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DUTY BOUND: A COMPARISON OF INSIDER TRADING LAW IN THE UNITED STATES AND THE EUROPEAN UNION

The SEC's victory in SEC v. Panuwat*, its first-ever enforcement action for "shadow trading" — a novel theory of insider trading liability premised on an individual's use of material non-public information about one company to trade in the stock of a separate company — highlights the reach and unpredictability of insider trading law in the United States. While ostensibly grounded in Section 10(b) of the Securities and Exchange Act of 1934, insider trading law has been established and developed by courts, leaving a body of law both very expansive and uncertain. In sharp contrast to this common-law approach to insider trading, the European Union has adopted comprehensive legislation that defines and prohibits insider trading and the disclosure of material non-public information. In this article, the authors compare insider trading regimes in the U.S. and the EU and discuss how the EU's approach may serve as a model for federal legislation in the U.S.*

By Jonathan S. Sack and Christian B. Ronald *

On April 5, 2024, a jury found that Matthew Panuwat had engaged in illegal insider trading. Panuwat was accused of using highly confidential information about an impending acquisition of his company, Medivation, Inc., not to trade in securities of Medivation, but to trade in the securities of a *different* company in the same sector of the biopharmaceutical industry. *Panuwat* was the SEC's first-ever enforcement action for "shadow trading," a novel theory of insider trading liability premised on an individual's use of material non-public information ("MNPI") about one company to trade in the stock of a separate company.[1] The SEC has maintained that "there was nothing novel" about *Panuwat*, and that the case involved "insider trading, pure and simple."[2] But practitioners and commentators generally disagree, arguing that the case represents an unprecedented

[1] The term "shadow trading" was coined in a July 2021 paper in *The Accounting Review*, which argued that this type of trading has long been used by company insiders to avoid regulatory scrutiny. Mihir N. Mehta et al., *Shadow Trading*, 96 Acct. Rev. 367, 367 (July 2021).

[2] Statement of Gurbir S. Grewal, Director, Division of Enforcement, Sec. Exch. Comm'n (Apr. 5, 2024), https://www.sec.gov/newsroom/speeches-statements/grewal-statement-040524.

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expansion of insider trading liability that lacks a meaningful limiting principle.[3] In denying the defendant's post-trial motions, the district court also recognized that the case was "unusual in terms of the underlying circumstances that gave rise to the SEC's suit," even though it ultimately held that the SEC's theory of the case was sound.[4]

The theory of liability in *Panuwat* is yet another reminder that insider trading law in the United States is unpredictable.[5] While ostensibly grounded in Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), insider trading law, at its core, is based on doctrines formulated by courts. Chief among those doctrines is the rule that, to be liable for insider trading, a defendant's use of MNPI must constitute a breach of duty — a purely common-law concept borrowed from state tort and corporate law. This duty-based approach has been used by courts, the SEC, and the DOJ to expand the scope of insider trading liability over the past four decades, and it has led to uncertainty surrounding precisely what types of trading activity are prohibited.[6]

In sharp contrast to the common-law approach to insider trading in the United States, the European Union has adopted a comprehensive statutory scheme. The EU's Market Abuse Regulation, unlike Section 10(b) of the Exchange Act, specifically defines and prohibits insider trading. The Market Abuse Regulation's definition of insider trading, moreover, dispenses with the duty-based approach followed in the U.S. in favor of a regime that looks to whether an individual possessed inside information at the time of trading — while carving out certain legitimate market activity from the scope of liability.

In this article, we compare the different approaches taken with respect to insider trading in the U.S. and EU, with a specific focus on the breach of duty element that has become so central to U.S. law. While the EU's statutory approach to insider trading has resulted in a broader scope of liability than currently exists in the U.S., the EU has also avoided some of the uncertainty that flows from a common-law regime. While many calls have been made for comprehensive federal legislation, novel and controversial theories of liability like the one in *Panuwat* lend support to those who seek clarity from Congress. The Market Abuse Regulation is

[3] *See, e.g.*, J.W. Verret & Greg Lawrence, *Introduction to* SEC v. Panuwat*: Understanding "Shadow" Insider Trading*, Harv. L. Sch. Forum on Corp. Governance (Apr. 29, 2024), https://corpgov.law.harvard.edu/2024/04/29/introduction-to-sec-v-panuwat-understanding-shadow-insider-trading/ (arguing that "[i]t is difficult to overstate the expansion *Panuwat* represents for potential liability for insider trading"); Editorial Board, *The SEC's Latest Insider-Trading Theory*, The Wall Street Journal (Feb. 27, 2024) (arguing that "the major problem with [*Panuwat*] is that it writes new insider-trading law by enforcement with no limiting principle"), https://www.wsj.com/articles/sec-insider-trading-civil-trial-matthew-panuwat-medivation-incyte-gary-gensler-572f5cb5; Stephen J. Crimmins, *"Shadow Trading" Becomes Insider Trading*, The CLS Blue Sky Blog (Mar. 28, 2022), https://clsbluesky.law.columbia.edu/2022/03/28/shadow-trading-becomes-insider-trading/ (arguing that *Panuwat* "appears to launch a substantial new insider trading that will substantially expand risk for traders and others, particularly those who focus on a particular industry").

[4] *SEC v. Panuwat*, No. 21-cv-06322-WHO, 2024 WL 4602708, at *17–18 (N.D. Cal. Sept. 9, 2024).

[5] For another recent example of unpredictability in the law of insider trading, *see* Donald C. Langevoort, *Watching Insider Trading Law Wobble:* Obus, Newman, Salman, *Two* Martomas, *and a Blaszczak*, 89 Fordham L. Rev. 507, 507–08, 528 (2020) (observing that "[n]o subject in insider trading law has wobbled more than the standards for tipper-tippee liability," and lamenting "the unnecessary complications some courts have caused").

[6] Peter J. Henning, *Making Up Insider Trading Law As You Go*, 56 Wash. U. J.L. & Pol'y 101, 103 (2018) ("The defining principle of insider trading law seems to be that you make it up as you go, but, if you don't like the outcome in a particular case, just do your best to make sure the law drifts back to the way you wanted it in the first place — a common law crime if there ever was one."); Roberta S. Karmel, *The Law of Insider Trading Lacks Needed Definition*, 68 SMU L. Rev. 757, 757 (2015) ("[I]nsider trading is not defined in the federal securities laws. It is, essentially, a common law crime.").

proof that such legislation is possible, and Congress could, if it so chose, act on its authority to define insider trading, instead of leaving that responsibility to the other branches of government.

THE DEVELOPMENT OF INSIDER TRADING LAW IN THE UNITED STATES

For the most part, insider trading cases in the U.S. have been brought pursuant to Section 10(b) of the Exchange Act, which makes it unlawful "[t]o use or employ . . . any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security."[7] Based on this provision, the SEC promulgated Rule 10b-5, which, among other things, makes it unlawful for any person "[t]o employ any device, scheme, or artifice to defraud" or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[8]

Because the language of Section 10(b) and Rule 10b-5 is so broad and ill-defined (the Exchange Act gives no guidance as to what constitutes a "manipulative or deceptive device or contrivance"), the substance and contours of U.S. insider trading law have largely been decided by federal courts.[9] The current duty-based framework for insider trading liability traces back to the Supreme Court's 1980 decision in *Chiarella v. United States*.[10]

The "Classical Theory" of Insider Trading

In *Chiarella*, the defendant was an employee of a financial printer, which published announcements of corporate tender offers. The defendant was convicted of insider trading after he learned of a planned tender offer (from the proofs provided to the financial printer) and bought shares in the target company before the tender offer was announced.[11]

The Supreme Court reversed the printer's conviction on the grounds that he was not an "insider" of the target company, and therefore had not breached a *duty* to the shareholders of that company by purchasing shares of the target company without disclosing his knowledge of the impending tender offer. The Court reasoned that, for a person to be liable under Section 10(b) and Rule 10b-5 based on silence — *i.e.*, the failure to tell a counterparty about MNPI that person has learned — the person must have some sort of duty to disclose the MNPI. *Chiarella* recognized that such a duty exists between corporate insiders and corporate shareholders because of the "relationship of trust and confidence" that exists "between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[12]

Chiarella's duty-based rule was not based on the text of Section 10(b); the Court acknowledged that "Section 10(b) was designed as a catch-all clause to prevent fraudulent practices," and that "neither the legislative history nor the statute itself afford[ed] specific guidance for the resolution of [the] case."[13] Instead, the Court crafted its rule based on general principles of state common law regarding fraud and fraudulent inducement, as well as on general principles of state corporate law.[14]

From *Chiarella* emerged what is now known as the "classical theory" of insider trading: Corporate insiders are prohibited from trading shares of their corporation based on MNPI they learn due to their insider status because that breaches those insiders' duty of trust and confidence owed to their corporation's shareholders.

Chiarella recognized, however, that corporate "outsiders" (like the financial printer in that case) are not generally required to disclose MNPI to their counterparties before trading, because — unlike corporate insiders — they do not owe a duty to all

[7] 15 U.S.C. § 78j(b). Congress has also enacted separate provisions under which insider trading actions have been pursued, such as Section 14(e) of the Exchange Act, which focuses on fraud in the context of tender offers. 15 U.S.C. § 78n(e). The vast majority of insider trading enforcement actions and criminal prosecutions, however, are brought under Section 10(b) and Rule 10b-5. Donald C. Langevoort, *What Were They Thinking? State of Mind Puzzles in Insider Trading* 2 (Georgetown L. Faculty Pubs. & Other Works No. 2496, 2023). This article thus focuses solely on the law that has developed in connection with those provisions.

[8] 17 C.F.R. § 240.10b-5.

[9] Jill E. Fisch, *Constructive Ambiguity and Judicial Development of Insider Trading*, 71 SMU L. Rev. 749, 750 (2018) ("The federal law of insider trading is one of the most prominent examples of judicial lawmaking.").

[10] *Chiarella v. United States*, 445 U.S. 222 (1980).

[11] *Id.* at 224.

[12] *Id.* at 228.

[13] *Id.* at 226.

[14] *Id.* at 227–28 & nn. 9–10 (citing, *inter alia*, RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976); 3 W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 838 (rev. 1975)).

corporate shareholders stemming from their special position within the corporation. *Chiarella* therefore explicitly rejected a "parity-of-information rule," under which individuals would be barred from trading if they possessed *any* MNPI, simply because their knowledge of that information gave them an unfair advantage over less informed buyers and sellers of securities.[15]

The "Misappropriation Theory" of Insider Trading

Chiarella did not answer the question of whether corporate outsiders could *ever* be held liable for insider trading. The answer to that question would not come definitively until 14 years later, in the Supreme Court's decision in *United States v. O'Hagan*.[16]

In *O'Hagan*, the defendant was a partner at a law firm retained to represent a company in connection with a tender offer. While his law firm was representing the tender offeror, and without that client's or the law firm's permission, the defendant purchased call options and stock in the target company, which he then sold at a profit after the tender offer was announced.[17]

Because the defendant in *O'Hagan* was not an insider of the target company, he could not be prosecuted for his pre-tender-offer trading under the classical theory. The Supreme Court upheld the defendant's conviction under Section 10(b) and Rule 10b-5 because, the Court said, he traded on MNPI "in breach of a duty of trust and confidence he owed to his law firm . . . and to its client."[18]

O'Hagan therefore recognized a second theory of insider trading under U.S. law: the "misappropriation" theory. This theory, like the classical theory, still requires the breach of a duty. But instead of the duty running from a corporate insider to corporate shareholders, the duty runs from a corporate *outsider* to the source of the MNPI that the outsider uses to trade in securities. As in *Chiarella*, *O'Hagan* derived the misappropriation theory from state common law, including the traditional principle of agency law that an agent must inform his or her principal before using or disclosing any confidential information to the principal's detriment.[19]

Since *O'Hagan*, the misappropriation theory has commonly been applied to situations in which a corporate outsider has an agreement (sometimes implicit) with the source of the MNPI not to trade on the information or, at a minimum, not to use the information for personal gain. In *United States v. Kosinski*, for instance, the Second Circuit upheld the conviction of a pharmaceutical researcher based on a misappropriation theory when the defendant traded on information he learned while conducting a clinical trial for a publicly traded pharmaceutical company. In that case, the defendant had signed an agreement in which he promised (1) to keep all such information in strict confidence and (2) to notify the company promptly if his shares in the company exceeded a certain threshold.[20]

The misappropriation theory has led to a peculiar paradigm: Companies can, in effect, set the outer boundaries of insider trading liability — for their employees and others in contact with them — by changing the specific wording of policies governing the use of MNPI. In *Panuwat*, for instance, one of the key issues was whether the insider trading policy of the defendant's company expressly prohibited him from using MNPI learned while working at the company to trade in the stock of another company in the same sector.[21]

Instead of a uniform statutory standard for insider trading, the duty-based approach has yielded a system in which liability can turn not on the defendant's own conduct, but on how his or her own employer defines permissible trading activity.[22] The duty-based approach has also led to considerable doctrinal uncertainty, as

[15] *Id.* at 233 (rejecting a "general duty between all participants in market transactions to forgo actions based on material, nonpublic information," and noting that "neither the Congress or the Commission has ever adopted a parity-of-information rule"); *see also* 2 ALAN R. BROMBERG AND LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD § 6:181 (2d ed.) (explaining that federal courts have rejected a theory of insider trading based on "unequal information/unfairness").

[16] *United States v. O'Hagan*, 521 U.S. 642 (1983).

[17] *Id.* at 647–48.

[18] *Id.* at 653.

[19] *Id.* at 654–55 (citing RESTATEMENT (SECOND) OF AGENCY §§ 390, 395 (1958)).

[20] *United States v. Kosinski*, 976 F.3d 135, 140, 146–47 (2d Cir. 2020).

[21] *SEC v. Panuwat*, No. 21 Civ. 6322 (WHO), 2023 WL 9375861, at *10–11 (N.D. Cal. Nov. 20, 2023).

[22] Geeyoung Min, *Strategic Compliance*, 57 U.C. Davis L. Rev. 415, 428–30 (2023) (surveying the insider trading policies used by S&P 500 companies and observing how the contours of those policies dictate whether employees have violated federal law).

courts are left searching for common-law hooks on which to hang liability — often drawn from ancient and generic principles of state law — instead of being guided by the text of a federal statute.[23]

INSIDER DEALING IN THE EUROPEAN UNION

The European Union has taken a markedly different approach to insider trading. In the EU, insider trading (referred to as "insider dealing") is specifically prohibited by the 2014 Market Abuse Regulation ("MAR"), which supplanted the previous 2003 Market Abuse Directive ("MAD").[24]

Unlike Section 10(b) of the Exchange Act, MAR expressly prohibits insider dealing, which occurs whenever a person "possesses inside information and uses that information" to buy or sell "financial instruments to which that information relates."[25] Although MAR limits the definition of insider dealing to include only certain types of persons that possess inside information, that list is broad, and includes anyone "having access to the [inside] information through the exercise of an employment, profession or duties."[26] It also includes "any person who possesses inside information under circumstances . . . where that person knows or ought to know that it is inside information."[27]

MAR defines "inside information" as information that (1) is "precise"; (2) "has not been made public"; (3) relates, directly or indirectly, "to one or more issuers of financial instruments"; and (4) "if it were made public, would be likely to have a significant effect on the prices of those financial instruments" or derivative financial instruments.[28] MAR further states that information is "precise" if it (1) indicates that an event has occurred, or that the event "may reasonably be expected to occur" and (2) the information is specific enough to allow a conclusion to be drawn with respect to that event or potential event and the price of the relevant financial instruments.[29]

In addition to expressly addressing insider dealing, MAR also prohibits the "unlawful disclosure of inside information," which occurs whenever "a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession, or duties."[30]

Despite MAR's broad definition of insider dealing and unlawful disclosure, it specifically carves out several categories of legitimate activity from liability. For instance, Article 9 of MAR provides that, even if a person possesses inside information at the time he or she trades, those trades do not constitute insider dealing if (1) they were made pursuant to an agreement entered into before the person obtained the inside information or (2) they were carried out to satisfy a legal or regulatory obligation that arose before the person obtained inside information.[31] Article 9 further provides that a person's

[23] Thomas L. Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 Hastings L.J. 881, 913–14 (2010) ("Without a statutory clarification the courts are left to fashion the common law of Rule 10b-5 as best they can within the parameters of section 10(b)."). A good example of this common-law decision-making process is the district court's summary judgment decision in *Panuwat*. In addition to finding that a reasonable jury could find that Panuwat violated his employer's insider trading policy, the district court also held that, even in the absence of such a policy, the jury could still find that Panuwat breached his duty to his employer to keep all information learned during his employment confidential. The court teased this duty out of an employee's inherent "duty to his company in traditional principles of agency law." *Panuwat*, 2023 WL 9375861, at *12 (citing, *inter alia*, RESTATEMENT (SECOND) OF AGENCY § 395 (1958)).

[24] Regulation (EU) No. 596/2014 ("MAR"), preamble §§ 3–4, 7. The substantive insider trading provisions of MAR and MAD are largely the same. The primary difference is how those laws are enforced in EU member countries. While MAD directed member countries to adopt certain prohibitions on insider trading, MAR *supersedes* any contrary country-level laws on insider trading. The goal of MAR was thus to achieve a uniform law of insider trading across the EU. 18 DONALD C. LANGEVOORT, INSIDER TRADING REGULATION, ENFORCEMENT, AND PREVENTION § 14:4 (Apr. 2024 ed.); Franklin A. Gevurtz, *The Road Not Taken: A Comparison of the E.U. and U.S. Insider Trading Prohibitions*, 56 Wash. U. J.L. & Pol'y 31, 36 (2018).

[25] MAR, arts. 8(1), 14(a).

[26] MAR, art. 8(4)(c).

[27] MAR, art. 8(4).

[28] MAR, art. 7(1)(a).

[29] MAR, art. 7(2).

[30] MAR, art. 10(1).

[31] MAR, art. 9(3)(a)–(b). This carve-out from liability bears some similarities to the affirmative defense to insider trading created by the SEC in Rule 10b5-1(c), which exempts from liability trading activity that is carried out pursuant to a plan entered into before a person becomes aware of MNPI. 17 C.F.R. § 240.10b5-1(c).

use of his or her "own knowledge" of a future intent to trade does not, in and of itself, constitute insider dealing.[32] And as to unlawful disclosure, Article 21 of MAR generally permits the disclosure of inside information "for the purpose of journalism or other form of expression in the media," so long as (1) the individuals involved do not profit from the disclosure and (2) the disclosure is not for the purpose of misleading the market.[33]

Three notable aspects of the EU's approach to insider dealing differ from insider trading law in the United States. First, EU law has no explicit requirement that a person breach a duty to be held liable for insider trading. Instead, individuals are generally liable for insider trading whenever they *possess* inside information and use that information to trade (or disclose it outside the ordinary course of business). The scope of insider trading liability under EU law is therefore generally broader than under U.S. law, and largely embodies the "parity-of-information rule" rejected by the Supreme Court in *Chiarella*.[34]

Second, notwithstanding this broad scope of liability, MAR specifically carves out from the definition of insider dealing certain types of legitimate market activity, such as trading to satisfy a legal obligation or agreement arising before a person came into possession of the inside information.[35]

Third, the concept of "precise" information is important in the EU in a way that it is not in the U.S. In theory, U.S. courts should consider the preciseness of information when assessing materiality; if inside information is not "precise," such as an inconclusive rumor about a company's potential activity, then it is less likely to be material.[36] But "preciseness" is not, in and of itself, an element of insider trading under U.S. law. Cases in the EU have therefore paid special attention to the "precise" information requirement in a way that courts in the United States have not.[37]

A U.S./EU COMPARISON – *CARPENTER* AND THE *DAILY MAIL* CASE

To see how the differing approaches to insider trading in the U.S. and the EU play out in practice, it is useful to look at two cases with very similar facts: *United States v. Carpenter*, a 1986 decision from the Second Circuit applying the misappropriation theory, and *Mr. A. v. Financial Markets Authority*, a 2022 decision from the European Court of Justice.[38] Both cases involved journalists who shared information about an upcoming financial column in their respective publications with investors, who in turn used that information to trade.[39]

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[32] MAR, art. 9(5).

[33] MAR, art. 21.

[34] LANGEVOORT, *supra* n.23, § 14:4.

[35] Merrit B. Fox et al., *Informed Trading and Its Regulation*, 43 J. Corp. L. 817, 885–86 (2018) (observing that, "[w]hile, on the surface, [MAR, and its predecessor MAD,] looks like it calls for a 'parity of information' approach . . . , a closer look reveals that, in fact, excepts from its prohibitions a variety of kinds of informed trading").

[36] *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (holding that "whether facts are material within Rule 10b-5 when the facts relate to a particular event" depends upon, among other things, "the indicated probability that the event will occur").

[37] *See, e.g.*, *Marcus Geltl v. Daimler AG*, Case C-19/11 (CJEU 2012) (European Court of Justice decision giving greater clarity to the meaning of "precise information," which had not been defined in the 2003 Market Abuse Directive.); *see also* LANGEVOORT, *supra* n.23, § 14:5 (discussing the importance of the "precise" information requirement).

[38] *United States v. Carpenter*, 791 F.2d 1024 (2d Cir. 1986), *aff'd* 484 U.S. 19 (1987); *Mr. A v. Financial Markets Authority*, Case C-302/20 (CJEU 2022). *Carpenter* was appealed to the Supreme Court, but the Court deadlocked 4–4 on whether to endorse the misappropriation theory underlying the insider trading charges in the case. *Carpenter*, 484 U.S. at 24. The Second Circuit's decision upholding the defendants' convictions therefore was affirmed without clarity from the Supreme Court on the insider trading issue in the case. As discussed above, the Supreme Court ultimately adopted the misappropriation theory in *O'Hagan*.

[39] The defendants in *Carpenter* were also charged under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, based on their alleged theft of confidential information from the *Wall Street Journal*, and their convictions on these counts were affirmed by a majority of the Supreme Court. *Carpenter*, 484 U.S. at 26. A decade later in *O'Hagan*, the Court relied upon *Carpenter*'s discussion of the mail and wire fraud charges to endorse the misappropriation theory of insider trading. *O'Hagan*, 521 U.S. at 654 (citing *Carpenter*, 484 U.S. 19, 25–27). Notwithstanding the interrelatedness of the misappropriation theory and mail and wire fraud based on the theft of confidential business information, many high-profile insider trading criminal prosecutions since *Carpenter* have not included Title 18 fraud charges — under either the mail and wire fraud provisions or the securities fraud provision added by the Sarbanes-Oxley Act in 2002 (Section 1348). Elkan Abramowitz & Jonathan S. Sack, *Back to the Future: Criminal*

In *Carpenter*, a journalist for the *Wall Street Journal*, R. Foster Winans, repeatedly shared information with two stockbrokers and another individual about an influential "Heard on the Street" column in the *Wall Street Journal*. The two stockbrokers set up trading accounts for Winans and the other co-conspirators, and those accounts were used to make trades based on Winans's inside information from the "Heard on the Street" column before it was published. Winans and his co-conspirators were charged with violating Section 10(b) and Rule 10b-5, based upon the misappropriation theory of insider trading.[40]

One of the key issues in *Carpenter* was whether Winans had breached a duty to the *Wall Street Journal* by passing information about upcoming columns to his co-conspirators, and by trading on that information himself. The Second Circuit concluded that Winans *had* breached such a duty (and could therefore be held liable for insider trading) because the *Wall Street Journal* had in place a company policy whereby employees agreed to treat nonpublic information learned on the job as confidential.[41]

In *Mr. A*, a journalist for the *Daily Mail* — known only as "Mr. A" — published two articles in the *Daily Mail* reporting on rumors about a potential takeover bid of Hermès by LVMH. The rumored price per share of LVMH's takeover bid was higher than the price per share of Hermès's stock on Euronext at the time. An investigation carried out by the French Financial Markets Authority showed that Mr. A had spoken to several UK residents about the upcoming articles, and that those residents had used the information to purchase shares of Hermès at a discount compared to the rumored premium bid by LVMH.[42]

The Financial Markets Authority brought an enforcement action against Mr. A, alleging that he had violated a French law prohibiting insider dealing that was essentially identical to MAD. The case made its way to the Court of Appeal of Paris, which certified several questions relating to MAD and MAR to the European Court of Justice. The questions related to (1) whether a market rumor to be published in an upcoming financial news article could constitute "precise" information under EU law and (2) whether a journalist's disclosure of information to potential sources about an upcoming article is carved out from unlawful disclosure liability under two separate provisions of MAR.[43]

The European Court of Justice's opinion primarily focused on whether the information at issue was "precise" within the meaning of MAR. The court held that information relating to the forthcoming publication of a press article reporting a market rumor *is* capable of constituting "precise" information — particularly when, as in that case, the forthcoming article mentions the rumored price of a takeover bid.[44]

The decision also focused on whether to apply the specific exceptions to unlawful disclosure liability for journalists under MAR. The court held that the disclosure of inside information by a journalist is lawful when it is "necessary for the purpose of carrying out a journalistic activity, which includes investigative work in preparation for publication."[45]

Because of the nature of the certified questions in *Mr. A.*, the opinion of the European Court of Justice was necessarily limited to specific issues of law. But the opinions in *Carpenter* and *Mr. A.* highlight the different approaches taken by U.S. and EU courts to insider trading. In *Carpenter*, consistent with the common-law foundations of U.S. insider trading law, the Second Circuit focused primarily on whether Winans had breached a duty to the *Wall Street Journal* by misappropriating inside information. In *Mr. A.*, in contrast, the absence of a breach of duty element under

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Insider Trading Under Title 18, New York Law Journal (July 3, 2018), https://www.law.com/newyorklawjournal/2018/07/02/back-to-the-future-criminal-insider-trading-under-title-18/. A notable exception to this trend was *United States v. Blaszczak*, in which the defendants were charged with insider trading under 18 U.S.C. § 1348 — although the defendants' convictions under that statute were ultimately vacated based on the government's interpretation of intervening Supreme Court precedent with respect to the statutory definition of property. 56 F.4th 320, 242 (2d Cir. 2022); *see also* Robert J. Anello & Richard F. Albert, *The Muddy Waters of Insider Trading Law Just Got Muddier*, New York Law Journal (Feb. 8, 2023), https://www.law.com/newyorklawjournal/2023/02/08/the-muddy-waters-of-insider-trading-law-just-got-muddier/ (discussing the convoluted procedural history and impact of *Blaszczak*).

[40] *Carpenter*, 791 F.2d at 1026–28.

[41] *Id.* at 1026, 1028, 1031.

[42] *Mr. A*, Case C-302/20 ¶¶ 18–22.

[43] *Id.* ¶¶ 15–17, 31.

[44] *Id.* ¶ 90(1).

[45] *Id.* ¶¶ 71, 90(2). After providing its opinion on the meaning of EU law, the European Court of Justice remanded the case to the Court of Appeal of Paris for further proceedings. *Id.* ¶ 90.

EU law guided the court towards two other issues that are linked to the wrongfulness and the market impact of the defendant's conduct: (1) whether the information he disclosed was precise enough to be material and (2) whether that disclosure, even if unlawful, should have been exempted from liability for the sake of encouraging journalistic investigation.

CONCLUSION – A LEGISLATIVE FIX?

The European Union's statutory approach to insider trading serves as a useful foil to the common-law regime in the United States. While MAR casts a liability net that is — at least in theory — broader than current U.S. law, expansive applications of the misappropriation theory such as the "shadow trading" claim in *Panuwat* continue to push U.S. insider trading law into uncharted territory. That creeping expansion (and uncertainty) is made possible by flexible duty-based theory at the heart of U.S. law.

Calls for a federal insider trading statute are not new.[46] But the need for clarity and predictability in insider trading law is greater than ever. In recent years, efforts have been undertaken to create a more detailed insider trading law in the United States, which would supplant Section 10(b) of the Exchange Act and Rule 10b-5.[47] But those efforts have not been successful, and have largely restated existing court-made doctrines.[48]

In the past, the SEC occasionally opposed efforts to codify U.S. insider trading law and draft a more comprehensive scheme like MAR on the grounds that the SEC benefits from a more "flexible" system in which it can push the boundaries of insider trading law, rather than being hampered by overly detailed legislation.[49] The SEC has also attempted to shape insider trading law through regulations that put the SEC's gloss on Supreme Court decisions — with mixed levels of success.[50]

Federal legislation might be an improvement on the uncertain, duty-based approach to insider trading formulated over time by courts and relied upon by prosecutors and regulatory authorities. A good start for Congress would be to take a close look at the model in place across the Atlantic. ■

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[46] *See, e.g.*, Langevoort, *supra* n.4, at 528 & n.128 (collecting cases and commentary "calling for Congress to replant the garden maze of doctrine that has too many circles and dead ends by writing a clear statutory definition of insider trading").

[47] John C. Coffee, Jr., *Congress and the Insider Trading Prohibition Act: "Can't Anybody Here Play This Game?"*, The CLS Blue Sky Blog (May 25, 2021), https://clsbluesky.law.columbia.edu/2021/05/25/congress-and-the-insider-trading-prohibition-act-cant-anybody-here-play-this-game/ (discussing the Insider Trading Prohibition Act, which passed the House of Representatives in 2021).

[48] Coffee, *supra* n.44 (criticizing the Insider Trading Prohibition Act for codifying the personal benefit test for tipper-tippee liability, and for doing so clumsily); *but see* Preet Bharara et al., *Report of the Bharara Task Force on Insider Trading* 18 (2020) (proposing a novel model insider trading statute hinging on "wrongfully" trading on or disclosing MNPI, where "wrongfully" includes, but is not limited to, "breaches of duties of trust or confidence or breach of an agreement to keep information confidential, express or implied").

[49] LANGEVOORT, *supra* n.24, § 2:13 (discussing SEC's opposition to efforts to draft a comprehensive insider trading law after *Chiarella*).

[50] *See, e.g.*, 17 C.F.R. § 240.10b5-1(b) (defining the mental state required to trade "on the basis of" MNPI, a phrase taken from *O'Hagan*, 521 U.S. at 651–52); 17 C.F.R. § 240.10b5-2 (purporting to set forth "a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the 'misappropriation' theory of insider trading"); *see also* Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 Georgetown L.J. 1225, 1238 n.77 (2017) (collecting cases endorsing and rejecting SEC Rule 10b5-2). In the wake of the Supreme Court's decision overruling *Chevron* deference, *see Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360, at *22 (S. Ct. June 28, 2024), these regulations are likely to face even greater scrutiny. *See, e.g.*, Brian A. Jacobs and A. Dennis Dillon, *Use and Knowing Possession: An Old Debate Gains New Relevance Amidst the Government's Latest Insider Trading Enforcement Push*, 56 Rev. Sec. & Commodities Reg. 91, 99 (2023) (predicting that, in the absence of *Chevron* deference, courts would be more likely to adopt a "use" standard for insider trading, rather than the "knowing possession" or "awareness" standard embodied in Rule 10b5-1).