

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

CHAMBERS OF
THE CHIEF JUSTICE

January 4, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

As you may recall from Conference, I was prepared to affirm the conviction and file a dissent along the lines of Dean Keeton's observation that "any time information is acquired by an illegal act it would seem that there should be a duty to disclose the information." Keeton, *Fraud*, 15 *Tex. L. Rev.* 1, 26 (1936). Here, Chiarella, literally in the shadow of the warning signs in the print shop, acquired private information by illegal means -- misappropriating nonpublic information entrusted in him in the utmost confidence by the acquiring company. I strongly believe this illegal conduct imposed upon him a duty to disclose or to abstain from trading on the information; his failure to abide by the disclose-or-abstain rule violated Rule 10-b-5.

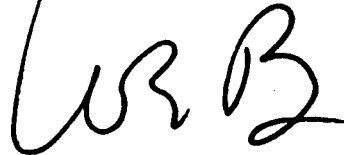
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Your thoughtful opinion now shifts the emphasis and basis of reversal. Since (1) the mere possession of non-public information is not sufficient to create a duty to disclose, and (2) the "Keeton theory" was not submitted to the jury, you have made a good case for reversal. Nonetheless, I am unable to join your opinion as now drafted. At page 7, the opinion suggests that liability for nondisclosure must be "predicated upon a . . . duty to disclose arising from a relationship of trust and confidence between the parties to a transaction." Similarly, at page 9, the opinion speaks of "a relationship between petitioner and the sellers that could give rise to a duty." My concern obviously is that this language can be read to undermine the notion that an absolute duty to disclose-or-abstain arises from the very act of misappropriating nonpublic information. Your language gives me pause. Possibly we can work out an accommodation.

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Your focus on what was not submitted to the jury was not -- at least in my recall -- explored in any depth in Conference. I will try to put together some specific language that would clear this up for me.

I could not accept any idea that "blue collar" fraud is less culpable than a "white collar" variety. I do not read you as suggesting anything like that but it should be affirmatively negated if possible.

More later.

Regards,

A handwritten signature in cursive script, appearing to read 'WRB', written in dark ink.

Mr. Justice Powell

Copies to the Conference