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United States V. Blaszczak Brings Insider Trading Law to a Tipping Point

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Notes

UNITED STATES V. BLASZCZAK BRINGS INSIDER TRADING LAW TO A TIPPING POINT

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"When contemplated in its extreme, almost any power looks dangerous."[1]

I. The Tip-Off: An Introduction to Insider Trading Law

Public confidence in the fairness and integrity of the stock market is necessary for the market to properly function.[2] If people believe they are trading at a disadvantage against market participants who possess inside information, they will likely choose to save or spend their hard-earned capital elsewhere.[3] This makes the enforcement of insider trading law vital to the preservation of the stock market and the economy at large.[4]

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1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 616 (2012) (Ginsburg, J., concurring in part and dissenting in part).

2. *See, e.g.*, Arthur Levitt, Chairman, U.S. Sec. & Exch. Comm'n, A Question of Integrity: Promoting Investor Confidence by Fighting Insider Trading (Feb. 27, 1998) (transcript available at https://www.sec.gov/news/speech/speecharchive/1998/spch202.txt [https://perma.cc/3SK4-F9D4]) (noting public confidence is essential to securities markets).

3. *See* United States v. O'Hagan, 521 U.S. 642, 658–59 (1997) (explaining that permitting insider trading would deter public from investing in securities); H.R. Rep. No. 100–910, at 8 (1988) (speculating public investors will likely remove their money from market when they feel market is "rigged against [them]"). The public generally and reasonably assumes that securities prices are based on all publicly available data. *See* H.R. Rep. No. 100–910, at 8.

4. *See* H.R. Rep. No. 100–910, at 8–9 (examining damaging effects of insider trading on stock market). An important purpose of the Securities Exchange Act of 1934, which is the traditional source of insider trading liability, is to ensure "honest securities markets and thereby promote investor confidence." *O'Hagan*, 521 U.S. at 658 (citing 17 C.F.R. pt. 240 (1980)). Given the essential position of the stock market within the U.S. economy, according to the Federal Register, unchecked insider trading may cause undesirable economic effects such as increased market volatility, decreased liquidity, and an increased cost of capital for businesses, while another commentator notes that these undesirable economic effects include less dependable information and more incentive for dishonest behavior by insiders. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51715, 51731 (Aug. 24, 2000) (to be codified at 17 C.F.R. pts. 240, 243, and 249) (first citing Michael J. Fishman & Kathleen M. Hagerty, *Insider Trading and the Efficiency of Stock Prices*, 23 Rand J. Econ. 106 (1992); then citing Michael Manove, *The Harm From Insider Trading and Informed Speculation*, 104 Q.J. Econ. 823 (1989)); and then citing Saul

Given the notoriety of insider trading schemes, it may seem obvious that insider trading is unlawful.[5] Yet federal securities law does not expressly forbid insider trading; rather, insider trading liability is based upon several federal antifraud provisions that generally prohibit securities fraud.[6] Thus, courts have largely shaped insider trading law by interpreting these antifraud provisions.[7] Courts' varying interpretations have produced widespread ambiguity and have led to the inconsistent application of insider trading law across jurisdictions.[8]

The Securities Exchange Act of 1934 (the Exchange Act) provides various prohibitions of securities fraud under Title 15 of the United States Code (Title 15).[9] Both civil and criminal enforcers have traditionally employed Section 10(b) of the Exchange Act (Section 10(b)) together with U.S. Securities and Exchange Commission (SEC) Rule 10b-5 (Rule 10b-5) in insider trading cases.[10] Accordingly, these Title 15 securities fraud pro-

Levmore, *In Defense of the Regulation of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 101, 104–05 (1988) (defending insider trading enforcement)).

5. The popular 1987 film *Wall Street* and its infamous antagonist Gordon Gekko brought public intrigue to insider trading that has endured ever since. *See* Francesco Guerrera, *How 'Wall Street' Changed Wall Street*, FIN. TIMES (Sept. 24, 2010), https://www.ft.com/content/7e55442a-c76a-11df-aeb1-00144feab49a [permalink unavilable] (proclaiming the film's "influence on popular culture remains strong"); *see also* WALL STREET (20th Century Fox 1987). In recent years, numerous high-profile individuals have been found liable for insider trading, including Martha Stewart (TV personality), Jeffrey Skilling (former Enron president), Steven Cohen (hedge fund manager), and Raj Rajaratnam (hedge fund manager). *See* Joel Anderson, *10 Unbelievable Cases of Insider Trading*, YAHOO (Sept. 7, 2020), https://www.yahoo.com/lifestyle/10-unbelievable-cases-insider-trading-172050946.html [https://perma.cc/ZGF5-RF87]. Other celebrities, such as Phil Mickelson (professional golfer) and Mark Cuban (entrepreneur), have been accused of insider trading but were ultimately cleared of wrongdoing. *See* Luke Kerr-Dineen, *How Phil Mickelson Escaped Insider-Trading Charges Amid a Federal Investigation*, USA TODAY (June 27, 2017, 12:47 PM), https://ftw.usatoday.com/2017/06/phil-mickelson-insider-trading-golfworld-article-billy-walters [https://perma.cc/4KNM-6U5E]; Marc D. Powers, Mark A. Kornfeld & Jessie M. Gabriel, *Not in My House: Mark Cuban Defeats the SEC's Insider Trading Charges*, BAKERHOSTETLER (Nov. 14, 2013), https://www.bakerlaw.com/alerts/not-in-my-house-mark-cuban-defeats-the-secs-insider-trading-charges-11-14-2013 [https://perma.cc/A6G2-GANT].

6. *See, e.g.*, 4 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12:160 (7th ed. 2020) (identifying Section 10(b) of the Securities Exchange Act of 1934 and U.S. Securities and Exchange Commission Rule 10b-5 as main sources of insider trading liability).

7. *See id.* (recognizing the central role of courts in developing federal insider trading law).

8. *See, e.g.*, Case Comment, *Criminal Law—Insider Trading—Second Circuit Redefines Personal Benefit Requirement for Insider Trading.*, 132 HARV. L. REV. 1730, 1735 (2019) (noting severity of "ignor[ing]" precedent in insider trading cases); PREET BHARARA ET AL., REPORT OF THE BHARARA TASK FORCE ON INSIDER TRADING 1 (2020) ("For too long, insider trading law has lacked clarity, generated confusion, and failed to keep up with the times.").

9. *See* 15 U.S.C. § 78a–78qq (2018) (disallowing numerous fraudulent securities transactions).

10. *See* § 78j(b) (prohibiting "any manipulative or deceptive device or contrivance" that violates SEC rules); 17 C.F.R. § 240.10b-5 (2020) (prohibiting fraudu-

visions have served as the prime source of the confusion involving insider trading law.[11] While there are some particular gray areas that need clarity and consistency, years of case law and Supreme Court precedent have at least put legal authorities and securities market participants on notice as to what to generally expect in insider trading cases.[12]

In 2002, Congress added a new wrinkle to insider trading law by introducing a criminal statute, 18 U.S.C. § 1348 (Section 1348), which broadly outlaws securities fraud under Title 18 of the United States Code (Title 18).[13] Congress enacted Section 1348 to provide criminal authorities with greater flexibility when pursuing insider trading actions.[14] In doing so, however, Congress failed to define the elements or requirements necessary for convictions under Section 1348, leaving courts to wrestle with its vague prohibition of defrauding schemes in connection with securities trading.[15]

Importantly, Section 1348 did not replace the Title 15 provisions, and it applies to only criminal cases.[16] Accordingly, criminal authorities such as the Department of Justice (DOJ) now have the ability to utilize *both* the traditional Title 15 provisions *and* Section 1348 when pursuing insider trading charges, while civil authorities like the SEC may use only the traditional Title 15 provisions.[17] Prosecutors have continued to rely on Title 15 as the primary vehicle for both civil and criminal insider trading actions.[18]

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lent securities transactions relating to "manipulative and deceptive devices"); Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1, 10–11, 29–30 (2014) (discussing role of Section 10(b) and Rule 10b-5 in insider trading actions).

11. *See generally* BHARARA ET AL., *supra* note 8 (repeatedly referencing Title 15 securities fraud provisions in detailing lack of clarity in insider trading law).

12. *See, e.g.*, Peter J. Henning, *What's So Bad About Insider Trading Law*, 70 BUS. LAW. 751, 753, 757 (2015) (arguing insider trading "has arrived at a fairly well-settled meaning that is not difficult for judges and juries to apply," while noting that "insider trading is hardly alone in the pantheon of federal offenses, especially those considered white-collar crimes, that can be criticized as confused or a theoretical mess").

13. *See* 18 U.S.C. § 1348 (2018).

14. *See* 148 CONG. REC. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("[Section 1348 is] intended to provide a flexible tool to allow prosecutors to address the wide array of potential fraud and misconduct which can occur in companies that are publicly traded.").

15. *See* § 1348 (broadly prohibiting securities fraud).

16. *See id.*; 148 CONG. REC. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("This provision would create a new 10-year felony for defrauding shareholders of publicly traded companies. The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision . . . .").

17. *See, e.g.*, Karen E. Woody, *The New Insider Trading*, 52 ARIZ. ST. L.J. 594, 615 (2020) (citing § 1348) (explaining the interplay of Section 1348 and Title 15 securities fraud provisions).

18. *See, e.g.*, Jonathan E. Green, Daniel M. Hawke, & Ryan D. White, *Past, Present, and Future: Insider Trading's Personal Benefit Test After Martoma, Gupta, and Other Recent Cases*, ARNOLD & PORTER (Jan. 31, 2019), https://

Section 1348 case law, while limited, demonstrates courts' struggles to identify where the Title 15 provisions overlap with Section 1348 and where they diverge.[19]

One area of confusion has been whether courts should apply Title 15 insider trading precedent to inform decisions in Section 1348 cases.[20] For example, one context where insider trading liability arises is when a corporate insider (tipper) provides confidential information to a third party (tippee), who may then trade securities based on that information.[21] The Supreme Court has established the tipper must receive a "personal benefit" in exchange for disclosing the information in order for either tippers or tippees to be liable under Title 15.[22] Nevertheless, it remains unclear whether the personal benefit requirement is necessary in tipper-tippee cases under Section 1348.[23]

This Note analyzes the United States Court of Appeals for the Second Circuit's application of Section 1348 to insider trading in *United States v. Blaszczak*.[24] In *Blaszczak*, the Second Circuit held the longstanding personal benefit requirement for tipper-tippee insider trading cases brought under Title 15 does not apply to similar actions brought under Section 1348.[25] This Note argues that while the Second Circuit's interpretation of

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www.arnoldporter.com/en/perspectives/publications/2019/01/past-present-and-future-insider-trading [https://perma.cc/7AVS-B7RQ] (noting Section 1348 was "seldom . . . used to charge insider trading prior to *Blaszczak*").

19. *See* Tom Hanusik, Rebecca Monck Ricigliano, & Nimi Aviad, *The Rise of Insider Trading as a Title 18 Offense*, 53 REV. SEC. & COMMODITIES REG. 49, 54 (2020) (indicating Section 1348 insider trading case law is limited and therefore Title 15 is more often employed in such actions).

20. *See* Woody, *supra* note 17, at 616–17 (recognizing general disagreement and lack of applicable case law regarding whether Section 1348 should be utilized in insider trading cases).

21. *See, e.g.*, 18 DONALD C. LANGEVOORT, INSIDER TRADING REGULATION, ENFORCEMENT AND PREVENTION § 4:1 (2020) (noting both the tipper and tippee may be held liable for insider trading).

22. *See* Dirks v. SEC, 463 U.S. 646, 667 (1983) (establishing personal benefit requirement).

23. *See generally* United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019), *vacated and remanded*, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021).

24. 947 F.3d 19 (2d Cir. 2019).

25. *See id.* at 26, 45. In January 2021, after defendants petitioned for Supreme Court review in September 2020, the Supreme Court vacated *Blaszczak* and remanded the case back to the Second Circuit for further consideration due to the Supreme Court's recent decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020). *See* Petition for Writ of Certiorari, *Blaszczak*, 947 F.3d 19 (2d Cir. 2019) (No. 18-5649); Reenat Sinay, *Justices Nix 2nd Circ. Insider Trading Ruling After Bridgegate*, LAW360 (Jan. 11, 2021, 10:37 AM), https://www.law360.com/articles/1343372/justices-nix-2nd-circ-insider-trading-ruling-after-bridgegate [https://perma.cc/L4B8-BF3E]. Importantly, the Supreme Court's decision to vacate and remand *Blaszczak* does not disturb the Second Circuit's findings related to the personal benefit requirement for insider trading cases. *See, e.g.*, Melissa S. Ho & Andrew T. Fox, *Supreme Court Asks Second Circuit to Reconsider Ruling in Insider Trading Prosecution*, NAT'L L. REV. (Jan. 13, 2021), https://www.natlawreview.com/article/supreme-court-asks-second-circuit-to-reconsider-ruling-insider-trading-prosecution

Section 1348 appears reasonable at first glance, the statute's text and legislative history—as well as policy considerations—indicate the court should have recognized the personal benefit requirement in Section 1348 tipper-tippee insider trading cases.[26] Part II of this Note explains the disjointed developments of insider trading law that set the stage for *Blaszczak*. Part III provides the facts and legislative history of *Blaszczak*. Part IV recounts the Second Circuit's reasoning in reaching its holding. Part V critically analyzes the Second Circuit's holding and argues courts should require Title 15 elements such as a personal benefit under both Title 15 and Section 1348 until Congress or the Supreme Court decide otherwise. Finally, Part VI considers the potential ramifications and impact of the *Blaszczak* decision on insider trading law.

II. APPROACHING THE TIPPING POINT: INSIDER TRADING LAW BACKGROUND

Since its enactment in 1934, the Exchange Act has served as the backbone for both civil and criminal insider trading enforcement.[27] Yet, because the Exchange Act neither mentions insider trading by name nor expressly forbids trading on inside information, courts have done the heavy lifting in developing insider trading law.[28] The resulting case law has been filled with disagreement and gray areas.[29] In the wake of the infamous financial scandals of the early 2000s, Congress added even more uncertainty by enacting Section 1348, which generally criminalizes securities fraud but fails to explicitly prohibit or define insider trading.[30] To appreciate the significance of *Blaszczak*, it is important to understand how

[https://perma.cc/3Z2T-HG83] ("Notably, the Supreme Court's decision to vacate and remand the judgment *did not* disturb the Second Circuit's finding that the personal benefit requirement found in Title 15 did not apply to prosecutions under Title 18."). Rather, the newly established *Kelly* precedent pertains to a separate finding in *Blaszczak*—regarding what is considered "property" under the Title 18 wire and securities fraud statutes—that is not the focus of this Note. *See id.* For a further discussion of the "property" issue and the *Kelly* decision, see *infra* notes 110, 125.

26. For an argument that the Second Circuit should have recognized the personal benefit requirement in Section 1348 tipper-tippee insider trading cases, see *infra* Part V.

27. *See, e.g.*, HAZEN, *supra* note 6 (recognizing insider trading liability is a product of the Exchange Act's antifraud provisions).

28. *See, e.g.*, Jon Eisenberg, *Insider Trading Law After* Salman, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 18, 2017), https://corpgov.law.harvard.edu/2017/01/18/insider-trading-law-after-salman/ [https://perma.cc/M8FB-Q7L6] ("Insider trading law is one of many examples of Congress providing no meaningful guidance and the courts largely inventing the law.").

29. *See, e.g.*, Charles L. Slamowitz, *Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading*, 77 WASH. & LEE L. REV. ONLINE 31, 37 (2020) (recognizing the unpredictability of insider trading cases).

30. *See* 18 U.S.C. § 1348 (2018) (broadly outlawing securities fraud in criminal cases). For further discussion of the financial scandals of the early 2000s, see *infra* note 85.

these separate, yet inherently related, securities fraud provisions overlap and diverge.

A. *Title 15 Securities Fraud Provisions*

The Exchange Act regulates securities trading in the United States.[31] Congress enacted the Exchange Act to maintain "fair and honest [securities] markets" and to negate the "use of inside information for personal advantage."[32] Further, the Exchange Act created the SEC, providing it with "broad authority over all aspects of the securities industry," including civil enforcement powers.[33]

The Exchange Act contains several antifraud provisions.[34] Section 10(b) and Rule 10b-5 are the traditional provisions utilized together to create both civil and criminal liability for insider trading violations.[35] Section 10(b) provides that it is

> unlawful for any person, directly or indirectly . . . [t]o 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 [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.[36]

The SEC promulgated Rule 10b-5, which prohibits any person from "employ[ing] any device, scheme, or artifice to defraud" or "engag[ing] in any act, practice, or course of business which operates or would operate as

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31. *See generally* 15 U.S.C. § 78a–78qq (2018); *see also Securities Exchange Act of 1934*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Exchange Act as "[t]he federal law regulating the public trading of securities").

32. United States v. O'Hagan, 521 U.S. 642, 657 (1997); *see also* Cady, Roberts & Co., 40 S.E.C. 907, 912 n.15, 1961 WL 60638 (Nov. 8, 1961) (stating one "significant purpose of the Exchange Act was to eliminate . . . the use of inside information for personal advantage").

33. *See The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/about-lawsshtml.html#secexact1934 [https://perma.cc/MG3S-HPYJ] (last visited Feb. 28, 2021) (noting SEC regulates securities trading and "[its authority] includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations").

34. *See generally* §§ 78a–78qq.

35. *See* § 78j(b); 17 C.F.R. § 240.10b-5 (2020); *see also* Hanusik, Ricigliano, & Aviad, *supra* note 19, at 50 (discussing Section 10(b) and Rule 10b-5 are employed for insider trading actions). The Exchange Act is a hybrid statute in that violations may result in both civil and criminal penalties. *See* Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1026–27 (2001) (using Exchange Act as an example of a hybrid statute that is enforceable in both criminal and civil actions).

36. § 78j(b).

a fraud or deceit upon any person, in connection with the purchase or sale of any security."[37]

B. *Insider Trading Liability*

Under the Title 15 securities fraud provisions, enforcers can establish insider trading under two separate theories of liability: the classical theory and the misappropriation theory.[38] Under either theory, tippers and tippees may be held liable for insider trading.[39] Tipper-tippee liability arises when a corporate insider discloses, or "tips," confidential information to a third party who uses that information to trade securities.[40] One key requirement in tipper-tippee cases brought under Title 15 is that the tipper (the insider) must receive a "personal benefit" for divulging the confidential information.[41] Several courts have debated exactly what amounts to a "personal benefit," but the Supreme Court continues to uphold the personal benefit requirement nonetheless.[42]

1. *Classical Theory of Insider Trading Liability*

Classical insider trading liability applies "when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information" (MNPI).[43] Therefore, classical liability is premised on the

37. 17 C.F.R. § 240.10b-5 (2020). The SEC first recognized insider trading as a violation of these antifraud provisions, specifically Rule 10b-5, in an SEC administrative court case. *See* Cady, Roberts & Co., 40 S.E.C. at 910–11 (finding that insiders have "duty to disclose material information" that may result in unfair investing advantage, and breach of that duty constituted "a device or scheme, an implied misrepresentation, and an act or practice" under Rule 10b-5).

38. *See* United States v. O'Hagan, 521 U.S. 642, 649–53 (1997).

39. *See* LANGEVOORT, *supra* note 21 (acknowledging the now well-settled principle that tipper-tippee liability arises under both theories).

40. *See* Jessica Hostert, Note, *Great Expectations, Good Intentions, and the Appearance of the Personal Benefit in Insider Trading: Why the Stage Needs Reset After Martoma*, 43 S. ILL. U. L.J. 703, 709–10 (2019).

41. *See* Dirks v. SEC, 463 U.S. 646, 663–64, 667 (1983) (declaring personal benefit requirement for Title 15 tipper-tippee insider trading cases).

42. *See* Salman v. United States, 137 S. Ct. 420, 427–29 (2016) (reinforcing the personal benefit requirement from *Dirks*); Andrew Carl Spacone, *The Second Circuit's Curious Journey Through the Law of Tippee Liability for Insider Trading:* Newman *to* Martoma, 24 ROGER WILLIAMS U. L. REV. 1, 2 (2019) (discussing how courts such as the Second Circuit have struggled to define what constitutes personal benefit); *infra* notes 78–79 and accompanying text.

43. *O'Hagan*, 521 U.S. at 651–52. A corporate insider is any person with a fiduciary duty to shareholders of the corporation. *See* Chiarella v. United States, 445 U.S. 222, 228 (1980). A person has such a duty when the person has a relationship of trust and confidence with shareholders. *Id.*; *see also* Hostert, *supra* note 40, at 708 (summarizing classical insider trading liability). In addition to corporate insiders, classical insider trading liability extends to fiduciaries serving as temporary insiders—such as underwriters, accountants, attorneys, and consultants—of a company. *See Dirks*, 463 U.S. at 655 n.14.

insider's breach of duty to shareholders.[44] For example, a Chief Executive Officer (CEO) may possess MNPI that will likely boost the corporation's stock price when it is publicly announced. If the CEO buys the company's stock before the information is released, without disclosing this information to stockholders, the CEO would be liable for insider trading.

2. *Misappropriation Theory of Insider Trading Liability*

The misappropriation theory (also called the embezzlement theory) of liability is central to the *Blaszczak* decision, thus, a deeper dive into its development is warranted. Two Supreme Court cases are particularly authoritative. *Carpenter v. United States*[45] laid the initial foundation for the misappropriation theory in Title 15 insider trading cases.[46] *United States v. O'Hagan*[47] later solidified the misappropriation theory's place in insider trading law and defined the theory as it is known today.[48]

In *Carpenter*, a *Wall Street Journal* (the Journal) reporter's misappropriation of confidential, prepublication information served as the basis for Title 15 insider trading liability.[49] The reporter wrote a daily column about stocks, which did not contain any MNPI but "had the potential of affecting the price of the stocks which it examined."[50] The reporter and his fellow defendants entered into a scheme to buy or sell stocks—based on the probable market impact of the information—before the column was published.[51] The lower courts found that the reporter's breach of confidentiality to the Journal—based on the Journal's policy that it held the exclusive right to use the column's content prior to its publication—amounted to a Title 15 violation because the reporter defrauded the Journal " 'in connection with' a purchase or sale of securities."[52] The Supreme

44. *See, e.g.*, *O'Hagan*, 521 U.S. at 651–52 ("The classical theory targets a corporate insider's breach of duty to shareholders with whom the insider transacts . . . ."); SEC v. Obus, 693 F.3d 276, 284 (2d Cir. 2012) ("Under the classical theory of insider trading, a corporate insider is prohibited from trading shares of that corporation based on material non-public information in violation of the duty of trust and confidence insiders owe to shareholders."). When corporate insiders fail to publicly disclose material information in their possession, they are generally prohibited from trading in the corporation's stock. Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 GEO. L.J. 1225, 1228 (2017).

45. 484 U.S. 19 (1987).

46. *See generally id.* (basing insider trading liability on misappropriation of MNPI).

47. 521 U.S. 642.

48. *See generally id.* (finding misappropriation theory liability appropriate in insider trading cases and noting the Court addressed "fraud of the same species in *Carpenter*").

49. *See Carpenter*, 484 U.S. at 21–24. The defendants were also charged with Title 18 mail and wire fraud violations. *See id.* For a further discussion of the mail and wire fraud issues in *Carpenter*, see *infra* notes 53, 87.

50. *See Carpenter*, 484 U.S. at 22. The reporter often interviewed corporate executives to inform his point of view. *See id.*

51. *See id.* at 23.

52. *See id.* at 24.

Court evenly split on the Title 15 charges, thus, affirming the lower courts' judgments with no further analysis.[53]

The *O'Hagan* decision engrained the misappropriation principles from *Carpenter* into insider trading law.[54] The defendant in *O'Hagan* was a partner at a law firm that represented a company in its potential tender offer to shareholders of Pillsbury Company.[55] The defendant's work did not involve his firm's support of the tender offer, but he learned about it from a coworker and subsequently purchased Pillsbury stock, which spiked after the tender offer was publicly announced.[56] The Court found it could not hold the defendant liable for insider trading under the classical theory because the defendant (1) was not an insider, and (2) did not owe a duty of trust and confidence to Pillsbury shareholders.[57]

Nevertheless, the Supreme Court held the defendant violated the Title 15 securities fraud provisions.[58] The Court asserted "[t]he undisclosed misappropriation of [MNPI], in violation of a fiduciary duty . . . constitutes fraud akin to embezzlement . . . ."[59] The Court further explained the misappropriation theory prohibits corporate outsiders from trading on the basis of MNPI in breach of their duty of trust and confidence to the *source of the MNPI*, rather than their duty to shareholders.[60] Misappropriators (the outsiders who receive and trade on the MNPI) are liable for insider trading under Title 15 when they breach "loyalty and confiden-

53. *See id.* Notably, the Court also affirmed the reporter's mail and wire fraud convictions. *See id.* In doing so, the Court relied on the same misappropriation of the confidential, prepublication information. *See id.* at 23–24, 27–28. This highlights the potential overlap of securities fraud and mail and wire fraud, which is considered in *Blaszczak*. For a further discussion of this potential overlap, see *infra* note 87.

54. *See generally* United States v. O'Hagan, 521 U.S. 642 (1997).

55. *See id.* at 647. "A tender offer is typically an active and widespread solicitation by a company or third party (often called the 'bidder' or 'offeror') to purchase a substantial percentage of [a] company's securities." *Tender Offer*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answerstenderhtm.html [https://perma.cc/MH3H-9K4M] (last visited Feb. 28, 2021).

56. *See O'Hagan*, 521 U.S. at 647–48, 648 n.1. The defendant also purchased call options on Pillsbury stock. *See id.* at 648. A call option purchaser profits if the underlying stock price rises. *See Investor Bulletin: An Introduction to Options*, U.S. SEC. & EXCH. COMM'N (Mar. 18, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_introductionoptions.html [https://perma.cc/XPN6-WWM8]. Altogether, the defendant profited about $4.3 million. *See O'Hagan*, 521 U.S. at 648.

57. *See* Woody, *supra* note 17, at 629 (citing Donna Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 18 (2016)). The defendant was a misappropriator, not an insider, in this context despite receiving MNPI from a coworker. *See id.*

58. *See O'Hagan*, 521 U.S at 666.

59. *Id.* at 654 (citing Carpenter v. United States, 484 U.S. 19, 27 (1987)) (clarifying that misappropriation insider trading liability was based on idea of embezzlement provided in *Carpenter*).

60. *See id.* at 652–53. This runs counter to the classical theory, which "premis[es] liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock." *Id.* at 652.

tiality, [which] defrauds the principal of the exclusive use of that information."[61] Because the defendant in *O'Hagan* breached the duty he owed to his law firm and their client—the sources of the MNPI—when he made stock trades based on the MNPI, the Court found him liable for Title 15 insider trading under the misappropriation theory.[62]

3. *Tipper-Tippee Situations*

Insider trading liability may arise under either theory of liability in tipper-tippee situations.[63] This occurs when an insider or misappropriator provides MNPI to an outsider who may trade securities based on that information.[64] Tippers owe a fiduciary duty either to their company's shareholders (classical theory) or to the source of the inside information (misappropriation theory).[65] Tippers may be liable for breaching this fiduciary duty when they share MNPI with a tippee.[66]

Recipients of the tips who trade on the MNPI may also be liable for insider trading.[67] Tippees assume the tippers' fiduciary duties and are liable when (1) they trade on the basis of MNPI, (2) the tippers breached a fiduciary duty by sharing the MNPI, and (3) the tippees *know or should have known* the tippers breached a fiduciary duty.[68] Notably, if a tippee receives MNPI and shares the MNPI with an additional person—referred to as a remote tippee—the remote tippee may be held to these same standards.[69]

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61. *Id.* at 652.

62. *See id.* at 652, 654, 656, 660, 665–66 (explaining misappropriation under Title 15 requires deception and connection to securities trade, and that the defendant met this criteria).

63. *See* LANGEVOORT, *supra* note 21 (asserting tipper-tippee liability arises under classical and misappropriation theories).

64. *See* Hostert, *supra* note 40, at 709–10.

65. *See O'Hagan*, 521 U.S. at 652–53.

66. *See* Hostert, *supra* note 40, at 709–10. A tipper is liable for insider trading when: "(1) the tipper had a duty to keep material non-public information confidential; (2) the tipper breached that duty by intentionally or recklessly relaying the information to a tippee who could use the information in connection with securities trading; and (3) the tipper received a personal benefit from the tip." SEC v. Obus, 693 F.3d 276, 289 (2d Cir. 2012).

67. *See Obus*, 693 F.3d at 289. Similar to the liability standard for a tipper, a tippee is liable for insider trading when:

> (1) the tipper breached a duty by tipping confidential information; (2) the tippee knew or had reason to know that the tippee improperly obtained the information (i.e., that the information was obtained through the tipper's breach); and (3) the tippee, while in knowing possession of the material non-public information, used the information by trading or tipping for his own benefit.

Id.

68. *See* Dirks v. SEC, 463 U.S. 646, 660 (1983). A tippee may be liable only if the tipper breached his or her fiduciary duty; if a court finds there is no fiduciary breach by the tipper, the tippee cannot be liable for insider trading. *See id.* at 662 ("[A]bsent a breach by the insider, there is no derivative breach.").

69. *See* Eisenberg, *supra* note 28. A remote tippee is anyone who indirectly obtains MNPI, meaning the remote tippee is removed from the initial tipper by

4. *Personal Benefit Requirement in Tipper-Tippee Cases*

The Supreme Court created the personal benefit element for tipper-tippee insider trading cases in *Dirks v. SEC*.[70] The personal benefit requirement states a tipper must receive a "direct or indirect" personal benefit from the disclosure of MNPI to be liable for insider trading under the Title 15 securities fraud provisions.[71] The requirement is meant to preserve the flow of information from corporate insiders to market analysts—without it, insiders would presumably be less likely to share pertinent company information with analysts—as investors often rely on analysts' assessments to make informed investment decisions.[72] Importantly, tippee—and even remote tippee—liability is contingent on the *original tipper* receiving a personal benefit for divulging the MNPI; if the court finds that the original tipper received a personal benefit, the tippee may be held liable—but only if the tippee or remote tippee knows or should have known that the tipper acted for the tipper's own personal benefit.[73]

The Supreme Court has articulated a broad and somewhat opaque standard for what constitutes a personal benefit.[74] *Dirks* provides several examples of how a personal benefit may be established, including when a tipper receives "a pecuniary gain or a reputational benefit that will translate into future earnings."[75] Courts may infer such benefits from "objec-

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one or more people. *See* Kathleen Coles, *The Dilemma of the Remote Tippee*, 41 GONZ. L. REV. 181, 183–84, 184 n.18 (2006).

70. 463 U.S. 646 (1983); *see id.* at 662.

71. *See id.* at 662–63. It is well-settled that the personal benefit requirement applies regardless of whether the tipper is accused of insider trading under the classical or misappropriation theory. *See* Salman v. United States, 137 S. Ct. 420, 425 n.2 (2016) (assuming the personal benefit requirement applies to both theories, though not conducting thorough analysis of the issue); LANGEVOORT, *supra* note 21 (acknowledging lower courts have tended to view *Salman* as sufficient authority to apply personal benefit test under both theories).

72. *See Dirks*, 463 U.S at 658–59 (indicating that flow of information to market analysts is "necessary to the preservation of a healthy market").

73. *See Salman*, 137 S. Ct. at 427; *see also* United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014) ("[W]ithout establishing that the tippee knows of the personal benefit received by the insider in exchange for the disclosure, the Government cannot meet its burden of showing that the tippee knew of a breach."), *abrogated on other grounds by Salman*, 137 S. Ct. 420; Eisenberg, *supra* note 28 (explaining remote tippees must know or should have known "that the source of the information breached a duty and acted for his or her personal benefit"). This standard makes it easier for remote tippees to escape liability. *See* Eisenberg, *supra* note 28 ("Remote tippees often will not know enough about the circumstances surrounding the original tip for the government to charge or prove that level of culpability.").

74. *See Dirks*, 463 U.S. at 663–64 (discussing personal benefit requirement and noting that "[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts"); *see also Salman*, 137 S. Ct. at 423–28 (defending *Dirks*'s personal benefit requirement but recognizing that it is merely a "guiding principle" (internal quotation marks omitted) (quoting *Dirks*, 463 U.S. at 664)).

75. *Dirks*, 463 U.S at 663.

tive facts and circumstances" such as "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient."[76] *Dirks* also specifies that the personal benefit requirement is satisfied "when an insider makes a gift of confidential information to a trading relative or friend."[77]

Although the guidelines provided in *Dirks* are conceptually useful, their broadness can present difficulties in application. For example, courts have substantially struggled to determine just how close a relationship must be to be considered a "trading relative or friend."[78] There are additional ambiguities related to the personal benefit requirement that vary across jurisdictions, but for the purposes of this Note, it is sufficient to appreciate that even almost forty years post-*Dirks*, courts have failed to consistently establish the parameters of what constitutes a personal benefit.[79]

Even though courts have struggled to define personal benefit, the Supreme Court has clarified some contexts in which a tipper does *not* satisfy the personal benefit element. In *Salman v. United States*,[80] the Court rejected the contention that "a gift of confidential information to *anyone*, not just a 'trading relative or friend,' is enough to prove [insider trading]."[81] In *Dirks*, the Court dismissed charges against the defendant tippee because the tipper—who shared MNPI with the defendant to expose

76. *Id.* at 664.

77. *Id.* When a tipper gifts inside information to a "trading relative or friend," "the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds." *Salman*, 137 S. Ct. at 428.

78. *See Salman*, 137 S. Ct. at 425, 428 (declining to either reject or adopt Second Circuit's "meaningfully close personal relationship" standard from *Newman*—nor attempting to define what comprises such a relationship (quoting United States v. Newman, 773 F.3d 438, 452 (2014)). *Compare Newman*, 773 F.3d at 452 (requiring a "meaningfully close personal relationship" between tipper and tippee), *with* United States v. Martoma, 869 F.3d 58, 69 (2d Cir. 2017) (finding that after *Salman*, "*Newman*'s 'meaningfully close personal relationship'" standard was "no longer good law"), *opinion amended and superseded*, 894 F.3d 64 (2d Cir. 2017), *and Martoma*, 894 F.3d 64 (2d Cir. 2017) (rescinding earlier outright rejection of the meaningfully close personal relationship standard but weakening its relevance).

79. *See* Donald C. Langevoort, *Watching Insider Trading Law Wobble:* Obus, Newman, Salman, *Two* Martomas, *and a* Blaszczak, 89 FORDHAM L. REV. 507, 508–10, 521–22, 528 (2020) (discussing courts' lack of consistency in defining personal benefit, especially within the Second Circuit); Thomas A. Zaccaro, Dina Ellis Rochkind, Nicolas Morgan, & Lily Lysle, *The Insider Trading 'Mess' Congress Is Trying To Fix*, PAUL HASTINGS (May 16, 2019) (noting circuit courts have reached opposing interpretations of what amounts to a gift of confidential information in recent years, with courts "sometimes expanding it and other times limiting it").

80. 137 S. Ct. 420 (2016).

81. *Id.* at 426 (emphasis added) (citing Brief for United States at 27, *Salmon*, 137 S. Ct. (2016) (No. 15-628)). The Supreme Court also clarified that a pecuniary gain is *sufficient, but not necessary*, to establish a personal benefit. *See id.* at 427–28.

fraudulent activity at a company—did *not* derive any personal benefit.[82] But in practice, courts fail to find a personal benefit only in very narrow contexts, such as when the tipper and tippee have essentially no relationship other than the alleged tip.[83] Again, the line is unclear, but some commentators argue the personal benefit requirement has become so attenuated that it has been reduced to a mere formality and should be eliminated altogether.[84]

C. *Section 1348 Securities Fraud*

In 2002, Congress enacted Section 1348, a criminal statute under the Sarbanes–Oxley Act that broadly prohibits securities fraud.[85] Section 1348 makes it a crime to "knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice . . . to defraud any person in connection with . . . any security."[86] In enacting Section 1348, Congress sought to lessen the burden on criminal prosecutors to prove securities fraud by eliminating his-

82. *See Dirks*, 463 U.S at 667 ("The tippers received no monetary or personal benefit for revealing [the MNPI], nor was their purpose to make a gift of valuable information . . . . [T]he tippers were motivated by a desire to expose the fraud.").

83. *See* SEC v. Obus, 693 F.3d 276, 292 (2d Cir. 2012) (stating the evidentiary bar for personal benefit requirement "is not a high one"). *Compare* SEC v. Anton, No. 06-2274, 2009 WL 1109324, at *9 (E.D. Pa. Apr. 23, 2009) (finding no personal benefit when tipper shared MNPI with former executive with whom tipper had "no social or personal relationship"), *and* SEC v. Maxwell, 341 F. Supp. 2d 941, 948 (S.D. Ohio 2004) (finding no personal benefit when tipper shared MNPI about upcoming merger with barber with whom tipper "did not even socialize outside of . . . haircut appointments"), *and* SEC v. Switzer, 590 F. Supp. 756, 766 (W.D. Okla. 1984) (finding no personal benefit when bystander overheard insider sharing MNPI with his wife), *with* SEC v. Yun, 327 F.3d 1263, 1280–81 (11th Cir. 2003) (finding personal benefit when tipper shared MNPI with coworker as they were "friendly" and had shared commissions in past real estate transactions), *and* SEC v. Sargent, 229 F.3d 68, 72, 77 (1st Cir. 2000) (finding personal benefit when tipper shared MNPI with his dentist, with whom tipper had a "friendly" relationship).

84. *See, e.g.*, Merritt B. Fox & George Tepe, *Insider Trading: Personal Benefit Has No Place in Misappropriation Tipping Cases*, COLUM. L. SCH. BLOG ON CORP. & CAP. MKT. (July 25, 2017), https://clsbluesky.law.columbia.edu/2017/07/25/insider-trading-personal-benefit-has-no-place-in-misappropriation-tipping-cases/ [https://perma.cc/L3VP-KKTJ] (arguing that personal benefit requirement's place within misappropriation theory is an unwarranted application of insider trading precepts).

85. *See* 18 U.S.C. § 1348 (2018) (enacting criminal penalties for fraudulent securities actions). Section 1348 is part of the Sarbanes–Oxley Act, which Congress enacted primarily to address various accounting fraud scandals of the early 2000s, and also includes various investor protections related to the accuracy of corporate disclosures. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 938, 952 (2003).

86. *See* § 1348. In *United States v. Mahaffy*, the Second Circuit identified three elements for Section 1348 cases: "(1) fraudulent intent, (2) [a] scheme or artifice to defraud, and (3) [a] nexus with a security." 693 F.3d 113, 125 (2d Cir. 2012) (citing United States v. Motz, 652 F.Supp.2d 284, 294 (E.D.N.Y. 2009)). The Seventh Circuit later adopted these elements as well. *See* United States v. Coscia, 866 F.3d 782, 796 (7th Cir. 2017) (citing *Mahaffy*, 693 F.3d at 125).

torically specific Title 18 requirements, such as "the element that the mails or wires were used to further the scheme to defraud."[87] Congress intended to provide added flexibility in criminal securities fraud cases by allowing criminal authorities to avoid some of the technicalities of the Title 15 provisions.[88]

Crucially, Section 1348—in addition to the Title 15 securities fraud provisions—is available to criminal prosecutors for securities fraud issues such as insider trading, but it is *not* available to civil enforcers such as the SEC.[89] Section 1348 supplements, but does not replace, the Title 15 securities fraud provisions in criminal cases.[90] Though criminal authorities have used Section 1348 for insider trading actions, Congress did not provide specific guidelines as to what constitutes insider trading under the statute.[91] Given the lack of clear direction from Congress and the lack of precedential case law involving Section 1348, the boundaries of insider

87. S. REP. NO. 107-146, at 30 (2002). Congress also identified the need for flexibility to protect investors from fraudulent schemes yet to be seen or defined. *See id.* at 20 ("[Section 1348] is intended to provide needed enforcement flexibility . . . to protect shareholders . . . against all the types [of] schemes and frauds which inventive criminals may devise in the future."). The Title 18 mail and wire fraud statutes forbid the use of the mail or wire communications as part of a "scheme . . . to defraud." *See* §§ 1341, 1343. Because almost all securities transactions involve the use of either mails or wires (or both), criminal authorities have successfully utilized these statutes to supplement Title 15 (and later Section 1348) securities fraud charges in insider trading actions brought under the misappropriation theory. *See* William K.S. Wang, *Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping*, 70 U. MIAMI L. REV. 220, 234–45, 254–64, 298 (2015) (explaining application of Title 18 mail and wire fraud statutes to insider trading cases); *see also* Carpenter v. United States, 484 U.S. 19, 20, 24, 28 (1987) (relying on misappropriation theory to unanimously affirm defendant's Title 18 mail and wire fraud convictions, which were brought in addition to Title 15 securities fraud charges). Notably, Congress modeled Section 1348, as well as the Title 18 bank and health fraud statutes, after the mail and wire fraud statutes. *See* CHARLES DOYLE, CONG. RES. SERV., MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW 18 (2019) (discussing how mail and wire fraud statutes have been used as models for other criminal fraud statutes); Angela Burgess, Greg Andres, & Neil MacBride, *Lower Bar for Criminal Insider Trading Charges*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 23, 2020), https://corpgov.law.harvard.edu/2020/01/23/lower-bar-for-criminal-insider-trading-charges/ [https://perma.cc/GLE7-YWA4] (stating Section 1348 was modeled after Title 18 mail and wire fraud statutes).

88. *See* 148 CONG. REC. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("[Section 1348 is] intended to provide a flexible tool to allow prosecutors to address the wide array of potential fraud and misconduct which can occur in companies that are publicly traded.").

89. *See, e.g.*, Burgess, Andres, & MacBride, *supra* note 87 (indicating that while criminal authorities may utilize Section 1348, Title 15, or both to prosecute insider trading, only Title 15 is available to the SEC to prosecute insider trading).

90. *See* 148 CONG. REC. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision . . . .").

91. *See* § 1348 (failing to mention insider trading).

trading under Section 1348 remain undefined, and there are no standard jury instructions on which to rely.[92]

D. *Intersection of Title 15 Securities Fraud Provisions and Section 1348*

As the relevant Title 15 provisions and Section 1348 similarly prohibit securities fraud, intersection of the respective case law is inevitable.[93] A crucial question is whether courts should consider Title 15 insider trading precedent to guide decisions in Section 1348 cases.[94] Even if courts choose to view Section 1348 in a vacuum, the SEC may potentially invoke the collateral estoppel doctrine to leverage a criminal Section 1348 conviction to impute summary judgment in a later civil case.[95]

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92. Sandra Moser & Justin Weitz, *18 U.S.C. § 1348—A Workhorse Statute for Prosecutors*, 66 DEP'T JUST. J. FED. L. & PRAC. 111, 113, 119–20 (2018). For a discussion of the jury instructions in *Blaszczak*, see *infra* notes 122–23 and accompanying text.

93. *See* Woody, *supra* note 17, at 623 (noting an "intersection between § 1348 and Rule 10b-5"). Some technical differences between the provisions do exist, but the provisions are so similar that the same insider trading conduct will typically give rise to both Title 15 and Section 1348 liability. *See* Peter J. Henning, *A New Way to Charge Insider Trading*, N.Y. TIMES (Aug. 24, 2015), https://www.nytimes.com/2015/08/25/business/dealbook/a-new-way-to-charge-insider-trading.html [https://perma.cc/TA69-W6XT] ("It is not clear how much [Section 1348] differs from [Title 15] because both require proof of some type of fraud."). For example, the provisions have different scienter standards and maximum penalties. *See* § 1348; 15 U.S.C. § 78ff(a) (2018). Section 1348 requires a defendant to act "knowingly" and carries a 25-year maximum imprisonment, while Rule 10b-5 requires a defendant to act with "willfulness" and carries a 20-year maximum imprisonment. *See* Moser & Weitz, *supra* note 92, at 112, 121, 122 n.35 (first quoting § 1348; then quoting § 78ff(a); and then citing 18 U.S.C. §§ 1341, 1343 (2018)) (presenting some technical differences between the provisions). These distinctions may be crucial for criminal prosecutors trying to avoid potential "multiplicity of charges" issues when attempting to prosecute insider traders under both Section 1348 and Title 15 in the same case. Woody, *supra* note 17, at 625. Courts have rejected multiplicity defenses raised by defendants charged with criminal violations of both the Title 15 and Section 1348 securities fraud within the same case. *See id.* at 623–25. Multiplicity, which is the "charging [of] a defendant under different statutes for the exact same conduct, without an additional fact," is outlawed by the Fifth Amendment. *Id.* at 623; *see also Multiplicity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Multiplicity violates the Fifth Amendment protection against double jeopardy.").

94. *See generally* United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (determining whether longstanding personal benefit requirement for tipper-tippee insider trading cases brought under Title 15 applies to actions brought under Section 1348), *vacated and remanded*, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021) (remanding back to Second Circuit in light of the Supreme Court's decision in *Kelly v. United States*, a case inapplicable to the personal benefit requirement). This Note discusses this issue in *Blaszczak infra* Parts III and VI.

95. For a full discussion of the collateral estoppel issue, see *infra* notes 99–103 and accompanying text.

1. *Application of Title 15 Precedent to Section 1348 Insider Trading Decisions*

Criminal authorities have sometimes brought insider trading actions under Section 1348, but the case law in this area is extremely limited.[96] Importantly, no clear consensus has been reached as to whether courts must interpret Section 1348 in a vacuum or whether they may rely on Title 15 securities fraud precedent to guide their interpretations.[97] This issue is at the heart of *Blaszczak*.[98]

2. *Criminal Conviction as a Basis for Civil Liability*

The doctrine of collateral estoppel prevents parties from "relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one."[99] Thus, civil authorities may invoke collateral estoppel to use a defendant's criminal conviction to attain summary judgment in a corresponding civil case.[100] In *SEC v. Stein*,[101] the Ninth Circuit granted summary judgment to the SEC in a civil Title 15 securities fraud case because the defendant's prior criminal conviction under Section 1348 provided the court with enough evidence to prove Title 15 securites fraud.[102] If other courts adopt the Ninth Circuit's reasoning, the SEC may have the ability to circumvent Title 15 insider trading precedent—including the personal benefit requirement—by allowing the DOJ to garner an easier criminal conviction under Section 1348, and then using the conviction to prove Title 15 elements in civil proceedings.[103]

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96. *See, e.g.*, Hanusik, Ricigliano, & Aviad, *supra* note 19, at 54–55 (noting limited use of Section 1348 in insider trading cases prior to *Blaszczak*).

97. *See* Woody, *supra* note 17, at 622–23, 631–39 (demonstrating that while several courts have refused to use Title 15 precedent to inform Section 1348 decisions, other courts have chosen to do so). *Compare* United States v. Melvin, 143 F. Supp. 3d 1354, 1374–75 (N.D. Ga. 2015) (declining to require Title 15 elements for Section 1348 insider trading conviction), *aff'd*, 918 F.3d 1296 (11th Cir. 2017), *and* United States v. Slawson, No. 1:14-CR-00186-RWS-JFK, 2014 WL 5804191, at *4–8 (N.D. Ga. Nov. 7, 2014) (refusing to use Title 15 precedent to inform Section 1348 insider trading decision), *with* United States v. Hussain, 972 F.3d 1138, 1147 (9th Cir. 2020) (considering Title 15 precedent in determining whether defendant met 1348 insider trading element).

98. *See Blaszczak*, 947 F.3d at 36 (determining *Dirks* is not binding precedent for Section 1348 securities fraud).

99. *Collateral Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

100. *See* Woody, *supra* note 17, at 638–39.

101. 906 F.3d 823 (9th Cir. 2018).

102. *See id.* at 834. Notably, the court stated that Title 15 securities fraud charges "involve 'the application of the same rule of law' as that involved in the criminal case" under Section 1348. *See id.* at 830 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c. (AM. LAW INST. 1982)). Although *Stein* involved securities fraud, it was not an insider trading case. *Id.* at 827. The defendant in *Stein* was also convicted of Title 18 mail and wire fraud, as well as money laundering and conspiracy to obstruct justice, in the criminal case. *See id.* at 827–28.

103. *See* Woody, *supra* note 17, at 641.

E. *Insider Trading Prohibition Act: Pending Legislation*

In December 2019, a vast and bipartisan majority of the United States House of Representatives voted to pass the Insider Trading Prohibition Act (ITPA), which attempts to codify and clarify much of the judge-made insider trading case law.[104] The ITPA includes the "direct or indirect personal benefit" requirement for tipper-tippee cases.[105] The House added the personal benefit language to the bill not only to prevent judges from construing the personal benefit test more broadly than the Supreme Court has permitted, but also to "prevent[ ] activist judges and overzealous prosecutors from reading the test out of the law entirely."[106] While the ITPA represents an effort to codify current insider trading law, it does not include an exclusivity provision.[107] This means that even if the ITPA is eventually enacted into law, criminal and civil authorities would still have the option to avoid the ITPA altogether by simply choosing to charge insider trading suspects under the existing securities fraud provisions rather than the ITPA.[108] As of this writing, the ITPA is still awaiting review by the Senate, but commentators are pessimistic it will become law given the current political climate.[109]

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104. *See* Insider Trading Prohibition Act, H.R. 2534, 116th Cong. §§ 1–2, 16 (2019) (prohibiting various insider trading actions). The House passed the ITPA by a margin of 410 to 13. *See* Press Release, Representative Jim Himes, Himes Bipartisan Insider Trading Bill Passes House (Dec. 5, 2019) (on file with author). Notably, the House passed this bill before the *Blaszczak* decision. *See* H.R. 2534; United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019), *vacated and remanded*, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021) (remanding back to Second Circuit to reconsider issues separate from the personal benefit requirement).

105. *See* H.R. 2534 (including examples of personal benefit such as "pecuniary gain, reputational benefit, or a gift of confidential information to a trading relative or friend").

106. Press Release, The House Financial Services Committee, McHenry Amendment Accepted to Improve Insider Trading Bill, Protect Good-Faith Traders, (Dec. 5, 2019) (on file with author) (stating in part why personal benefit requirement is included in proposed ITPA). While the personal benefit requirement was absent from earlier drafts of the bill, Representative Patrick McHenry, the House Financial Services Committee's highest-ranking Republican, proposed an amendment to add the personal benefit requirement to the bill just two days before the House vote brought it back to life. *See id.*; H.R. REP. NO. 116–320, at 2–3 (2019).

107. *See* Press Release, House Financial Services Committee, *supra* note 106 ("H.R. 2534 as amended does not include . . . an exclusivity provision to make [the ITPA] the exclusive insider trading law of the land").

108. *See* Lyle Roberts, *The Insider Trading Law Is Bad. Will Congress Make It Worse?*, WALL ST. J. (Jan. 9, 2020, 6:58 PM), https://www.wsj.com/articles/the-insider-trading-law-is-bad-will-congress-make-it-worse-11578614315 [permalink unavailable] (noting that without exclusivity clause, prosecutors "could cherry-pick its preferred law based on the facts of the case").

109. *See, e.g.*, Telemachus P. Kasulis, *Lessons from the Insider Trading Prohibition Act After Its Likely Demise in the Senate*, BUS. CRIMES BULL. (Aug. 14, 2020, 3:45 PM), https://www.law.com/2020/08/14/lessons-from-the-insider-trading-prohibition-act-after-its-likely-demise-in-the-senate/?slreturn=20210005115814 [permalink unavailable] (speculating the Senate will not pass the ITPA).

III. TIPPING THE SCALES: FACTS OF *UNITED STATES V. BLASZCZAK*

The principal insider trading issue before the Second Circuit in *Blaszczak* was whether the *Dirks* personal benefit test, which must be met for Title 15 securities fraud liability, also applies to Section 1348 claims.[110] Defendant David Blaszczak was a "'political intelligence' consultant for hedge funds."[111] He was also a former employee of the Centers for Medicare & Medicaid Services (CMS), a federal government agency, and "enjoyed unique access to [CMS's] predecisional information through his inside sources at [CMS]," including defendant Christopher Worrall.[112]

A. *Deerfield and Visium Schemes*

Defendants Theodore Huber and Robert Olan were employees of Deerfield Management Company, L.P. (Deerfield), a hedge fund focused on healthcare investments.[113] They approached Blaszczak numerous times between 2009 and 2014, seeking tips on CMS's confidential information to gain an "illegal market edge."[114] On several occasions, Blaszczak provided the Deerfield partners with MNPI regarding upcoming CMS rate changes, which would presumably affect the prices of certain healthcare stocks.[115] Deerfield then executed short sales against companies that would be negatively affected by the rate changes.[116]

During roughly the same time period as the Deerfield scheme, Blaszczak tipped off a portfolio manager at another hedge fund, Visium Asset Management (Visium), about upcoming CMS rate changes.[117] Visium executed transactions such as short sales and put-option purchases

110. *See* United States v. Blaszczak, 947 F.3d 19, 30 (2d Cir. 2019), *vacated and remanded*, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021). The court also considered whether the personal benefit test applied to the Title 18 wire fraud statute and addressed the separate issue of whether the inside information constituted "property" under Section 1348 and the Title 18 wire fraud statute. The "property" issue was critical to deciding the defendants' conversion charges as well. *See id.*

111. *Id.* at 26.

112. *Id.* at 26–27.

113. *See id.*; *see also About Deerfield*, DEERFIELD, https://deerfield.com/about-deerfield [https://perma.cc/NX4R-PD94] ("Deerfield Management Company is an investment firm dedicated to advancing healthcare . . . .") (last visited Feb. 28, 2021). Another Deerfield employee acted in concert with Huber and Olan, but he previously pled guilty and testified at the *Blaszczak* trial. *See Blaszczak*, 947 F.3d at 26.

114. *Blaszczak*, 947 F.3d at 27.

115. *See id.* at 27–28.

116. *See id.* (showing Deerfield profited approximately $6.3 million from these trades). A short sale is a securities transaction in which an investor profits if the underlying stock price falls; this is the opposite of traditional stock purchasing, in which an investor profits if the stock price rises. *See Short Sales*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/shortsale.htm [https://perma.cc/9CHX-WQXX] (last visited Feb. 8, 2021).

117. *Blaszczak*, 947 F.3d at 28 (noting the portfolio manager who traded using Blaszczak's inside information previously pled guilty as part of a cooperation agreement and testified that Blaszczak provided MNPI).

against companies that would be negatively affected by the rate changes.[118]

B. *Procedural History of* Blaszczak

In March 2018, the federal government filed an indictment in the United States District Court for the Southern District of New York, alleging that the four defendants—Blaszczak, Huber, Olan, and Worrall—committed securities fraud under both Title 15 and Section 1348 in connection with the Deerfield and Visium schemes.[119]

In April 2018, the case proceeded to a jury trial.[120] The district court instructed the jury that under *Dirks*, "in order to convict Worrall of Title 15 securities fraud, it needed to find that he tipped confidential CMS information in exchange for a 'personal benefit.'"[121] Further, the district court instructed the jury that in order to convict Blaszczak, Huber, or Olan of Title 15 securities fraud, the jury "needed to find that [the respective defendants] knew that [Worrall or] a CMS insider had tipped the information in exchange for a personal benefit."[122]

Conversely, the district court did *not* provide similar personal benefit jury instructions for the Section 1348 allegations.[123] The district court did, however, instruct the jury that it could convict the defendants of Section 1348 securities fraud if the defendants engaged in a scheme to convert or embezzle CMS's confidential information, and wrongfully used that information for their own use or shared it for someone else's use.[124]

The jury returned a split verdict and acquitted all defendants on the Title 15 securities fraud charges but found all defendants besides Worrall guilty of Section 1348 violations.[125] The court sentenced all four defend-

118. *See id.* (noting Visium profited approximately $330,000 from these trades). Like a short seller, a put-option purchaser profits if the underlying stock price falls. *See Investor Bulletin: An Introduction to Options*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_introductionoptions.html [https://perma.cc/L4PD-Y8CW] (last modified Feb. 6, 2017).

119. *See Blaszczak*, 947 F.3d at 28–29. The government also charged the defendants with criminal wire fraud, conversion, and conspiracy violations. *See id.* at 29. For a brief description of the property issue on which the conversion charges were based, see *supra* note 110.

120. *Blaszczak*, 947 F.3d at 29.

121. *Id.* (reiterating jury instructions for Title 15 charges against Worrall).

122. *See id.* (restating jury instructions for Title 15 charges related to defendants Blaszczak, Huber, and Olan). For a further discussion on how the personal benefit requirement affects tippees and remote tippees, see *supra* notes 69, 73 and accompanying text.

123. *See Blaszczak*, 947 F.3d at 29 (noting lack of a personal benefit jury instruction for Section 1348 charges). The district court also chose not to give personal benefit instruction for the wire fraud charges. *See id.*

124. *See id.* The district court also instructed the jury that for both the Section 1348 and Title 18 wire fraud allegations, the jury needed to find that the respective defendant "knowingly and willfully participated in the fraudulent scheme." *Id.*

125. *See id.* at 29–30. The jury also found all defendants guilty of Title 18 wire fraud and conversion violations, and Blaszczak, Huber, and Olan guilty on the

ants to varying periods of imprisonment and ordered various monetary remedies.[126]

All four defendants timely appealed the district court ruling, in part on the grounds that the district court should have instructed the jury that the personal benefit requirement applies to Section 1348 (in addition to the Title 15 securities fraud provisions).[127] Upon review, a three-judge panel of the Second Circuit affirmed the district court's decision and upheld the jury's verdict on all counts.[128] In April 2020, the Second Circuit denied the defendants' petition for rehearing.[129] In September 2020, Blaszczak, Olan, and Huber petitioned for Supreme Court review.[130] In January 2021, the Supreme Court vacated the *Blaszczak* decision and remanded the case back to the Second Circuit for further consideration of the Supreme Court's recent decision in *Kelly v. United States*.[131]

IV. SECOND CIRCUIT TIPS ITS HAND: NARRATIVE ANALYSIS OF *BLASZCZAK*

In *Blaszczak*, the Second Circuit analyzed whether the *Dirks* personal benefit requirement for insider trading under the Title 15 securities fraud provisions also applies to Section 1348.[132] The court focused on the differing legislative purposes served by the Title 15 provisions and Section

conspiracy counts. *See id.* at 30. For a further discussion of the conversion charges and the property issue the court considered, see *supra* note 110. The Supreme Court vacated and remanded *Blaszczak* back to the Second Circuit so the Second Circuit can reconsider what constitutes "property" in light of *Kelly*, in which the Supreme Court narrowly construed the meaning of "property" under the Title 18 fraud statutes. *See generally* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020); *see also supra* note 25 (discussing how property issue represents basis of Supreme Court's decision to vacate and remand *Blaszczak*).

126. *See Blaszczak*, 947 F.3d at 30. Blaszczak was sentenced to twelve months and one day, Worrall to twenty months, and Huber and Olan each to thirty-six months imprisonment. *See id.* The court issued fines of $1,250,000 each to Huber and Olan, and also ordered Blaszczak to forfeit $727,500, Huber to forfeit $87,078, and Olan to forfeit $98,244. *See id.* The four defendants were also ordered to jointly and severally cover CMS's costs for providing witnesses, which equaled $1,644.26 total. *See id.*

127. *See id.* at 30, 35. The defendants also argued that the personal benefit requirement should extend to the wire fraud statute. *See id.*

128. *See id.* at 25–26, 45. Circuit Judge Richard J. Sullivan delivered the majority opinion. *See id.* at 25. Senior Circuit Judge Amalya Lyle Kearse dissented, but the dissent was unrelated to the personal benefit issue. Rather, Senior Circuit Judge Kearse primarily argued that the MNPI was not government "property." *See id.* at 45–49 (Kearse, C.J., dissenting). For a discussion of the conversion charges and the property issue the court considered, see *supra* notes 110, 125.

129. *See* Order, Petition for Rehearing, *Blaszczak*, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811).

130. *See* Petition for Writ of Certiorari, *supra* note 25.

131. For a further discussion of the Supreme Court's decision to vacate and remand *Blaszczak*, see *supra* note 25. For a discussion of *Kelly* and its relevance to the property issue in *Blaszczak*—which is unrelated to the personal benefit requirement in insider trading cases—see *supra* note 125.

132. *See Blaszczak*, 947 F.3d at 34–35. The court also considered whether the requirement extends to Title 18 wire fraud. *See id.*

1348 and ultimately concluded a personal benefit was not necessary within the misappropriation theory of insider trading liability.[133] The court also declined to consider the policy concerns raised by the defendants.[134] Ultimately, the Second Circuit held the personal benefit requirement does not apply to insider trading cases brought under Section 1348.[135]

A. *Statutory Interpretation and the Misappropriation Theory of Fraud*

In *Blaszczak*, the Second Circuit relied heavily on statutory interpretation to decide the personal benefit issue.[136] First, the court compared the plain language of the Title 15 and Section 1348 securities fraud provisions and found none of the provisions explicitly declare a personal benefit requirement; rather, the provisions all similarly address "schemes to 'defraud.'"[137] Next, the court cited *Dirks*, asserting "Congress enacted the Title 15 fraud provisions with the limited 'purpose of . . . eliminat[ing] [the] use of inside information for *personal advantage*.'"[138] On these grounds, the Second Circuit determined the Title 15 personal benefit requirement is judicially crafted to reflect the overarching purpose of the Exchange Act.[139]

The Second Circuit then differentiated the legislative intent behind Section 1348 from that of the Title 15 provisions.[140] The court stated Congress enacted Section 1348 to allow criminal authorities to more broadly enforce securities fraud and to "overcome the 'technical legal requirements' of the Title 15 provisions."[141] The court also emphasized its belief that Congress sought to implement similar elements and intent requirements for Section 1348 as it did for other Title 18 fraud statutes.[142]

Moreover, the Second Circuit distanced the personal benefit test from the misappropriation theory of fraud on which the court relied to uphold the convictions of the defendant tippees.[143] Because a breach of

133. *See id.* at 35–37.

134. *See id.* at 37.

135. *See id.*

136. *See id.* at 35–37 (discussing primarily the text and purposes of the Exchange Act and Section 1348 in analyzing the personal benefit issue).

137. *See id.* at 35.

138. *Id.* (alterations in original) (quoting Dirks v. SEC, 463 U.S. 646, 662 (1983)).

139. *See id.* at 35–36 ("While it is true that Section 1348 . . . concerns the general subject matter of securities law, Section 1348 and the Exchange Act do not share the same statutory purpose.").

140. *See id.* at 36.

141. *Id.* (quoting S. REP. NO. 107-146, at 6 (2002)).

142. *See id.* (citing S. REP. NO. 107-146, at 14). The court specifically referenced the Title 18 bank and health care fraud statutes, which were modeled after the Title 18 mail and wire fraud statutes. For a further discussion of these criminal statutes, see *supra* note 87.

143. *See Blaszczak*, 947 F.3d at 36 ("In the context of embezzlement, there is no additional requirement that an insider breach a duty to the owner of the [inside information], since 'it is impossible for a person to embezzle the money of

duty is implied within the embezzlement context, criminal prosecutors did not need to prove exactly how that breach of duty occurred, thus, any evidence of a tipper receiving a personal benefit was superfluous to the Section 1348 charges.[144] On these grounds, the Second Circuit declined to extend the personal benefit test to Section 1348 securities fraud.[145]

B. *Policy Considerations Rejected*

In removing the personal benefit requirement for Section 1348 cases, the court refused to consider the merits of the defendants' policy arguments in *Blaszczak*.[146] The defendants contended the decision would allow criminal prosecutors to circumvent the well-established personal benefit test required under Title 15 by instead charging tippers with Section 1348 violations for the same conduct.[147] The court maintained that even if this criticism was true—though the court declined to explicitly agree or disagree—it would not consider the policy argument because it is Congress's responsibility to do so.[148]

V. FOUL TIP: CRITICAL ANALYSIS OF *BLASZCZAK*

The Second Circuit's decision in *Blaszczak* to forgo the personal benefit requirement in Section 1348 cases appears reasonable given the legislative history of Section 1348.[149] Nevertheless, a deeper dive into the context of the legislative history and a textual analysis of Section 1348 uncover an opposing and more persuasive interpretation.[150] In addition, the rule of lenity—which requires a criminal court to resolve statutory ambiguity in favor of criminal defendants—should have served as a backstop that further deterred the court from its holding.[151] Moreover, the Second Circuit should have more rigorously considered the significant policy implications before deciding *Blaszczak*, especially given the lack of Section 1348 case law and lack of clear direction from Congress about Section 1348's

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another without committing a fraud upon him.'" (quoting Grin v. Shine, 187 U.S. 181, 189 (1902))).

144. *See id.*

145. *See id.* 36–37 (using the same reasoning to decline to extend the personal benefit requirement to Title 18 wire fraud cases).

146. *See id.* at 37.

147. *See id*; *see also* Brief and Special Appendix for Defendant-Appellant Robert Olan at 33, *Blaszczak*, 947 F.3d 19 (No. 18-2811) (arguing prosecutors would never use Title 15 for criminal insider trading enforcement if Section 1348 allowed them to avoid the personal benefit requirement altogether).

148. *See Blaszczak*, 947 F.3d at 37.

149. *See infra* text accompanying notes 157–58.

150. *See id.*

151. *See* Whitman v. United States, 574 U.S. 1003, 1003 (2014) (noting the rule of lenity is meant to provide fair notice of crime elements to potential violators and that lenity "vindicates the principle that only the *legislature* may define crimes and fix punishment"); *see also infra* Section V.A.3.

treatment of Title 15 insider trading elements.[152] Ultimately, the Second Circuit should have opted to uphold the personal benefit requirement in tipper-tippee insider trading cases brought under Section 1348.[153] Nevertheless, congressional action or further judicial review can still cure the errors from the *Blaszczak* decision.

A. *Statutory Interpretation*

The context of the legislative history the Second Circuit cited in *Blaszczak* suggests Congress did not intend to abolish the personal benefit requirement in criminal cases.[154] While the Second Circuit offered plausible arguments based on the legislative purpose of Section 1348, the similarities in the text of Section 1348 and the Title 15 provisions support the application of the personal benefit requirement.[155] Additionally, given the multiple reasonable interpretations of Section 1348, the rule of lenity should have further discouraged the Second Circuit's holding in *Blaszczak*.[156]

1. *Legislative Intent*

From a legislative intent perspective, the Second Circuit had adequate grounds to find it was not bound by the Title 15 insider trading elements in *Blaszczak*.[157] Congress partially enacted Section 1348 to avoid the "technical elements from the [Title 15] securities laws," and it is conceivable that the personal benefit requirement was one of those technical elements.[158]

But in discussing the burdens of Title 15's "technical elements," Congress provided specific examples of the technical elements it sought to avoid and did not reference the insider trading elements.[159] Notably, Congress critiqued the Rule 10b-5 requirement that a fraud be "in connection with a *purchase or sale* of any security," indicating that Section 1348

152. *See, e.g.*, Slamowitz, *supra* note 29, at 37.

153. *See infra* Sections V.A & B.

154. *See infra* Section V.A.1 (analyzing the legislative history and intent behind Section 1348).

155. *See infra* Section V.A.2 (comparing text of Section 1348 and the Title 15 provisions).

156. *See infra* Section V.A.3.

157. *See* United States v. Blaszczak, 947 F.3d 19, 34–37 (2d Cir. 2019) (discussing and comparing the legislative history and intent behind Section 1348 to the relevant Title 15 provisions, and ultimately declining to extend the personal benefit requirement to Section 1348 prosecutions), *vacated and remanded*, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021).

158. S. REP. NO. 107-146, at 20 (2002) ("[Section 1348] should not be read to require proof of technical elements from the securities laws . . . .").

159. *See id.* (discussing desire to avoid Title 15 technicalities but never mentioning the personal benefit or other judge-made requirements); Brief of Amici Curiae Law Professors at 7-11, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) (arguing nothing in Section 1348's language or legislative history suggests Section 1348 was meant to address insider trading elements).

would forgo the technical "purchase or sale" element to cover a wider range of fraud.[160] This example suggests Congress was referring to "technical elements" in the text of the Title 15 provisions, not to judge-made elements such as a personal benefit.[161] In addition, the Second Circuit may have overstated the dissimilarity of the purposes of Section 1348 and the Exchange Act.[162] For example, the Second Circuit posited that eliminating the use of MNPI for a "personal advantage" was the "limited purpose" of the Exchange Act, but this was really only one of the several purposes of the Exchange Act.[163]

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160. *See* 17 C.F.R. § 240.10b-5 (2020) (emphasis added); S. REP. NO. 107-146, at 6 n.9 (2002) (citing SEC v. Zandford, 238 F.3d 559 (4th Cir. 2001)) (asserting one of the technicalities Congress was looking to avoid was courts' strict construction of Rule 10b-5's "purchase or sale" verbiage in dismissing some criminal cases); Luke A. E. Pazicky, *A New Arrow in the Quiver of Federal Securities Fraud Prosecutors: Section 807 of the Sarbanes–Oxley Act of 2002 (18 U.S.C. § 1348)*, 81 WASH. U. L.Q. 801, 821 (2003) (discussing Congress's disapproval of strict constructions of Rule 10b-5's "purchase or sale" technicality). Congress also indicated that Section 1348 was meant to cover a wider range of fraud than Title 15, and insider trading is clearly already outlawed by Title 15. Further, Congress emphasized the need for flexibility in addressing novel types of securities fraud that have yet to arise, which could not refer to the well-established Title 15 insider trading doctrine. *See* S. REP. NO. 107-146, at 20 ("By covering all 'schemes and artifices to defraud' . . . [Section] 1348 will be more accessible to [criminal] investigators and prosecutors and will provide needed enforcement flexibility and, in the context of publicly traded companies, protection against all the types schemes and frauds which inventive criminals may devise in the future." (citation omitted)).

161. *See* S. REP. NO. 107-146.

162. *See Blaszczak*, 947 F.3d at 34–35 (differentiating purposes of Section 1348 and the Exchange Act); Andrew N. Vollmer, *The Second Circuit's* Blaszczak *Decision:* Dirks *Besieged* (Jan. 11, 2020), https://ssrn.com/abstract=3516082 [https://perma.cc/6DU9-58FU] (claiming that "almost nothing about" the Second Circuit's explanation of the legislative intent behind the Title 15 provisions was correct).

163. *See Blaszczak*, 947 F.3d at 35 (quoting Dirks v. SEC, 463 U.S. 646, 662 (1983)). Essentially, the Second Circuit replaced the word "a" with the word "limited" from the *Dirks* assertion that "*a* purpose of the securities laws was to eliminate 'use of inside information for personal advantage.'" *Dirks*, 463 U.S. at 662 (quoting Cady, Roberts & Co., 40 S.E.C. 907, 912 n.15, 1961 WL 60638 (Nov. 8, 1961)); *see also Second Circuit Denies Rehearing in Key Insider Trading Case*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Apr. 13, 2020), https://www.paulweiss.com/practices/litigation/litigation/publications/second-circuit-denies-rehearing-in-key-insider-trading-case?id=32632 [https://perma.cc/3MF6-TDFX] ("[T]here is a substantial difference between 'a purpose' . . . and 'the limited purpose' of [the Exchange Act] . . . . *Dirks* was simply noting that the personal benefit test is consistent with the Exchange Act's origins, not suggesting that the requirement implements some purpose unique to the Exchange Act that does not apply to other fraud statutes."). The Exchange Act was largely aimed at ensuring that only accurate information persisted in securities markets, and the personal benefit test was borne in part to draw a line between fraudulent and benign disclosures of MNPI. *See* Vollmer, *supra* note 162. This purpose is more in line with Section 1348.

2. *Textual Analysis*

Section 1348's explicit text also supports upholding the personal benefit requirement in Section 1348 tipper-tippee cases.[164] Conspicuously, Section 1348's crucial language essentially mimics Rule 10b-5's language.[165] Yet, Congress chose not to clarify the limits of what constitutes a scheme to defraud or include any explicit reference to insider trading in the Section 1348 text.[166] This implies elements of "fraud" under Title 15—including the personal benefit requirement—are the same under Section 1348.[167]

Context matters, too. The Supreme Court has consistently construed Rule 10b-5 to require a personal benefit in both criminal and civil tipper-tippee cases.[168] The requirement has stood for almost forty years, yet Congress has not expressly stricken it down.[169] If Congress intended to drastically alter the scope of insider trading law by abolishing a key element such as a personal benefit, it is reasonable to conclude that Congress would have either: (1) more clearly articulated this goal in the language of Section 1348; or (2) made this abundantly clear in the legislative record instead of merely relying on the broad statement that Section 1348 would help avoid some "technical requirements."

3. *The Rule of Lenity*

The Second Circuit's broad interpretation of Section 1348 not requiring a personal benefit is even more questionable because of the rule of lenity. To provide criminal defendants with proper notice of what conduct constitutes a crime, the rule of lenity states courts must narrowly construe ambiguous statutes in favor of criminal defendants.[170] Given the

164. *See generally* 18 U.S.C. § 1348 (2018).

165. Brief of Amici Curiae Law Professors at 13, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811). *Compare* § 1348 (making it unlawful for any person to "knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice . . . to defraud any person in connection with . . . any security"), *with* 17 C.F.R. § 240.10b-5 (2020) ("It shall be unlawful for any person . . . [t]o employ any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security.").

166. *See* § 1348 (providing very broad securities fraud prohibition).

167. Petition for Writ of Certiorari, *supra* note 25, at 24–25 ("What makes tipping or trading on tipped information 'fraud' under [both Title 15 and Section 1348] . . . are the same elements: a breach of duty of confidence by the tipper for a personal benefit and knowledge of that by the tippees.").

168. *See, e.g.*, Salman v. United States, 137 S. Ct. 420 (2016) (reinforcing personal benefit requirement in affirming criminal conviction on those grounds); Dirks v. SEC, 463 U.S. 646 (establishing personal benefit requirement in a civil case).

169. *See, e.g.*, Vollmer, *supra* note 162 (noting *Dirks* remains valid Supreme Court precedent).

170. *See* Whitman v. United States, 574 U.S. 1003, 1003 (2014); Anna Currier, *The Rule of Lenity and the Enforcement of the Federal Securities Laws*, 5 AM. U. BUS. L. REV. 79, 94 (2015) (explaining the rule of lenity requires that defendants be put on notice about the elements of a given crime).

multiple plausible interpretations of Section 1348 regarding the personal benefit issue, the rule of lenity should have served as a final line of defense against the holding in *Blaszczak*.[171] Interpreting Section 1348 in favor of the defendants would have surely compelled the court to require a personal benefit under Section 1348. Therefore, the rule of lenity should have signaled the Second Circuit to defer to the Supreme Court's Title 15 case law—at least until Congress more explicitly asserted its intent to the contrary.[172]

B. *Policy Implications of* Blaszczak

Although policy determinations are best left to the legislature, courts may consider them when attempting to interpret an ambiguous statute.[173] Therefore, the Second Circuit unnecessarily limited its analysis in *Blaszczak* by pronouncing "it is not the place of courts to check [Congress's] decision on policy grounds."[174] If the court had considered the implications of its interpretation of Section 1348—as this Note argues it should have—the court would have likely upheld the personal benefit requirement in Section 1348 insider trading cases.

The policy concerns raised by the defendants in *Blaszczak* are persuasive.[175] For starters, the holding may essentially extinguish the *Dirks* personal benefit requirement in criminal cases.[176] In addition, criminal authorities' relative advantage over the SEC in pursuing insider trading actions runs counter to the traditional relationship between criminal and

171. Lenity is especially relevant in decisions such as *Blaszczak*, where the Second Circuit essentially created a new version of tipper-tippee liability without explicit instruction from Congress. *See* Brief of Amici Curiae Law Professors at 25, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) (first citing Skilling v. United States, 561 U.S. 358 (2010); then citing United States v. Bass, 404 U.S. 336 (1971)) (arguing rule of lenity should apply with "special force" in *Blaszczak* because the Second Circuit essentially developed its own common-law jurisprudence of tipping liability despite a lack of clear legislative intent).

172. *See Bass*, 404 U.S. at 348 ("[L]egislatures and not courts should define criminal activity."); Woody, *supra* note 17, at 641–44 (discussing how the rule of lenity should have applied in *Blaszczak* given the severe penalties for Section 1348 violations and the absence of clear Section 1348 case law in insider trading contexts).

173. *See* ROBERT A. KATZMANN, JUDGING STATUTES 31–32 (2014) ("When the text [of a statute] is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes.").

174. *See Blaszczak*, 947 F.3d 19, 37 (2019).

175. *See id.* For a further discussion of the defendants' policy arguments, see *supra* notes 146–48 and accompanying text.

176. *See infra* Section V.B.1 & Part VI; *see also* Jonathan W. Haray, *Expert Q&A on Insider Trading Law After* United States v. Blaszczak, PRACTICAL L. (Thomson Reuters, Toronto, Can.), Apr.–May 2020, at 16 (suggesting criminal prosecutors will choose to bypass Title 15 requirements by utilizing Section 1348 for insider trading cases).

civil actions.[177] This discrepancy creates a potential loophole for the SEC to bypass the personal benefit requirement on the heels of a Section 1348 criminal conviction.[178]

1. *Title 15 Insider Trading Precedent: A Dead Letter?*

As the defendants asserted, if *Blaszczak*'s personal benefit analysis stands, it has the potential to render decades of insider trading case law futile in criminal cases.[179] Criminal authorities may now choose to sidestep longstanding insider trading Supreme Court precedent—including but potentially not limited to the personal benefit element from *Dirks*—by bringing only Section 1348 charges against suspected insider traders.[180] A result this extreme should require more precise congressional instruction. The profound impact of this outcome is discussed further in Part VI.

Blaszczak opens the door for criminal prosecutors to pursue convictions against individuals to whom insider trading liability should not extend.[181] Without the personal benefit requirement, employees who merely overshare MNPI in a careless way may be liable as tippers, and individuals who fall into MNPI may be liable as tippees despite being unaware of the information's source.[182] Imposing liability on these unaware or careless individuals would too severely discourage those in possession of MNPI from ever sharing it with anyone, including market analysts.[183]

2. *Criminal Liability Becomes Easier Than Civil Liability*

Blaszczak undoubtably makes criminal convictions easier to obtain than civil verdicts in insider trading cases.[184] This effectively inverts the

177. *See infra* Section V.B.2; *see also* Adam Pritchard, *2nd Circ. Ruling Makes Messy Insider Trading Law Worse*, LAW360 (Jan. 27, 2020, 4:10 PM), https://www.law360.com/articles/1237586/2nd-circ-ruling-makes-messy-insider-trading-law-worse [permalink unavailable] (maintaining Congress did not intend for Section 1348 to allow criminal prosecutors to prove less elements than the SEC in insider trading cases).

178. *See infra* Section V.B.2; *see also* Woody, *supra* note 17, at 641 (asserting the SEC could utilize a criminal insider trading conviction—achieved under the more lenient Section 1348 standards—to secure summary judgment in a later civil case).

179. *See Blaszczak*, 947 F.3d at 37 (arguing the court should consider policy implications); *see also* Joint Petition for Rehearing or Rehearing En Banc at 16, *Blaszczak*, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) ("If left undisturbed, the majority's ruling would render those decisions a dead letter and create crippling uncertainty.").

180. *See, e.g.*, Burgess, Andres, & MacBride, *supra* note 87 (highlighting that criminal authorities may use both 1348 and Title 15 in insider trading actions while the SEC is limited to Title 15).

181. *See* Pritchard, *supra* note 177.

182. *See id.*

183. *See* Dirks v. SEC, 463 U.S 646, 658–59 (1983) (noting proper functioning of the stock market partially depends on market analysts' access to important company information).

184. *See, e.g.*, Jody Godoy, *Wall Street Insider Trading Just Got Easier To Prosecute*, LAW360 (Jan. 2, 2020, 10:21 PM), https://www.law360.com/articles/1230773/wall-

traditional legal principle that civil verdicts require a lower standard of proof than criminal convictions.[185] Further, the resulting weakening of the SEC's power to enforce insider trading violations compared to criminal authorities may clash with the Exchange Act, in which Congress empowered the SEC to lead the charge in safeguarding the securities markets.[186]

On the other hand, and perhaps just as unsettling, *Blaszczak* may indirectly create an avenue for the SEC to circumvent the personal benefit requirement in Title 15 cases entirely.[187] The SEC may do this under the collateral estoppel doctrine by simply waiting for criminal prosecutors to convict insider traders under Section 1348, then using the criminal conviction to garner summary judgment in a subsequent civil case—without addressing the personal benefit requirement or other traditional Title 15 securities fraud elements.[188] While the collateral estoppel doctrine is well-established, courts should decline to impute civil liability in this particular context, as it sidesteps the Supreme Court's explicit Title 15 securities fraud requirements.[189] Both consequences of *Blaszczak*—criminal authori-

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street-insider-trading-just-got-easier-to-prosecute [permalink unavailable] (declaring that *Blaszczak* "makes it easier to [criminally] prosecute selling and trading on inside information, giving [criminal] prosecutors a potential escape hatch from the increasingly complicated requirements to prove insider trading under the Securities Exchange Act").

185. *See* Woody, *supra* note 17, at 639–40 (arguing the Second Circuit's inversion of civil and criminal standards in *Blaszczak* runs counter to this foundational legal concept). Civil cases typically require a lower "preponderance of evidence" standard, while criminal convictions typically require a heightened "beyond a reasonable doubt" standard. *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Reasonable Doubt*, BLACK'S LAW DICTIONARY (11th ed. 2019). While this technically remains true in the wake of *Blaszczak*, in effect the criminal authorities have to prove fewer insider trading elements than do civil authorities.

186. *See* Woody, *supra* note 17, at 640 (asserting *Blaszczak* decision "hamstrings the SEC [in insider trading cases] . . . despite being tasked by Congress to maintain fairness of the securities markets"); *see also* Henning, *supra* note 93 (noting the abnormality that criminal authorities may secure tipper-tippee liability even when the SEC, the primary securities regulator, finds no personal benefit).

187. *See* Woody, *supra* note 17, at 641 (positing after *Blaszczak*, "[t]he SEC will allow the DOJ to pursue the easier outcome of criminal liability under [Section] 1348, and then take advantage of imputing the criminal conviction as proof for the civil action without ever addressing the elements of [Title 15] liability established by the courts for the past five decades").

188. *See generally* SEC v. Stein, 906 F.3d 823 (9th Cir. 2018) (allowing SEC to impute summary judgement from criminal conviction in a civil securities fraud case); *see also* Woody, *supra* note 17, at 641 (suggesting SEC could exploit *Stein*, along with more lenient Section 1348 standards, to effectively reduce Title 15 insider trading precedent to irrelevance).

189. Fortunately, even if *Blaszczak* does open the door for the SEC to use Section 1348 criminal convictions to get around some of the stricter Title 15 requirements, statute of limitations and efficiency concerns would likely deter the SEC from substantially adopting this strategy. By definition, to utilize collateral estoppel, the SEC would need to fully rely on criminal authorities to both pursue and win a criminal case—meaning the SEC would have to wait out a potentially lengthy trial—in order for it to utilize collateral estoppel in its corresponding civil suit. *See*

ties' relative advantage in pursuing insider trading actions and the SEC's potential use of collateral estoppel to combat the competitive imbalance—are problematic.

C. *Potential Silver Linings of* Blaszczak

Although *Blaszczak* is a net negative for insider trading law in the short term due to the uncertainty it brings for securities traders and enforcement authorities, it might yield positive, long-term results if it provokes more legislative or judicial attention to the intersection of Title 15 and Section 1348. Even now, those who advocate for broader enforcement of the securities fraud provisions will likely view *Blaszczak* as a step in the right direction and a welcome indication that the personal benefit test could be obsolete.[190]

The Supreme Court recently vacated and remanded *Blaszczak* to the Second Circuit due to an issue unrelated to the personal benefit requirement, but the remand does not prohibit the Second Circuit from reconsidering its interpretation of Section 1348.[191] The Second Circuit should take advantage of this fortuitous opportunity to do so. But even if the Second Circuit keeps its original personal benefit analysis intact—which seems likely when considering the remand had nothing to do with the personal benefit requirement—the Supreme Court should provide a definitive position on whether courts should import Title 15 insider trading elements to Section 1348 cases, especially given the potentially radical repercussions for insider trading liability.[192] Ideally, the Court would en-

Collateral Estoppel, BLACK'S LAW DICTIONARY (11th ed. 2019). For a further discussion of collateral estoppel, see *supra* notes 99–103 and accompanying text.

190. *See, e.g.*, John C. Coffee, Jr., *The* Blaszczak *Bombshell: A Return to the "Parity of Information" Theory of Insider Trading?*, COLUM. L. SCH. BLOG ON CORP. & CAP. MKT. (Feb. 26, 2020), https://clsbluesky.law.columbia.edu/2020/02/26/the-blaszczak-bombshell-are-we-returning-to-a-parity-of-information-theory-of-insider-trading/ [https://perma.cc/6FYN-TAAH] (agreeing with the Second Circuit's step to effectively remove the personal benefit requirement from criminal insider trading cases but acknowledging the peculiarity of the context in which the removal occurred).

191. Christian Garcia & John Murray, *U.S. Supreme Court Vacates Second Circuit's Expansion of Criminal Insider Trading Liability*, JD SUPRA (Jan. 25, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-vacates-second-8047640/ [https://perma.cc/6RJB-7YY6] ("It is . . . unclear whether the Second Circuit will revisit its holding that the *Dirks* personal benefit test does not apply to [Section 1348]. . . . [The remand] leav[es] the door open for the government to continue to argue that it need not establish a personal benefit in its insider trading prosecutions under [Section 1348]."). For a further discussion of the Supreme Court's decision to vacate and remand *Blaszczak*, see *supra* note 25.

192. *See, e.g.*, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019), *vacated and remanded*, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021); *see also* Joint Petition for Rehearing or Rehearing En Banc, *supra* note 179, at 12 ("If left in place, the [*Blaszczak*] decision will radically expand criminal liability by allowing prosecutors to evade the personal-benefit requirement and will throw insider-trading law—and those who rely on it to govern their conduct—into chaos."); Ho & Fox, *supra* note 25 (discussing how Supreme Court's decision to vacate and remand *Blaszczak* did

dorse the personal benefit requirement for *all* insider trading cases for the reasons stated throughout this Note. But even if not, any clarification of the relationship between Title 15 and Section 1348 in the insider trading context would help lower courts address the storm of uncertainty that *Blaszczak* epitomizes.

If the Supreme Court does not get the opportunity to adjudicate the personal benefit requirement in *Blaszczak* or another similar case, legislative intervention is a particularly attractive outcome that is already looming due to the House's passage of the ITPA.[193] Such legislative action has only become more critical in the wake of *Blaszczak*.[194] While the ITPA is a good start, it must also add an exclusivity clause for sufficient effectiveness; otherwise, criminal authorities could simply choose to use Section 1348 instead of the ITPA in insider trading actions.[195] Even without an exclusivity clause, a comprehensive insider trading law would serve as strong authority to guide courts in future cases.

VI. AT THE TIPPING POINT: IMPACT OF *BLASZCZAK*

If its personal benefit analysis remains undisturbed, *Blaszczak* carries the potential to fundamentally alter the way that both criminal and civil authorities approach insider trading cases.[196] To avoid the burden of es-

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not disturb the Second Circuit's personal benefit analysis). The Supreme Court providing a holding on the interplay of the Title 15 provisions and Section 1348 is the most desirable route for clarification. *See* Petition for Writ of Certiorari, *supra* note 25 ("[*Blaszczak*] is an ideal vehicle to stop judicial expansion of criminal liability for leaks and information sharing that does not constitute insider trading.").

193. *See, e.g.*, Coffee, Jr., *supra* note 190 (advocating for a legislative response to *Blaszczak*). Notably, the SEC has largely resisted attempts by Congress to define insider trading due to concerns that such legislative action would impede the SEC's current flexibility in enforcing securities fraud actions, and Congress has deferred to the SEC's judgment on the issue. *See* Hostert, *supra* note 40, at 744 (recognizing the SEC's past influence on the lack of a legislative answer to insider trading law). The holding in *Blaszczak* may inspire the SEC to change its approach.

194. *See* Burgess, Andres, & MacBride, *supra* note 87 ("[The *Blaszczak*] ruling may be used as support for a comprehensive insider trading statute to address the issues that have arisen in recent judicial opinions."); *see also* Brett Atanasio, Mark Cahn, Elizabeth Mitchell & Theresa Titolo, *Insider Trading Law Alert: The Second Circuit Clears the Path for Insider Trading Convictions Absent a Dirks Personal Benefit*, JD SUPRA (Jan. 8, 2020), https://www.jdsupra.com/legalnews/insider-trading-law-alert-the-second-82209/ [https://perma.cc/VTR4-LGW3] (noting *Blaszczak* likely increases the need for Congress to create clearer insider trading standards).

195. *See* John C. Coffee Jr., *A Short Primer on the New Law of Insider Trading*, N.Y. L.J. (Mar. 18, 2020, 12:30 PM), https://www.law.com/newyorklawjournal/2020/03/18/a-short-primer-on-the-new-law-of-insider-trading/?slreturn=20200804012816 [permalink unavailable] (positing that without an exclusivity clause, "[criminal] prosecutors can simply ignore [the ITPA] and continue to prosecute under [Section] 1348 and *Blaszczak*. Only if this proposed statute were made exclusive . . . would this legislation have real impact.").

196. *See, e.g.*, U.S. v. Blaszczak*: The 2nd Circuit Makes it Easier to Prosecute Insider Trading*, AKIN GUMP STRAUSS HAUER & FELD LLP (Jan. 7, 2020), https://www.akingump.com/en/news-insights/u-s-v-blaszczak-the-2nd-circuit-makes-it-eas-

tablishing that a tipper received a personal benefit, which has long been a critical element of tipper-tippee liability, criminal prosecutors in the Second Circuit would have the option to forgo Title 15 charges altogether and instead pursue only Section 1348 charges.[197] As the *Blaszczak* decision itself highlights, this option—which is not available to the SEC—gives criminal prosecutors a much easier road to insider trading convictions.[198] Consequently, the DOJ would likely make Section 1348 the new default vehicle for criminal tipper-tippee cases.[199] The resulting power shift may alter the SEC's role in insider trading enforcement in a way that potentially runs counter to the legislative intent of the Exchange Act.[200]

Because the personal benefit requirement is already satisfied somewhat easily, the DOJ's ability to evade the personal benefit requirement in Section 1348 criminal cases would, on its own, be unlikely to produce a dramatic increase in insider trading convictions.[201] But the personal benefit requirement might just be the first domino to fall. Courts may rely on *Blaszczak* to allow the DOJ to bypass other longstanding Title 15 insider trading standards.[202]

Only time will tell exactly how pervasive *Blaszczak*'s impact on insider trading law will be; therein lies the problem. Even a subtle shift by the DOJ toward utilizing Section 1348 instead of Title 15 in criminal insider trading cases would further complicate insider trading law.[203] Courts will

ier-to-prosecute.html [https://perma.cc/5JWA-HHZU] (surmising *Blaszczak* "will likely change the landscape for insider trading enforcement").

197. *See, e.g.*, Burgess, Andres, & MacBride, supra note 87 (explaining *Blaszczak* allows prosecutors to circumvent the longstanding personal-benefit requirement by utilizing Section 1348).

198. *See* Haray, *supra* note 176, at 16.

199. *See* Atanasio, Cahn, Mitchell, & Titolo, *supra* note 194 (positing that criminal prosecutors will rely more heavily on Section 1348 in insider trading cases in the wake of *Blaszczak*). Similar broad interpretations of Section 1348 may eventually inspire the DOJ to do the same for all criminal insider trading cases. *See* Coffee, Jr., *supra* note 190 (arguing the *Blaszczak* decision "may in time trump Rule 10b-5").

200. *See* Woody, *supra* note 17, at 640 n.305.

201. *See Second Circuit Denies Rehearing in Key Insider Trading Case*, *supra* note 163 (commenting on the generally low bar for satisfying the personal benefit requirement and how criminal authorities have rarely struggled to establish this element).

202. *See* Stephen L. Ascher, Anthony S. Barkow, Anne Cortina Perry, & Charles D. Riely, *Second Circuit Allows Insider Trading to Be Proven Without Personal Benefit*, AM. B. ASS'N (Jan. 21, 2020), https://www.americanbar.org/groups/litigation/committees/securities/practice/2020/united-states-v-blaszczak/ [https://perma.cc/E8LA-368K] (indicating *Blaszczak* "could have the effect of subjecting defendants to possible criminal liability even in situations in which the government is unable to meet the elements of [Title 15] and the SEC is unable to bring a civil case"); Haray, *supra* note 176, at 16 ("We should expect prosecutors to look for opportunities to use [*Blaszczak*] to create other advantages for themselves in [Section 1348] securities fraud cases, and, where possible, avoid being bound by precedent applicable to [Title 15] claims.").

203. *See Second Circuit Denies Rehearing in Key Insider Trading Case*, *supra* note 163 (asserting the Second Circuit's inconsistent application of the personal benefit

be forced to forge ahead with minimal precedent to rely on, and results in insider trading cases will likely become even more unpredictable than they currently are.[204] Although the updated *Blaszczak* decision binds courts in only the Second Circuit, the Second Circuit serves as the main hub for insider trading cases and may persuade other courts to follow suit.[205] The robust unknowns make one thing clear: if neither the Supreme Court nor Congress intervenes to provide clear guidance on how to navigate the interplay between the Title 15 and Section 1348 securities fraud provisions, *Blaszczak* and similar future cases will push insider trading law into an even deeper state of uncertainty.

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requirement in criminal versus civil cases eliminates the clarity that the Supreme Court attempted to provide in *Dirks*); Sarah E. Aberg & Bochan Kim, United States v. Blaszczak*: Second Circuit Ruling Creates Opening for Significant Increase in Insider Trading Prosecutions*, NAT'L L. REV. (Jan. 31, 2020), https://www.natlawreview.com/article/united-states-v-blaszczak-second-circuit-ruling-creates-opening-significant-increase [https://perma.cc/WGX7-JTHB] ("[T]here is no doubt that *Blaszczak* has the potential to remarkably expand insider trading liability.").

204. *See* Vollmer, *supra* note 162 ("Judges and juries in future cases will have less guidance about the conduct necessary for a conviction. . . . Participants in the securities markets will have less guidance about their legal obligations.").

205. *See* Slamowitz, *supra* note 29, at 37 n.31 ("While it also remains to be seen if the Second Circuit *Blaszczak* decision will be adopted by other circuit courts, the Southern and Eastern Districts of New York are where most insider trading cases take place."). Notably, the Second Circuit includes New York City, the unofficial financial center of the United States. *See, e.g.*, DUFF & PHELPS, GLOBAL REGULATORY OUTLOOK 2019 5 (2019) (deeming New York the financial hub of the entire world).