

# The Misappropriation Theory: *Carpenter* and Its Aftermath

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## I. INTRODUCTION

During the first week of the current Term, the Supreme Court heard oral arguments in a case testing the validity and limits of the “misappropriation theory” of liability for insider trading. The petitioners in *Carpenter v. United States*<sup>1</sup>—R. Foster Winans, a former *Wall Street Journal* reporter, and his two codefendants, Kenneth P. Felis and David Carpenter—were challenging their convictions of securities fraud, mail fraud, and wire fraud.<sup>2</sup> Winans, Felis, Carpenter, and others had participated in a scheme of buying and selling stocks on the basis of advance information, supplied by Winans, concerning what had been written about those stocks in articles that were to be published in the *Journal*'s “Heard on the Street” column.<sup>3</sup> In affirming the defendants’ convictions under section 10(b) of the Securities Exchange Act of 1934<sup>4</sup> and rule 10b-5,<sup>5</sup> a divided panel of the Second

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1. 108 S. Ct. 316 (1987).

2. Petitioners Winans and Felis had been convicted of violating § 10(b) of the Securities Exchange Act of 1934, 18 U.S.C. § 78j(b) (1982), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1987); the federal mail fraud and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1982); and the federal conspiracy statute, 18 U.S.C. § 371 (1982). Petitioner Carpenter had been convicted of aiding and abetting the commission of securities fraud, mail fraud, and wire fraud. *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985), *aff'd in part and rev'd in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir. 1986).

3. Winans was one of the two authors of the “Heard on the Street” column, which discussed selected stocks or groups of stocks and expressed “a point of view with respect to investment in the stocks. . . .” *United States v. Winans*, 612 F. Supp. 827, 830 (S.D.N.Y. 1985). Although the column did not disclose any inside information about the corporations or stocks that it discussed, it did affect stock prices. *Carpenter v. United States*, 108 S. Ct. 316, 319 (1987).

The *Journal* had an official policy declaring that the contents of the “Heard” column, prior to publication, were confidential information belonging to the *Journal*. Nevertheless, Winans entered into a trading scheme with two securities brokers, Peter Brant and petitioner Felis, to whom he gave advance information concerning the contents of articles that were to be published in the column. Brant, Felis, and one of Brant’s clients thereafter bought and sold stocks in anticipation of the column’s probable impact on the market. *Id.* at 319. Carpenter served primarily as a messenger for the conspirators. *United States v. Carpenter*, 791 F.2d 1024, 1026 (2d Cir. 1986).

Over a four-month period, the brokers made almost \$690,000 of trading profits on the basis of the information provided by Winans. After the SEC commenced an investigation, Winans and Carpenter revealed the entire scheme. The trial of Winans, Felis, and Carpenter followed. Brant entered into a plea bargain and served as a witness for the prosecution. *Carpenter v. United States*, 108 S. Ct. 316, 319 (1987).

4. Section 10(b), 15 U.S.C. § 78j(b) (1982), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . .

(b) 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, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

5. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1987), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order

Circuit had relied on the misappropriation theory<sup>6</sup>—the theory that a person violates rule 10b-5 when he buys or sells securities on the basis of material nonpublic information that he misappropriated from another person.<sup>7</sup> According to the Second Circuit, Winans had committed a “fraud” on the *Journal* by misappropriating its “confidential schedule of forthcoming publications,”<sup>8</sup> and the defendants had violated rule 10b-5 by using the misappropriated information “in connection with” their purchases and sales of securities.<sup>9</sup>

Less than six weeks after the oral argument in *Carpenter*, the Supreme Court announced its decision.<sup>10</sup> Those who had expected the Court to settle the fate of the misappropriation theory, once and for all, were disappointed. Most of the Court’s brief opinion was devoted to a discussion of the mail fraud and wire fraud statutes, which all eight Justices agreed the defendants had violated.<sup>11</sup> One cryptic sentence disposed of the issues under rule 10b-5: “The Court is evenly divided with respect to the convictions under the securities laws and for that reason affirms the judgment below on those counts.”<sup>12</sup>

Different legal experts reacted quite differently to the Court’s four-to-four deadlock on the question of whether the *Carpenter* defendants had committed securities fraud. A member of the Securities and Exchange Commission insisted that the Justices had left the misappropriation theory “alive and well.”<sup>13</sup> A prominent law professor, on the other hand, thought that the decision indicated “pretty strongly” that the theory was “a fairly dubious proposition.”<sup>14</sup> Perhaps the least controversial appraisal was offered by a former SEC official: “The fact that it’s four to four shows there is a split in the Court.”<sup>15</sup>

This Article will explore the possible explanations for the division of the Court in *Carpenter* and argue that all of the Justices should have endorsed the misappropriation theory. In addition, it will examine the impact of the *Carpenter* decision on civil and criminal proceedings against defendants who have traded on misappropri-

to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To 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.

6. Judge Pierce, writing for himself and Judge Mansfield, had stated the panel’s holding in these words: [S]ection 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 proscribe an employee’s unlawful misappropriation from his employer, a financial newspaper, of material nonpublic information in the form of the newspaper’s forthcoming publication schedule, in connection with a scheme to purchase and sell securities to be analyzed or otherwise discussed in future columns in that newspaper. . . .

United States v. *Carpenter*, 791 F.2d 1024, 1026 (2d Cir. 1986).

7. See Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L. REV. 101, 114 (1984).

8. United States v. *Carpenter*, 791 F.2d 1024, 1031 (2d Cir. 1986).

9. *Id.* at 1032.

10. United States v. *Carpenter*, 108 S. Ct. 316, argued Oct. 7, 1987, decided Nov. 16, 1987.

11. See *id.* at 320–22.

12. *Id.* at 320.

13. Sontag, *Misappropriation Theory in Limbo: An SEC Victory—or Not?*, The Nat’l L.J., Dec. 7, 1987, at 10, col. 2 (quoting SEC Commissioner Joseph A. Grundfest).

14. Donovan, *Supreme Court Upholds Conviction of Former Business Writer Winans*, Investor’s Daily, Nov. 17, 1987, at 1, col. 4 (quoting Alan Bromberg, professor of securities law at Southern Methodist University).

15. *Id.* at 34, col. 1 (quoting Ira Lee Sorkin, a New York lawyer and the former top official of the SEC in New York).

ated information. Finally, it will evaluate a pending proposal for a new, comprehensive federal statute directed against insider trading.

## II. THE DEADLOCK IN *CARPENTER*

### A. *The Probable Sticking Point*

It is hardly surprising that experts in securities law have disagreed about the viability of the misappropriation theory after the *Carpenter* decision. Because the four members of the Supreme Court who voted to reverse the defendants' convictions for securities fraud neither identified themselves nor explained their positions, one can only speculate whether they disapproved of the misappropriation theory in general or simply of its application to the facts before them.

*Carpenter* was, by any reckoning, an unusual case. Despite the Second Circuit's firm commitment to the misappropriation theory, Judge Miner dissented from the panel decision in *Carpenter* on the ground that the defendants had not abused any position of trust to obtain the "non-public, confidential, securities-related information."<sup>16</sup> In his view, basing the defendants' convictions on Winans' misappropriation of the *Journal*'s publication schedule "extend[ed] the sweep of section 10(b) and rule 10b-5 beyond all reasonable bounds."<sup>17</sup>

As Judge Miner emphasized, *Carpenter* can easily be distinguished from the two earlier cases in which the Second Circuit had endorsed and applied the misappropriation theory. In those cases, *United States v. Newman*<sup>18</sup> and *SEC v. Materia*,<sup>19</sup> employees had misappropriated confidential information that had been entrusted to their employers by clients preparing to engage in corporate acquisitions. In *Newman*, the Second Circuit expressly held that the defendant employees had both "defrauded" their employers and "wronged" their employers' clients, the acquiring companies.<sup>20</sup> In *Carpenter*, however, Winans had misappropriated information—"information regarding the timing and content of certain *Journal* columns"<sup>21</sup>—that belonged to the *Wall Street Journal* itself. Under the Second Circuit's reasoning, Winans had committed a fraud on the *Journal*,<sup>22</sup> but not on any "market participant."<sup>23</sup> Unlike the acquiring companies that owned the information purloined by the defendants in *Newman* and *Materia*, the *Journal* did not engage in, and did not plan to engage in, any transaction in securities.

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16. *United States v. Carpenter*, 791 F.2d 1024, 1036 (2d Cir. 1986) (Miner, J., dissenting in part) (emphasis in original).

17. *Id.* at 1037.

18. 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983).

19. 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

20. *United States v. Newman*, 664 F.2d 12, 17 (2d Cir. 1981).

21. *United States v. Carpenter*, 791 F.2d 1024, 1033 (2d Cir. 1984).

22. *Id.* at 1032.

23. The Supreme Court noted in *Carpenter* that the *Journal* "was not a buyer or seller of the stocks traded in or otherwise a market participant." *Carpenter v. United States*, 108 S. Ct. 316, 319 (1987).

According to the petitioners' brief in *Carpenter*, the Second Circuit's decision illegitimately "transformed Rule 10b-5 into a law governing relationships outside the securities markets."<sup>24</sup> An examination of the Supreme Court's opinion in *Carpenter* indicates that some members of the Court may have agreed with the petitioners that the Second Circuit erred in construing rule 10b-5 to protect persons other than buyers and sellers of securities. Even if they accepted the results in *Newman* and *Materia*, some Justices may have balked at interpreting the misappropriation theory to encompass the misuse of information belonging to a "market observer"<sup>25</sup> rather than to a "market participant."<sup>26</sup>

The Supreme Court's opinion in *Carpenter* begins with a statement of the facts of the case and continues with the following paragraph:

The District Court found, and the Court of Appeals agreed, that Winans had knowingly breached a duty of confidentiality by misappropriating prepublication information regarding the timing and contents of the "Heard" columns, information that had been gained in the course of his employment under the understanding that it would not be revealed in advance of publication and that if it were, he would report it to his employer. It was this appropriation of confidential information that underlay both the securities laws and mail and wire fraud counts. With respect to the § 10(b) charges, the courts below held that the deliberate breach of Winans' duty of confidentiality and concealment of the scheme was a fraud and deceit on the Journal. Although the victim of the fraud, the Journal, was not a buyer or seller of the stocks traded in or otherwise a market participant, the fraud was nevertheless considered to be "in connection with" a purchase or sale of securities within the meaning of the statute and the rule. The courts reasoned that the scheme's sole purpose was to buy and sell securities at a profit based on advance information of the column's contents. The courts below rejected petitioners' submission, which is one of the two questions presented here, that criminal liability could not be imposed on petitioners under Rule 10b-5 because "the newspaper is the only alleged victim of fraud and has no interest in the securities traded."<sup>27</sup>

The above-quoted paragraph contains the Court's entire discussion prefatory to its announcement that it was "evenly divided with respect to the convictions under the securities laws."<sup>28</sup> In this paragraph the Court adverted to two critical conclusions of the lower courts: (1) that "the deliberate breach of Winans' duty of confidentiality and concealment of the scheme was a fraud and deceit on the Journal," and (2) that the fraud occurred "in connection with" a purchase or sale of securities within the meaning of [section 10(b) and rule 10b-5]" even though "the victim of the fraud, the Journal, was not a buyer or seller of the stocks traded in or otherwise a market participant."<sup>29</sup> By indicating that these two conclusions accounted for the defendants' convictions under rule 10b-5, the Supreme Court invited the inference that the

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24. Brief for Petitioners at 21, *Carpenter v. United States*, 108 S. Ct. 316 (1987) (No. 86-422).

25. In its brief to the Supreme Court, the government characterized the *Wall Street Journal* as a "market observer." Brief for the United States at 45, *Carpenter v. United States*, 108 S. Ct. 316 (1987) (No. 86-422) (emphasis in original).

26. The petitioners in *Carpenter* conceded that "[i]n the 'insider trading' context, a 'misappropriation theory' might arguably be applied without doing violence to the historic meaning of fraud or to the intent of the federal securities laws where 'misappropriated information' belongs to a market participant." Brief for Petitioners at 19, *Carpenter v. United States*, 108 S. Ct. 316 (1987) (No. 86-422) (footnotes omitted).

27. *Carpenter v. United States*, 108 S. Ct. 316, 319-20 (1987).

28. *Id.* at 320.

29. *See id.* at 319.

four Justices who voted to reverse the convictions did so because they disagreed with one or both of the conclusions.

Before the Court decided *Carpenter*, a number of commentators had expressed doubt that an employee who breaches a fiduciary duty to his employer by misappropriating the employer's confidential information is guilty of "deception" or "fraud."<sup>30</sup> It seems unlikely, however, that any member of the Supreme Court rejected the lower courts' conclusion in *Carpenter* that Winans' "deliberate breach of [his] duty of confidentiality and concealment of the scheme was a fraud and deceit" on the *Wall Street Journal*.<sup>31</sup> After all, the Justices unanimously agreed that the defendants' activities constituted a "scheme to defraud" the *Journal* within the meaning of the mail and wire fraud statutes.<sup>32</sup> Winans, the Court observed, had misappropriated his employer's confidential business information, "all the while pretending to perform his duty of safeguarding it."<sup>33</sup> He had engaged in deceit "as he played the role of a loyal employee."<sup>34</sup> That deceit was enough to support a finding that he had committed "fraud" under the mail and wire fraud statutes and, presumably, was enough to support a finding that he had committed "fraud" under rule 10b-5 as well.<sup>35</sup>

The most plausible explanation for the division of the Court in *Carpenter* is that four Justices rejected the proposition that "[a]lthough the victim of the fraud, the *Journal*, was not a buyer or seller," Winans' fraud nevertheless had occurred "in connection with" a purchase or sale of securities."<sup>36</sup> The petitioners' brief hammered away at the point that "[t]he only victim of fraud alleged by the government . . . was the *Journal*, a financial newspaper which had absolutely no interest in the purchase, sale or value of any of the securities traded by petitioners."<sup>37</sup> Even before the *Carpenter* case arose, some commentators had questioned whether any fraud perpetrated on a non-trading party could be said to have occurred "in connection with" a securities transaction.<sup>38</sup>

In a purely logical sense, it is obvious that there was a "connection" between Winans' misappropriation of the *Journal*'s information and the defendants' purchases and sales of securities. Indeed, the purchase and sale of securities was the "sole

30. See, e.g., ABA Comm. on Federal Regulation of Securities, *Report of the Task Force on Regulation of Insider Trading—Part I: Regulation Under the Antifraud Provisions of the Securities Exchange Act of 1934*, reprinted in 41 BUS. LAW. 223, 237 (1985); Phillips & Zutz, *The Insider Trading Doctrine: A Need for Legislative Repair*, 13 HOFSTRA L. REV. 65, 91 (1984); Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 DUKE L.J. 960, 983; Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217, 1272 (1981). But see Aldave, *supra* note 7, at 118–21.

31. *Carpenter v. United States*, 108 S. Ct. 316, 319 (1987).

32. *Id.* at 320.

33. *Id.* at 322.

34. *Id.*

35. "The concept of 'fraud' includes the act of embezzlement, which is 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *Id.* at 321 (quoting *Grin v. Shine*, 187 U.S. 181, 189 (1902)).

36. *Id.* at 319.

37. Brief for Petitioners at 10, *Carpenter v. United States*, 108 S. Ct. 316 (1987) (No. 86-422).

38. See, e.g., Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1, 47 (1982); Wang, *Recent Developments in the Federal Law Regulating Stock Market Insider Trading*, 6 CORP. L. REV. 291, 302 (1983).

purpose' ” of the defendants' scheme.<sup>39</sup> The Supreme Court, however, described the issue as whether a fraud had been committed “ ‘in connection with’ a purchase or sale of securities *within the meaning of the statute and the rule.*”<sup>40</sup> As the Court apparently saw it, the question was not whether there was a logical nexus between Winans' misappropriation of information from the *Journal* and the defendants' subsequent trading. Rather, the question was whether section 10(b) and rule 10b-5 should be interpreted, *as a matter of policy*, to protect the interests of a party which “was not a buyer or seller of the stocks traded in or otherwise a market participant.”<sup>41</sup>

If one formulates the issue in *Carpenter* as stated in the preceding sentence, one can easily understand why four members of the Supreme Court voted to reverse the defendants' convictions under rule 10b-5. The purpose of the antifraud provisions of the federal securities laws is to protect the interests of investors, not the property rights of employers or the reputations of newspapers.<sup>42</sup> If, in fact, the defendants injured no one but the *Journal*, they should not have been convicted of violating rule 10b-5. The members of the Court were in error, however, if they believed that the *Journal* was the only victim, or even the principal victim, of the defendants' fraud.

#### B. A Suggested Analysis

Because a fraud is not complete until someone is injured,<sup>43</sup> the fraud committed by the *Carpenter* defendants did not consist solely of the misappropriation of confidential information from the *Journal*. Neither the *Journal* nor any other person would have been harmed if Winans had simply taken a copy of the *Journal*'s publication schedule home with him and locked it in a strong box. Nor did the fraud consist of the misappropriation of the *Journal*'s information *and* the defendants' failure to disclose that information to particular securities traders or to the public. Obviously, Winans and his codefendants had no duty, and no right, to disseminate advance information to anyone about what would appear in the *Journal* on a given date.<sup>44</sup> Rather, the fraud consisted of Winans' misappropriation of the *Journal*'s confidential information *and* the defendants' subsequent trading on that information. Both the misappropriation and the trading were essential elements of the defendants' fraudulent scheme.

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39. *United States v. Carpenter*, 791 F.2d 1024, 1033 (2d Cir. 1986) (quoting *United States v. Newman*, 664 F.2d 12, 18 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983)).

40. *Carpenter v. United States*, 108 S. Ct. 316, 319 (1987) (emphasis added).

41. *Id.*

42. *See, e.g.*, *Phillips & Zutz*, *supra* note 30, at 91; *Silver*, *supra* note 30, at 983.

43. Damage is an element of common-law fraud or deceit. *See* 2 F. HARPER, F. JAMES, JR., & O. GRAY, *THE LAW OF TORTS* § 7.1, at 381 (2d ed. 1986); L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 712 (2d ed. 1988). Professor Loss asserts, however, that “the establishment of a ‘scheme . . . to defraud’ under [Section 17(a)(1) of the Securities Act of 1933] is not dependent on proof that any victim suffered actual loss.” *Id.* at 723. Presumably, the establishment of a “scheme . . . to defraud” under rule 10b-5(a) does not require proof of actual loss either.

44. “Disclosure by the employee [of confidential information that he misappropriated from his employer] would aggravate the breach of duty to the employer, not cure it.” *Phillips & Zutz*, *supra* note 30, at 91.

Only after one has acknowledged that the defendants' entire scheme constituted a "fraud" can one accurately identify all the parties or classes of parties who were victims of that fraud. The victim of Winans' *misappropriation* was the *Wall Street Journal*, which was deprived of an intangible property right.<sup>45</sup> The victims of the defendants' *trading*, however, were investors. The defendants inflicted concrete economic injuries on those anonymous investors who were induced by the defendants' trading to buy or sell securities on unfavorable terms, or were preempted by the defendants' trading from buying or selling securities on favorable terms.<sup>46</sup> The defendants' fraud caused innocent members of the investing public to suffer net losses in the amount of the defendants' illicit gains.<sup>47</sup>

In a case like *Carpenter*, in which the defendants have misappropriated confidential information from a non-trading party and used that information in buying and selling securities on a stock exchange, the federal securities laws may not provide a remedy to any of the persons injured by the defendants' fraud. The non-trading victim of the defendants' *misappropriation* will not have standing to sue for damages under rule 10b-5.<sup>48</sup> The members of the investing public who were injured by the defendants' *trading* ordinarily will be unaware, and unable to prove, that they were harmed.<sup>49</sup> That there may be no private plaintiffs who can sue the wrongdoers under the securities laws should not, however, obscure the fact that the defendants committed a fraud, and that its victims included investors.

45. In affirming the mail and wire fraud convictions of the *Carpenter* defendants, the Supreme Court reasoned that they had deprived the *Journal* of its "right to exclusive use" of its confidential business information. *Carpenter v. United States*, 108 S. Ct. 316, 321 (1987).

46. As Professor Wang has demonstrated, every "inside trade"—i.e., trade made on the basis of material nonpublic information—injures "induced traders," "preempted traders," or both:

The inside trade could induce opposite trade transactions that otherwise would not have occurred, or preempt trades of the same type that otherwise would have occurred. Thus, there are at least two categories of people harmed by an inside trade: those who would not have made bad purchases or sales but for the inside trade; and those who would have made good purchases or sales but for the inside trade.

Wang, *supra* note 30, at 1235 (footnote omitted).

The inside trade may also injure some investors who trade on the same side of the market as the "inside trader":

If a substantial purchase or sale based on nonpublic information causes the specialist or market-maker to change his price quotations, those engaging in the same type of transaction at approximately the same time as the inside trade (the "same type" class) will either pay more or receive less than they otherwise would. . . .

Although the members of the same type class are unquestionably worse off, those with whom they transact (the "opposite type" class) are better off. Members of the same type class, however, are unsympathetic figures. Along with the inside trader, they are either buying into a windfall gain or selling into a windfall avoidance of loss.

*Id.* at 1239-40 (footnote omitted).

In short, "any particular inside trade clearly harms other investors." *Id.* at 1321.

47. "When someone trades on nonpublic information, the group of all other investors suffers a net loss. (Some members of this group gain, others lose; but the losses will exceed gains.) . . . The group's net loss is equivalent to the inside trader's gain." *Id.* at 1235.

48. Only a person who has purchased or sold securities can sue for damages under the rule. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-36 (1975).

49. Although those who trade on nonpublic information injure specific investors, the injured investors generally cannot be identified. "In practice, it is impossible to recreate the hypothetical universe that would have existed" in the absence of the unlawful trading. The trading "directly or indirectly changes the inventory of a specialist or market-maker. There is no way of knowing how this change alters the intermediary's price quotations, and how these quotations affect the behavior of public investors." Wang, *supra* note 30, at 1312.

In its brief in the *Carpenter* case, the government argued that trading on misappropriated information damages the integrity of the securities markets and undermines public confidence in the honesty of those markets, to the detriment of all investors.<sup>50</sup> While the government's position has considerable merit, one need not posit an indirect injury to the amorphous class of all investors in order to justify bringing the wrongdoing of the *Carpenter* defendants within the coverage of the federal securities laws. In fact, the defendants had committed a fraud in connection with the purchase and sale of securities, and that fraud had damaged investors—specific if unidentifiable investors. The Supreme Court should have held, unanimously, that the defendants had violated rule 10b-5.

### III. THE IMMEDIATE CONSEQUENCES OF *CARPENTER*

#### A. *The Future of the Misappropriation Theory*

If the four members of the Supreme Court who voted to reverse the securities fraud convictions of the *Carpenter* defendants did so because they entirely disapproved of the misappropriation theory, and if Justice Kennedy<sup>51</sup> should also prove hostile to that theory, the Court might repudiate it in some future case. Without the aid of the misappropriation theory, section 10(b) and rule 10b-5 would lose much of their efficacy as weapons against trading on nonpublic information, since they would no longer extend to trading by "outsiders."<sup>52</sup> As explained above,<sup>53</sup> however, at least some of the four members of the Court who voted to reverse the securities fraud convictions in *Carpenter* probably did so only because they were unconvinced that the defendants' fraud had injured any market participant. These Justices might well vote differently in a more typical misappropriation case,<sup>54</sup> or one in which the

50. Brief for the United States at 42–45, *Carpenter v. United States*, 108 S. Ct. 316 (1987) (No. 86-422). The government also cited the Second Circuit's argument that the defendants had used the information they misappropriated from the *Journal* "for [their own] financial benefit . . . and to the financial detriment of those investors with whom [they] traded." *Id.* at 44 (quoting *United States v. Carpenter*, 791 F.2d 1024, 1032 (2d Cir. 1986)).

51. On November 11, 1987, President Reagan nominated Judge Anthony M. Kennedy of the Ninth Circuit Court of Appeals to fill the Supreme Court vacancy that had been created by the resignation of Associate Justice Lewis F. Powell, Jr., at the end of the Court's 1986 Term. *N.Y. Times*, Nov. 12, 1987, at A1, col. 6 (late city final ed.). The United States Senate confirmed Judge Kennedy's appointment on February 3, 1988. *Id.*, Feb. 4, 1988, at A18, col. 1 (late city final ed.). He was sworn in as Justice Kennedy on February 18, 1988. *Id.*, Feb. 19, 1988, at A10, col. 1 (late city final ed.).

52. Under the mode of analysis approved by the Supreme Court in *Chiarella v. United States*, 445 U.S. 222 (1980), and *Dirks v. SEC*, 463 U.S. 646 (1983),

a person violates Rule 10b-5 by buying or selling securities on the basis of material nonpublic information if (1) he owes a fiduciary or similar duty to the other party to the transaction; (2) he is an insider of the corporation in whose shares he trades, and thus owes a fiduciary duty to the corporation's shareholders; or (3) he is a tippee who received his information from an insider of the corporation and knows, or should know, that the insider breached a fiduciary duty in disclosing the information to him.

Aldave, *supra* note 7, at 101–02.

The reasoning of *Chiarella* and *Dirks* does not bar trading on material nonpublic information by an "outsider"—"a person who is not an insider of the issuer and has not improperly received information from an insider." *Id.* at 112. The misappropriation theory, on the other hand, bars any person, insider or outsider, from trading on the basis of material nonpublic information that he misappropriated from another person. *See id.* at 121.

53. *See supra* text accompanying notes 36–42.

54. For examples of more typical cases, see *SEC v. Materia*, 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983); and *SEC v.*



government successfully demonstrated that those who profit by trading on misappropriated nonpublic information always cause damage to other investors. In any event, the evenly divided vote in *Carpenter* leaves the misappropriation theory intact for the present, most notably in the Second Circuit, where insider-trading litigation is concentrated.<sup>55</sup>

### B. The "Criminalization" of Insider-Trading Law

Even if the Supreme Court were to repudiate the misappropriation theory at some time in the future, the *Carpenter* decision ensures that the Department of Justice could continue to prosecute persons who had traded on the basis of misappropriated nonpublic information. In the second part of its opinion in *Carpenter*, the Supreme Court unanimously upheld the defendants' convictions under the mail fraud and wire fraud statutes<sup>56</sup> on the far-reaching theory that Winans' misappropriation of the *Journal's* publication schedule had deprived the *Journal* of a "property right"<sup>57</sup>—the right to "exclusive use" of its "confidential business information."<sup>58</sup> Hereafter, anyone who misappropriates confidential business information for the purpose of trading on it will, as long as she uses the mails or wires to further her scheme, be subject to criminal prosecution under the federal mail or wire fraud statutes.<sup>59</sup> It may make little difference, as a practical matter, whether she can be prosecuted for violating rule 10b-5 as well.<sup>60</sup>

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Musella, 578 F. Supp. 425 (S.D.N.Y. 1984) (mem.). In these cases employees had misappropriated information that had been entrusted to their employers by market participants—companies preparing to purchase securities.

55. Most insider-trading cases have a strong nexus to New York, the site of the major stock exchanges.

56. The mail fraud statute, 18 U.S.C. § 1341 (1982), provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

The wire fraud statute, 18 U.S.C. § 1343 (1982), provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

57. *Carpenter v. United States*, 108 S. Ct. 316, 320 (1987).

58. *Id.* at 321.

59. The Court's affirmation of the *Carpenter* defendants' convictions of mail and wire fraud eased the concerns of prosecutors about the breadth of the ruling in *McNally v. United States*, 107 S. Ct. 2875 (1987). In *McNally*, the Court had held that the mail fraud statute does not outlaw "schemes to defraud citizens of their intangible rights to honest and impartial government," *id.* at 2879, but is "limited in scope to the protection of property rights." *Id.* at 2881. In *Carpenter*, however, the Court made it clear that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Carpenter v. United States*, 108 S. Ct. 316, 320 (1987). "Confidential business information has long been recognized as property," said the Court, and "its intangible nature" does not remove it from the protection of the mail and wire fraud statutes. *Id.*

60. Under the Sentencing Guidelines for United States Courts, see 52 Fed. Reg. 18,046 (1987), multiple counts of conviction for offenses that involve "substantially the same harm" are grouped together for the purpose of determining the defendant's sentence. *Id.* § 3D1.2 at 18,089. If a defendant is convicted of mail fraud and wire fraud, the "base

The Court's expansive reading of the mail and wire fraud statutes, in conjunction with its failure to endorse the misappropriation theory, could accelerate the "criminalization" of insider-trading law.<sup>61</sup> Because the Securities and Exchange Commission cannot be certain that the Supreme Court will sustain any judgment dependent on the misappropriation theory, it may hesitate to bring civil actions in some cases in which it must rely on that theory. The Department of Justice, on the other hand, does not need to invoke the misappropriation theory, or to depend solely on that theory, to support criminal charges against defendants who have used the wires or mails in furtherance of an insider-trading scheme. A possible result is that proportionally more persons accused of insider trading will be pursued by a U.S. Attorney, and proportionally fewer by the SEC.

### C. Implications for Private Actions

*Carpenter* may also prove to be a boon to private plaintiffs who seek damages from defendants who traded on the basis of misappropriated nonpublic information. Although the Second Circuit has decided three cases endorsing the government's use of the misappropriation theory,<sup>62</sup> it has held that the theory does not support a private remedy for plaintiffs who traded on the opposite side of the market from defendants who traded on the basis of misappropriated information.<sup>63</sup> Thus, the investors who sold the stocks that the *Carpenter* defendants purchased, or purchased the stocks that the *Carpenter* defendants sold, could not have stated a cause of action against the defendants under rule 10b-5. The *Carpenter* decision, however, increases the possibility that private plaintiffs may be able to recover damages from insider-trading defendants under RICO.<sup>64</sup>

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offense level" of her misconduct will be "6." *Id.* § 2F1.1 at 18,069. If she also is convicted of insider trading in violation of rule 10b-5, the "base offense level" of her misconduct will be "8." *Id.* § 2F1.2 at 18,070. The two-point difference may be relatively minor in comparison to other factors considered in calculating the defendant's "total offense level" (on a scale of "1" to "43," see *id.* at 18,095-96), and determining an appropriate sentence.

61. See Peloso, *Securities, Commodities Litigation: The Criminalization of Securities Laws*, N.Y.L.J., May 28, 1987, at 1, col. 1 (arguing that the SEC is abdication part of its enforcement function by allowing the U.S. Attorney to decide for himself which defendants to prosecute, and for what offenses).

62. *United States v. Carpenter*, 791 F.2d 1024 (2d Cir. 1986), *aff'd*, 108 S. Ct. 316 (1987); *SEC v. Materia*, 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983).

63. See *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

The plaintiff in *Moss* sold shares of a target company prior to the public announcement of a tender offer for the company's stock. On the day of the plaintiff's sale, the defendants purchased shares of the target company on the basis of information that one of them had misappropriated from his employer, the investment banker for the tender offeror. When the tender offer was announced a week later, the defendants tendered their shares and made a substantial profit. The Second Circuit held that the plaintiff had failed to state a cause of action under rule 10b-5, because the defendants did not owe a duty of disclosure to the shareholders of the target company, *id.* at 13, or to the entire marketplace, *id.* at 16.

64. Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986), in 1970 in an effort to halt the infiltration of organized crime into American businesses. See Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-53 (1982).

The statute contains four prohibitions. First, RICO declares it unlawful for any person who has received any income from a pattern of racketeering activity to use or invest that income in the acquisition of any interest in, or the establishment or operation of, any enterprise engaged in or affecting interstate or foreign commerce. 18 U.S.C. § 1962(a) (1982 & Supp. IV 1986). Second, RICO declares it unlawful for any person to acquire or maintain any interest in any such enterprise through a pattern of racketeering activity. *Id.* § 1962(b). Third, RICO makes it unlawful for any person employed by or associated with any such enterprise to conduct or participate in the conduct of its affairs through a pattern of racketeering

Both mail fraud and wire fraud are acts of "racketeering activity" as defined in RICO, and a "pattern of racketeering activity" requires the commission of at least two such acts within a ten-year period.<sup>65</sup> A person who has been "injured in his business or property" by a defendant's conduct of the affairs of an "enterprise" through a pattern of racketeering activity can recover treble damages, plus attorney's fees, from the defendant.<sup>66</sup> Although some of the ground rules for establishing a private cause of action under RICO are still unclear,<sup>67</sup> the *Carpenter* decision is likely to encourage the filing of civil RICO actions by plaintiffs who may be unable to state a claim under rule 10b-5, but who can allege the elements of mail fraud or wire fraud.

#### IV. THE SEC'S LEGISLATIVE PROPOSAL

##### A. An Overview of the Proposal

At one time the SEC opposed the enactment of a statutory definition of illegal insider trading.<sup>68</sup> Arguing that existing law was "sufficiently clear to provide guidance as to prohibited transactions,"<sup>69</sup> the Commission wished to retain the flexibility of a case-by-case approach,<sup>70</sup> and worried that a statutory definition "would create new uncertainties and spawn future litigation."<sup>71</sup> After the Supreme Court granted certiorari in *Carpenter*,<sup>72</sup> however, the Commission announced that it "could support a definition that preserved its authority and flexibility."<sup>73</sup> In August

activity. *Id.* § 1962(c). And, fourth, RICO makes it unlawful for any person to conspire to violate any of the foregoing provisions. *Id.* § 1962(d).

RICO defines "racketeering activity" to mean any of a number of state and federal offenses, including indictable mail fraud or wire fraud, or "any offense involving . . . fraud in the sale of securities . . . punishable under any law of the United States." *Id.* § 1961(1). A "pattern of racketeering activity" requires at least two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." *Id.* § 1961(5).

The government can seek criminal penalties or civil remedies for violations of RICO. *Id.* §§ 1963, 1964(a)-(b), (d). The statute also creates a private cause of action. "Any person injured in his business or property" by a RICO violation may sue to "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.* § 1964(c).

65. See *supra* note 64.

66. See *id.*

67. For an excellent discussion of the major precedents and unresolved issues under RICO, particularly in relation to securities litigation, see R. JENNINGS & H. MARSH, *SECURITIES REGULATION: CASES AND MATERIALS* 1493-1508 (6th ed. 1987).

Perhaps the most important current issue is what constitutes a "pattern of racketeering activity." See Black, *Racketeer Influenced and Corrupt Organizations (RICO)—Securities and Commercial Fraud as Racketeering Crime after Sedima: What is a "Pattern of Racketeering Activity"?*, 6 *PACE L. REV.* 365 (1986).

68. When Congress was considering the bill which became the Insider Trading Sanctions Act of 1984, the SEC opposed the addition to it of a definition of insider trading. See *Insider Trading Sanctions and SEC Enforcement Legislation: Hearing on H.R. 559 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance, 98th Cong., 1st Sess. 92, 98 (1983)* (letter of John S. R. Shad, Chairman, SEC, to Subcomm. Chairman Timothy E. Wirth).

69. *Id.* at 92.

70. See *id.* at 99.

71. *Id.* at 92.

72. The petition for a writ of certiorari was granted on December 15, 1986. *Carpenter v. United States*, 107 S. Ct. 666 (1986).

73. *Definition of Insider Trading: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, Part I, 100th Cong., 1st Sess. 111 (1987)* (statement of Charles C. Cox, Commissioner, SEC).

1987, the Commission submitted a proposed legislative definition of insider trading to the Subcommittee on Securities of the Senate Banking, Housing and Urban Affairs Committee.<sup>74</sup> The Subcommittee already had been holding hearings on a bill, prepared by a committee of securities lawyers, that differed in some respects from the SEC proposal.<sup>75</sup> Then, in November, shortly after the Supreme Court issued the *Carpenter* opinion,<sup>76</sup> the SEC sent to the Subcommittee a revised proposal entitled "The Insider Trading Proscriptions Act of 1987" (the "ITPA" or "the Act").<sup>77</sup> Most of the provisions of this "proposal for compromise legislation," according to the chairman of the SEC, were acceptable to both the lawyers' committee and a majority of the members of the Commission.<sup>78</sup>

If enacted into law, the compromise version of the ITPA would add section 16A to the Securities Exchange Act of 1934<sup>79</sup> and make conforming amendments to other sections of the Exchange Act.<sup>80</sup> Proposed section 16A would bar a person from trading in securities while in possession of material nonpublic information relating to those securities if he "kn[ew] or recklessly disregard[ed]"<sup>81</sup> that the information had been "obtained wrongfully," or that his trading would constitute a "wrongful use" of the information.<sup>82</sup> Trading while in possession of material nonpublic information would be "wrongful" if the information had been obtained by, or its use would constitute, "(A) theft, bribery, misrepresentation, espionage (through electronic or other means) or (B) conversion, misappropriation, or any other breach of a fiduciary duty, breach of any personal or other relationship of trust and confidence, or breach of any contractual or employment relationship."<sup>83</sup> A person who would violate section 16A by trading while in possession of material nonpublic information would also violate the section by "wrongfully" communicating that information to a tippee who traded while in possession of it, or to a tippee who communicated it to a subtippee who traded while in possession of it, if the trading by the tippee or subtippee was "reasonably foreseeable."<sup>84</sup> Further, section 16A would give any

74. See *Definition of Insider Trading: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, Part II*, 100th Cong., 1st Sess. 9 (1987) (memorandum of SEC in support of proposed bill entitled "The Insider Trading Act of 1987"), 52-56 (text of proposed bill entitled "The Insider Trading Act of 1987").

75. See *id.* at 1 (opening statement of Senator Riegle), 48-51 (text of S. 1380, drafted by lawyers' committee).

76. *Carpenter* was decided on November 16, 1987. *Carpenter v. United States*, 108 S. Ct. 316 (1987).

77. See *Letter from SEC Chairman Ruder to Senator Donald W. Riegle, Chairman, Securities Subcomm. of the Comm. on Banking, Housing, and Urban Affairs and Senator Alfonse D'Amato, Securities Subcomm. of the Comm. on Banking, Housing, and Urban Affairs*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 84,202 (Nov. 16, 1987) [hereinafter *Letter from SEC Chairman Ruder*]. Both the SEC Chairman's transmittal letter (dated Nov. 16, 1987) and the proposed bill entitled "The Insider Trading Proscriptions Act of 1987" (dated Nov. 18, 1987) appear at 84,202.

78. *Id.* at 88,913-14.

79. The Exchange Act is codified at 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986).

80. The ITPA would amend §§ 20(d), 21(d)(2)(A), and 21(d)(2)(B) of the Exchange Act, 15 U.S.C. §§ 78t(d), 78u(d)(2)(A), 78u(d)(2)(B) (Supp. IV 1986). The proposed amendments to these provisions are not discussed in this Article.

81. See *Letter from SEC Chairman Ruder, supra* note 77, at 88,916 (proposed Exchange Act § 16A(b)(1)). It is hard to imagine how a person could *recklessly disregard* a fact that he did not *know*. Perhaps the drafters intended to outlaw trading by a person who *recklessly disregarded evidence indicating* that the information in his possession had been obtained wrongfully, or *was reckless in not knowing* that his trading would constitute a wrongful use of the information.

82. See *id.* (proposed Exchange Act § 16A(b)(1)).

83. *Id.*

84. See *id.* (proposed Exchange Act § 16A(c)).

person who traded contemporaneously on the opposite side of the market a cause of action against a defendant who traded in violation of the section,<sup>85</sup> and would give any other person injured by a violation of the section "in connection with such person's purchase or sale of securities" a right to sue for damages or equitable relief.<sup>86</sup> A person who tipped information in violation of section 16A would be jointly and severally liable with his tippees or subtippees.<sup>87</sup>

The foregoing summary of the provisions of the ITPA, while selective,<sup>88</sup> is sufficient to demonstrate that the Act is not simply a restatement of the current law of insider trading. In fact, the Act would go considerably farther than the courts have gone, even with the aid of the misappropriation theory, in imposing liability on those who trade on material nonpublic information.<sup>89</sup> First, the Act would outlaw some varieties of misconduct that cannot be reached by rule 10b-5, which only prohibits "fraud."<sup>90</sup> Second, the Act would grant private remedies to some persons who do not have, and to other persons who may not have, such remedies under existing law.<sup>91</sup>

### B. The Definition of "Wrongful" Trading

Over the years, many commentators have argued that Congress should enact a statute under which a defendant's liability for trading on nonpublic information would not depend, as it does under rule 10b-5, on whether he committed "fraud."<sup>92</sup> Under rule 10b-5, the central inquiry in insider-trading cases is whether the defendant traded on the basis of material nonpublic information which he obtained through "fraud," or whether his trading or tipping constituted "fraud."<sup>93</sup> Under the ITPA, on the other hand, the central inquiry would be whether the defendant traded while in possession of material nonpublic information which he had obtained "wrongfully," or whether

85. *See id.* at 88,917 (proposed Exchange Act § 16A(g)(1)(A)). The defendant's liability to contemporaneous traders would be limited to the amount of his "actual profit obtained or loss avoided," and the damages awarded against him would be diminished by any amount that he had been ordered to disgorge in an action brought by the SEC. *See id.* (proposed Exchange Act § 16A(g)(2)).

86. *See id.* (proposed Exchange Act § 16A(g)(1)(B)).

87. *See id.* (proposed Exchange Act § 16A(g)(3)).

88. Provisions of the Act other than those discussed in the text would set forth legislative findings, codify the present SEC rule outlawing trading and tipping by persons in possession of material nonpublic information relating to a tender offer, limit the respondeat superior liability of employers or controlling persons for violations of the Act by employees or controlled persons, grant the Commission broad power to create exemptions from the provisions of the Act, and establish a statute of limitations for the commencement of private actions under the Act. *See id.* at 88,916-18.

89. The ITPA would make a number of changes in the law in addition to those discussed in this Article. For example, the Act would establish that an individual can be held liable for trading "while in possession of" material nonpublic information without a showing that the person traded "on the basis of" that information. *See generally* Langevoort, *The Insider Trading Sanctions Act of 1984 and Its Effect on Existing Law*, 37 VAND. L. REV. 1273, 1289-90 (1984) (suggesting that Congress already has endorsed the view that a person can violate rule 10b-5 by trading "while in possession of" material nonpublic information). This Article focuses on two questions—what constitutes unlawful trading, and who can recover damages from defendants who have engaged in such trading—to which the ITPA would provide answers different from those provided by the misappropriation theory.

90. *See infra* text accompanying notes 92-100.

91. *See infra* text accompanying notes 111-33.

92. *See, e.g.*, ABA Comm. on Federal Regulation of Securities, *supra* note 30, at 253; Freeman, *The Insider Trading Sanctions Bill—A Neglected Opportunity*, 4 PACE L. REV. 221 (1984); Phillips & Zutz, *supra* note 30; Seligman, *The Reformulation of Federal Securities Law Concerning Nonpublic Information*, 73 GEO. L.J. 1083, 1137-40 (1985).

93. "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." Chiarella v. United States, 445 U.S. 222, 234-35 (1980).

his trading or tipping was “wrongful.”<sup>94</sup> The proposed Act itself lists the means of acquiring or using information which, if the Act were adopted, would be considered “wrongful.”<sup>95</sup>

Because the ITPA would shift the focus from “fraud” to “wrongfulness,” there is a possibility that merely negligent conduct would violate the Act. The “scienter” requirement that is an essential element of “fraud” ensures that a defendant cannot commit a non-reckless, inadvertent violation of rule 10b-5.<sup>96</sup> A corporate insider would violate the ITPA, however, by “wrongfully” communicating material nonpublic information relating to the corporation’s securities to another person who, while in possession of the information, engaged in reasonably foreseeable trading in the securities.<sup>97</sup> The insider’s communication of the information would be “wrongful” if he “kn[ew] or recklessly disregard[ed]” that its communication “would constitute, directly or indirectly, . . . any . . . breach of a fiduciary duty, breach of any personal or other relationship of trust and confidence, or breach of any contractual or employment relationship.”<sup>98</sup> The ITPA would not explicitly require that the critical breach of a duty or a relationship be intentional, or reckless, or self-serving. Thus, should some material nonpublic information slip from the lips of a company official who had had a few drinks, or should an aggressive securities analyst pry out of an official more information than he ought to have disclosed, it appears that the official would be in violation of the Act if the recipients of the information traded in the securities to which it related, and their trading was reasonably foreseeable.<sup>99</sup> Whether this result was intended is unclear. What is clear is that the drafters’ reliance on unqualified and elastic phrases like “breach of any . . . relationship of trust and confidence” would do little to “reduc[e] uncertainties in the state of the law.”<sup>100</sup>

Free of dependence on the concept of “fraud,” the ITPA would fill some gaps that exist under rule 10b-5. The Supreme Court’s pre-*Carpenter* decisions on insider trading<sup>101</sup> establish that a person violates rule 10b-5 by buying or selling securities on the basis of material nonpublic information if he owes a fiduciary or similar duty to the party with whom he trades; or if he is an insider of the issuer in whose shares he trades, and thus owes a fiduciary duty to the issuer’s shareholders; or if he is a tippee who received information from an insider of the issuer and knows, or should know,

94. See *supra* note 82 and accompanying text.

95. See *supra* note 83 and accompanying text.

96. See *Aaron v. SEC*, 446 U.S. 680, 695 (1980) (concluding that “scienter is a necessary element of a violation of § 10(b) and Rule 10b-5”).

97. See *supra* notes 81–82 and accompanying text.

98. See *supra* note 83 and accompanying text.

99. See *supra* note 84 and accompanying text.

100. Proposed § 16A(a)(5) of the Exchange Act would read as follows:

It is appropriate to, and this section does, establish exclusive statutory prohibitions that clarify the conduct that constitutes the wrongful trading of securities while in possession of material, nonpublic information, and the wrongful communication of such information under the federal securities laws, thereby *reducing uncertainties in the state of the law* without otherwise affecting existing statutory prohibitions against manipulative, deceptive or fraudulent conduct.

Letter from SEC Chairman Ruder, *supra* note 77, at 88,916 (emphasis added).

101. *Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980).

that the insider breached a fiduciary duty in disclosing the information to him.<sup>102</sup> The Second Circuit decisions embracing the misappropriation theory establish, in addition, that a person violates rule 10b-5 by buying or selling securities on the basis of material nonpublic information if he or a coconspirator misappropriated that information from another person.<sup>103</sup> Neither the Supreme Court decisions nor the Second Circuit decisions, however, outlaw an outsider's trading on material nonpublic information which he stole from a stranger,<sup>104</sup> accidentally overheard,<sup>105</sup> or used with the owner's permission.<sup>106</sup> The ITPA, as drafted by the SEC, would prohibit the ordinary thief from trading on information he stole,<sup>107</sup> and *might* prohibit one who serendipitously acquired information from trading on it.<sup>108</sup> Oddly, the ITPA apparently would *not*, under any circumstances, prohibit an outsider from trading on the basis of nonpublic information which the rightful owner of the information authorized him to use in his trading.<sup>109</sup> The notion that the *Wall Street Journal* should be permitted to immunize its reporters from liability for trading on advance information concerning articles to be published in the *Journal* is troubling, to say the least.<sup>110</sup> Although there are some anomalies in the law of insider trading as the courts have developed it under rule 10b-5, these anomalies should not be perpetuated in a statute specifically designed to define what is and what is not "wrongful" trading on nonpublic information.

102. Aldave, *supra* note 7, at 101-02.

103. See *United States v. Carpenter*, 791 F.2d 1024 (2d Cir. 1986), *aff'd*, 108 S. Ct. 316 (1987); *SEC v. Materia*, 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983).

104. See Aldave, *supra* note 7, at 122.

105. See *SEC v. Switzer*, 590 F. Supp. 756 (W.D. Okla. 1984) (holding that rule 10b-5 does not prohibit an outsider from trading on the basis of information inadvertently revealed by an insider).

106. See Aldave, *supra* note 7, at 121-22.

107. "[T]rading while in possession of material, nonpublic information is wrongful . . . if such information has been obtained by . . . theft . . ." *Letter from SEC Chairman Ruder*, *supra* note 77, at 88,916 (proposed Exchange Act § 16A(b)(1)).

108. An insider who negligently or recklessly disclosed material nonpublic information to an outsider—*e.g.*, by speaking so loudly that he was overheard—might be guilty of "wrongfully" communicating the information. "[I]nformation is wrongfully communicated . . . if the person making the communication knows or recklessly disregards that . . . its communication would constitute, directly or indirectly, . . . any . . . breach of a fiduciary duty, breach of any personal or other relationship of trust and confidence, or breach of any contractual or employment relationship." See *id.* (proposed Exchange Act § 16A(c)). If the outsider then traded while in possession of the information, and his trade was "reasonably foreseeable," the insider would be in violation of proposed § 16A(c). See *supra* text accompanying note 84. The outsider would be in violation of proposed § 16A(b)(1) if he "kn[ew] or recklessly disregard[ed]" that his trading constituted a "wrongful use" of the information. See *supra* text accompanying notes 81-83.

On the other hand, an outsider who observed a huge explosion in the XYZ factory while driving past it on a deserted road would not be in violation of the ITPA if he immediately called his broker and sold all his XYZ stock. Although he possessed material nonpublic information, he did not obtain it "wrongfully," and his trading on the basis of that information would not constitute a "wrongful use" of it. See *id.*

109. The letter which Chairman Ruder sent to the Senate with the SEC proposal for the ITPA addressed the point: [A]s under existing case law, "misappropriation" and "conversion" refer to possession or use of information in breach of a preexisting duty of confidentiality or non-use arising from the expectations of the parties thereto, or from law. The proposed section 16A(b) *per se* does not create such duties, nor would section 29 of the Securities Exchange Act invalidate otherwise lawful agreements to waive any such preexisting duties.

*Letter from SEC Chairman Ruder*, *supra* note 77, at 88,914-15.

110. The misappropriation theory has been criticized for its inability to reach an employee who traded on nonpublic information with the permission of his employer. See *Chiarella v. United States*, 445 U.S. 222, 246 (1980) (Blackmun, J., dissenting); Wang, *supra* note 30, at 1296.

### C. *Private Causes of Action*

Besides defining the circumstances under which it would be unlawful for a person to trade on material nonpublic information or to communicate such information to other traders, the ITPA would create two private causes of action. First, any person who "contemporaneously" purchased securities of the class which the defendant sold, or sold securities of the class which the defendant purchased, could sue a defendant who violated the Act by trading in securities while in possession of material nonpublic information that was obtained or used wrongfully.<sup>111</sup> The defendant's liability would be limited to the amount of her "actual profit obtained or loss avoided,"<sup>112</sup> and the damages awarded against her would be diminished by any amount that she had been ordered to disgorge in an action brought by the Commission.<sup>113</sup> Second, any other purchaser or seller of securities who was injured by a violation of the Act could sue to recover "any damages caused by reason of such violation, or for appropriate equitable relief, or both."<sup>114</sup>

The remedy which the ITPA would grant to persons who traded contemporaneously with the defendant appears to be modeled on the remedy which the Second Circuit developed in two rule 10b-5 cases, *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>115</sup> and *Elkind v. Liggett & Myers, Inc.*<sup>116</sup> These decisions allow plaintiffs who purchased securities in the open market during a period when insiders or tippees were selling securities of the same class on the basis of material nonpublic information, or sold securities in the open market during a period when insiders or tippees were purchasing securities of the same class on the basis of material nonpublic information, to recover damages up to the amount of the defendants' trading profits.<sup>117</sup> *Shapiro* and *Elkind*, it should be stressed, authorize actions for damages by plaintiffs who traded on the other side of the market from insiders or tippees—defendants who owed an obligation to the issuer's shareholders either to disclose material inside information or to abstain from trading.<sup>118</sup> Although the Second Circuit permits open-market traders to sue insiders or tippees who breached a disclose-or-

111. See *Letter from SEC Chairman Ruder, supra* note 77, at 88,917 (proposed Exchange Act § 16A(g)(1)(A)).

112. See *id.* (proposed Exchange Act § 16A(g)(2)).

A person who violated § 16A by tipping would be jointly and severally liable with "any persons who obtained profits or avoided losses" as a consequence of the tipping. See *id.* (proposed Exchange Act § 16A(g)(3)).

113. See *id.* (proposed Exchange Act § 16A(g)(2)).

114. See *id.* (proposed Exchange Act § 16A(g)(1)(B)).

115. 495 F.2d 228 (2d Cir. 1974).

116. 635 F.2d 156 (2d Cir. 1980).

117. In *Shapiro*, the Second Circuit held that all persons who purchased particular securities during the period when the defendant tippees were selling securities of the same class could recover damages against the tippees and their tipplers. The court acknowledged that the resulting liability of the defendants might be "Draconian," but left the task of determining the proper measure of damages to the district court on remand. *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 242 (2d Cir. 1974). Subsequently, in *Elkind*, the Second Circuit held that a non-trading tipper whose tippees had sold securities on the basis of the tipped information could not be held liable for damages in excess of the tippees' profits. *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 172 (2d Cir. 1980).

118. In *Dirks v. SEC*, 463 U.S. 646 (1983), the Supreme Court affirmed that a corporation's insiders owe a fiduciary duty to the corporation's shareholders, so that the insiders are required either to disclose material inside information or to abstain from trading in the corporation's securities. *Id.* at 653. Further, the Court held that a tippee assumes a fiduciary duty to the shareholders, and acquires the obligation to abstain from trading on inside information, "when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 660 (footnote omitted).



abstain obligation that was owed to them, it does not allow such traders to sue defendants who breached only a duty that was owed to a third party.<sup>119</sup> Thus, if the sole basis of a defendant's liability under rule 10b-5 is that she defrauded her employer or some other person by misappropriating material nonpublic information, and then purchased or sold securities on the basis of that information, the Second Circuit will not allow contemporaneous traders to recover damages from her.<sup>120</sup>

The ITPA would not distinguish, as do the Second Circuit precedents under rule 10b-5, between the civil liability of a defendant who breached a duty to the issuer's shareholders and the civil liability of a defendant who breached a duty to a third party. The defendant's trading while in possession of material nonpublic information may have been "wrongful" because she used the information in violation of a fiduciary duty to the issuer or its shareholders, or may have been "wrongful" because she misappropriated the information from a third party.<sup>121</sup> In either case, the ITPA would allow a suit against her by persons who traded during the same period, but on the other side of the market.<sup>122</sup> In fact, however, in neither case would the class of potential plaintiffs include all the persons, or only the persons, who actually were harmed by the defendant's trading. The persons who actually were harmed by the defendant's trading, as opposed to her failure to disclose material nonpublic information or her misappropriation of such information, were the investors who were induced by her trading to make unfavorable purchases or sales, or were preempted by her trading from making favorable purchases or sales.<sup>123</sup> Unfortunately, these investors ordinarily cannot be identified.<sup>124</sup>

In proposing that the ITPA grant a private cause of action to persons who traded on the opposite side of the market from the defendant, the SEC must have reasoned that private suits would aid in enforcing the prohibitions of the Act. As commentators have observed, however, allowing individual investors or classes of investors to sue to recover a defendant's illicit profits is not an efficient means of deterring unlawful trading.<sup>125</sup> Private suits do not contribute significantly to the enforcement of the current rules against trading on material nonpublic information, because such suits typically are filed only after the SEC has discovered the unlawful trading and taken action against the wrongdoers.<sup>126</sup> On the other hand, governmental sanctions—

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119. See *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984). For a discussion of the facts of *Moss*, see *supra* note 63. The Second Circuit held that the district court had properly dismissed the plaintiff's complaint, because he had "failed to demonstrate that he was owed a duty by any defendant." *Id.* at 15 (emphasis added).

120. *Id.* at 12-13, 15-16.

121. See *Letter from SEC Chairman Ruder, supra* note 77, at 88,916 (proposed Exchange Act § 16A(b)(1)).

122. See *id.* at 88,917 (proposed Exchange Act § 16A(g)(1)(A)).

123. See *supra* note 46 and accompanying text.

124. See *supra* note 49.

125. See, e.g., Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 73 (1980) (concluding that "[p]ublic enforcers clearly must bear the entire burden of regulation"); Karjala, *Statutory Regulation of Insider Trading in Impersonal Markets*, 1982 DUKE L.J. 627, 649 (concluding that the issuer of the securities that were unlawfully traded should be the only party authorized to bring a private action).

126. See Dooley, *supra* note 125, at 16-17.

injunctions,<sup>127</sup> disgorgement orders,<sup>128</sup> civil fines,<sup>129</sup> and criminal penalties<sup>130</sup>—are well-suited to the goals of deterring unlawful trading and punishing those who engage in it.

In addition to authorizing private actions by purchasers or sellers who traded on the opposite side of the market from defendants who engaged in wrongful trading, the ITPA would grant a cause of action to any other purchaser or seller who was injured by a violation of the Act.<sup>131</sup> Presumably, the major beneficiaries of this cause of action would be takeover bidders which paid inflated prices for the shares of target companies because of unlawful trading by employees of investment banks or other firms to which the bidders had entrusted information about their takeover plans.<sup>132</sup> Whether Congress should create a federal remedy for such injured bidders or remit them to their possible contract and tort remedies under state law is a question which deserves careful consideration. In the last two or three years a number of acquiring companies have filed suits asserting both state and federal claims for damages attributable to unlawful trading or tipping by employees of financial intermediaries.<sup>133</sup> At this juncture, before it has been determined whether or not state law is adequate to the task of providing compensation to injured bidders, the proposal of a new federal cause of action for them is premature.

## V. CONCLUSION

In *Carpenter v. United States*, the Supreme Court missed two important opportunities—the opportunity to endorse the misappropriation theory as a basis for liability under rule 10b-5, and the opportunity to refute the argument that insider trading does not harm investors. The *Carpenter* decision will not, however, have any disastrous consequences. Since the Court neither approved nor disapproved the misappropriation theory, the SEC and the Justice Department can continue to rely on that theory, and the lower courts can continue to base judgments on it.

By giving an expansive reading to the federal statutes outlawing mail and wire fraud, the *Carpenter* decision will make it easier for the government to obtain criminal convictions in insider-trading cases. The Court's ruling also increases the possibility that some private plaintiffs will succeed in recovering damages from

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127. See Securities Exchange Act of 1934, § 21(d)(1), 15 U.S.C. § 78u(d) (1982).

128. See Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L.J. 641.

129. See Securities Exchange Act of 1934, § 21(d)(2)(A), 15 U.S.C. § 78u(d)(2)(A) (Supp. IV 1986).

130. See Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff (1982).

131. See *Letter from SEC Chairman Ruder, supra* note 77, at 88,917 (proposed Exchange Act § 16A(g)(1)(B)).

132. "Trading in a target company's stock by intermediaries, such as investment bankers and lawyers, prior to the public announcement of a tender offer or merger can drive up the price of the target shares, thereby making the acquisition more difficult and less profitable for a potential acquirer." Note, *Insider Trading by Intermediaries: A Contract Remedy for Acquirers' Increased Costs of Takeovers*, 97 YALE L.J. 115, 115-16 (1987) (footnotes omitted).

The role of unlawful trading in increasing the prices of target company stocks is difficult to assess. Speculation by arbitrageurs and open-market purchases on behalf of acquiring companies may be "more plausible explanations of massive price movements in target company stocks than insider trading by professionals and their tippees." Garten, *Insider Trading in the Corporate Interest*, 1987 WIS. L. REV. 573, 630 (footnote omitted).

133. See, e.g., *Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc.*, No. 86-6447 (S.D.N.Y. filed Aug. 19, 1986); *Anheuser-Busch Cos. v. Thayer*, No. CA3-85-0794-R (N.D. Tex. filed Apr. 26, 1985). See also *FMC Corp. v. Boesky*, 673 F. Supp. 242 (N.D. Ill. 1987) (dismissing corporation's complaint alleging that insider trading raised cost of recapitalization).

defendants who traded on misappropriated information. A plaintiff who can establish that the defendants committed mail fraud or wire fraud, and injured him in his “business or property,” may be able to state a claim for treble damages against the defendants in a RICO action.

Since *Carpenter* does not undermine the existing system of civil and criminal sanctions for insider trading, it does not create a need for corrective legislation. The “compromise” bill that the SEC has submitted to Congress would significantly expand the definition of unlawful trading, would overturn old doctrines and create new uncertainties, and would grant remedies of questionable merit to private parties. Given the absence of any pressing need for legislation and the deficiencies of the compromise proposal, Congress should stay its hand and allow the courts to continue developing the law of insider trading. As we say in Texas, “If it ain’t broke, don’t fix it.”

