UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1132

REGINALD H. HOWE,

Plaintiff-Appellant,

v.

GOLDCORP INVESTMENTS LTD., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

SUPPLEMENTAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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The Securities and Exchange Commission submits this supplemental brief to urge that this Court not reach the merits of plaintiff-appellant's Investment Company Act ("ICA"), as suggested by appellees. The issue on this appeal is, after all, which trial court -- the federal court in Boston or a court in Canada -- should hear plaintiff's claims. It would be perverse, in deciding that question, for this Court to reach and determine the merits in the first instance. In the event, however, that this Court determines to reach the merits, the Commission respectfully requests an opportunity to submit a post-argument brief on the merits, as the question is of considerable importance to the agency in its administration of the ICA.

The plaintiff contends that the defendant-appellee, Goldcorp Investments Ltd., was required, under Section 7(d) of the ICA, to

register as an investment company and, thus, was subject to various restrictions under the ICA. In its brief, the Commission, while noting that the complaint's allegations regarding violations of the ICA are deficient, urges this Court to remand the ICA claim to the district court to provide the plaintiff with an opportunity to amend his complaint to satisfy, if he can, Section 7(d)'s "offering" requirement. _See_ SEC Br. 30 n.29.

The defendants argue that consideration of the ICA claim is appropriate, notwithstanding their failure to cross-appeal, under the rule of _Langnes v. Green_, 282 U.S. 531 (1931), which permits an appellee to seek affirmance of a district court judgment on the basis of "any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." 9 Moore, _Federal Practice_ ¶ 204-11[3] at 4-47 (2d ed. 1991); _see_ _Norris v. Lumbermen's Mutual Casualty Co._, 881 F.2d 1144, 1151-52 (1st Cir. 1989). The _Langnes_ rule, however, is inapplicable in this case. In the absence of a cross-appeal, reliance on alternative grounds for an affirmance is appropriate only if a ruling on such grounds does not have the effect of "enlarging" appellees' rights (or, alternatively, "lessening the rights of his adversary"). _See_ _Morley Construction Co. v. Maryland Casualty Co._, 300 U.S. 185, 191 (1937). In this case, affirmance on alternative grounds would improve the position of appellees relative to that of the appellant because the dismissal would become one on the merits rather than on procedural grounds.

In this case, the district court did not address the merits of the plaintiff's claims and dismissed solely on the ground of forum non conveniens. The dismissal is essentially on procedural grounds, having no claim or issue preclusive effects in subsequent litigation on the merits. In contrast, a ruling by this Court dismissing plaintiff's ICA claim for failure to state a claim, as urged by appellees here, would have very different effects; defendants could seek to persuade a Canadian court to give claim or issue preclusive effect to such a ruling.

In analogous circumstances, where dismissal had been obtained on abstention grounds, the Third Circuit expressly declined to consider an appellee's alternative contentions that the plaintiffs' complaint failed to state a cause of action. See University of Maryland v. Peat Marwick Main & Company, 923 F.2d 265, 277 (3d Cir. 1991). 1/ The court noted that consideration of the alternative grounds for affirmance urged by appellees would, "if successful, clearly expand [appellee's] rights and restrict the rights of the [plaintiffs] through claim or issue preclusion." Id. at 277.

The Langnes rule is also inapplicable in this case because a ruling on the merits of the ICA claim is not possible on the present record and, in any event, such a ruling would not result in an affirmance disposing of the entire case. As indicated in the Commission's brief, the complaint as it currently stands is

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1/ The Commission's brief notes certain procedural similarities between the abstention doctrine and the doctrine of forum non conveniens. See SEC Br. 19 n.15.

deficient. Plaintiff, however, may be able to allege new facts that would cure the deficiencies of its ICA claim. Leave to amend is a matter entrusted to the discretion of the district court and "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see also Corey v. Look, 641 F.2d 32, 38 (1st Cir. 1981)("Absent a discretionary judgment by the district court and given the liberal rule favoring amendment, * * * we cannot hold as a matter of law that a trial court under these circumstances would abuse its discretion by permitting amendment."). Accordingly, this Court's decision regarding the sufficiency of the complaint's present allegations will not necessarily dispose of the issue in this litigation. Moreover, because the plaintiff's action alleges violation of the Securities Exchange Act of 1934 and the rules thereunder, as well as violation of the ICA, a determination that the ICA claim should be dismissed will not provide alternative grounds for an affirmance of the dismissal of the entire action. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n.4 (1970) (declining to consider alternative grounds which "would not dictate affirmance of [the] court's judgment").

Under these circumstances, a decision by the court of appeals on the plaintiff's ICA claim would be premature and possibly unnecessary. By obtaining appellate review of the merits of the ICA claim in this case, appellant and appellees would be afforded interlocutory review of an issue not dispositive of the case and which the district court has not even

addressed. Such a result would violate the spirit, if not the letter, of 28 U.S.C. § 1292(b).

Finally, since the Langnes rule is discretionary rather than obligatory, the Court may exercise its discretion to decline consideration of appellees' alternative grounds. Courts have recognized that when a court from which a case has come has expressed no views on a question of law, it may be appropriate to remand the case to that court rather than deal with the merits of that question on appeal. See Reeder v. Kansas City Board of Police Commissioners, 733 F.2d 543, 548 (8th Cir. 1984) (remand is disfavored "only where the issue is one of law, no factual questions are outstanding that might affect its resolution, and there is no reason to believe that we would benefit from giving the opportunity to the District Court to address the question in the first instance."); see also Aetna Casualty and Surety Co. v. Flowers, 330 U.S. 464, 468 (1947); United States v. Ballard, 322 U.S. 78, 88 (1944).

In this case, prudential considerations argue against a premature decision on the merits of the ICA claim. The ICA claim raises questions regarding the scope of Section 7(d) which have significant implications for the internationalization of investment company services. Indeed, the Commission is presently engaged in a comprehensive review of the ICA, including Section 7(d). See Request for Comments on Reform of the Regulation of Investment Companies, Investment Company Act Release 17534, [Transfer Binder 1990] Fed. Sec. L. Rep. (CCH) ¶ 84,607 (June 15,

1990). Moreover, because the issue is both complex and significant, consideration of the issue by this Court is likely to be more efficient after the district court has addressed the issue and in connection with the other securities law issues underlying this action.

If the Court is disposed to address the merits of the plaintiff's ICA claim, the Commission respectfully requests the opportunity to submit a amicus curiae brief addressing the ICA issues.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed. Of course, the district court will then consider the merits of plaintiff-appellant's Investment Company Act claim, together with his other claims.

Respectfully submitted,

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