BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Berkeley Center for Law, Business and the Economy

University of California, Berkeley
School of Law
2850 Telegraph Ave, Suite 500
Berkeley, CA 94705-7220

Ph: 510.642.0532 – Fax: 510.643.7095
E-mail: BCLBE@law.berkeley.edu
http://www.law.berkeley.edu/bclbe.htm

The Theory of the SEC's Case Against Leon Cooperman

By Amanda Bradley, J.D. Candidate 2017 | October 25, 2016

On September 21, 2016, the Securities & Exchange Commission filed a complaint alleging Leon G. Cooperman, the billionaire hedge fund manager of Omega Advisors, "generated significant illegal profits" due to insider trading. The trading arose when Cooperman purchased additional securities in Atlas Pipeline Partners, a company in the Omega Advisor portfolio, after receiving information that Atlas intended to sell a large portion of its assets. When Atlas announced the sale, its stock price jumped 31%. The SEC alleges that Cooperman agreed to keep the information confidential, and that by trading on it, he violated insider trading laws.

There are two theories of insider trading. The first, "classical" theory, prohibits a corporate insider from trading on the basis of material, nonpublic information without disclosing the information prior to trading. As an insider, the trader has a "duty of trust or confidence" to the shareholders, and must not use their position within the company to trade on confidential information to which the shareholders have no access. Because Leon Cooperman was simply an investor in Atlas, and not a corporate insider, this theory does not apply to the SEC's case.

Instead, the SEC's theory arises from the "misappropriation" theory of insider trading. This broader theory of liability holds that a person violates insider trading laws when they use confidential information for personal gain in breach of a duty owed to the *source* of the information. Instead of being a corporate insider with a duty to shareholders, a duty exists whenever a corporate outsider agrees to maintain the information in confidence, and instead, trades on the information.

The SEC has had mixed results under the misappropriation theory. The Commission successfully enforced an insider trading violation against a partner at a law firm who had access to confidential information about a client's potential tender offer for a publicly traded company. The attorney was not party to the transaction, but the Supreme Court found his trading to be in breach of the duty owed the source of the information (the firm's client).

However, most recently, the SEC did not fare as well against famed entrepreneur Mark Cuban. In a fact pattern similar to Mr. Cooperman's, the SEC attempted to prove that Mr. Cuban sold his stake in an internet company after learning that the CEO was planning on consummating a deal that would likely hurt the company's stock price. The move saved Mr. Cuban $750,000 in losses. The case against Mr. Cuban went before a jury, who found that the SEC had failed to prove that Mr. Cuban agreed to keep the information confidential.

Like Mr. Cuban, Mr. Cooperman has pledged to fight the case, saying he was under no obligation to keep the information confidential. The SEC, hoping to avoid another loss, intends to prove that Mr. Cooperman was fully aware of his confidentiality obligations.