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Panuwat v SEC's implications on insider trading regulations

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ABSTRACT

As the United States of America has evolved from its founding to the present day, financial fraud has grown increasingly complex. In response to this changing landscape, the United States government has attempted to prevent fraud through various mediums: regulations, legislation and judicial enforcement. Yet, financial fraud remains deeply woven into the fabric of American history, as some of the country's most pivotal moments have also served as catalysts for sweeping financial reforms. Insider trading is one of the most popular uses of this, one in which individuals misappropriate information from a company to use for personal gain. The definition of insider trading has largely been debated and has culminated in the case of *Panuwat v. Security Exchange Commission*. This paper will discuss the facts of *Panuwat v. SEC*, the history leading up to the passage of The Securities Exchange Act of 1934 , and cases that are significant in insider trading regulation. Depending on how the courts decide, a new era of regulation will be created changing the way that corporations interact with the markets and how the stocks are traded.

Keywords*:* *insider trading*, *fraud*, *security regulations*, *shadow trading*, *financial reform*, *SEC*, *judiciary*, *courts*, *misconduct*

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***"Knowledge is of no value unless you put it into practice."* – Anton Chekhov**

Insider trading, the act of trading securities with confidential non-public information, is a practice as old as securities markets themselves, whether it was in 1792 when an aide to George Washington used information about the Revolutionary War to invest in bonds (Narron, 2014) or it was in 1869 when President Grant hiked the price of gold to support farmers only for it to be later known that his advisors suggested this to corner the market (Ackermann, 1990). This cycle has continued over the last 200 years, and insider fraud has become increasingly complex. In 2024, the case *Panuwat v. SEC* demonstrated the further evolution of this cycle, showing the cracks in current legislation, regulation and judicial enforcement against insider fraud displaying how history and law are often intertwined. This paper will discuss (i) the facts of *Panuwat v. SEC*; (ii) the history leading up to the passage of The Securities Exchange Act of 1934 (the "Act"), an explanation of the Act and its enabling regulation of its anti-fraud provisions, and a discussion of further anti-fraud laws and regulation; (iii) a discussion of *Chiarella v. SEC* and how it has affected *Panuwat v. SEC*; (iv) how *Dirks v. SEC* has changed the way the SEC looks at insider trading; (v) the common law created by *O'Hagan v. United States* on *Panuwat v. SEC*; (vi) how Panuwat lost his 12(b)(5) motion; (vii) how Panuwat lost his summary judgment motion; and (viii) how this case appeal could change the SEC's view on insider trading.

FACTS OF PANUWAT V. SEC

In 2016, Matthew Panuwat was a lawyer working on an upcoming merger between Pfizer and his company, Medivation. Due to his position, Panuwat had access to insider information about this merger before it was announced to the markets. When the merger was approved by the SEC, it was not known to the public. Panuwat received an email telling him the merger had been confirmed. Three minutes after the email was sent to him, he invested in a competitor company, Incyte Corporation, which he believed would be an obvious purchase by another company due to there being a relatively small number of publicly traded, biomedical companies. After the merger was officially announced, Incyte's stock price increased and Panuwat made around $110,000 by selling his Incyte stock (*SEC.gov | Matthew Panuwat*, 2024). Panuwat intentionally made all of his trades in a manner that made it harder to trace back to him (Altman, 2023). After discovering Panuwat's trade, the SEC brought a complaint against him under violations of Rule 10 b-5, claiming he breached his duty to Medivation by trading on insider information and charged him with fraud (*SEC.gov | Matthew Panuwat*, 2024) (O'Keefe, 2024).

HISTORY OF INSIDER TRADING REGULATION

Before the Great Depression, there was little to no prohibition on trading securities based on insider information. This laissez-faire approach led to rampant abuse, as corporate insiders exploited their privileged positions for personal gain, often at the expense of unsuspecting shareholders. One glaring example of this unethical behavior was embodied by Albert Wiggin, the CEO of Chase Bank, whose actions on "Black Monday", the day in 1929 that marked the beginning of the Great Depression, serves as a stark reminder of the unchecked power wielded by corporate executives (Times, 1951). Wiggin infamously shorted Chase Bank's stock during the market crash, pocketing a staggering $4 million windfall ($73,825,731 in 2025). His brazen disloyalty in shorting the stock of a company to which he owed a fiduciary duty highlighted the urgent need for legislative intervention (Battacharya & Daouk, 2000).

Another example of the lack of legislation preventing insider trading can be seen through the Supreme Court case *Strong v. Repide*, in which a CEO of a company bought all of the shares of a company before releasing news of a large sale of property. Had the shareholders selling their shares known of the sale of the company's property, they could have demanded a higher price for the shares or could have chosen not to sell them at all. While today a CEO acting in this manner would be prohibited, in 1909 there was no law or regulation banning this, leading the Supreme Court to allow these harmful business tactics (*Strong v. Repide*, 213 U.S. 419 (1909)). The repercussions of these unchecked abuses reverberated far beyond individual incidents, shaking the foundations of investor confidence and eroding trust in the fairness of the financial system generally (Bhattacharya & Daouk, 2000). The absence of regulatory safeguards allowed a culture of self-serving opportunism to flourish, emboldening corporate insiders to prioritize personal enrichment over fiduciary responsibilities. The resulting erosion of public trust created the conditions for the catastrophic collapse of the stock market in 1929 (*NCpedia | NCpedia*, n.d.). During the Great Depression, President Fredrick Roosevelt believed that market instability and fundamental distrust of the markets were primary drivers of the sustained financial crash and committed his administration to fundamentally change its approach to the way they prevented securities fraud (Library of Congress, 2022). Recognizing the urgent need for a transformative shift in their regulatory framework, the government embarked upon a historic endeavor, culminating in the creation of the four groundbreaking pieces of legislation, Securities Registration act of 1933, Securities Exchange Act of 1934, the Investment Companies Act of 1940 and the Investment Advisers act of 1940 (Cornell Law School, 2019).

The second piece of legislation, the Securities Exchange Act of 1934 (the "Exchange Act"), was fundamental to how investments are bought and sold. Central to the Exchange Act was the establishment of the Securities and Exchange Commission (SEC), a regulatory body tasked with investigating and enforcing securities laws (Flexner, 1934; *What is the Securities Exchange Act of 1934? | Winston & Strawn Legal Glossary*, n.d.). The creation of the SEC marked a significant departure from previous regulatory approaches, empowering the government to take a more proactive stance in overseeing the nation's financial markets. Among the key provisions of the Exchange Act was Section 10(b) (not to be confused with Rule 10b-5, the regulation that implements Section 10(b) of the Exchange Act), the provision of the law that instituted new understanding of the function of the government to prohibit and prevent securities fraud. This provision, known as the "Anti-Fraud Rule," prohibited the use of any manipulative or deceptive device in connection with the purchase or sale of securities:

(It shall be unlawful) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based

swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors (15 U.S. Code § 78j - Manipulative and deceptive devices. n.d.).

Section 10(b) prohibited all securities fraud, including insider trading, through purposely creating an extremely broad definition of it, which would allow regulators and courts to determine what was disallowed before and after it had occurred. The amorphous nature of this law forced people engaging in securities markets to be extremely cautious as they would not know what activities were disallowed until they were punished for engaging in them, a practice derisively called "regulation through enforcement". This legislation and its enacting regulation were crafted to be purposely broad to allow the SEC to go after all cases of insider trading, even if they were not contemplated at the time of the passage. Note that the Securities Registration Act was fundamentally a disclosure rule, which would have been rendered ineffective without the Exchange Act as insiders would have been able to freely trade on information prior to its disclosure to the public. In other words, company information disclosed to the public would have been rendered useless by the time it was disclosed.

The battle to pass the Exchange Act was extremely difficult, with criticism coming from both sides of the aisle. Democrats such as Huey Long argued that the law did not do enough to protect lower income people. He suggested the creation of a social program to redistribute the wealth earned by securities trading and give it to support anti-poverty programs as well as, putting caps on the money that could be earned from trading securities (Long Legacy Project, 2019). Although he gained the support of the populists of the time, his proposal was deemed by many to be too unrealistic, too socialist in a time when the United States had strained relations with the Soviet Union, and potentially a violation of the Constitution due to its taking property of individuals for public use without just compensation (Congress.gov, 1791). However, pieces of Senator Long's plan, such as government deposit insurance for state and federal banks holding customer deposits found their way into the New Deal.

CRITICS ON THE RIGHT

On the conservative side of the political divide, there were four large critics of the Exchange Act: The first was Charles Coughlin, known colloquially as "Father Coughlin", a fundamentalist Catholic priest who was an early adopter of the radio to spread far-right, racist, fascist and religious extremism. Coughlin viewed the creation of the SEC as a market arbiter as an effort destined to fail, and instead supported monetary reform based on silver. As well as this, Coughlin founded the National Union for Social Justice (NUSJ) which planned on ending the Great Depression by putting more money into the markets as they currently existed instead of regulating the market itself (if this idea ever had been put into effect it would have likely led to hyperinflation deepening the Depression) (C*harles Coughlin to NUSJ Member · Catholics and Politics · American Catholic History Classroom*, n.d.). He also had an extremist though ill-defined plan to cleanse the country of securities traders, which he viewed as "Christ-like" due to Jesus's Cleansing of the Temple in the New Testament. It is also important to note how Charles Coughlin's antisemitism played a role in his policies, due to his belief in the conspiracy that Jewish people had an outsized role in American politics and banking (United States Holocaust Memorial Museum, 2019).

The second was Richard Whitney. He was the head of the New York Stock Exchange and viewed stricter requirements about how insider information, such as information about assets held by the company, could be used by the company and its insiders and requirements to share such information with the public as obstacles to companies' ability to raise capital (Bock, 2023). Whitney argued that companies should be able to characterize their finance operations and prospects in a form that they saw appropriate to insiders and private external investors, which may be different than the way they were presented to the investing public. Essentially, Whitney's argument was that companies' ability to undervalue or overvalue themselves to the public was valuable as they leveraged it to gain investors (Times, 1974). This argument was considered foolish by many of the time, as he essentially claimed that the factors that created the Great Depression could be used to end it. However, due to his position on the New York Stock Exchange, he was able to leverage his influence on financial leaders, legislators, financial and governmental institutions and lobbyists. The third is Albert Wiggin, the CEO of Chase Bank, who argued that the Exchange Act would stifle financial innovation and that mandated earnings reports would lead to fewer companies going public. due to fear of a lack of investment. If insiders contemplating taking their companies public were restricted from using non-public information, they would be less likely to go public. It is important to reiterate Wiggin's personal insider trading and how the creation of this law would make his actions illegal (CFI Team, 2023). Due to this, reasonable skeptics question whether Wiggins was focused on protecting his own financial interest. Despite this however, he was an advisor to President Hoover and can be seen as a major reason that reform was not passed earlier (Bhattacharya & Daouk, 2000).

The final dissenter of the Exchange act was Thomas Lamont. Lamont was a senior partner at J.P. Morgan, one of the most powerful investment banks of the time, which gave him influence in financial markets around the world and allowed him to take a role in both political and economic policy. During World War I, he took an active role in arms sales to the Allies, eventually landing him a position as a representative of the United States Treasury Department in the Paris Peace Conference (*Collection: Thomas W. Lamont papers*, 2019). This position put him in connection with some of the most powerful men in the world at the time. After the peace accords, he became the Chairman at J.P. Morgan, which was to be considered to be one the most powerful positions in the country. During Black Thursday, the day in which the New York Stock Exchange crashed marking the start of the Great Depression, he bought securities that had dropped to try and buy favors with President Hoover (*Britannica Money*, 2025). This tactic worked, and he gained strong influences on Hoover's fiscal policy. He advocated for the adoption of laissez faire policies by President Hoover which strongly favored larger earners such as himself (*Britannica Money*, 2025).

When FDR was elected, he began to create the New Deal legislation to which Lamont was strongly opposed. He viewed the Exchange Act as an overstepping of the government and detrimental to the markets, claiming that it hurt companies' ability to raise capital (*Britannica Money*, 2025). Using his large wealth paired with his large political influence, he lobbied against its passage and led a smear

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campaign against it. Together, all four of the men' s criticisms were successful in creating negative public energy around the reformation of financial markets. Coughlin's populist and religious messages inspired non-wealthy people to rise up against it, while the financiers' economic arguments created dissent within the government and Wall Street's investors. While their influence did not prevent the Exchange Act from being passed, it created a large national discussion on whether the Federal Government even had a role in managing the economy or directing the securities market's rules; these theories that came out of these dissents endorsed as arguments for future critics of securities reform which are still present.

SUPPORTERS OF THE SECURITIES EXCHANGE ACT

On the other side, there were many supporters of the Exchange Act; they came from a wide range of expertise and across the political spectrum. First, Supreme Court Justice Louis Brandeis viewed the Great Depression as a call for new and better regulation of the markets. While Brandeis was not a legislator and did not create new laws, the precedents of his cases made a body of "bench made" rules and laid the groundwork for FDR when he was crafting the Exchange Act (Warren & Brandeis, 1890). Second, Joseph Kennedy was a businessman who made most of his fortune through fraud, insider trading and the sale of alcohol during prohibition (Manchester, 1998). While it may seem as if he would be against legislation to prevent fraud, as he made his fortune through fraudulent means, he became a strong supporter of anti-fraud legislation due to him being able to tell from personal experience that fraud was extremely prevalent in the markets. Third, Arthur Vandenberg was a Senator from Michigan who felt it was important personally to create bipartisan solutions in the market (*Arthur H. Vandenberg | United States senator | Britannica*, n.d.). Due to this, he was able to secure Republican votes leading to the passage of the Exchange Act of 1934. Another influence that helped facilitate the passage of the Exchange Act was FDR's Fireside Chat, in which he would give unopposed speeches to the public via radio to try and advocate for public support for his ideas. This one-way medium essentially gave him the ability to gain massive amounts of support by voters who did not understand the financial system, as he framed his arguments simply and easily, allowing him to present himself as a humble and respectful man who was working for the good of the people. This, combined with bipartisan supporters, led to the eventual passage of the Act (Flexner, 1934).

POST-GREAT DEPRESSION

After the Great Depression, insider trading was largely defined not by laws and regulation but instead by judges' interpretations of the Exchange Act. After the passage of the Act, insider trading was not implicitly disallowed by the law itself, and it remained unclear whether any insider trading could be considered fraud under the Act. Modern regulations specifically created to ban insider trading began to be drafted in the 1960s with the creation of Rule 10b-5 by the SEC (Wiesenfeld, 2016). This anti-fraud regulation used an amorphous theory of not misusing company information, later described as the classical theory of insider trading, to largely prohibit the trading of securities based on insider information. Legislatively, insider trading was not explicitly addressed until the Insider Trading Sanctions Act of 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988, in which the penalties of insider trading were determined to be three times as high as the profit gained from it.

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Many consider the creation of the laws as a reaction to the exposure of the frauds by Michael Milken (Chen, 2019). Michael Milken was a wildly successful hedge funder who paved the road for high yield bonds or "Junk Bonds". Essentially, he created the path for a new form of bonds that had a high chance to default meaning that the bonds rating is extremely low; however, this high chance of default is backed up by large payouts. Milken discovered that the higher risk of junk bonds could be minimized through diversification across many independent investments. For example, an investor who invests in a relatively safe AA rated bond has an average payout of around 2.3 percent; however, an investor investing in a diversified portfolio of junk bonds rated CCC has an average payout of about 12.699 percent with similar risk of total default. Milken's insight of this sector brought him instant wealth; however, he wanted more. He wanted to be able to predict which bonds were more likely to pay out and which bonds would default.

Due to this drive for strong information in the markets, he began to insider trade, greatly increasing his profits as he went from profiting due to diversification to investing on strong information. His insider trading eventually led to illegal profits of over 800 million dollars (Wayne, 2024). However, when his fraud was exposed, he was forced to pay 600 million dollars and served 22 months in prison. In other words, even though he was caught and punished for his crimes, he still made 200 million dollars profit. These laws were based on deterring future insider trading by making the penalties so extreme that no future committers of insider trading would be incentivized to risk the consequences of getting caught. While critics argued that this was an extreme punishment, it was deemed necessary due to the widespread corruption and fraud that had been uncovered. It is important that these penalties were not criminal in nature but instead were civil actions by the SEC against individuals engaging in insider trading which has a preponderance of the evidence standard (i.e., only 51% certainty) rather than the beyond a reasonable doubt standard of criminal courts.

CHIARELLA V. SEC

One of the first major cases brought to regarding insider trading was the Supreme Court case *Chiarella v. United States,* 1980. This case stretched the extent of Section 10(b) as it involved someone who was not considered a corporate insider. Rather, the defendant was a printer, Vincent Chiarella, who worked for Pandick Press, a printing company that printed the announcements of corporate takeover bids. Chiarella would take information from financial forms given to his company papers to print and invest with the information contained in them (*Chiarella v. United States*, 445 U.S. 222 (1980)). When the SEC realized what Chiarella had been doing, they brought a suit against him, claiming that he had violated Section 10(b) due to his investing in other companies with insider information that they believed he had a fiduciary duty to protect (*Chiarella v. United States*, 445 U.S. 222 (1980)). The case was eventually appealed to the Supreme Court as lower courts could not come to a conclusion on whether "Chiarella violated Section 10(b) of the 1934 Act by failing to disclose the impending takeover before trading in the target company's securities?" (*Chiarella v. United States*, 445 U.S. 222 (1980)). The Supreme Court relied on the classical theory of insider trading, which states that someone who insider trades must be an employee within the company, deciding that Chiarella did not have a fiduciary duty to not invest in the other companies as the relationship he had with the other companies did not

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constitute one of trust. Due to this, he was not considered an insider and therefore did not commit insider trading. This is best explained in the Supreme Court's opinion, written by Justice Lewis Powell:

The element required to make silence fraudulent -- a duty to disclose -- is absent in this case. No duty could arise from petitioner's relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions… We see no basis for applying such a new and different theory of liability in this case. As we have emphasized before, the 1934 Act cannot be read "more broadly than its language and the statutory scheme reasonably permit"(Chiarella v. United States, 445 U.S. 222 (1980)).

In summary, the Court took a narrow view of what could be considered insider trader that relied on the imposition of a fiduciary relationship for insider trading to even apply. The passage argues against the imposition of a duty to disclose in the given case, due to the absence of a fiduciary relationship or any prior dealings that would give rise to such a duty. It emphasizes a strict adherence to the language and reasonable interpretation of the Exchange Act. The Supreme Court's decision that Chiarella did not commit insider trading signifies that the Court believes that the definition of insider trading set by the Exchange Act, as well as the SEC's Rule 10b-5, was too broad and must be narrowed. Powell's opinion made sense politically as well, due to his slight conservative lean because of his appointment by Richard Nixon (Lewis, n.d.). The Chiarella precedent was significant to *Panuwat v. SEC,* as it allowed Panuwat to claim that his lack of a fiduciary relationship with Incyte was similar to Chiarella and thus the SEC had overreached.

In 1983, the SEC attempted to expand their power through *Dirks v. SEC*. In this case, Raymond Dirks was an investment analyst who specialized in insurance companies for Wall Street Maverick. In the course of his work, he received information from a former employee of Equity Funding, Ronald Secrist, that an insurance company had been severely overvaluing the assets that they reported to the public (*Dirks v. SEC,* 463 U.S. 646 (1983)). Upon receiving this information, Dirks investigated the company to confirm this information and eventually went to the *Wall Street Journal*, in an effort to have them publish his findings in the hope of a drop in the company's share price. While he was investigating the company, he advised clients to sell their stake in the company due to the fraud he uncovered (*Dirks v. SEC*, 463 U.S. 646 (1983)). The *Wall Street Journal* declined to publish a story. When the information of the frauds was exposed to the public independent of Dirk's efforts, the markets reacted swiftly, leading the stock to plummet and the New York Stock Exchange to halt trading of the stock (Eisenberg, 2017). Additionally, the SEC launched an investigation into Equity Funding, resulting in a civil complaint against the company. The *Wall Street Journal* then reported a story with the complaint along with the information that Dirks provided them.

When the SEC discovered that Dirks had advised his clients to sell their positions in equity, they brought an action leading to a civil censure.[#] Dirks appealed this decision to an Administrative Law Judge (a judge who only reviews cases on regulations) who decided that Dirks violated the

Securities Exchange Act of 1933, claiming that he had a duty to abstain from trading on the information or disclose it to the markets. The D.C. Court of Appeals entered judgment and also found him guilty of insider trading under the equal access to information theory of insider trading claiming that one inherits a fiduciary duty when one receives insider information (Carlson, 2016). The Supreme Court decided, using the common law established by *Chiarella v. SEC*, that Dirks had no fiduciary duty and that a fiduciary duty is gained from a fiduciary relationship (*Dirks v. SEC*, 463 U.S. 646 (1983)). This new legal precedent is best exemplified through Supreme Court Justice Lewis Powell's opinion on the case:

(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure…

In examining whether Chiarella had an obligation to disclose or abstain, the Court found that there is no general duty to disclose before trading on material nonpublic information, and held that "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.". Such a duty arises, rather, from the existence of a fiduciary relationship (*Dirks v. SEC*, 463 U.S. 646 (1983)).

Powell's opinion is important, as he told the SEC that insider trading is not based on possessing and trading on insider information, but instead is trading on information that one has a fiduciary duty to protect for the good of the shareholders. For a Supreme Court Justice who leaned much more Democratic, this decision was a surprise to many as the "equal access to information" theory of insider trading was much more prevalent among progressive politicians.

The *Panuwat v. SEC* case strongly helps Panuwat as it allows him to claim that he has no fiduciary duty to the company that he is representing in the merger. The power of the SEC and the common law that empowered them was changed again in the case *O'Hagan v. SEC,* when the SEC decided to expand the definition of who was liable to insider trade. James O'Hagan was a lawyer at Dorsey and Whitney, who managed a merger between Grand Metropolitan and Pillsbury Company (*United States v. O'Hagan,* 521 U.S. 642 (1997)). During this merger, he worked as a central lawyer drafting the tender offer to eventually buy Pillsbury. Due to this role in the merger, he had a significant amount of insider information about Pillsbury but was not an insider in Pillsbury and did not have a fiduciary relationship with Pilsbury (*United States v. O'Hagan,* 521 U.S. 642 (1997)). As he was working on this merger, he began to buy large amounts of call options on Pillsbury. Eventually, when the merger went public his holdings profited him 4.3 million dollars (*United States v. O'Hagan,* 521 U.S. 642 (1997)). When the SEC discovered his scheme, they brought a civil complaint against O'Hagan, claiming he engaged in insider trading fraud by using Pillsbury's information for personal trades (*United States v. O'Hagan*, 521 U.S. 642 (1997)). The District Court agreed with the SEC's claim that O'Hagan violated Rule 10(b)5 due to his misuse of insider information due to his fiduciary relationship with his companies (*United States v. O'Hagan,* 521 U.S. 642 (1997)).

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However, the Court of Appeals reversed the sentence relying on classical theory, claiming that Rule 10 b-5 liability cannot be grounded in misuse of a company's information when there is not a fiduciary relationship with the trader.. The question that the Supreme Court was asked was "Does a security-trader violate the Securities and Exchange Act of 1934 by trading securities on the basis of misappropriated information pertaining to a company other than his own?" (*United States v. O'Hagan,* 521 U.S. 642 (1997)). The Supreme Court decided that O'Hagan did violate Rule 10 b-5 even though he was not a fiduciary of Pillsbury—he owed a fiduciary duty to his firm's client, Grand Metropolitan, as a relation between a lawyer and a client constitutes a fiduciary relationship—by trading on information that he gained through that relationship. In doing so the Court created the "misappropriation theory" of insider trading, in which trading on non-public information of companies that one has no fiduciary relationship is still a manipulative device if the information is gained through a breach of a relationship with a third party (Fahey, 2025). This can best be seen through the Supreme Court's opinion written by Justice Ruth Bader Ginsberg:

Under the "traditional" or "classical theory" of insider trading liability, § 10(b) and Rule 10b-5 are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information. Trading on such information qualifies as a "deceptive device" under § 10(b), we have affirmed, because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." Chiarella v. United States. That relationship, we recognized, "gives rise to a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from ... tak[ing] unfair advantage of ... uninformed ... stockholders.'". The classical theory applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation (United States v. O'Hagan, 521 U.S. 642 (1997), 1997).

Ginsberg in her opinion has woven multiple theories of insider trading theory by directly claiming that the classical theory is too narrow. She is saying that insider trading is when one steals company information for personal gain (Pritchard, 1998). This case is important to *Panuwat v. SEC* as it establishes that violations of Rule 10b-5 can apply to companies to which one does not have a fiduciary relationship. This decision could help or hurt Panuwat's position. On one hand, O'Hagan is clear that the prohibition on insider trading is not limited to the company that insider has a duty to and thus Panuwat could be responsible for trading Incyte stock even though he has no fiduciary relationship with them. On the other hand, misappropriation theory relies on the theft of insider information from the party that the insider has a relationship with and Medivation has no information on Incyte.

PANUWAT: RULE 12(B)(6) MOTION

A Rule 12(b)(6) motion is a motion that the defendant in a civil action can file to dismiss the action based on a claim that even if the court were to accept the facts presented by the plaintiff, the plaintiff has not brought a claim upon which the court may rule (*Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving*

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Defenses; Pretrial Hearing, n.d.). Panuwat made an argument for his Rule 12(b)(6) motion, which can be split into three arguments: (i) materiality, (ii) duty, and (iii) scienter (Altman, 2021).

MATERIALITY

Panuwat first argued that, as a matter of law, that he not prohibited on from trading with insider trading on information that was not material to the company he purchased, and information about Medivation's purchase could not be material because it contained no non-public information about Incyte (Goldstein, 2024). Panuwat argued that, in circumstances where the information relates to a merger between two companies, the information can only be material to the securities of those two companies (Orrick, 2023). The court decided SEC's allegations could be sufficient to support a finding of materiality because (i) Medivation and Incyte were among only a few closely comparable companies in a relatively small sector meaning that the merger would affect the entire sector; (ii) several companies had expressed an interest in acquiring Medivation before it decided to merge with Pfizer; (iii) it was reasonable to assume the companies that were unsuccessful in their attempts to acquire Medivation would turn their attention to Incyte as the next potential acquisition target as it was an extremely small industry; and (iv) Incyte's stock price did in fact increase the day the Medivation merger news was announced (*SEC.gov | Matthew Panuwat*, 2024). In doing this, the court took a position never seen before, as they applied insider trading to companies about which the insider had no non-public information. This is a monumental expansion of the misappropriation theory, as it says that misappropriated information does have to be the non-publicly traded information of the company or even related to the traded company at all, but instead merely has to have the potential to affect the price of the company.

DUTY

Second, Panuwat claimed that for trading by an insider to be prohibited, it must be done with information gained through a breach of the insider's fiduciary duty to the company. Though Panuwat conceded that he owed a duty to Medivation, he argued that he did not breach this duty because Medivation's insider trading policy did not prohibit him from trading the securities of companies including Incyte for which Medivation did not hold insider information. Panuwat pointed to Medivation's insider trading policy:

During the course of your employment you may receive important information that is not yet publicly disseminated about the Company. Because of your access to this information, you may be in a position to profit financially by buying or selling or in some other way dealing in the Company's securities or the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company. For anyone to use such information to gain personal benefit is illegal (Morrison, n.d.)

Panuwat's lawyers argued that the SEC's claim could not support a finding that he violated his duties from the policy as Incyte was not related to Medivation in any form. The court disagreed, finding that Incyte was a competitor to Medivation, which was clearly set forth in the insider trading policy and due to Panuwat's trading of Incyte, he violated his fiduciary responsibility to his own company (*SEC.gov | Matthew Panuwat*, 2024).

SCIENTER

Third, Panuwat's lawyers then claimed that the SEC failed to plead scienter.[#] Panuwat argued that he had the information in his possession when he traded; however, the SEC could not prove that the information was the motivation for his trade, and further, because the information was not final, it could not have been his motivation for trading Incyte. If this could not be proven, the SEC did not have evidence that he had scienter to defraud, and, as such, could not support a claim that Panuwat was in a fraudulent mindset when trading Incyte securities (Altman, 2023). The courts conceded that there was a split in the district courts over whether the SEC has to prove that the respondent used the confidential information to trade versus only having pure possession (Altman, 2023). However, a 12(b)(6) motion is decided before facts are presented to a jury, and the judge decided that a reasonable jury could in fact find that Panuwat had scienter to defraud. The judge noted that the SEC brought facts that Panuwat had traded Incyte stock immediately after the trade was announced, he did not announce the purchase to his employer and he tried to hide his purchase of the shares.

PANUWAT SUMMARY JUDGMENT

A summary judgment motion is a motion in which a party to a litigation asks the court to decide the case in their favor because there are no material disagreements in the facts of the case and based on the agreed upon facts, the parties should win the case as a matter of law. In such a case, there are no facts that a jury should be expected to decide. In his Summary Judgement Panuwat reasserted his claims from his 12(b)(6) motion that: (i) there was no material information that he used, the merger was only significant to the stock prices of Medivation and Pfizer, not Incetye (Goldstein, 2024); (ii) he didn't breach the duty to his own company as he didn't trade his own company using insider information, therefore, he could not have violated his companies anti insider trading policy and did not break his fiduciary responsibility to his company (Altman, 2023); (iii) he was not trying to defraud anyone by trading this stock as he had no intent to defraud. The court denied Panuwat's motion for summary judgment, ruling that a reasonable jury could find: (i) he did use material information to trade as insider information on mergers can affect multiple companies not just the two merging (Altman, 2021); (ii) he breached his duty to his company as his company banned trading insider information for all companies not just his own; (iii) and he traded Incyte stock three minutes after the merger was announced to him in an email meaning that he had the intent to defraud (*SEC.gov | Matthew Panuwat*, 2024).

PANUWAT'S IMPACT ON INSIDER TRADING

Panuwat v. SEC is an extremely important case as, if it is appealed up to the Supreme Court and they decide that Panuwat did not violate Rule 10 b-5 jurisdiction of shadow trading, that act of investing in a third party company with insider information will be taken from the SEC, and new laws

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will have to be passed by Congress to give them this power again. If Panuwat's case is upheld on appeal and loses his case, this will give the SEC much more power to pursue insider traders and will largely broaden Rule 10 b-5 (Lawrence & Verret, 2024).

If this case is appealed to the Supreme Court, Panuwat will most likely win. This is due to the current Supreme Court term leaning more conservative. They are more likely to be against giving the federal government broader power. As well as this, the Supreme Court has a majority that views the Constitution in an originalist view. Originalism is a philosophy of the law in which the judges consider what the writers of the Constitution have written and intended; to this, they try to bind their decisions as closely as possible. An example of an originalist philosophy can be seen in David Strauss's paper on the Living Constitution:

An originalist claims to be following orders. An originalist cannot be influenced by his or her own judgments about fairness or social policy-to allow that kind of influence is, for an originalist, a lawless act of usurpation. An originalist has to insist that she is just enforcing the original understanding of the Second Amendment, or the Free Exercise Clause of the First Amendment, and that her own views about gun control or religious liberty have nothing whatever to do with her decision (Strauss, 2010).

This philosophy is considered very narrow by many experts as it does not create dialogue on the Constitution but instead uses the legal judgment of 1787 to decide the problems of 2024. The form in which Supreme Court Justices read the Constitution is usually parallel to the way that they read other forms of laws, meaning that the Supreme Court will read Rule 10b-5 as a purely fraud statute, not an insider trading law. For *Panuwat v. SEC*, this will strongly help Panuwat's defense as it allows his team to make the case that the creators of Rule 10b-5 did not see shadow trading as a manipulative device that constitutes fraud. The SEC will argue that shadow trading is a manipulative device that constitutes fraud due to the intent of the law being to combat fraud. However, when the rule was created in 1934, complex securities fraud were not considered by the writers due to the time period in which it was drafted. Due to this, an originalist point of view would make the law ill-equipped to fight new forms of fraud (Lawrence & Verret, 2024). As well as this, in 2024, information is much more free flowing, making it harder for the SEC to decide what information can be considered material.

In conclusion, *Panuwat v. SEC* is important as it displays how the U.S. court system reacts to new situations in a rapidly changing and technologically advancing world. If the Court informs the SEC that they cannot regulate shadow trading, then the SEC will have to get legislation passed to incorporate this scope. This process is important, as it severely cripples the power of the SEC to combat new forms of fraud. For example, every time the SEC discovers a new form of insider trading, they will not be able to manage against it, but instead, they will need to try to have legislation passed before enforcement can occur. While *Panuwat v. SEC* may seem like a small matter with little impact on the everyday American, the precedent that it will have on the SEC will impact the nature in which fraud can be pursued by the federal government for the next fifty years.

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