In the

Supreme Court of the United States

AMERICAN PIPE AND CONSTRUCTION CO., ET AL.,

Petitioners,

v.

STATE OF UTAH, ET AL.,

Respondents.

No. 72-1195

Washington, D.C.
November 12, 1973

Pages 1 thru 35

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v.	:	No. 72-1195
STATE OF UTAH, ET AL., Respondents.	:	

Washington, D. C.
Monday, November 12, 1973

The above-entitled matter came on for argument at 11:46 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JESSE R. O'MALLEY, ESQ., One Wilshire Boulevard, Los Angeles, California 90017; for the Petitioners.

GERALD R. MILLER, ESQ., Third Floor, John Hancock Building, 455 South Third East, Salt Lake City, Utah 84111; for the Respondents.

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C O N T E N T S

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Afternoon session begins at page 12.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1195, American Pipe and Construction v. Utah.

Mr. O'Malley, you may proceed whenever you are ready.

ORAL ARGUMENT OF JESSE R. O'MALLEY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. O'MALLEY: Mr. Chief Justice, and may it please the Court:

This case is before this Court on a writ of certiorari to the Ninth Circuit. The narrow question involved is the validity of the order of the trial court denying intervention by respondents in an antitrust treble damage action based upon a prior government action after the running of the perintent statute of limitations, section 5(b) of the Clayton Act.

Before beginning, I should note that I shall be referring to the key dates which are pertinent to this statute of limitations question, and these key dates are set forth in the record appendix, pages one to four, in summary form. And I should also indicate that the statutes which we believe to be pertinent and controlling in the rules of court are set forth in the following six pages also of the record appendix.

As I indicated, this case is based upon a denial of a motion made by respondents in the Central District of California, in December 1969 intervened in an antitrust damage action which had been filed by the State of Utah on May 13,

1969 as a purported class action. The Utah complaint alleges that the action was based on prior government criminal and unequitable actions and thus by reasons of the prior government actions, and pursuant to the tolling provisions of sections 5(b) of the Clayton Act, the State of Utah was able to bring this action based upon alleged acts which ended in 1962.

The government criminal action on which the Utah complaint was based, was begun on March 10, 1964 and was terminated as to all defendants on June 19, 1964. A separate government civil action filed after the criminal action ended was terminated as to all defendants except American Pipe and Construction Company on December 8, 1967. But the final judgment as to American Pipe and Construction Company wasn't filed until May 24, 1968, and it is by reason of this date of May 24, 1968 that the trial court has held that the date of one year later, May 24, 1969, was the date the statute of limitations finally ran in this case.

The District Court, on December 4, 1969, entered an order that the Utah action did not constitute a class action and subsequently entered an order made after the denial of the class action by respondent, denying respondent's motion to intervene. It was this order denying intervention at this juncture that is the subject of these appellate proceedings.

The Court of Appeals reversed the order of the trial court denying leave to intervene and held that the suit was

instituted on behalf of respondents by the filing of the Utah complaint on May 13, 1969, even though the prerequisites to a class action had not been met by the State of Utah, and even though respondents took no action, no steps whatsoever to intervene until December 1969, a date more than five months after the limitations period prescribed by 5(b) of the Clayton Act.

The narrow question involved therefore is whether respondents, who had not filed suit within the period prescribed by section 5(b), were properly before the trial court by reason of the fact that the State of Utah erroneously designated its cause of action as a class action. Although this case may appear to have very superficial factual complexity, it turns on the very simple issue of congressional intent in enacting section 5(b) of the Clayton Act.

Q Mr. O'Malley, is there anything peculiar to the section 5(b) of the Clayton Act about the Ninth Circuit's reasoning here? Wouldn't it apply equally well to any other claim of statute of limitations?

MR. O'MALLEY: Yes, indeed, and that is, of course, as we have pointed out, Mr. Justice Rehnquist, in connection with our petition for certiorari. This has the effect, as we see it, of affecting in every federal statute of limitations by the mere fact that a class action is typed on a complaint, even though one does not in fact exist, it has the effect by virtue of that Act of a private party of tolling the statute

of limitations. And I would say yes, indeed, that is indeed one of the major issues not only insofar as 5(b) of the Clayton Act is concerned, which is pertinent to this case, but I think the principle is applicable equally, Mr. Justice Rehnquist, to every federal statute of limitations.

I would submit that the intent in connection with 5(b) as to what the statute really means is clearly stated in the barring provision of the statute, and it is also stated, we submit, with some precision in the legislative reports underlying the statute.

It should first be noted that the State of Utah is in court only because of 5(b) which provides for the suspension of the statute of limitations during the pendency of the government's antitrust action, and which limits the period in which the litigant may commence an action based upon the government's suit to the period of the pendency of the government civil or criminal action and within one year thereafter. Respondents didn't move within that statutory period and were not before the court until after the one-year suspension period, unless the filing of the invalid class action by Utah has the legal effect of bringing respondents before the court.

Now, in order to escape the barring provisions of the Clayton Act, the opinion of the Court of Appeals via legal sanction treats the respondents as if they had filed suit simultaneously with the State of Utah. However, factually, it

is not -- there is no dispute about this. They had done nothing in any factual sense at that time. They had done nothing whatsoever and they hadn't brought an action of their own volition and they hadn't moved to intervene, and either of these steps would merely have required the respondents to file a short and plain statement of the alleged violation and its purported impact upon the plaintiff. And we submit that in enacting 5(b) of the Clayton Act, the Congress clearly intended to spell out the requirement that each plaintiff, relying upon section 5(b) to toll the statute of limitations, must take the minimal step of stating its claim within the period prescribed by the statute.

Now, where there is no class action, of course, that would require the filing of the short and plain statement of the claim pursuant to rule 8 of the Federal Rules of Civil Procedure.

Q But not if it is a good class action.

MR. O'MALLEY: But in the case, Mr. Justice White, of a proper class action, we would submit that it is the legislative intent in enacting 5(b) of the Clayton Act that each member of the class respond affirmatively to the order of the court inviting the members of the class to state their claims, and that they do so within the period of the statute of limitations.

The legislative history --

Q Well, that would be impossible for unnamed members of the class in this case. Utah didn't file until eleven

days before the year expired. By the time the court would get around to ruling on the class, the one-year period would have expired to all unnamed members.

MR. O'MALLEY: Well, of course, you have to -- that is --

Q Unless you are going to say -- and I was asking you whether pending the court's ruling the limitations period is tolled?

MR. O'MALLEY: No. To say that pending the court's action pursuant to rule 23, the action is tolled, is to say that rule 23 in some manner abridges or modifies section 5(b) of the Clayton Act.

Q So you do say then that in this case unnamed members of the class could not participate in the action at all?

MR. O'MALLEY: I am saying that they cannot do so unless they affirmatively within that period --

Q Within that eleven days?

MR. O'MALLEY: Yes. I would point out, however, that within the -- this action had -- this is not a bare bones, this was not one case, it is a series of cases, and practically there are opportunities in seven prior class actions and invitations to join, but forgetting that factual background, the fact is that they did not move to intervene at any time within the statutory period, and I would submit that unless it

had held that rule 23 somehow abridges or somehow modifies section 5(b) of the Clayton Act, there is no power in the court to permit intervention after the period of the running of the statute of limitations.

Q Mr. O'Malley, isn't it possible to defend Judge Pence's decision in the District Court consistently with the reasoning of the Ninth Circuit, saying in effect that the statute was tolled during the pendency of the action, but in the time following Judge Pence's ruling on the class action, the eleven days afterwards, that the plaintiffs were then under an obligation to file actions of their own, and that his decision denying intervention might be justified on grounds applicable to intervention without saying that they were cut off had those chosen to file their own actions rather than to intervene in Utah's action?

MR. O'MALLEY: I would think the answer to your question is in the affirmative, Mr. Justice Rehnquist. I think very clearly it would be possible to, within the discretionary realm of the -- support the trial court under rule 24(b) to justify the acts of the trial court only in terms of the motion as being clearly within the discretion of the trial court, and the trial court, by reason of its knowledge and experience in the West Coast Pipe case, in which it receded, and within the framework of the time that was available to the respondents during the period prior to the running of the statute, and in

the framework of the fact that the facts of this case showed that counsel for -- appearing on behalf of respondents in this case at this time had been studying this action for six months, and prior to the filing of the suit, and is charged with the knowledge of the problems of the statute of limitations growing out of the prior litigation. I think in the light of that history, clearly the court is justified in exercising its discretion, and I think incorporating its decision respecting the class action in its decision on the motions to intervene, I think it clearly was exercising the discretion which Your Honor has referred to.

Q Well, Judge Pence did say that as a second reason, intervention just isn't permissible in this case?

MR. O'MALLEY: Yes.

Q Now, what happened to that ground in the Court of Appeals?

MR. O'MALLEY: Well, it was argued --

Q They just didn't reach it?

MR. O'MALLEY: -- in terms of the briefs before the Court of Appeals, we argued two points, number one, that it was incumbent upon the respondents to show an abuse of the discretion which had been exercised by the trial court, and we argued that they had not shown such an abuse.

Q Even if they weren't barred by the statute of limitations, they shouldn't have been allowed to intervene?

MR. O'MALLEY: That is correct.

Q Which Judge Pence did say.

MR. O'MALLEY: And suffice it to say that except for the dissenting opinion by the Ninth Circuit, the dissenting opinion stated in so many words that it was the judgment of the court that the trial court has considered this and, as a matter of discretion, and exercising that discretion, that discretion should be upheld by the Court of Appeals. But that --

MR. CHIEF JUSTICE BURGER: We will resume there after lunch, Mr. O'Malley.

[Whereupon, at 12:00 o'clock noon the Court was recessed until 1:00 o'clock p.m.]

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AFTERNOON SESSION -- 1:00 P.M.

MR. CHIEF JUSTICE BURGER: Mr. O'Malley, you may continue.

ORAL ARGUMENT OF JESSE R. O'MALLEY, ESQ.,

ON BEHALF OF THE PETITIONERS -- Continued

MR. O'MALLEY: Yes, Your Honor.

The question was raised in the hearing before the recess as to whether members of the purported class could have intervened in the eleven-day period before the statute of limitations ran, assuming there was a valid class action. Of course, that is not this case, for the trial court specifically held, and it has not been the subject of any appeal, that there is no class action in this case. But I should point out that where that has been found, that the members of the non-class are no worse off than if the class action had not been alleged or if a litigant was a member of the class or was not a member of the class. The mere allegation that there was or was not a class should not be held to give to parties who may fall within the designation of the class some privileged status when Congress has specifically held that section 5(b) of the Clayton Act is a barring statute under the circumstances of this case.

That is true because the basic contention of the respondents and the contention which essentially was adopted by the Court of Appeals is that section 5(b) of the Clayton

Act is somehow abridged or modified by rule 23 of the Federal Rules of Civil Procedure, and we would submit that this is contrary to the enabling Act which expressly authorizes this Court to promulgate the Federal Rules of Civil Procedure, but which prohibits such rules from abridging, enlarging or modifying any substantive right.

Now, of course, the basic premise of the Court of Appeals and of the respondents in this action is also contrary to the elementary and hornbook principle that the court rules, whatever they may be, are subject to congressional statute.

The legislative history of section 5(b) clearly establishes that that statute has a dual purpose to give timely notice of the claims within the period stated by the statute and the barring of causes of action not timely filed. Each of these purposes is thwarted by the decision of the Court of Appeals. The mere filing of a class action, whether it is valid or invalid, doesn't give notice to defendants as to the claims of the members of the class or non-class which will be asserted thereunder until members of the class actually do assert such claims prior thereto, neither members of the class nor their claims are identified and, further, if it is under rule 23, members of a class have the option to opt out of this litigation pursuant to rule 23.

Now -- and it is particularly true that the mere filing of a pleading bearing the label of class action doesn't

have any meaning, doesn't afford any meaningful notice whereas in this case there have been seven prior class actions in which the class has been exhaustively solicited.

Now, the history of this case, in the West Coast Pipe litigation, establishes in very practical terms that the purposes of the statute, that the filing of the statute give notice to defendants just doesn't exist in this case. In his opinion, Judge Pence pointed out that in the West Coast Pipe cases some 300 parties intervened and stated claims in those seven prior class actions. In this case, after the action was filed by the State of Utah, no member of the class ever appeared to state their claims until five months after the limitations period, and they didn't do so even then until they were solicited by plaintiffs' counsel, and plaintiffs' counsel obtained leave from respondents' separate boards to present such claims, and indeed at that point counsel for respondents stated to respondents -- and this is in the record -- that the statute probably ran on May 24, 1969, which was a date some five months prior to that time, so that intervenors filed this motion with notice that the statute had run as to them, and defendants never did have notice of the purported members of the claims by -- of the purported claims by members of the class until five months after the period prescribed by the statute.

A case which we believe comes close to being on all

fours with this case is Iocono v. Anastasio, which we have cited in our brief for another point, where Judge Medina, when he was sitting on the District Court, with respect to a fair labor standards act, stated that, in a case where a motion to intervene was, like in this case, filed after the statute had run, stated that defendants had no notice whatsoever that any claim was made on behalf of any of the claimants. That is this case exactly, because although no class action was alleged here, in that case, none exists in this case, and Judge Medina went on to say it will not suffice -- he is talking about the issue of notice here -- that someone else has a pending law suit against the defendant sought to be charged in which a similar but different claims are alleged.

Now, the language of House Report No. 422, 84th Congress, 1st Session, of 1955, we believe confirms the principle that timely affirmative notice by each plaintiff is required to give defendants notice of each claim, and this appears from the language of that report which states that in cases where the plaintiff's action has been suspended by the pendency of government antitrust proceedings, he would be required to bring his action either within the suspension period, i.e., one year after the government suit had terminated, or within the four-year statute. This clearly stated requirement mandates, we believe, affirmative action by each claimant within the statutory period, and any other construction would

make the barring provision of the statute without meaning. To permit intervention as in this case, after the barring period has run, after the statute has run, is tantamount and the equivalent and is identical to granting an additional tolling period.

In enacting 5(b), Congress clearly stated its intent to eliminate the very kind of additional tolling exceptions and extensions which is the basis for the Court of Appeals' verdict in this case. The report referred to a private treble damage action which had been based on the suit against the motion picture industry which was pending during the forties by the government, and stated that the extent to which this, the litigation in this case was extended by virtue of various tolling provisions of federal law, is disposed by the following table indicating the inadvisability of prolonging the limitation period in such instances.

While the committee considers it highly desirable to toll the statute of limitations during a government antitrust action, and to grant plaintiffs a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust law. And thus it would clearly appear that the congressional policy as stated in such report is to eliminate the very kind of additional tolling periods authorized by the opinion of the Ninth Circuit.

We submit that the decision of the Ninth Circuit can't be squared with the attempt to eliminate tolling extensions and exceptions, and it can't be squared with the requirement that in a case, which is this case, where the statute of limitations has been suspended by the pendency of a government anti-trust proceedings, such plaintiff would be required to bring his action within one year after the government suit is terminated.

Contrary to the plain meaning of the statute, the effect of the decision of the Court of Appeals that if a class action is filed, members of the purported class would be granted an additional tolling period beyond the statutory period until the court determines whether the action may be maintained as a class action. In this case, it was five months.

In Eisen v. Carlisle, which is now pending in this Court, pursuant to a write of certiorari, the additional tolling period would have been approximately five years, and during this period, under the decision of the Court of Appeals, plaintiffs' counsel is authorized by such opinion to solicit class members until a negative class has been reached. At that point he is able to bring motions on behalf of those he solicited, and that is what occurred in this case. And this is contrary, we submit, to the principle that the power to create tolling extensions and exceptions is limited by the general rule that when a federal statute of limitations exists, such

as 5(b), it acts as a total bar, extinguishing the right to sue. That concept was stated by this Court in Holmberg v. Armbrecht, 327 U.S. 395, in this language, "If Congress explicitly puts a limit upon the time for enforcing a right which it has created, there is an end of the matter."

The Ninth Circuit stated the proposition in somewhat similar language with respect to the statute of limitations with respect to the Federal Tort Claims Act, that a federal district court has no jurisdiction to entertain a suit after the statute of limitations has run. Despite their contention, we believe that respondents' position, if we understand the thrust of it, is that the barring provisions of -- and it is the premise of the opinion of the Court of Appeals -- that the barring provision of 5(b) are somehow limited by rule 23 of the Federal Rules of Civil Procedure.

We submit that, consistent with the intent of Congress, the filing of a class action can have no bearing as to whether claimants have satisfied the statute of limitations. If rule 23 affects the limitations stated in 5(b) in any respects, it constitutes an abridgement of such statute by rule of court.

If the applicability of section 5(b) is dependent upon whether the class action is alleged or found, it is a capricious standard which is inconsistent with the clearly stated congressional intent and, as I have stated earlier, section -- the barring provisions of section 5(b) of the

Clayton Act --

Q Mr. O'Malley, we had some discussion this morning -- I notice your time is running out --

MR. O'MALLEY: Yes.

Q -- whether the Court of Appeals had also reversed on the other grounds, namely that, as a matter of exercising discretion, permissive intervention, Judge Pence had denied intervention. In the Court of Appeals' second opinion, not in the first one, I notice this paragraph: "However, denial of appellants' motion for permissive intervention, under rule 24 (b), was in our judgment erroneous." Is that a disposition of the other grounds?

MR. O'MALLEY: Well, I did not really feel so, if the Court please. It did not seem to me that that mere language seemed to reach the question as to whether the trial court, Mr. Justice Brennan, had exercised an abuse of discretion within the meaning of rule 24.

Q Well, the reason I wonder is that that comes about half-way through the opinion. I admit it is not very clear. And then the penultimate paragraph deals with a 5(b) question, we conclude that it was there for the court to hold that appellants' petitions for intervention were barred by 5(b). And I wondered if the former paragraph was intended as a disposition of --

MR. O'MALLEY: Well, in all candor, I was somewhat

uncertain myself, but I felt that the best view of the court's opinion, of the principal opinion by the Ninth Cirtcuit was that it really wasn't reaching the issue as to whether there had been an abuse of discretion. We argued that to the Ninth Circuit, in our briefs and in argument, but --

Q Well, Mr. O'Malley, the Ninth Circuit had to reach that to reverse, did it not?

MR. O'MALLEY: I would think --

Q It would have found there was an abuse --

MR. O'MALLEY: I would think it is mandatory under rule 24. However, except for the somewhat ambiguous language that you have cited, Mr. Justice Brennan, I don't know of any place that it is discussed except in the dissenting opinion.

Q Well, let me put it this way: Do you think that both issues are before us for decision?

MR. O'MALLEY: Yes, I do, Your Honor, and it is my judgment that even if the Court should disagree with our position, which we think is basic with respect to the power --

Q Of 5(b), yes.

MR. O'MALLEY: -- with respect to 5(b), there still is a failure on the part of the Appellate Court in the Ninth Circuit to show any -- and on the part of respondents -- to show any abuse of discretion by Judge Pence which is a matter peculiar -- both under the rules, it is within his province, and I suppose there is no living person who knows more about

the background of this litigation than Judge Pence, who had charge of the 350 cases which were pending between 1964 and which are pending even now insofar as this case is concerned.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Miller?

ORAL ARGUMENT OF GERALD R. MILLER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MILLER: Mr. Chief Justice, and may it please the Court:

I think the facts of this case are particular important. The State of Utah filed its class action eleven days prior to the running of the suspension period provided by section 5(b). The state was fully aware of the fact that that suspension period was about to run, and it undertook to protect its lesser governmental bodies. Those are the -- at least some of them are the respondents before this Court. Not the state. There is no question but what the state's antitrust case was filed timely, and that is pending before Judge Pence right now.

The state's action was transferred by the panel down to California and the first major thing that happened was that the motion to determine the class was brought on before Judge Pence. Judge Pence indicated clearly in my mind that he preferred to handle these matters through joinder and intervention. He made a reference to his vast experience in handling the West Coast pipe cases, and he indicated that this was a more

efficient, a more desirable way to proceed.

Now, the class action was alleged by the state, even though there were affidavits in support thereof, indicated that there might be upwards of some 800 members in that class. And Judge Pence pointed out that in his experience there probably wouldn't really be that many members, and he pointed to the fact that California, Hawaii, Washington, Oregon, Arizona had been involved in the West Coast pipe cases, their populations were much greater than the States of Utah, Wyoming and Idaho, and he indicated he expected maybe they would have one-seventh of the number that they had actually turn out.

Q What did Judge Pence decide on the issue of class action?

MR. MILLER: He decided that we could not maintain the class action. He, as the Ninth Circuit indicated, and I think they are absolutely right, he invited intervention enjoinder.

Q And what did the Ninth Circuit do about that?

MR. MILLER: Well, the Ninth Circuit didn't do anything about the class action because Judge Pence wouldn't certify it for appeal and, as counsel is right in pointing out, it has not been appealed. It couldn't reasonably fit into the death knell theory of cases. These parties were not before the court at that time.

We thought that the only reasonable thing to do for these, Salt Lake City, Salt Lake County, and all the rest of

these governmental bodies, was to move to intervene in this action.

Q Did you ask Judge Pence to certify the appeal, Mr. Miller?

MR. MILLER: On the class action?

Q Yes.

MR. MILLER: Yes, we did.

Q You did.

MR. MILLER: And he denied it. He indicated that reasonable minds couldn't disagree.

Q What were your options or the options of the other potential members of the class at that time?

MR. MILLER: Upon denial of class action?

Q And denial of the certification for appeal.

MR. MILLER: Well, that wasn't denied until later on. That was argued at the same time as the motions to intervene, Your Honor. When Judge Pence read his opinion indicating we could not maintain the class action, the first thing that occurred to counsel was that we had better move to intervene and we had better do it within eleven days, because that is the number of days that were left when the class action was filed, and the Attorney General thereupon sent a telegram to all of the cities, counties, water districts, sewer districts, advised them that this case had been filed in their behalf, advised them that the court had now decided that it could not be

maintained as a class action, and that their rights would be in jeopardy; whereupon, some sixty-some-odd bodies did contact the Attorney General's office and we filed the motions to intervene within eight days.

Now, there were five governmental bodies that did not move to intervene until the 29th, some 25 days after the court's ruling and after the eleven days remaining. So we have got both situations going here. I don't think the Ninth Circuit focused upon these five Johnny-come-latelies.

Q Did you give any thought on behalf of the clients you represent to filing separate original actions within the leven days, rather than just moving to intervene in the State of Utah's action?

MR. MILLER: Yes, Your Honor, we did, and we decided that -- there is a great deal of talk, and there is talk running through these successive opinions concerning relation back, and we thought that our best bet to safeguard their rights was a motion to intervene in this specific case, that after all it was filed on May 13, 1969, rather than risk having some court rule that while there is nothing to relate back to, admittedly it is a fiction, we thought that this was the best way to proceed.

The motions to intervene were filed, together with the proposed complaints which, by the way, tracks the original complaint in this case, when counsel talked about surprise and

he didn't know the parties before him, I think these are straw man arguments, because he knew full well when the class action was filed that there were other members to this case, and he knew at that time, or he should have known or shouldn't have been in a position to expect all of the other -- certainly all of the other lesser governmental bodies of Utah to have claims before the court.

We filed the applications to intervene, and that came on for hearing before Judge Pence, and Judge Pence then rules, well, I can't let you intervene because the statute has run. Well, of course, he knew the statute had run when we argued the class action matter. That is one of the important things, I thought, that was argued to the court that, look, if the court rules against us on the class action, we are going to have serious problems on the statute of limitations.

Well, now he says the statute is run, section 5(b) is substantive and we can't let procedural rule 23 affect it in any way.

Q Did Judge Pence indicate that even if the class action was accepted, even if the case could go forward as a class action, that nevertheless, in order to present the running of the statute of limitations, unnamed members would have to come in and identify themselves?

MR. MILLER: Yes, sir, he did that in his opinion on the motions to intervene, in dictum, because that really wasn't

really the case. He indicated that in his mind --

Q So that for the statute of limitations purposes, it really was sort of irrelevant?

MR. MILLER: Right.

Q Whether the statute of limitations would run as to whether it would go forward as a class action?

MR. MILLER: Yes, sir.

Q People individually would have to come in within the year?

MR. MILLER: That is the way I read Judge Pence's opinion. In a class action or a non-class action, that is one which maintained and one that is ordered not to be maintained, still the members of that class must come in and file something and it didn't specify what, a claim or a motion to intervene, before the statute runs or their rights will be barred. He said this has more force in this case where I have ruled that it cannot be maintained.

Q What is the effect on the potential members of the class of this dictum of Judge Pence on that subject?

MR. MILLER: Well, I think if his dictum is correct, then --

Q Well, not if it is correct, just that it is dictum, what impact does that have, if any? Does it justify them in doing nothing? That is one of the things I am driving at.

MR. MILLER: I'm not so sure I understand your question, sir.

Q Well, did they do anything after that?

MR. MILLER: After filing the motion to the applications to intervene?

Q Yes.

MR. MILLER: Well, we appealed the denial of those applications to the Ninth Circuit and now we are here on them.

Q But not the class action aspects?

MR. MILLER: No, the class action aspect has not been appealed. The state asked that it might be certified for appeal, and the judge denied that. These applicants, after all, were before the court only in the sense of applying for intervention, and that was after the class action ruling.

I could find no authority for an unnamed absent member of a class that had been ordered not to be maintained to pursue an appeal except in a situation where you have a death knell theory, and then the representative party versus the one that is appealing, such as in the Eisen case, saying that there will be no case if it is not a class action, there will be no case at all.

Q Mr. Miller, before you move on, does the record show whether or not, as a matter of fact, any of these 60-odd agencies, governmental agencies that tried to intervene, had relied on the pendency of the class action suit?

MR. MILLER: Well, I feel that it does. There are some six or seven affidavits indicating that they were aware of the class action suit, they discussed it with me or one of my partners or with someone with the Attorney General's office, and that they were in fact relying on it. They were waiting information from the court, waiting for notices to be sent. One is from Salt Lake City, and one is from Sale Lake County, the City of Ogden, Weaver County.

Judge Pence found specifically that they had no right to rely, and so "they did not rely." That was one of his findings.

Now, as to the question on abuse of discretion, which has been mentioned, Judge Pence did exercise his discretion as to the specific applicants. He did get it insofar as the claims included in the four years preceding the filing of the applications were concerned. In other words, he said these claims are not barred, and so these parties are before me, and I cannot deny their motions to intervene. He did back in March, when he was ruling on the motions for intervention, in his opinion on March 30, 1970, said he had no final orders for the applicants. It was necessary then to have a meeting of all the applicants and determine whether or not they wanted to sacrifice their claims in the preceding four years in order that we could secure a final order and appeal it to the Ninth Circuit, and they decided that that would be the better course to pursue.

So then he amended the proposed complaint and intervention to eliminate those years that were not barred by the statute of limitations, whereupon some three months later, on July 8, Judge Pence then entered his order, indicating it was a final order, that the claims were barred under the statute of limitations, denying intervention.

So I don't feel that -- the Ninth Circuit didn't feel that this case involved abuse of discretion in any way. And if in fact it did, I think the Ninth Circuit properly ruled by application that once he invited intervention as an alternative to class action procedure, even though it might include some 800 members, as he said, 350 members, I can do it better by intervention, then it would certainly be an abuse of discretion to deny those applications for intervention.

Q Well, do you think that is the import of that one sentence that I read to you earlier?

MR. MILLER: No, Your Honor, I don't believe it is the import of that one sentence. I think, from implication in the whole opinion, certainly that was argued to him. The only other comment I have on abuse of discretion is I think it is really a threshold question for the Appellate Court to determine whether they are going to kill the case on the merits. As Professor Moore points out, it is almost an appellate fiction if they say, well, we don't want to hear the case, and they say, well, he exercised his discretion, and if they really

want to reach the merits of the case, then they reach the merits.

And as Professor Moore points out, one way or another, they usually have to do this anyway. Well, the Ninth Circuit did this and they decided the case.

Q I suppose in this case, you are not urging that the class you wanted to define included people whose claims were already barred?

MR. MILLER: No, no. Their claims were not barred --

Q You wanted to include in the class only those unnamed people who at that time, at the moment of filing this suit, had a law suit that if it had been filed by those people individually would have been timely?

MR. MILLER: Right. That is exactly the case before the Court. Now, rule 23 uses two words. It uses the word "commence," and it uses the word "maintain." And it clearly indicates that there are two events that will take place. One, an action will be commenced. It is commenced by a representative party on behalf of a group of people, a class. At a later time -- and rule 23 specifies this -- as soon as practicable, the court then will determine whether or not that action shall be maintained as a claas action -- two different events entirely. There is nothing in rule 23 about reliance. Quite to the contrary. With the amendment that the unnamed parties are going to be bound by that judgment one way or another, all that is necessary is that they receive notice, the best possible

notice calculated to reach them, and if they do not opt out, they are going to be bound by the judgment. They don't have to show that they rely.

Likewise, in section 5(b), it provides the suspension period that we are dealing with, there is nothing there that concerns relying on anything. It merely provides that the statute willrrun unless an action is commenced, the same word, unless is commenced within one year after the government proceedings have ceased.

As far as legislative history is concerned, I don't think there is any legislative -- certainly no legislative history on this point, because the rule wasn't amended until 1966, and it isn't reasonable to suggest that Congress had within its contemplation what would happen in connection with the procedural rule determined by this Court as to how you commence an action.

I think clearly Congress left that up to this Court and the advisory council to determine the rules of procedure under the statutory grant, promulgate proper rules as to how you commence an action. Rule 3 says you can commence an action by filing a complaint. There is nothing at all that shocks me with the thought that the State of Utah determined that they wanted to undertake to protect the rights of its cities and towns, it labeled the complaint a class action, it defined that complaint to include those lesser public bodies

that purchased pipe from these defendants, that that then commenced an action and satisfied section 5(b).

Now, the Ninth Circuit I think properly decided this question, and I think they gave us in my mind the least they could have. They indicated that the statute then be -- once the court determined the class negatively, determined they could not be maintained, then the statute began to run again, the eleven days began to run. And since at least the majority of these parties filed within eight days, they were safely inside the statute.

I would suggest to the Court that a better rule would be the one I think was expressed by Justice Douglas in his concurring opinion in Burnett v. New York Central Railroad, and that didn't involve class action but it involved a similar situation. In that case, an FELA case, the plaintiff filed an action in the Ohio court and the statute then run, and then the plaintiffs discovered that the Ohio court was the wrong court and that id did not have venue. There was no saving statute in Ohio, and there was no law in Ohio by which that case could be transferred to a proper court, where it was proper venue. So that case was dismissed, and eight days later, interestingly enough, that plaintiff filed an action in the federal court. And this Court held that that satisfied the statute. Now, the majority in that opinion indicated that the statute did not begin to run again until the appeal time had run in Ohio, and

thus that was a final order. And in the concurring opinion, I feel a better rule was stated, and that was once the action had been filed, the statute of limitations was satisfied, and then the manner in which the plaintiff pursued that was subject to laches. In other words --

Q Can you tell, does the Attorney General represent your separate independent local entities?

MR. MILLER: No, he does not do so specifically. He is the chief legal officer of the state. He renders opinions to those entities, if they should seek opinions from him.

Q If separate suits had been instituted here, would he have represented them?

MR. MILLER: Well, as it turns out, he did, at least for the sixty before the court.

Q For the purposes of intervening, he did?

MR. MILLER: Right. But has has no statutory authority to automatically represent Salt Lake City or the Weaver Basin Water Conservancy District.

Q Right.

MR. MILLER: But when the Attorney General was faced with this dilemma -- now, counsel refers to it as solicitation -- the Attorney General felt that it was his duty, that he would be remiss in his duty if he did not notify these people in order that they could bring their actions.

I suggest that any rule other than the one that the

Ninth Circuit came up with, that is decision contrary to the Ninth Circuit, will do violate to the statute of limitations, do violence to the true congressional intent, which was uniformity of application. I think if you indulge yourself in theories such as the class members must rely, then those that can prove reliance to the satisfaction of one judge are safe. Those that cannot are barred by the statute of limitations. Those who were ignorant, if the class is ordered maintained, possibly they are protected. If the class is ordered not maintained, they are not protected. So you have an unequal application of the statute, and in this day and age, especially in antitrust legislation, where you have transferor courts and transferee courts, and where the trial court can amend and modify the class action order at any time prior to judgment on the merits, and then even after that, you have the Appellate Court, as in Esplin v. Hirschi, saying, oh, no, there really should have been a class, if you make the statute dependent upon whether or not a court ultimately orders a class be maintained, there is going to be very much like straining and shifting uses. You are going to have the statute popping up and shifting around at various times for various persons, depending on their situation, depending on what the court finally decided was the situation for their class action.

We feel that the Ninth Circuit decided this in the only proper way, that the Ninth Circuit did justice, and that

their decision is proper.

Q Mr. Miller, is it well settled that an order denying a motion to intervene is appealable from the District Court to the Court of Appeals?

MR. MILLER: Permissive intervention, Your Honor?

Q Yes.

MR. MILLER: No, I think the law there is -- the words that are used by the Appellate Court is that if an abuse of discretion is shown, then it is appealable, we will hear it on the merits.

Q Is that under 1291, is it considered a final decision of the District Court, under 20 U.S.C. 1291?

MR. MILLER: Yes. Oh, I think that is settled, yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Miller.

Thank you, Mr. O'Malley.

The case is submitted.

[Whereupon, at 1:37 o'clock p.m., the case was submitted.]

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