The Burger Court Opinion Writing Database

Dirks v. SEC

463 U.S. 646 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1983

Re: No. 82-276, Dirks v. Sec

Dear Lewis:

I join.

Regards,

WEB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 4, 1983

Re: No. 82-276 -- Dirks v. SEC

Dear Thurgood and Harry,

We three are in dissent in the above. Harry, will you undertake the dissent?

Sincerely,

Bill

Justice Marshall
Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 27, 1983

No. 82-276

Dirks v. SEC

Dear Harry,

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1983

Re: 82-276 - Dirks v. SEC

Dear Lewis,

Please join me.

Sincerely yours,

Justice Powell

cc: The Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1983

Re: No. 82-276-Dirks v. Securities and Exchange Commission

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 28, 1983

Re: No. 82-276-Dirks v. Securities and Exchange Commission

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 4, 1983

Re: No. 82-276 - Dirks v. SEC

Dear Bill:

I shall be glad to undertake the dissent in this case.

Sincerely,

Harry

Justice Brennan

cc: Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1983

Re: No. 82-276 - Dirks v. SEC

Dear Lewis:

I shall try my hand at a dissent in this case in due course.

Sincerely,

Harry

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 24, 1983

Re: No. 82-276 - Dirks v. SEC

Dear Lewis:

Because of the time pressure, I give you herewith a xerox copy of the dissenting opinion I have formulated in this case.

Sincerely,

Harry

Justice Powell

Received at 4 PM mon
then
two
mon
after
9
circulat
Dirks
Here we
are at
end of
Term!

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JUN 2 5 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-276

RAYMOND L. DIRKS, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[June ——, 1983]

JUSTICE BLACKMUN, dissenting.

The Court today takes still another step to limit the protections provided investors by § 10(b) of the Securities Exchange Act of 1934.[1] See *Chiarella* v. *United States*, 445 U. S. 222, 246 (1980) (dissenting opinion). The device employed in this case engrafts a special motivational requirement on the fiduciary duty doctrine. This innovation excuses a knowing and intentional violation of an insider's duty to shareholders if the insider does not act from a motive of personal gain. Even on the extraordinary facts of this case, such an innovation is not justified.

---

[1] See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977); *Chiarella* v. *United States*, 445 U. S. 222 (1980); *Aaron* v. *SEC*, 446 U. S. 680 (1980). This trend frustrates the congressional intent that the securities laws be interpreted flexibly to protect investors, see *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963), and to regulate deceptive practices "detrimental to the interests of the investor," S. Rep. No. 792, 73d Cong., 2d Sess., 18 (1934); see H. R. Rep. No. 1383, 73d Cong., 2d Sess., 10 (1934). Moreover, the Court continues to refuse to accord to SEC administrative decisions the deference it normally gives to an agency's interpretation of its own statute. See, *e. g.*, *Blum* v. *Bacon*, 457 U. S. 132 (1982).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 28, 1983

Re: No. 82-276 - Dirks v. SEC

Dear Lewis:

In response to the changes made in your third draft, I shall make the following changes in the dissent:

1. The opening paragraph of footnote 6 will be made to read:

> "[6]The Court cites only a footnote in an SEC decision and Professor Brudney to support its rule. Ante, at 15-16. The footnote, however, merely identifies one result the securities laws are intended to prevent. It does not define the nature of the duty itself. See n. 9, infra. Professor Brudney's quoted statement ..."

2. I shall add the following to my footnote 14, immediately following "(1970)" on the fifth line:

> "The Court also seems to embrace a variant of that extreme theory, which postulates that insider trading causes no harm at all to those who purchase from the insider. Ante, at 18, n. 27. Both the theory and its variant sit at the opposite end of the theoretical spectrum from the much maligned equality-of-information theory, and have never been adopted by Congress or ratified by this Court. See Langevoort, 70 Calif. L. Rev. ..."

Apart from these changes, I am content.

Sincerely,

Harry

Justice Powell

cc: The Conference

pp 1, 5, 10, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 28 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-276

RAYMOND L. DIRKS, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June ——, 1983]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court today takes still another step to limit the protections provided investors by § 10(b) of the Securities Exchange Act of 1934.[1] See *Chiarella* v. *United States*, 445 U. S. 222, 246 (1980) (dissenting opinion). The device employed in this case engrafts a special motivational requirement on the fiduciary duty doctrine. This innovation excuses a knowing and intentional violation of an insider's duty to shareholders if the insider does not act from a motive of personal gain. Even on the extraordinary facts of this case, such an innovation is not justified.

[1] See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977); *Chiarella* v. *United States*, 445 U. S. 222 (1980); *Aaron* v. *SEC*, 446 U. S. 680 (1980). This trend frustrates the congressional intent that the securities laws be interpreted flexibly to protect investors, see *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963), and to regulate deceptive practices "detrimental to the interests of the investor," S. Rep. No. 792, 73d Cong., 2d Sess., 18 (1934); see H. R. Rep. No. 1383, 73d Cong., 2d Sess., 10 (1934). Moreover, the Court continues to refuse to accord to SEC administrative decisions the deference it normally gives to an agency's interpretation of its own statute. See, *e. g.*, *Blum* v. *Bacon*, 457 U. S. 132 (1982).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 2 8 1983

Recirculated: _____

MAY 2 8 1983

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-276

RAYMOND L. DIRKS, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[June ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Raymond Dirks received material nonpublic information from "insiders" of a corporation with which he had no connection. He disclosed this information to investors who relied on it in trading in the shares of the corporation. The question is whether Dirks violated the antifraud provisions of the federal securities laws by this disclosure.

I

In 1973, Dirks was an officer of a New York broker-dealer firm who specialized in providing investment analysis of insurance company securities to institutional investors.[1] On March 6, Dirks received information from Ronald Secrist, a former officer of Equity Funding of America. Secrist alleged that the assets of Equity Funding, a diversified corporation primarily engaged in selling life insurance and mutual funds, were vastly overstated as the result of fraudulent corporate practices. Secrist also stated that various regula-

[1] The facts stated here are taken from more detailed statements set forth by the administrative law judge, App. 176–180, 225–247; the opinion of the Securities and Exchange Commission, 21 S.E.C. Docket 1401, 1402–1406 (1981); and the opinion of Judge Wright in the Court of Appeals, 220 U. S. App. D.C. 309, 314–318, 681 F. 2d 824, 829–833 (1982).

June 9, 1983

82-276 Dirks v. SEC

Dear Sandra:

I have now had an opportunity to get back to Dirks in light of your letter. As you know, with your approval and mine, Gary and Jim Browning have worked out some changes that I have reviewed this morning.

They have done well. It seems to me that your suggestions have been incorporated into the opinion clearly, and that they "fit" very well.

In a more fundamental sense, I am grateful to you for suggestions that I think are quite constructive.

I will need to keep the other "joins", but cannot believe there will be any objection.

Sincerely,

Justice O'Connor

lfp/ss

June 9, 1983

82-276 Dirks v. SEC

Dear Byron, Bill and John:

As you have been good enough to join me in this case, I write this note to say that the only changes in this second draft (other than stylistic) have resulted from my conversations with Sandra.

The reasoning of the opinion is not changed. Sandra thought my reference to the "purpose" of the insider (see pp. 15-17 of first draft) was unnecessarily subjective. She prefers using the more objective term: "benefit" to the insider, direct or indirect (see pp. 17, 18 second draft).

As the Chief has not voted, Sandra's vote will assure a Court. I also believe the changes are constructive.

I am circulating the second draft, and will assume your approval unless I hear to the contrary.

Sincerely,

Justice White
Justice Rehnquist
Justice Stevens

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

Changes: 1-2, 5, 7-8, 11, 14-17

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 9 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-276

RAYMOND L. DIRKS, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[June ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Raymond Dirks received material nonpublic information from "insiders" of a corporation with which he had no connection. He disclosed this information to investors who relied on it in trading in the shares of the corporation. The question is whether Dirks violated the antifraud provisions of the federal securities laws by this disclosure.

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JUN 27 1983

Changes: 1, 4-6, 8-11, 13-20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 27 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-276

RAYMOND L. DIRKS, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[June ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Raymond Dirks received material nonpublic information from "insiders" of a corporation with which he had no connection. He disclosed this information to investors who relied on it in trading in the shares of the corporation. The question is whether Dirks violated the antifraud provisions of the federal securities laws by this disclosure.

I

In 1973, Dirks was an officer of a New York broker-dealer firm who specialized in providing investment analysis of insurance company securities to institutional investors.[1] On March 6, Dirks received information from Ronald Secrist, a former officer of Equity Funding of America. Secrist alleged that the assets of Equity Funding, a diversified corporation primarily engaged in selling life insurance and mutual funds, were vastly overstated as the result of fraudulent corporate practices. Secrist also stated that various regula-

[1] The facts stated here are taken from more detailed statements set forth by the administrative law judge, App. 176–180, 225–247; the opinion of the Securities and Exchange Commission, 21 S. E. C. Docket 1401, 1402–1406 (1981); and the opinion of Judge Wright in the Court of Appeals, 220 U. S. App. D. C. 309, 314–318, 681 F. 2d 824, 829–833 (1982).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

Changes: 1, 20

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 29 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-276

RAYMOND L. DIRKS, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[June ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Raymond Dirks received material nonpublic information from "insiders" of a corporation with which he had no connection. He disclosed this information to investors who relied on it in trading in the shares of the corporation. The question is whether Dirks violated the antifraud provisions of the federal securities laws by this disclosure.

I

In 1973, Dirks was an officer of a New York broker-dealer firm who specialized in providing investment analysis of insurance company securities to institutional investors.[1] On March 6, Dirks received information from Ronald Secrist, a former officer of Equity Funding of America. Secrist alleged that the assets of Equity Funding, a diversified corporation primarily engaged in selling life insurance and mutual funds, were vastly overstated as the result of fraudulent corporate practices. Secrist also stated that various regula-

[1] The facts stated here are taken from more detailed statements set forth by the administrative law judge, App. 176–180, 225–247; the opinion of the Securities and Exchange Commission, 21 S. E. C. Docket 1401, 1402–1406 (1981); and the opinion of Judge Wright in the Court of Appeals, 220 U. S. App. D. C. 309, 314–318, 681 F. 2d 824, 829–833 (1982).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1983

Re: No. 82-276 Dirks v. SEC

Dear Lewis:

Please join me.

Sincerely,

WHR

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1983

Re: 82-276 - Dirks v. Securities & Exchange Commission

Dear Lewis:

Please join me.

Respectfully,

JPS

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 28, 1983

Re: 82-276 - Dirks v. Securities & Exchange Commission

Dear Lewis:

The last paragraph in your footnote 27 which begins on page 19 and runs over onto page 20 troubles me somewhat. I think there may be a causal connection between insider trading and outsiders' losses in some situations. I wonder, therefore, if you really need that last paragraph and would consider either omitting it, or perhaps just omitting the reference to the Sixth Circuit case.

It seems to me that you have effectively answered Harry in the earlier portions of that footnote.

Respectfully,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

File

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Helpful suggestions. I think we can make changes.

June 7, 1983

No. 82-276 Dirks v. SEC

Dear Lewis,

I am sorry that I have not gotten back to you earlier on this case. I assure you that my delay was occasioned more by the chaos of May than by anything in your draft!

Let me say that I think that you have done a fine job with your opinion, and with some changes that I do not think will affect your basic approach, I am prepared to join it even though I originally preferred another approach. My view was that irrespective of the limits of any proscription on insider and tippee trading, the information tipped by Secrist and Dirks in this case could not have come within that proscription because it was information concerning a crime, rather than a legitimate corporate matter. Although the nature of the information might not matter to the affected shareholders, I had thought that when the social and economic good was weighed against possible shareholder harm, the balance tipped in favor of dissemination of evidence of a crime. I was very concerned not to send any signal that would discourage future "detective" work on the part of those interested in uncovering corporate fraud.

I agree

As I understand your view, it focuses on the purpose of the insider in communicating to the tippee, and not on the character of the information that is communicated. Unless the insider acts from an "improper purpose" in communicating the information, the insider does not breach its fiduciary duty to the shareholders of the corporation. If the tippee does not have some independent fiduciary duty not to trade, then he is insulated from liability for further tipping or trading because he cannot be an after-the-fact participant in the insider's breach of duty. The key is the motivation of the insider, and from p. 15 of your draft, it appears that motivation is measured by the subjective good faith of the insider.

True

I have two primary difficulties with the approach as it now stands. First, I am concerned that the opinion not be read to preclude our later holding that information about a crime cannot be inside information. I realize that your

footnote 23 may be read as reserving this question, but I would feel more comfortable with an explicit statement to this effect, appended to the end of footnote 23. Perhaps you could add something like: "We do not decide whether the information communicated was 'material,' or whether information concerning corporate crime is properly characterized as 'inside information.' " This will make clear that the Court does not hold that there is insider and tippee liability depending on purpose even if the information communicated concerns crime.

My second difficulty goes to the "purpose" test that you set out at pp. 14-16 of the draft. As it now reads, the fact-finder is required to determine the subjective state of mind of the insider, and liability may be imposed only when the insider has an improper purpose, or the tippee has some independent duty not to trade. Although there may be rules of thumb, e.g., the one you suggest concerning relationship between the parties, that are used to help determine subjective intent, it nevertheless appears that the focus of the inquiry is subjective motivation. Your focus on subjective purpose is consistent with, and very much like, your approach in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), although that opinion is not cited in your draft.

The subjective purpose requirement is an inherently difficult determination to make. It requires that the tippee "predict" what is going on in the mind of his tipper. Although the SEC currently requires a tippee to make an assessment about whether information is material, that assessment requires only that the tippee determine whether "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Industries v. Northway, Inc., 426 U.S. 438, 449 (1976). I would imagine that most tippees have a better "feel" for whether a shareholder would consider information important than whether an insider subjectively possesses a prohibited purpose. In addition, the purpose test might prohibit the dissemination of the information in this case. If Secrist's motivation was proven to be a desire for vengence against Equity Funding, and if the SEC determined that this was a prohibited purpose, Secrist and Dirks would violate the securities laws.

It seems that the "purpose" discussion may be omitted without altering your basic approach. Then the focus would be on whether Secrist breached a fiduciary duty. Rather than offering a general discussion of purpose, one could say

that Secrist simply owed no duty not to relate information concerning fraud (even if the information were considered "inside information" under TSC). Since Secrist could not owe a fiduciary duty, there was no duty for Dirks to inherit.

This is easy way to decide this case

If you want to retain a broader approach, it might be better to focus on benefit, rather than purpose. That is, you suggest that if the insider benefits from his tipping, that may show improper purpose. As I read Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), In re Cady, Roberts & Co., 40 S.E.C. 907 (1961), and In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 S.E.C. 933 (1968), the focus is more on whether the insider derives a direct or indirect benefit from his disclosure, and that benefit is primarily of a pecuniary nature. An emphasis on benefit differs from your approach only insofar as it establishes a more objective indicia of liability. If, as a factual matter, the insider did not benefit from his disclosure, then I am not inclined to be concerned with a further inquiry into his motivation. I am not sure about what will be gained from an inquiry into intent, but from my past experience on the bench, I know that a great deal of time will be lost!

I do

True

I am interested to know your thoughts on these points.

Sincerely,

Sandra

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 10, 1983

Re: No. 82-276 Dirks v. SEC

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference