaint was filed in New Jersey, the subsequent case was filed—too late—in California, and California does not recognize "cross jurisdictional" class tolling.) Yet the Circuit also found that the very same facts and circumstances that did not give rise to class tolling—the filing of the class complaint in New Jersey—did give rise to equitable tolling. Because plaintiff Hatfield knew of the filing of the New Jersey class complaint and "acted in a good faith belief that the six-year statute of limitations was tolled during the pendency" of the putative class action, *id.* at 1186, the California statute of limitations was tolled as a matter of equity. It did not matter that class tolling was unavailable as a matter of law. Equitable tolling, the Circuit said, "focuses on a plaintiff's good faith and reasonable conduct in filing a second action." *Id.* Echoing the Federal Circuit's remand here, the Ninth Circuit explained that equitable tolling "covers situations beyond those covered by *American Pipe*." *Id.* at 1188.

IHS tries to distinguish *Hatfield* solely because it involved cross-jurisdictional class tolling whereas “[t]his case involves no cross-jurisdictional tolling issue.” IHS Opp. Br. at 11. But that is a distinction without a difference. The issue is not why class tolling is inapplicable, but whether equitable tolling can apply even where class tolling does not. On that core issue, *Hatfield* is directly on point and it squarely stands for the proposition that where a party can show a reasonable and good faith reliance on the filing of a defective class action, equitable tolling applies even if class tolling does not. The same is true here.

3. The foregoing discussion also answers IHS’s argument that the Supreme Court in *Irwin* intended to do no more than restate the *American Pipe* rule when it referred to a “defective class action” as the third example of a “defective pleading” that gives rise to equitable tolling. IHS Opp. Br. at 10 (discussing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990)). Although IHS reads *Irwin* to mean that equitable tolling cannot apply if legal class tolling does not apply, nothing supports so constricted a reading of *Irwin*. Class action tolling is not the same as equitable tolling, e.g., *Stone Container Corp.*, 229 F.3d at 1354 (distinguishing between Rule 23 class tolling and “judge-made equitable tolling”), and it is simply implausible to believe the Supreme Court mistakenly thought otherwise. While *American Pipe* describes the application of mandatory Rule 23 tolling, it also describes a situation where a “defective pleading” has been filed, and thus a situation where in appropriate circumstances involving reasonable reliance (such as in *Halifax*), equitable tolling can arise.

II. THE STANDARDS FOR EQUITABLE TOLLING ARE MET.

IHS next challenges the reasonableness of ASNA’s reliance on the filing of the *Zuni* class case, which occurred in the context of ASNA’s familiarity with the history of the prior *Ramah* and *Cherokee* class cases (including ASNA’s direct participation in the *Ramah* class). Although

IHS insists that ASNA's reliance on *Zuni* was just "a bold and risky gamble," IHS Opp. Br. at 13, the facts and law show otherwise.

1. The generally applicable standard for equitable tolling is "'reasonable diligence', not 'maximum feasible diligence.'" *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010) (internal citations omitted); *see also Campbell v. United States*, 375 Fed. Appx. 254, 259 (3rd Cir. 2010) ("Equitable tolling requires the exercise of reasonable diligence."); *In re Jim. L. Shetakis Distributing Co.*, 2010 WL 4269532, at *1 (9th Cir. 2010) ("A party cannot invoke equitable tolling when it fails to investigate its claim in a reasonable, diligent manner."); *Pafe v. Holder*, 615 F.3d 967, 969-70 (8th Cir. 2010) (applying standard of "reasonable diligence"). Indeed, although ASNA meets that standard, the test here is actually more relaxed. ASNA relied on the filing of the "defective" *Zuni* class action as the vehicle for the filing of its own claims, and that filing was made well within the statutory six-year limitations period for ASNA's claims. The Federal Circuit has observed that "the diligence requirement is more relaxed for cases where the claimant filed a pleading in the wrong place as opposed to filing it after a statutory deadline." *Jaquay v. Principi*, 304 F.3d 1276, 1287 (Fed. Cir. 2002) (en banc), *overruled on other grounds by Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *petition for certiorari granted* No. 09-1036 (U.S. June 28, 2010). The New Mexico district court where the *Zuni* class complaint was filed may have been the "wrong place" for ASNA to file its claims, but the filing certainly was within the time period set in section 605(a).

Regardless of whether the usual or "more relaxed" standard of diligence applies, ASNA meets the standard. The material "facts" and "circumstances" presented here are not disputed.¹

¹ With one immaterial exception, IHS does not contest any of the facts asserted by ASNA. The only exception is ASNA's inadvertent mistake in stating that it presented its claims on September 1, 2005, instead of on September 30, 2005 (the correct date), an inconsequential error

First, ASNA knew that in 1993 the *Ramah* court had certified a class of ISDA contractors in an action to recover CSC damages from the Bureau of Indian Affairs (BIA), because ASNA was a member of that class and received class notices. Hopson Aff. at ¶ 9.

Second, ASNA knew that the class certified in *Ramah* included contractors which had not presented their claims to a BIA contracting officer, because ASNA itself had not presented any claims to a BIA contracting officer.

Third, ASNA knew that the court in *Ramah* had specifically ruled that presentment to a contracting officer was not necessary for it to be included in the class.

Fourth, ASNA knew that it had actually recovered its share of the settlements that the government made with the *Ramah* class, all without ASNA ever having presented a claim. *Id.*

Fifth, ASNA also knew that in 2000 the government in the *Cherokee* class case had argued that a class could not include contractors which had individually presented their claims administratively (*id.* at ¶ 11), and that the government's position was that any contractor which made its own administrative presentment was actually ineligible to be included in a certified class.

Finally, ASNA knew that, well within the applicable six-year statute of limitations for the claims at issue here, the Pueblo of Zuni had, in 2001, filed a class action complaint against IHS that, on its face, included ASNA as a member of the class, *id.* at ¶ 12, just as the *Ramah* case against the BIA had included ASNA as a member of that class for the same claims. Indeed,

which IHS concedes “does not raise a material issue of fact.” IHS Statement of Genuine Issues at ¶ 4. Otherwise, IHS claims that certain statements of fact asserted by ASNA are instead legal conclusions that do not require response. *Id.* at ¶¶ 16, 17. Finally, IHS asserts that, because it has not had the opportunity for discovery, it is “unable to respond” to ¶ 20, in which ASNA asserts only that it worked with an expert to help prepare its claim and to estimate the amount of ASNA's CSC underpayments. *Id.* at ¶ 20. Otherwise, IHS does not challenge the facts presented, all of which are supported by the Hopson Affidavit and by the record.

ASNA knew that the *Zuni* class action was filed in the same district court as *Ramah*, and that it was pending before the same district judge who had certified a class in the virtually identical *Ramah* case where ASNA had actually recovered damages for unpaid contract support costs.

On the basis of these uncontested facts, ASNA contends that it quite reasonably relied on the *Zuni* class complaint as a filing that—again, well within the applicable limitations period—covered ASNA’s claims for unpaid contract support costs. Under these “facts” and “circumstances,” ASNA’s reliance on the filing of the *Zuni* complaint as the vehicle that would vindicate its own claims was eminently reasonable and diligent, and the standard for equitable tolling is accordingly met.

2. IHS’s various objections to the foregoing history, and to the reasonableness of ASNA’s reliance, do not withstand scrutiny.

First and foremost, IHS contends that the *Ramah* court did not find that presentment by putative class members was excused because the class representative had already presented a claim (the so-called “single-filing rule”), but rather found that presentment by putative class members was excused because their separate presentment would have been futile. IHS Opp. Br. at 4-5.

But so what? Whatever its rationale, the *Ramah* court decided that putative class members did not need to exhaust their administrative remedy of presentment in order to be members of the class. The court explained that the class complaint in *Ramah* “challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms.” *Ramah*, Mem. Op. of Oct. 1, 1993 at 5 (Simon Decl. Exh. A). “In such a case as this, exhaustion of administrative remedies is not required,” the court said. *Id.* And to emphasize the point, the court added: “In light of the above, it is not necessary that each member

of the proposed class exhaust its administrative remedies under the Contract Disputes Act.” *Id.* The only important point is that the *Ramah* court explicitly ruled that class members did not need to present.

The government also contends that the futility analysis made in *Ramah* is “by nature, a case-by-case determination” and therefore that it was unreasonable for ASNA to assume that a similar ruling would be made in *Zuni*, a different case. IHS Opp. Br. at 14. But that is simply not so. The *Zuni* case was a carbon copy of the *Ramah* case, and it was actually pending before the same judge. The *Zuni* complaint sought the same relief based on the same challenge to the same kinds of agency “policies and practices,” only this time the challenge was to IHS’s unlawful CSC policies rather than to the BIA’s unlawful CSC policies. ASNA knew this, it knew that presentment had not been required of it in *Ramah*, and it knew that this question in the *Zuni* class action would be decided in the same court and by the same judge as in *Ramah*. There was no reason to believe at the time (and the government suggests none) that this issue in the *Zuni* case would come out differently from the *Ramah* case.²

² Indeed, there was every reason to believe that the court in *Zuni* would find a presentment requirement to be futile. The law at the time indicated that exhaustion was not required where “an administrative remedy may be inadequate” because an agency “lack[s] authority to grant the type of relief requested” or “has otherwise predetermined the issue before it.” *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992); *see also Booth v. Churner*, 532 U.S. 731, 736 (2001) (Futility excuses a litigant from a statutory exhaustion requirement “where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint.”); *Ass’n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (“Exhaustion is not required, however, where it would be futile or fail to provide adequate relief.”). In the context of a claim over contract support cost underpayments, a tribal contractor would have had “nothing to exhaust,” *Booth*, 532 U.S. at 736, n.4, because IHS contracting officers lacked any authority to relieve contractors from the dictates of IHS circulars. *Johnson Mgmt. Group CFC, Inc.*, 00-2 BCA 31,116, 2000 WL 1528761 at *6 (HUDBCA Sept. 20, 2000) (“A contracting officer may not exceed his or her authority by disregarding the relevant regulations”). The CSC underpayments that were being contested by ASNA and other contractors resulted from the operation of the applicable IHS circulars.

IHS next musters various distinctions between *Ramah* and *Zuni*, but none bears weight. IHS notes that in *Ramah*, “[t]he memorandum opinion is an unpublished decision involving a different agency that did not appeal and a prior version of the CDA that mandated presentment but did not have a statutory presentment deadline.” IHS Opp. Br. at 4; *see also id.* at 14. The fact that the decision in *Ramah* was unpublished did not make it facially less relevant to how the same judge would decide the same issue in the carbon-copy *Zuni* case. The government’s failure to appeal the *Ramah* ruling on presentment suggests, if anything, the agency’s acquiescence in it. (After all, the government then paid over \$100 million in two settlements to *Ramah* class members, including to non-presenters like ASNA.) The fact that *Zuni* involved a “different agency” from *Ramah* is another distinction without a difference, since the legal claim in the two cases was identical in every materially relevant way. And even though the “prior version” of the CDA at issue in *Ramah* did not have a fixed deadline for presentment, it still had a presentment requirement, subject to a futility exception, just like the later version of the CDA at issue in *Zuni*.

Of course, ultimately the court in *Zuni* did depart from the ruling in *Ramah*, after the unforeseen event of the case being transferred to a different judge who decided he was not bound by the *Ramah* precedent. From this, the government now contends that ASNA was reckless in relying on the filing of the class complaint in *Zuni*. But hindsight is always 20-20. If ASNA knew then what it knows now, it obviously would not have believed that it would be a member of the *Zuni* class absent presentment, and it would not have believed that a *Zuni* class would be certified at all. Indeed, had ASNA known then what it knows now, it would have presented its claims to a contracting officer within the original six-year period.

But hindsight is not the standard, and equitable tolling does not turn on whether reliance was reasonable given what is known now. Rather, it turns on whether reliance was reasonable

given what was known then. And at the time, what ASNA knew was that Judge Hansen had decided that presentment by putative class members was not required—that it would be futile—in a class action that challenged an agency’s “policies and practices” in underpaying contract support costs. There simply was no reason to believe Judge Hansen would decide the same issue differently in *Zuni*, which raised the same claims and where presentment would have been equally futile. ASNA’s reliance on the filing of the *Zuni* class complaint, given what it knew about *Ramah*, was perfectly reasonable at the time.³

3. IHS also disputes the reasonableness of ASNA’s reliance on the agency’s representation in the *Cherokee* case that presentment by a contractor would serve to exclude, rather than include, the contractor from being a class member. Here, too, IHS is wrong.

To begin, it is irrelevant that IHS’s statement in its *Cherokee* brief was made in the context of Rule 23’s “numerosity” requirement. What is relevant is that ASNA reasonably believed from IHS’s assertion that “if a contractor filed its own claim against IHS, the contractor would be excluded” from a class. Hopson Aff. at ¶ 11. IHS’s quibbling notwithstanding (IHS Opp. Br. at 14), the agency’s brief in *Cherokee* speaks for itself. The government contended that the *Cherokee* plaintiffs “failed to establish class numerosity,” Def. Opp. to Pl. Mot. for Class Certif. at 10 (Simon Decl. Exh. B), in part, IHS said, because “plaintiffs erroneously include ‘all’ Tribes [in the putative class] even though numerous putative class members already have cases involving contract support cost issues either pending or finally adjudicated in a number of federal

³ Recall, too, that presentment to a contracting officer was equally futile because ASNA’s claim arising out of unpaid CSCs challenged IHS’s circulars that capped nationwide CSC appropriations at the \$7.5 million ISD Fund level, and at the levels discussed in congressional committee reports. So far as undersigned counsel is aware from the discovery conducted in other CSC cases against IHS (including in *Zuni*), no IHS contracting officer in history had ever granted a claim presented for unpaid CSC’s until the Supreme Court struck down IHS’s circular-based policy and practice in *Cherokee v. Leavitt*, 543 U.S. 631 (2005).

courts or administrative forums across the country.” *Id.* at 12 (emphasis added). IHS’s footnote to this statement not only cites a number of pending cases, but adds: “In addition, IHS has received claims under the Contract Disputes Act for additional contract support costs from” additional contractors named in the footnote. *Id.* at 12-13 n.3 (emphasis added). This statement can only be a reference to contractors who had presented CDA claims to IHS, and IHS included the statement to support its argument opposing any class that would “erroneously” include such contractors. The only logical understanding of IHS’s argument is that the agency sought to have the court exclude from any class those contractors which had already decided to go forward individually and present their own claims (or at least IHS was arguing that without those contractors the proposed class would fail Rule 23’s numerosity requirement).

The agency’s effort now to recast its argument as one that applied only to those contractors who were actually litigating their claims in an administrative forum (*i.e.*, in this Board) (IHS Opp. Br. at 15) is simply contradicted by the language that IHS actually used, which plainly referred to the claims that IHS had “received” under the Contract Disputes Act. Perhaps IHS now regrets the overbreadth of the statement it made then, but again, hindsight is not the standard.

IHS also responds that any such argument against exhaustion would have been inconsistent with the government’s prior position in the *Ramah* case, where the government had insisted on the necessity of presentment. IHS Opp. Br. at 16. But the government lost that claim in *Ramah*, it never appealed the point, and it then paid over \$100 million to the *Ramah* class members, including those like ASNA which had never presented. Given that history, it was understandable that, when it later came to contesting class certification in *Cherokee*, IHS did not try to re-litigate the exhaustion point the government had lost in *Ramah*, but instead tried an

entirely different tack—opposing certification on grounds that the proposed class failed to meet the requirements of Rule 23. Indeed, IHS made no argument in *Cherokee* about exhaustion. *See Cherokee*, 199 F.R.D. at 366 n.1 (“In the *Ramah* case, . . . [t]he United States only opposed class certification on the grounds that the purported class had failed to exhaust its class administrative remedies. . . . In this case, the United States has opposed the class certification on Rule 23 grounds.”) Given this shift in the government’s litigating strategy, any inconsistency with the exhaustion argument it had unsuccessfully made in *Ramah* was unremarkable. In fact, IHS’s argument that individual presentment would take a contractor out of any certified class was also unremarkable at the time.⁴

Finally, IHS now engages in tortured counter-factual speculation to bolster the argument that its *Cherokee* brief cannot possibly have meant what it says. IHS notes that “had Judge Hansen” in *Ramah* not found exhaustion was excused by futility, “it is fair to conclude” that Tribes “would have had to present claims to participate in the *Ramah* class.” IHS Opp. Br. at 16. Accordingly, IHS argues, “it would have made no sense for IHS to posit in *Cherokee* that a tribe is excluded from a class by complying with the CDA requirement” of presentment.” *Id.* This is true only in the trivial sense that such counter-factuals are always true—if things had happened differently, things would have been different. If the government had not lost its exhaustion

⁴ It was hornbook class action law that a putative class member who is already pursuing its claims in another forum is generally not included in a certified class unless special provision is made. *See Manual for Complex Litigation, Third*, at 235 (Federal Judicial Center 1995) (explaining how courts coordinate class litigation with related individual actions brought “by persons who do not wish to be members of the class”); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 Ind. L. J. 507, 507 (1987) (“a principal objective of the class action is to avoid having members of the class file individual suits”); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (“To allow individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications.”). Thus, IHS’s argument that a contractor which had individually presented its claims would not be eligible for inclusion in the class was in accord with existing Rule 23 law, and ASNA’s understanding of the argument as meaning what it said was eminently reasonable.

defense in *Ramah*, then it is true that Tribes (including ASNA) would have known that presentment would be required in order to participate in a class, and it is almost certainly true that the government would not have then taken the position in *Cherokee* that, for numerosity purposes, the court should not count Tribes which had already individually presented their claims.

But that is not what happened. In *Ramah* the government lost its argument that presentment was required for participation in a class. The government then shifted its litigating strategy in *Cherokee* to fight certification on Rule 23 grounds instead of on exhaustion grounds. And in support of its new Rule 23 numerosity argument, for which it wanted to show that the smallest possible number of Tribes was eligible for inclusion in the class, the government then took the position that contractors who had presented their claims individually must be excluded from the class.

All of this only reinforces the underlying point about ASNA's reliance: that in assessing equitable tolling, what is important is whether ASNA's reliance in 2001 on the filing of the *Zuni* class action was reasonable given what ASNA knew at the time, in 2001. And at that time, ASNA knew that Judge Hansen, in *Ramah*, had held that presentment by putative class members was not required, and it knew that in every relevant way the *Zuni* case was indistinguishable from the *Ramah* case. IHS offers no reason why ASNA could not reasonably have assumed that Judge Hansen would act precisely in accord with his earlier ruling by deciding the same issue in the same way and certify an identical class (including non-presenters) in *Zuni*.⁵

⁵ Seemingly as an afterthought, IHS argues that ASNA's reliance on the filing of the *Zuni* class complaint is also precluded by the rule against class action "stacking." IHS Opp. Br. at 18-19. But the anti-stacking rule comes into play only where a litigant seeks to use the class tolling period from a first and unsuccessful class action to toll the time for filing a second class action, thus "stacking" the tolling from the second class action on top of the tolling from the first class

CONCLUSION

ASNA acted with reasonable diligence in relying on the *Zuni* class complaint as a timely, albeit ultimately defective, filing sufficient to pursue its claims for recovery of its contract support cost underpayments. Because equitable tolling, unlike class tolling, “focuses on a plaintiff’s good faith and reasonable conduct,” *Halifax, supra* at 1186, and because it “covers situations beyond those covered by *American Pipe*,” *id.* at 1188, the time for ASNA to present its administrative claims should be deemed equitably tolled by the filing of the *Zuni* class complaint.

Respectfully submitted this 19th day of November 2010.

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action. *E.g., Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) (“[T]he pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original class.”). IHS appears to argue that ASNA is violating this rule because it is “stacking” its reliance on the timeliness of the *Zuni* class action on top of the previously filed *Cherokee* class action. But that is not what ASNA is doing at all. ASNA is not relying on the tolling effect of the *Cherokee* case as the basis for anything, much less for the timeliness of the *Zuni* case. The *Zuni* case, all on its own, was timely filed within the six-year statute of limitations for all of ASNA’s claims at issue here. ASNA’s “reliance” on the prior *Cherokee* case is solely with regard to IHS’s statement in that case that putative class members who presented their claims must be excluded from any certified class. Although IHS admits that its stacking argument here “may not be the traditional sort of class action stacking that courts have consistently rejected . . .,” (IHS Opp. Br. at 19), in fact it is no kind of “stacking” at all.

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