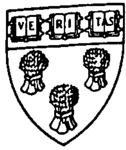

HARVARD LAW SCHOOL
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#82-276
Dirks

July 8, 1983

The Honorable Harry A. Blackmun
Justice, Supreme Court of
the United States
One First Street, N.E.
Washington, D.C. 20543

Dear Justice Blackmun:

I am writing to tell you that I thoroughly enjoyed your opinion in the Dirks case and to thank you for making plain that the devil can cite Scripture for his purpose.

The Dirks decision is unquestionably another step in the steady narrowing by the Court of the investor protection contemplated by the securities laws. As you point out, it is very hard to understand why, if (as all apparently concede) Secrist could not trade on material information for himself or for others, he should be allowed to give that information to a selected recipient to use for trades for the recipient's benefit.

Analogizing the Dirks problem to the problems raised when corporate executives make statements to securities analysts was unnecessary -- except to erode investor protection against insider trading. Pre-Dirks case law left little doubt that if a corporate executive singled out a particular analyst to give him information as significant (i.e., as material) as the item of information which Secrist gave to Dirks and the analyst thereafter traded before disclosing it, both would be in violation of 10b-5. For information as significant as that here involved a corporate executive should be required to make a "public" announcement rather than to give it to a single analyst, however innocently. Generally, corporate executives who are honestly available to inquiring analysts give solitary inquirers information which constitutes only a piece of a larger mosaic; the honest analyst's talent and diligence may provide the other pieces to make the whole mosaic "material" and legitimately advantageous. The problem created by that process is how to fashion a rule that permits such information to flow from insiders but still interdicts the transmission to (and knowing use by) a single analyst of a significant or "material" item of information. That problem has nothing to do with the Dirks issue. To use the Dirks fact situation to fashion a rule making the propriety of the analyst's trading turn on the financially self-aggrandizing motives of the tipper is to gut investor protection against insider trading by reciprocity of one sort or another.

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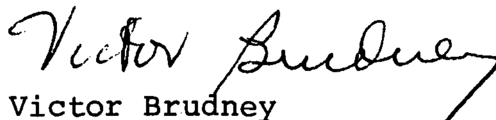
As you suggest, in order to avoid the difficulty of determining when information is material, the Court requires (a) inquiry into the motives of the tipper and (b) decision as to which benefits to the tipper (e.g., expectation of favors to come, psychological rewards, or cash on the barrelhead) dominate his action. The difficulties of such a process are certainly not less than those it purports to avoid. And no less important, the rule apparently announced rests on a wrong principle -- i.e., on a requirement of breach of fiduciary duty. The citation to the Morgan case in footnote 22 (especially in light of the import of footnote 14) emphasizes that the applicability of a uniform federal rule will depend on whether the tipper breaches a fiduciary duty as defined by local law -- unless Justice Powell thinks the securities statutes invite federal courts to create a kind of federal equity jurisprudence or common law!! Nothing in the language or history of those statutes suggests, and their policy is certainly at odds with, making the propriety of insider or tippee behavior turn on financially self-aggrandizing motives or on variations in local fiduciary law.

Please forgive my long ramble. It is depressing to watch the Court undoing what Congress and the courts wrought in the past. But it is encouraging to read dissents like yours. They keep the flame burning.

Sincerely,



Victor Brudney

VB:amk

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