ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-118

TITLE CROWN, CORK & SEAL COMPANY, INC., Petitioner
v. THEODORE PARKER

PLACE Washington, D. C.

DATE April 18, 1983

PAGES 1 thru 29

ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

CROWN, CORK & SEAL COMPANY, INC.,

Petitioner

v. No. 82-118

THEODORE PARKER

Washington, D.C.

Monday, April 18, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

GEORGE D. SOLTER, ESQ., Baltimore, Maryland; on behalf of the Petitioner.

NORRIS C. RAMSEY, ESQ., Baltimore, Maryland; on behalf of the Respondent.

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CHIEF JUSTICE BURGER: We will hear arguments first this morning in Crown, Cork & Seal against Parker.

Mr. Solter, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF GEORGE D. SOLTER, ESQ.

ON BEHALF OF THE PETITIONER

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

The real issue in this case is whether a blanket application of equitable tolling by the application of a blanket equitable tolling the defendant should be subjected to a second wave of separate, individual lawsuits by putative members of the class after the denial of class certification.

The Fourth Circuit's decision not only permits this, but also makes it possible for such individuals to file their complaints as class actions, thus beginning the tolling cycle once again.

We respectfully submit that the Fourth Circuit rule announced in this case is not supported by case law, is an intrusion upon legislative prerogative and is inconsistent with legislative purpose in establishing time requirements for filing. It violates the integrity of Rule 23, expands rather than limits litigation arising out of class actions, and overlooks the jurisdictional aspect of the 90-day period prescribed in Title VII.

We further submit that there are no facts in this

case which warrant equitable tolling for the individual respondent and there is no basis in fact in this case or in law for the adoption of the broad rule extending the tolling of American Pipe versus Utah to individual private actions after class certification has been denied.

Now, on the surface, it might appear that there is little difference between intervention as prescribed by American Pipe and a separate, individual lawsuit after class certification has been denied.

In order to examine the difference and illustrate the differences, it is necessary to see just what the Fourth Circuit tolling rule does by extending it to the private individual action. By the mere filing of a complaint in the District Court, entitled a "Class Action," and broadly defining that class, this automatically will extend filing requirements of federal and state statutes, thus impacting on all types of class actions, not just the type we are dealing with here in Title VII.

Secondly, and perhaps the most frightening part of it is that it really has the effect of placing the tolling power in the hands of lawyers and plaintiffs and not in the hands of the courts and this is done by the use of a broad class definition in the initial complaint, because in American Pipe, the filing of a complaint is what tolls the statute.

It is illustrated by this case in the complaint

filed by the two alleged class members which the respondent seeks to -- seek the benefit from, define the class as this: Black persons who have been, continue to be, or may in the future will be denied equal employment opportunities by the defendant. That is from the first such person that was ever hired to infinity. There is no limitation in that definition as to time, as to the location. It wasn't restricted to the Baltimore plant and this company has plants in 26 states of the United States. There is nothing to limit it by definition as to the nature of the discrimination or any other circumstance. It simply refers to this gigantic class of persons in a very general sense.

Now, this danger was recognized in the concurring opinion in American Pipe where it was warned that it should not be interpreted as an encouragement to lawyers to frame overly broad issues -- I mean, overly broad definitions to attract members.

We also feel finally that it is totally inconsistent with the purpose of the 90-day notice in Title VII. In that notice, under the law, actual service of the notice upon the complainant after EEOC waives its jurisdiction is mandated. The time does not begin to run until he actually has possession of that notice and that notice, as is shown in the Appendix, is extremely explicit. It is not something that he is supposed to know about in the sense of when statutes start to run or

filing times start to run. He must know about it immediately by reading that notice or having someone read it to him.

There are no exceptions carved out in the statute for any other different period or any changing of that period and it seems extremely explicit even though this is a remedial statute and we all recognize the rule of liberal construction when we are referring to remedial statutes.

The important relevant facts in this case to remember are simply these: That the respondent, after having timely filed his complaint with the EEOC, sat back as he had to to await the result. While that was being investigated, two other gentlemen from Crown, who were black employees who had been terminated, filed a class action known as Pendleton and Allen, and they used the broad definition which is have just referred to. That occurred on September 15, 1978. Approximately two months later the EEOC issued its no reasonable cause to believe that discrimination had occurred and the 90-day notice to sue. Mr. Parker did nothing. In the meantime, two years went by and finally the District Court, after hearing and after a period of holding the matter sub curia, decided that class certification should be denied. That occurred on September 4, 1980, within two months. Which was timely in the sense of the 90 days if there is, in fact, a tolling, Mr. Parker filed his own private individual suit.

Time went on. Of course, he was met with a motion

for summary judgment by Crown which brings the case ultimately here today.

Also, when he was met with the summary judgment motion, three days later, he filed a motion to intervene in the Parker-Pendleton class action which had been -- in which certification had been denied many, many months before. He filed it under the concept of United Airlines versus McDonald in order to appeal the denial of the class action. He did not intervene in a timely fashion under American Pipe to become a party in the remaining litigation.

Now, with those facts as the background, it is particularly significant to us and we submit should be to the Court that here the respondent had actual notice of the filing time when he received his notice from the EEOC. There is nothing to indicate that he relied on the existence of the Pendleton-Allen class action, even though that is alleged in the brief, because he went back to EEOC in 1980 and tried to get another fresh 90-day notice of right to sue in order to give substance to his new filing. Of course --

QUESTION: Mr. Solter, do you think American Pipe requires reliance at least to the putative intervenors?

MR. SOLTER: No, I don't. I think that is one of the things that is considered in the discussion; that the people who do know about it are entitled to rely on it for the purposes outlined in American Pipe, namely, to intevene. In other words,

if they decide to stay out and they are aware of it, then obviously they are relying on it and they come in to intervene.

QUESTION: You say the very fact of their later intervention shows they probably relied on the existence prior to the refusal to certify?

MR. SOLTER: If they knew of it, but, of course, American Pipe extended to those inactive and unknown members as well who might subsequently learn of the class action and the fact that it was not certified and file in time. It covered all of the members, potential members, of the putative class whether they had knowledge and relied or whether they gained knowledge at a later time.

The respondent in this case did take advantage of his right to intervene for purposes of appeal under United Airlines versus McDonald and then, for one reason or another, after having been given that right to intervene and file the appeal, the appeal was not timely filed and that was the end of that.

We submit that the Fourth Circuit has provided a fifth alternative to a situation where the respondent, under the scheme of Title VII, had already four alternatives. He could have filed timely if he wanted to go his own individual way. He had the notice, he could have filed timely. He admitted having received it and having taken it to an attorney.

He also admitted having gone back to EEOC after

receiving it for further explaination.

He could have moved to intervene in the Pendleton-Allen case while class status was pending. He could have moved to intervene in a timely fashion after class certification was denied, but he did not. And, he could have moved to appeal the denial of class certification, which he did, but, of course, then lost that by failing to file in the Fourth Circuit a timely appeal.

QUESTION: There would be no point to your third alternative, would there, to intervene in the class action after denial of class certification?

MR. SOLTER: Oh, yes, I think that is the whole point. The reason for intervention that was prescribed in the American Pipe case was to keep control over the litigation in the same court, in the same district, rather than to allow the individuals, as they can now under this rule if it is adopted, to go out and file their own private actions.

QUESTION: Well, as I understood your fourth alternative was to intervene in an appeal, appeal the denial. Your third was simply to intervene after refusal to certify. And, I am wondering, what is the point to that if you don't plan to appeal?

MR. SOLTER: Well, I got my numbers mixed up. I thought you were referring to the actual intervention in the case before the appeal stage, while it was still viable to --

QUESTION: No, I meant after denial of certification.

MR. SOLTER: What he did in this case you mean?

QUESTION: Yes. Except I thought you were posing as two separate alternatives intervention after refusal to certify for purposes of appealing and simply intevention after refusal to certify, apparently wanting to be in an uncertified class.

MR. SOLTER: Well, I did mean to make that distinction, because after denial of certification, he can -- the statute starts to run again under American Pipe and he is provided the opportunity to then intervene provided he does it within the time left to him on whatever statute it is. So, that is one alternative.

QUESTION: Then when he does that he is simply submitting his individual claim on the merits really?

MR. SOLTER: Precisely. And, that is why I am arguing that that is the route that should be followed and not to go out with his private action and institute another case outside of the framework of the class action which is really the whole basis on which the American Pipe case was placed as I read it. And, that was to effectuate the purposes of Rule 23, to protect the class as a whole, inactive and uninformed as well as those who relied, and to control the individual claims through Rule 24, the intervention route, rather than to have the independent actions going on. And, here is where the reason for intervention is so necessary. When someone tries to intervene in a

case of this kind after the denial, in order to intervene and get the benefit of the tolling, they have to show that first there really was a class of some kind and, secondly, that they were a member of it in order to get the benefit of the tolling. And that is where I think the District Court should have the power to control rather than if an individual action is filed and a motion for summary judgment filed on the basis of limitations, to then hold another, almost a de novo hearing to determine whether there was a potential class and whether this man or woman was a member of that class.

The whole idea of American Pipe was to use Rule 23 to keep the litigation in some orderly fashion controlled so that the matter could be managed in a proper way and a practical way. And, after all, the decisions that are rendered are for the district courts to follow and to help them in implementing their court calendar. And, it seems to me that that is why this point was made so firmly in American Pipe where it said it was limited for the purposes of intervention.

Also, there is another question that is raised by the language of American Pipe where tolling was limited at least where the denial of class certification was solely for the lack of numerosity. The reason for that was that in that case there was a class clearly established but there weren't enough members to satisfy Rule 23 and, therefore, there was a clear finding that joinder was practical and, therefore, the

next logical thing that follows is if joinder is practical, then intervention is the next step.

Now, if certification was denied for lack of typicality or commonality, there is a good chance there is no class there at all underlying the action or at best it is a very narrow class and, therefore, intervention, as opposed to a private suit, provides the mechanism for screening out non-meritorious claims. It keeps the litigation in the same court in a fairly timely fashion, because members would have to act promptly because their statute is running out, so that everything is fresh, it is all in one place, and not scattered in many districts perhaps where a defendant may have a different plant so there would be venue there.

QUESTION: Mr. Solter, may I ask you --

MR. SOLTER: Yes, Your Honor.

QUESTION: -- what do you do with the plaintiff, prospective plaintiff who seeks to intervene not as a right but intervention in the discretion of the trial judge and the trial judge decides he won't allow intervention, not because of time bar but just because he doesn't think it is an appropriate case to -- He doesn't want to complicate his own lawsuit with this group of intervenors? Would you say they are also barred?

MR. SOLTER: Well, I would say that if the judge granted it on the grounds that you suggest, it might be an

abuse of discretion under the rule, but if he granted --

QUESTION: I am asking if he denied it.

MR. SOLTER: If he denied it?

QUESTION: Yes.

MR. SOLTER: If he denied intervention because he felt that the individual had failed to estabish that he was a member of a class or that there was such a class --

QUESTION: Well, assume he was literally within the class described by the plaintiff, but when it came around to certifying the class, the judge decided the commonality or typicality reason for not certifying a class and then he also decided not to allow intervention because he thought it would delay the proceeding, allow too many people to come in. What do you do -- How does your rule deal with that kind of a case?

MR. SOLTER: Well, the result, I think, would be that, first of all, the person would be time barred because he wouldn't be able to then claim the benefit of tolling. But, I think he has -- That would constitute a final order as far as he is concerned and he would have a right of appeal.

QUESTION: But that is his only right?

MR. SOLTER: Sir?

QUESTION: The Fourth Circuit Rule would protect him though as I understand it.

MR. SOLTER: I don't think any more so necessarily than the intervention rule would, because a defendant is going

to raise the limitations issue in one way or another, even in the private action that the Fourt Circuit advocates. In other words, you would still have to come in and file a motion for summary judgment based on limitations and then there would have to be, it seems to me, a hearing on this whole question of class status for his to reach back and get the benefit of the tolling. This isn't something that is handed to him. He gets the benefit of the tolling only if (a) there is a class, and (b) he is a potential member of it. And, somewhere down the road there has got to be proof of that. So, I think you still end up with that same --

QUESTION: Well, I should think we would always have a case in which the plaintiff would be within the description of the class representative, within the class described in the complaint, but not within the class the trial judge was willing to certify. You have got kind of concentric circles almost and he is within the outer ring.

MR. SOLTER: Well, that is true, of course, but the purpose of the motion and hearing on certification is to narrow it and try to determine what the real class --

QUESTION: And, if he doesn't get within the class that is actually certified, then he does not get the benefit of the tolling rule?

MR. SOLTER: I would say that is correct, yes.

QUESTION: Mr. Solter, in the category that you are

talking to Justice Stevens about, doesn't your position encourage perhaps the unnecessary filing of a bunch of complaints in anticipation that this problem might arise and isn't that as burdensome or moreso than the protective motions to intervene that the court was concerned about in American Pipe?

MR. SOLTER: Well, obviously there is the risk of that being involved. The question is whether it really amounts to anything greater by going the intervention route. After all, if a potential member of the class thinks he is has got a claim and he belongs in this class and he wants to intervene, he has to make these showings. And, it just strikes me that it comes back to the question of control and management at the trial level that really dictates the answer to the problem.

Now, the Second Circuit has ruled in the fashion that tolling does not affect -- That the member of the class does not get the benefit of tolling to file a private action, he only can intervene.

Also, the Ninth Circuit, where the American Pipe case came from originally, has taken that view. The Fourth Circuit takes the other view and that, of course, is why we are here.

Now, under Rule 23, which this Court placed a great deal of emphasis upon in the American Pipe case, it recognized that back before the 1966 amendment, there were the spurious type class actions which where unfair advantage could be

obtained by persons who wanted to sit on the sidelines and see what happened and not be bound by any judgment. And, to cure this effect, Rule 23 was amended and it provided for process, among other things, if there is certification, to identify the members. And, American Pipe recognized --

QUESTION: Mr. Solter --

MR. SOLTER: Yes, sir.

QUESTION: Is that the reason that Hansberry and Lee doesn't apply here?

MR. SOLTER: I am sorry, sir, I didn't understand.

QUESTION: The case of Hansberry against Lee. It is an old 1940 case.

MR. SOLTER: I can't recall it, sir.

QUESTION: Chief Judge Stone said that where there is a class action case it does not bind a future class action case on the same properties.

MR. SOLTER: I think that -- I don't -- I have to be frank. I don't recall the case, but from what you say, it seems that that was one of maybe --

QUESTION: The reason for this.

MR. SOLTER: The problems that brought about amendments to Rule 23 in 1966.

I would like to reserve my last five minutes for rebuttal, Your Honor.

CHIEF JUSTICE BURGER: Very well.

Mr. Ramsey?

ORAL ARGUMENT OF NORRIS C. RMASEY, ESQ.

ON BEHALF OF THE RESPONDENT

MR. RAMSEY: Mr. Chief Justice and members of the Court:

It is the respondent's position that the Fourth Circuit's ruling is consistent with the purpose for the tolling rule as announced in American Pipe.

First, I shall discuss the policy considerations. The effect on Rule 23 if the Court were to limit the putative class member to intervention into the cause action. Second would be the practical effect of limiting it to intervention. Third would be the effects of the broad interpretation of the tolling rule on Rule 23. Fourth, the effect on the case at bar, and fifth, the fact that the interpretation given to the tolling rule by the Fourth Circuit is consistent with this Court's dictum in Eisen and the fact that a broad interpretation of the limitations rule on the statute, for purpose of statute of limitations is also consistent with the tolling rule. And, finally, that the 90-day notice of right to sue is a statute of limitations as opposed to a jurisdictional prerequisite.

The policy reasons for the American Pipe tolling rule is to prevent premature filings of motions to intervene into the class action before the class certification issue has been decided. If the Court were to limit the putative class member

to intervening into the existing cause of action, then that would undermine the policy considerations of judicial economy and efficiency. It might make the purported class action unmanageable by the filing of numerous separate lawsuits in different jurisdictions and numerous and multiple motions to intervene into the class before the class certification issue has been decided.

Moreover, the Court should pay close attention to Federal Rule of Civil Procedure 24A and Rule 24B in this case. Federal Rule of Civil Procedure 24A gives the intervenor a right to intervene, whereas, Rule 24B allows the court to exercise its discretion as to whether or not the putative class member would be able to intervene into the cause of action.

Knowing this, any smart lawyer or smart putative class member would move to intervene on a timely basis prior to the motion for class certification being denied and again thus undermining the purpose of the tolling rule.

The practical considerations for requiring intervention only would have -- A decision to require intervention only would have as a practical matter an adverse impact on the putative class member. That is the putative class member would step into the shoes of the party plaintiff. When he steps into the shoes of the party plaintiffs, he inherits all of the procedural errors, discovery errors, and other problems inherent in intervening into a cause of action where litigation

has already taken place. Thus, again, this would serve to encourage the intervenor to intervene pursuant to Rule 24A prior to the motion for class certification being decided.

QUESTION: Mr. Ramsey, as a practical matter, can you say, based on your experience, how much discovery usually takes place in a typical class action case before the class certification motion is ruled upon?

MR. RAMSEY: Yes, Your Honor. A significant amount of discovery generally occurs in that in cases of this nature, such as Title VII class actions, the motion is due and decided on statistical evidence as to whether or not there is a pattern and/or practice of discrimination that has been practiced against a class.

In addition, the class plaintiff may have also attempted to discover evidence concerning disparate treatment of class members.

And, in fact, in the case at bar, after the class certification issue had been decided, there was a dispute as to whether or not the main plaintiffs in the class action would be allowed to go into the employer's personnel files for purposes of discovering evidence concerning disparate treatment.

If the District Court had made an adverse decision to the class plaintiffs and denied them the right to seek that evidence, then the Respondent Parker, having intervened at that state in the litigation, he would have been deprived of evidence

to carry his burden of proof on the merits.

QUESTION: Mr. Ramsey, that also would have been true if they had certified the class, isn't it? They would have been stuck with the developments in that lawsuit.

MR. RAMSEY: Well, if the Court had certified a class, the --

QUESTION: And then denied discovery.

MR. RAMSEY: And then denied discovery, then they would have been faced with that problem, although we believe the District Court would have been wrong in that Eisen versus Carlisle & Jacquelin teaches that the court should not go into the merits when determining whether or not a case should be certified as a class action.

QUESTION: No, but it seems to me you are arguing it is unfair to make the non-party accept the bad features of the litigation, but unless he files his own lawsuit, he is going to do that if the class is eventually certified. He, in effect, seems to be content with the class until the certification ruling is adverse.

MR. RAMSEY: Well, at that point, he may be able to move to intervene pursuant to Federal Rule of Civil Procedure 24A on the grounds of inadequacy of representation in that the main plaintiffs would not have sought sufficient discovery to have the case determined on its merits.

QUESTION: It just seems to me there is a little

inconsistency in your position. I may not get it entirely.

MR. RAMSEY: Well, further, the other practical effects on the case would be that requiring a putative class member to intervene into an existing cause of action may not be financially feasible in that should the court have before it a nationwide class action individuals located in jurisdictions far from the original jurisdiction may not be able to financially afford to hire attorneys and litigate in a foreign jurisdiction.

Moreover, if there was a nationwide class action, then the individuals, by being required to file to intervene, may be required to litigate in a jurisdiction in which witnesses, documents, and other factors related to this litigation would not be present in a foreign jurisdiction. For example, an employer, as counsel stated, may have plants in separate jurisdictions throughout the country. That is where those personnel files would be located. That is where the supervisors would be located. And, thus --

QUESTION: Mr. Ramsey, is it customary where motions to intervene in a class action have been filed and intervention has been granted that each of the intervenors keeps their own attorney who made the motion to intervene on their behalf?

MR. RAMSEY: I believe that is discretionary with the court. The court may appoint lead counsel where there are several intervenors or it may allow the intervenor to keep his

own counsel. In all instances, the court would probably allow the intervenor to keep his own counsel, although there would be lead counsel for purposes of carrying out the major phases of the litigation.

Now, after the class certification issue has been denied, then, of course, there is no longer any interest in protecting judicial economy and efficiency, because the purpose of that rule in the first place was to disencourage premature motions to intervene into the class action and the filing of separate lawsuits.

Of course, once the court decides adversely to the class; that is that there should not be a class certification, then Federal Rule of Civil Procedure 24B comes into place. That rule allows discretionary intervention.

And, should this Court limit the putative class members to intervening into the existing cause of action, then it is possible that the putative class member could lose his lawsuit on the grounds unrelated to the merits of his cause of action. That is the Court could decide that the motion pursuant to Federal Rule of Civil Procedure 24B was untimely, that it may cause undue delay in the original cause of action, and, thus, deny the putative class member the right to intervene, and, thus, his day in court.

As a practical matter, deciding that the American Pipe tolling rule should be given a broad interpretation and

allow separate lawsuits or intervention would not undermine the purpose of Rule 23.

Should separate lawsuits be filed, then the court, pursuant to Federal Rule of Civil Procedure 42A could consolidate all like and related causes of action for purposes of pre-trial litigation, for purposes of trial, or he may pass -- the court may pass any other orders it deems necessary to effect judicial economy and efficiency.

Should there be several lawsuits filed in separate jurisdictions, then the court on motion by any party, the employer as well as the intervenors, may coordinate the litigation through the multi-district litigation panel, and, thus, conduct all pre-trial proceedings so that there will not be unnecessary burdens and expenses on the employers, the court, or the litigants. And, once the pre-trial phases of the litigation has been completed, the panel of multi-district litigation then can remand the case back to the particular jurisdiction in which the lawsuit was originally filed for trial.

In the case at bar, the petitioner was not prejudiced at all. This is said because the respondent here filed a charge of discrimination with EEOC which then put the petitioner on notice as to the claim of the respondent, that he was complaining that there was discrimination against him on the basis of his race. And, indeed, as counsel pointed out, there

was an investigation conducted by the Maryland Commission on Human Relations and EEOC finding no probable cause in which the employer participated.

Second, as the District Court opinion points out, the respondent here was a member of the putative class and the petitioner had been placed on notice as to the type of claims that the respondent had. In fact, the class had been shaped by discovery and members of the putative class had been named in the record so they actually knew the identity of each putative class member.

Moreover, once the respondent had filed his own lawsuit, he moved to consolidate his lawsuit with the case that had been filed as a class action.

To say that the difference between intervention and consolidation is to -- It would be to exhalt form over substance by saying that consolidation and intervention would be different.

QUESTION: Was there any particular reason that you chose on behalf of your client to file separately and then move to consolidate rather than to intervene?

MR. RAMSEY: The reasons were because being experienced with that litigation and being counsel in both cases, I was aware of the pre-trial discovery and difficulties that had gone on in that particular case and not wanting my client to be bound by those difficulties, then I opted to file a separate lawsuit and then move to consolidate those lawsuits based on my

experience in other cases where class actions had been filed and separate lawsuits had been filed and the District Court allowed the separate lawsuit to engage in his own discovery, to complete his own discovery for purposes of trial.

So, there was a practical reason for doing that.

The respondent submits that the Fourth Circuit's interpretation of American Pipe to allow the filing of a separate lawsuit is consistent with this Court's dictum in Eisen versus Carlisle & Jacquelin. There the Court rejected the argument that class members would not opt out of a class action because the limitations period would have run, citing American Pipe.

We believe that the only fair reading of that dictum is that a class member would opt out for purposes of filing a separate lawsuit since a putative class member would not opt out of a class only to move to intervene into that same lawsuit again.

Furthermore, we believe that the tolling of the statute of limitations for purposes of separate lawsuits or intervention is consistent with the purposes of the statute of limitations. The purpose of a statute of limitation is to promote justice by preventing unfair surprise through the recovery of stale claims that have been allowed to slumber until evidence has been lost, memories faded, or witnesses disappeared.

Here, where a case has been filed as a class action, it is encumbent upon the defendant or employer to retain its records and documents. It is encumbent upon the employer or defendant to prepare its case for trial and retain the necessary evidence. Therefore, the purpose of a statute of limitations would not be undermined by such a tolling rule.

Finally, the defendants -- the petitioner argues that the 90-day period for bringing a lawsuit is a jurisdictional prerequisite as opposed to the statute of limitations. The respondent submits that this Court in Zipes versus Trans World Airlines has addressed that issue to a large extent. It pointed out in that decision that the limitation periods under Title VII have always been referred to by this Court as statutes of limitations subject to waiver, estoppel, and tolling.

Moreover, a reading of 42 USC § 2000e-5(f)(3), the Jurisdictional Section of Title VII, does not mention the 90-day limitations period.

It would seem that the defendant or the petitioner concedes that this case involves a statute of limitations as opposed to a jurisdictional prerequisite in that it admits that American Pipe applies and if American Pipe applies, then there was a tolling of the statute of limitations during the pendency of the class action.

In conclusion, the respondent submits that a broad interpretation of the American Pipe rule to allow separate

lawsuits or intervention is consistent with Rule 23; that is to promote judicial economy and efficiency. We submit that it would undermine the purpose of the tolling rule and encourage the filing of pre-certification motions to intervene and separate lawsuits should this Court decide otherwise.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Solter?

ORAL ARGUMENT OF GEORGE D. SOLTER, ESQ.

ON BEHALF OF THE PETITIONER -- Rebuttal

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

Very briefly, it seems that the respondent argues that equitable tolling should be looked upon as some sort of a right. This Court and all courts look upon equitable tolling as something that is given only sparingly, almost on a case-by-case basis, and it wasn't until, I believe, the American Pipe case that a blanket exercise of judicial or equitable tolling was granted so that it covered many, many people.

I think that what we have to look at here is that the equitable tolling of American Pipe came about because the Court was anxious to maintain the integrity of Rule 23 and that it saw that if tolling was not given in that situation many people would be harmed and would not have an opportunity to even move to intervene to determine whether they were class

members who were entitled to assert a private action after the denial of class certification.

We say that if a putative member of the class wants the benefit of that tolling, he must bear the burden of that tolling by showing through intervention in an orderly, manageable fashion before the same court that he is a member of that class and that the class existed. Otherwise, it seems to me that if you adopt the Fourth Circuit rule, you simply open the door for an entire new round or wave of litigation in courts today that are already overly swamped. At the same time, the intervenor is adequately protected by the technique that is available to him under Rule 24 where he can come before this Court, the District Court, and assert his right to intervene in that action.

We simply feel that this -- The whole purpose of the American Pipe tolling rule through intervention was to keep the power to control and direct class litigation in the courts and not in the hands of opportunistic lawyers and litigants where abuses could occur.

We respectfully submit that the judgment of the Fourth Circuit should be reversed.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

We will hear arguments next in Bell against New Jersey and Pennsylvania.

(Whereupon, at 10:46 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

CROWN, CORK & SEAL COMPANY, INC. Petitioner v. THEODORE PARKER

82-118

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pierce Hammond

(REPORTER)