Chris Collins is in big trouble, despite the murkiness of insider trading laws

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Last Wednesday the FBI arrested Rep. Chris Collins, R-N.Y., along with his son and the father of his son's fiancee, on charges of insider trading. The arrest comes on the heels of a federal indictment alleging that Collins provided his family members with insider information on the unpublicized failure of a drug being developed by Innate Immunotherapeutics while he was the firm's largest shareholder and a board member. His son, Cameron Collins, and the father of his son's fiancee, Stephen Zansky, both sold their holdings in the company before the failure went public and share prices plummeted by 92 percent.

While Collins' attorneys have already gotten out front to remind everyone that "even the government does not allege that Congressman Collins traded a single share of Innate Therapeutics stock," such pronouncements will do nothing to help stave off a conviction. (Particularly since there are allegations that Collins only refrained from trading because his stock was held on the Australian Stock Exchange, which was not open when he received the bad news).

Insider trading comes with stiff penalties, which is disconcerting for an area of law desperately in need of clarification, where liability is easy to find and sometimes based on nothing more than a simple conversation between friends or family members. Sometimes ambiguity in the law can be an advantage for defendants. Yet in spite of the manifest need for elucidation, current confusion in securities law doesn't seem to provide an escape hatch for Collins.

Convictions for insider trading are easy to obtain based on the malleable rules employed by prosecutors. This entirely judge-made doctrine, still in search of the ill for its purported cure, originally sprouted from securities fraud prohibitions. The standard for what exactly constitutes "tipper" and "tippee" (in this case, Chris Collins as the tipper, Cameron Collins and Stephen Zansky the tippees) liability is a decidedly low bar. A trade based on "material, non-public information" and a fiduciary breach on the part of the insider is the crux of any insider trading case.

In its major case on the subject, *Dirks v. Securities and Exchange Commission*, the Supreme Court in 1983 decided that the lynchpin in whether a disclosure constitutes such a breach "is whether the insider personally will benefit, directly or indirectly, from his disclosure." That may seem promising for Collins if he did not trade a single share of stock himself, but the last means

of finding liability, “giving insider information to a trading relative or friend” (knowing they will benefit) would likely suffice to ensnare Collins. Providing your son with information allowing him to sell before the public becomes aware of a precipitous drop in value certainly seems to qualify.

The Supreme Court’s lackluster 2016 decision in *Salman v. U.S.* emphasizes the point. Expressly rejecting the contention that the tipper must receive a valuable benefit “in exchange for a gift to family or friends,” the court clarified that “when a tipper gives inside information to a trading relative or friend, the jury can infer that the tipper meant to provide the equivalent of a cash gift. In such situations, the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds.”

As far as Collins is concerned, his fate seems sealed unless the law changes before he cops a plea or sits through a trial. But there is a small possibility that the mens rea (or criminal intent) questions the court has yet to answer may be implicated, particularly in the cases of Collins and Zansky, who received and subsequently traded on the non-public information. Typically, a criminal conviction requires proof of intent, but finding liability for insider trading can explicitly be based on inference (including that an insider gets a valuable “feel-good” benefit from “gifting” information to family or friends).

We have yet to find out exactly what a tippee needs to know to be found guilty of insider trading. Do Collins and Zansky simply need to have been aware that Collins broke confidentiality by sharing inside information? (A low bar.) Or perhaps prosecutors are required to prove that the tippees knew that Collins had both committed a breach and received the requisite personal benefit from that breach? (A much higher standard.) Which requirement is applied may be the difference between a conviction and acquittal.

From the available facts, it seems unlikely that Collins or Zansky lacked the requisite knowledge for a conviction. They both knew that Collins was an insider and that he was providing them with nonpublic, material information. Perhaps an argument could be made that Collins was not gifting nonpublic information to family and friends so much as having a panic attack about a failed drug (meant to treat a form of multiple sclerosis) that was intended to improve the lives of many. In the midst of his panicked response to the soul-crushing news that the drug was a failure, he couldn’t help but vent to friends, family, and several individuals at the annual White House Picnic, where he was in attendance last summer when he received the bad news.

Styled this way, there is room for a tenuous (under current legal standards) argument that Collins and Zansky did not have the requisite knowledge to be guilty of insider trading on a tippee liability theory. Maybe they didn’t know that Collins received a personal benefit for sharing the information (because maybe Collins didn’t receive a benefit, maybe he was just freaking out). While the Court said in its recent *Salman* decision that gifting information to a trading relative or friend could be read as providing something of value to the tipper, in that case the insider acknowledged that he gifted information to his brother to “benefit” and “provide for” him and all his needs. Thus far, we know of no similar statement by Collins.

Aside from the particulars of Collins’ case, the knowledge question remains critical, particularly when it comes to recipients of information that are further removed from the insider. It’s a point the Supreme Court should take the next available opportunity to clarify. Whatever the value of such laws in the first place, it should not be that a standard lacking clear contours and

serious *mens rea* requirements can be used by federal prosecutors to send people to prison for an extended period of time.

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