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A New Variation in SEC Insider Trading Enforcement

Earlier this week, the SEC filed a complaint in the Northern District of California alleging insider-trading charges that may signal a more aggressive approach to enforcement under the agency's new leadership. In *SEC* v. *Panuwat*, the SEC charged a corporate executive who learned about an impending acquisition of his employer and then traded in the securities of an unrelated company in the same industry that he anticipated would materially increase in price when his employer's acquisition was publicly announced.

The SEC's complaint alleges that Mathew Panuwat was a business development executive at Medivation, Inc., a mid-cap oncology-focused biopharmaceutical company. In the course of his employment, Panuwat learned from Medivation's CEO that the company expected to be acquired by a major pharmaceutical company within a few days, at a premium to the then-market price. Panuwat did not trade in Medivation securities. Rather, within minutes of hearing from the CEO, Panuwat purchased out-of-the-money call options in Incyte Corporation, another mid-cap oncology-focused biopharmaceutical company that he believed would increase in value when the Medivation acquisition was announced.

Medivation's insider trading policy prohibited employees from profiting from Medivation's material nonpublic information by trading in Medivation securities or in the securities of another publicly traded company. Incyte's stock price did rise by 8% after disclosure of the Medivation news, and Panuwat obtained $107,066 in profits from his option trade.

Most corporate insider trading policies include a provision similar to Medivation's prohibition of trades in the securities of other companies on the basis of the employer's information. But the *Panuwat* allegations are quite different from the concerns that usually animate such policies; for example, companies recognize that their employees may learn of confidential plans to enter into a material contract with a supplier, to acquire a target company, or to terminate a material relationship with a vendor, and accordingly, their policies prohibit trading in the securities of the supplier, target or vendor before the news becomes public.

By contrast, the connection between the information that Panuwat allegedly received and the company in whose securities he traded was indirect, and the

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information did not arise from any dealings between his employer and Incyte. As the *Panuwat* litigation proceeds, the issue of materiality is likely to be hard-fought. The courtroom battle can be expected to center on issues such as how likely or uncertain it was that the Medivation news would affect Incyte's stock price, as well as on the indirect nature of the connection between Medivation's information and the securities in which Panuwat traded. The case will likely also test the SEC's assertion that Panuwat misappropriated Medivation's information when he traded. The courts will ultimately need to determine whether the misappropriation theory of insider trading liability extends to these facts.

With all this said, the type of information that Panuwat received – about an impending M&A transaction – is highly significant in most contexts. It remains to be seen whether the SEC would seek to pursue this theory of liability against an executive who trades in third-party securities while in possession of information that is less inherently sensitive.

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