OPINION MEMORANDUM

No. 78-1202

Chiarella

v.

United States

I have studied Mr. Justice Powell's circulated draft opinion in this case. In accordance with your vote at Conference I recommend that you await the dissent.

Justice Powell's opinion more or less follows the expected path. It treats the duty of disclosure as arising of necessity out of some personal relationship with the seller, it finds no such personal relationship here, and it holds that the

possession of material non-public information is not enough to create a disclose-or-abstain responsibility. I think the opinion reads too narrowly the Cady, Roberts line of cases, gives a narrowing interpretation to Affiliated Ute Citizens, and places too much emphasis on analogy to the tender offeror. It also, sub rosa, lends added force to the trend of past decisions -- in most of which you are in dissent -- that press toward the conclusion that Rule 10b-5 is bound by the scope of fraud at common law.

In Part IV the opinion does raise a new consideration. In its brief and on oral argument the Government pressed the theory that Chiarella's breach of duty to the tender offeror could supply a basis for a finding of fraud independent of any fraud against the seller. In Part IV this argument is rejected on the ground that the DC's instructions to the jury will not bear the theory.

I have photocopied the relevant sections of the court's charge and appended them to this memorandum. I am inclined to think that Justice Powell's reading of them is not inaccurate. They generally stress failure to disclose material non-public information as sufficient to establish "deceit" within Rule 10b-5. The instructions are not completely devoid of mention of the breach of confidentiality. At one point the court says: "Here Chiarella is charged with obtaining secret information about imminent mergers or imminent tender offers where big companies were about to take over smaller, target corporations and that he then used that information to buy the stock of the targets without disclosing that information." Record, 685.

The court also charged the jury, at the Government's request, that "my charge is to be taken as a whole; you are not to concentrate on any part of it to the exclusion of any other part, because at some points I discussed an aspect and at another point I discussed something else." Record, 714. But the general impression one gets from reading the charge is that failure to disclose material nonpublic information is enough.

This charge, however, is not exactly the theory which the prosecution sought to have put before the jury. I have also photocopied the relevant portion of the Government's request to charge, which goes into more detail about the manner in which the defendant came into possession of the non-public information. If you are interested, I can try to obtain the summations (I am not sure they have been filed here) to see how the case was argued to the jury.

Given the state of the charge that went to the jury, it is probable that any dissent will have to take the position that the breach of a confidential relation is not required to establish a breach of Rule 10b-5. As my bench memorandum indicated, I think that result is supportable, although the confidential relation theory is perhaps the more attractive. If you have doubts about going the full distance that the CA went, then it might be appropriate to concur in the result, with an opinion indicating a) that the Court's interpretation of the duty to disclose is too narrow; and b) that the breach of confidential duty is appropriate, even though the trial court's charge forecloses reliance on it here.

For the moment, however, I would await word from the

dissenting camp.

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