In the

Supreme Court of the United States

Santa Fe Industries, Inc., Santa Fe Natural Resources, Inc., and Kirby Lumber Corporation,

Petitioners,

v.

S. William Green, et al.,

Respondents.

No. 75-1753

Washington, D. C.
January 18, 1977
January 19, 1977

Pages 1 thru 47

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v.	No. 75-1753
S. WILLIAM GREEN, et al., Respondents.	

Washington, D.C.
Tuesday, January 18, 1977

The above-entitled matter came on for argument at 2:51 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM R. GLENDON, Esq., 200 Park Avenue, New York, New York 10017; for the Petitioners.

SIDNEY BENDER, Esq., 405 Lexington Avenue, New York, New York 10017; for the Respondents.

C O N T E N T S

* * *

January 19th session begins at page 8.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1753, 1660, 1782, Santa Fe Industries against Green.

Mr. Glendon, you may proceed.

ORAL ARGUMENT OF WILLIAM R. GLENDON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

My name is William R. Glendon. I represent the Santa Fe parties who are defendants below and are petitioners here.

In this proceeding there are raised some very troublesome and even startling problems by the decision below in reference to the scope of the securities laws, particularly 10(b) of the '34 act, and further the entire relationship between federal and state governments.

The case arises out of the fact that the plaintiffs are suing, claiming that in a short form merger, pursuant to the Delaware statute, the price that they were given of $153 was grossly undervalued and that this constitutes a violation of scheme and contrivance under Rule 10b-5 because it was given without notice, although the Delaware statute does not require any notice.

In fact, all the Delaware statutes were complied with. And in this action under a statute requiring manipulation

and deceit, it is clear that there was no deceit, and there was no non-disclosure. Nonetheless, two members of the Court of Appeals said that the conduct pursuant to this statute was a fiduciary breach, and they said that this was a scheme to defraud.

The dissenting opinion, Judge Moore, said: To say that the facts here presented a scenario of fraud was a patent distortion of the term. There was no fraud at all.

The facts very quickly are that Santa Fe acquired 60 percent of the Kirby Lumber Company 1933 under a reorganization. In 1967 they acquired another 25 percent at a price--and I will remind Your Honors the price claimed here to be grossly undervalued is $125--in 1967 the remaining 25 percent, to get them up to 90 percent, was acquired at a price of $65. There were additional purchases of the stock in between '67 and '74 at prices of $65 to $92, to bring them up to the number of 90 percent under Delaware law. You may enter into a short-form merger if you have 90 percent.

Santa Fe decided to invoke the provisions of the Delaware short-form statute and have a short-form merger. To do this it did a number of things. It first of all caused appraisals to be made of the physical properties, and this physical appraisal of the properties showed a value--asset value--of $320 million. It also had an appraisal made of the mineral properties, and this too was submitted to Morgan

Stanley along with the asset appraisal, whom Santa Fe had engaged to give it an independent advice as to the fair market value of the stock of the minority, the fractional shareholders.

Morgan Stanley did an appraisal of the market value of the stock and came up with a figure--after considering a variety of factors, including the appraisals which were submitted to them--of $125.

Q Was the Kirby stock traded over the counter?

MR. GLENDON: They are very thin market, Mr. Justice. I think that it was not even traded over the counter. There just was not much trading in it. The record reflects the buys by Santa Fe during the period '67 on and, as you will see there, they are very small numbers of shares.

Santa Fe took the Morgan Stanley recommendation, $125, increased it to $150. Parenthetically this would be 12-1/2 times earnings for the previous year. It set up a corporation called Forest Products, Inc. to implement the merger. It gave Forest Products $3.8 million to have the money to buy in the minority stock. And I mention this because the lower court was under the misapprehension that Kirby itself paid for the stock, that the stock was paid for out of Kirby's funds. This simply was not so. The parent provided the money.

The merger pursuant to the statute was effected on--

Q Mr. Glendon, is that really a significant point because did not Kirby incur an indebtedness to get the money from the parent?

MR. GLENDON: No.

Q You mean it was just a capital contribution?

MR. GLENDON: Yes. I stress it because Your Honors will probably read the Marshall case along with this case, which is another case that came out of the Second Circuit. And there was great stress laid in that case that a merger without a corporate purpose where the company's funds were used was a violation of 10(b). And I just want to make the distinction here that that did not happen here.

The merger occurred on July 31st, and on August 1st, the next day, as provided by the statute, notice was sent to the fractional, the minority, shareholders. Along with the notice--and this is very important to our case--along with the notice went a ream of material describing the background of the merger, describing the merger, describing the appraisals, including the appraisals; every single bit of relevant information that could possibly be put out was put out. And in fact there is no claim that any of that material was misleading, that it misrepresented anything, that it said that something was only a half-truth or that it failed to disclose anything. There is no claim with reference to this material.

Indeed, the claim itself--in fact, the claim of undervaluation is based on the figures disclosed by the information we gave them which is, in passing, strange in a 10b-5 non-disclosure case.

We moved to dismiss in the District Court. The District Court, it seemed to us--and of course we are prejudiced--it seemed to us, took a realistic and rather straightforward view of this case. It said there is no deception in the case. It is a 10b-5 case. There is no claim of non-disclosure. Therefore, it is not a 10b-5 case, and dismissed it.

To the claim that there was no corporate purpose, it said you do not need a corporate purpose in Delaware.

To the claim that there should have been prior notice, it said the statute provides for post-merger notice. And I might just say there that that we think is the relevant time because that is the time the minority stockholder needs the information in order to make an investment decision. He wants to know at that time, Do I accept $150 or do I seek the appraisal rights which I have under the Delaware statute? So, we say and Judge Brieant in the lower court said that this was proper and adequate notice under the statute.

MR. CHIEF JUSTICE BURGER: I think we will resume there at 10:00 o'clock in the morning, Mr. Glendon.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned until the following day, Wednesday, January 19, 1977, at 10:00 o'clock a.m.]