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SENTENCING IN RECENT INSIDER TRADING CASES: WHAT JUDGES HAVE SAID AND DONE

Amidst several years of doctrinal confusion about what does and does not constitute illegal insider trading, less attention has been paid to what actually happens at the conclusion of insider trading prosecutions when defendants appear in court for sentencing. It is notable that judges have used harsh language at sentencings to describe the seriousness of insider trading, but then have imposed sentences below the minimums provided in the Sentencing Guidelines. What accounts for this discrepancy? In this article, the authors assess recent insider trading sentencing proceedings and evaluate the factors that may be contributing to the outcomes.

By Brian A. Jacobs and Joshua Bussen *

On September 25, 2018, following his trial conviction for insider trading, Dr. Edward Kosinski appeared in the United States District Court for the District of Connecticut for sentencing.[1] Dr. Kosinski, a cardiologist, had previously participated as a principal investigator in a clinical drug trial. After he had started participating in the drug trial, he began buying common stock in the company conducting the trial. By May 2014, he owned $250,000 of that company's stock. On June 29, 2014, as a part of the study, Dr. Kosinski received information about several allergic reactions to the drug at issue and learned that the study coordinators would be putting a hold on new enrollments. This information was secret and had not been announced publicly. The next day, with the company's stock valued at about $7.00 per share, Dr. Kosinski sold his entire stake in the company. Three days later, after the company announced that it would pause the study to conduct a safety analysis, the price dropped to $2.81 per share. Thus, Dr. Kosinski avoided a loss of about $160,000 by trading on material, non-public information.

At trial in federal court, the jury found Dr. Kosinski guilty of securities fraud. When he appeared for sentencing, United States District Judge Vanessa L. Bryant excoriated his behavior. The court noted that his conduct was "serious" and a "violation of trust."[2] The court found it particularly offensive that Dr. Kosinski—whose net worth was approximately $20 million —would commit fraud for less than $200,000. The court railed against insider trading as a whole, stating: "[this] is the kind of offense that occurs in the privacy of the upper echelons of our society. It's not the kind of crime that is committed on the streets of the inner city. It's the

[1] *United States v. Kosinski*, 16 Cr. 148 (VLB) (D. Conn.), Docket Entry 135 (Sentencing Transcript, Sept. 25, 2018).

[2] *Id.* at 69.

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kind of crime that is committed in million-dollar mansions, in office buildings, outside of the glare of the public, in places totally unsuspected of criminality. And so it is a crime that is rarely detected, it is rarely prosecuted. And when it is detected and prosecuted and an individual is convicted, the consequence of that conviction speaks volumes to the public." The court further explained the need for general deterrence and how sentences in insider trading cases helped prevent others from committing similar crimes. The court calculated the sentencing range based on the United States Sentencing Guidelines, and noted that the Guidelines called for a minimum term of imprisonment of 33 months and a maximum of 41 months.[3] Then, with little further explanation — beyond reference to Dr. Kosinski's age, lack of criminal history, and prior work for patients — the court sentenced him to six months in prison, less than a fifth of the low end of the Guidelines range.[4]

The *Kosinski* case is not an anomaly. Based on a review of recent sentencings in insider trading cases, judges often highlight the seriousness of the offense, calling insider trading "serious,"[5] "significant,"[6] "inexcusable,"[7] "extraordinarily bad on a number of levels,"[8] and noting that "[i]t involve[s] real damage to the financial markets,"[9] "destroys confidence in the markets,"[10] and is done "totally out of pure greed."[11] Yet, according to the United States Sentencing Commission's statistics, for the most recent year for which data is available, only *one* defendant to whom the insider trading guideline applied received a sentence within the Guidelines range, while the rest received below-Guidelines sentences. The rate at which below-Guidelines sentences are imposed in cases under the insider trading Guidelines, as discussed below, is far higher than in cases under the general fraud guideline.

At the same time, the current state of insider trading law in the United States "is, to use the technical legal term, a mess."[12] Starting with the Second Circuit's decision in *United States v. Newman*[13] in late 2014, and continuing through the Supreme Court's decision in *Salman v. United States*[14] in 2016, and the Second Circuit's multiple opinions in *United States v. Martoma*[15] in 2017, courts have wrestled with the meaning of the element that requires the Government to prove a "personal benefit" to a tipper in insider trading cases it prosecutes under the antifraud provisions of the Securities Exchange Act of 1934.[16] The "personal benefit" element may not be further clarified by courts anytime soon,[17] and worse, whatever clarity existed in the doctrine was upended further at the end of 2019, with the Second Circuit's decision in *United States v. Blaszczak*. In *Blaszczak*, the Second Circuit held that when prosecutors use the general wire and securities

[3] *Id.* at 75.

[4] *Id.* at 76, 80.

[5] *See, e.g.*, *United States v. Yan*, 17 Cr. 497 (KBF) (S.D.N.Y.), Docket Entry 23 (Sentencing Transcript, Mar. 30, 2018); *Kosinski*, *supra* note 1; *United States v. Xie*, 17 Cr. 92 (JWD) (M.D. La.), Docket Entry 232 (Sentencing Transcript, Dec. 20, 2018).

[6] *United States v. Chang*, CR-18-34-LHK (N.D. Cal.), Docket Entry 70 (Sentencing Transcript, June 13, 2018).

[7] *United States v. Berke*, 17 Cr. 450 (KPF) (S.D.N.Y.), Docket Entry 65 (Sentencing Transcript, Apr. 17, 2018).

[8] *United States v. Little*, 17 Cr. 450 (KPF) (S.D.N.Y.), Docket Entry 59 (Sentencing Transcript, Feb. 22, 2018).

[9] *Id.*

[10] *Berke*, *supra* note 7.

[11] *Chang*, *supra* note 6.

[12] *Insider Trading, Annual Review, 2018*, Morrison & Foerster LLP, at 16, *available at* https://media2.mofo.com/documents/190118-insider-trading-2018.pdf.

[13] 773 F.3d 438 (2d Cir. 2014).

[14] 137 S. Ct. 420 (2016).

[15] 869 F.3d 58 (2d Cir. 2017) (*Martoma I*), *opinion amended and superseded by* 894 F.3d 64 (2d Cir. 2018) (*Martoma II*).

[16] David Miller & Grant MacQueen, *Martoma – The Latest Critical Insider Trading Decision*, LAW360 (June 27, 2018), *available at* https://www.law360.com/articles/1057759/martoma-the-latest-critical-insider-trading-decision.

[17] Brian A. Jacobs, *How Institutional Dynamics Have Shaped Insider Trading Law*, 51 REV. SEC. COMMODITIES REG. 247 (2018).

fraud statutes in Title 18 — Sections 1343 and 1348 — to prosecute insider trading, rather than the Exchange Act, prosecutors need not even try to establish the "personal benefit" element that has bedeviled courts in recent years.[18] And not to be left out, the House of Representatives recently passed the Insider Trading Prohibition Act,[19] which attempts to address the doctrinal confusion, but which could simply lead to more and different questions.[20] Notwithstanding this doctrinal confusion, judges do not mention it at sentencing, instead highlighting different factors to support below-Guidelines sentences.

In this article, after discussing the evolution of the Guidelines' approach to insider trading sentences, we analyze recent sentencings in insider trading cases, look at the factors that courts have considered, and discuss what courts have actually said during the proceedings, in an effort to assess the reasons that may be driving sentencing outcomes.

I. BACKGROUND: SENTENCING IN INSIDER TRADING CASES

In 1980, a group of legal commentators published a study on white-collar sentencing after extensive interviews with federal judges, many of whom had the heaviest white-collar crime dockets in the country.[21] They found that white-collar defendants often were afforded "special empathy" at sentencing due to their status in the community.[22] Judges believed that the corresponding consequences of a criminal conviction — namely, loss of career and social status — were sufficient punishment.[23] Thus, "[w]hite collar offenders . . . receive[d] notoriously lighter sentences than street offenders in federal court."[24] In response, the Sentencing Reform Act was passed "to create the U.S. Sentencing Commission, which in turn promulgated the Federal Sentencing Guidelines."[25] The Guidelines went into effect in the fall of 1987.[26] In recognition of the relatively light sentences that white-collar defendants had received in the past, the fraud guideline that the Commission created was "driven by [ ] economic loss."[27] "In effect, the Commission and the guideline equalized the white-collar fraud offenses with blue-collar theft offenses."[28]

After the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law in July 2010.[29] In the Act, there is a directive to the Sentencing Commission to "review and, if appropriate, amend" the Guidelines for securities fraud offenses to "appropriately account for the potential and actual harm" such offenses cause the public and financial markets.[30] In response, the Commission amended the Guidelines to increase sentencing ranges for a number of financial crimes, including insider trading.

Under the current version of the Guidelines, the base offense level for insider trading is eight.[31] That base offense level increases to 14 if the offense involved "an organized scheme to engage in insider trading."[32] In determining whether the offense involved an organized scheme, the Guidelines instruct courts to consider the following factors: (1) the number of transactions; (2) the dollar value of the transactions; (3) the number of securities involved; (4) the duration of the offense; (5) the number of participants in the scheme (although

[18] 947 F.3d 19, 34-37 (2d Cir. 2019). It remains to be seen whether *Blaszczak* prompts the Second Circuit to go en banc or the Supreme Court to grant *certiorari*.

[19] Insider Trading Prohibition Act, H.R. 2534 (2019).

[20] Rahul Mukhi, Shannon Daugherty & Destiny D. Dike, Cleary Gottlieb Steen & Hamilton LLP, A Look inside H.R. 2534: Insider Trading Prohibition Act, Harvard Law School Forum on Corporate Governance (July 25, 2019), *available at* https://corpgov.law.harvard.edu/2019/07/25/a-look-inside-h-r-2534-insider-trading-prohibition-act/.

[21] Kenneth Mann et al., *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 481 (1980) (footnote omitted).

[22] Daniel Richman, *Federal White-collar Sentencing in the United States: A Work in Progress*, 76 L. & CONTEMP. PROBS. 53, 55 (2013).

[23] *Id.* (citing Mann et al., *supra* note 21, at 482-86).

[24] Samuel W. Buell, *Is the White-collar Offender Privileged?*, 63 DUKE L.J. 823, 833 (2014).

[25] *Id.*

[26] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

[27] Mark W. Bennett, Justin D. Levinson, Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 Iowa L. Rev. 939, 950 (2017) (quoting Richman, *supra* note 22, at 53, 56) (internal quotation marks omitted).

[28] *Id.* at 950-51.

[29] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[30] *Id.* at 2078.

[31] U.S.S.G. § 2B1.4(a).

[32] *Id.* § 2B1.4(b)(2).

an organized scheme may exist even with one participant); (6) the efforts undertaken to obtain material, nonpublic information; (7) the number of instances in which material, nonpublic information was obtained; and (8) the efforts undertaken to conceal the offense.[33]

Section 2B1.4 further instructs courts to increase the offense level, if the gain exceeded $6,500, by the corresponding number of levels in the fraud loss table in Section 2B1.1. Unlike in fraud cases, which look first to victims' losses under Section 2B1.1 for the applicable enhancement, the Guidelines use *gain* as the measure of harm in insider trading cases because "victims and their losses are difficult if not impossible to identify," so that "the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses."[34]

The Guidelines' treatment of insider trading has been subject to criticism. Shortly after the Sentencing Commission increased the sentencing ranges for insider trading in the wake of Dodd Frank, commentators criticized these amendments for "establish[ing] an even higher sentencing plateau for insider trading defendants — and financial industry professionals in particular — even as many judges were already departing downward from the existing, gain-driven Guidelines."[35] The key problem with the insider trading guideline, made worse by the amendments, is that "the factor most responsible for increasing sentencing minimums under the Guidelines, the defendant's monetary gain, is often not the most relevant to judges when assessing culpability."[36]

Against the backdrop of such criticism, it is not a surprise that many insider trading defendants receive below-Guidelines sentences; the question is why insider trading defendants receive below-Guidelines sentences at a higher rate than defendants convicted of other white-collar crimes.

[33] *Id.* § 2B1.4, comment. (n.1).

[34] *Id.* § 2B1.4, comment. (backg'd).

[35] Christopher P. Conniff, Steven S. Goldschmidt & Helen Gugel, *Sentencing Guidelines for Insider Trading: Recent Amendments Create Greater Disparity*, FEDERAL SENTENCING REPORTER, VOL. 26, NO. 1, at 43 (Oct. 2013).

[36] *Id.* at 45.

II. RECENT INSIDER TRADING SENTENCING STATISTICS

The United States Sentencing Commission compiles federal sentencing information and produces an *Annual Report* and *Sourcebook of Federal Sentencing Statistics*.[37] According to the Commission's most recent Sourcebook for fiscal year 2018,[38] 42.9 percent of defendants sentenced under the general fraud guideline in Section 2B1.1 received a sentence within the Guidelines range.[39] By contrast, for the 31 defendants sentenced under Section 2B1.4 of the Guidelines — the guideline that applies to insider trading — only *one* defendant received a sentence within the Guidelines range (or 3.2 percent of the 31 total defendants). According to prior sourcebooks, defendants sentenced under 2B1.4 enjoyed similarly low rates of Guidelines sentences in prior years as well.[40] Thus, it is no exaggeration to say that insider trading defendants sentenced under Section 2B1.4 receive Guidelines sentences at a substantially lower rate than defendants sentenced under the other economic crime sections.

After the Guidelines amendments that followed Dodd-Frank that increased the sentencing ranges for insider trading cases, the average sentences handed out appeared to increase for a time. A Reuters analysis in 2014 showed that over the prior five-year period, insider trading defendants had received average sentences of 17.3 months, up from 13.1 in the five years before that, or a 31.8 percent increase.[41] Shortly thereafter, Mathew Martoma received a sentence of nine years' imprisonment, leading one commentator to ask in 2015

[37] U.S. Sentencing Commission's 2018 Sourcebook of Federal Sentencing Statistics, *available at* https://www.ussc.gov/research/sourcebook-2018.

[38] The Commission's fiscal year for 2018 runs from October 1, 2017 to September 30, 2018.

[39] Table E-7, Sentence Imposed Relative to the Guideline Range for Economic Offense Offenders Fiscal Year 2018, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/TableE7.pdf.

[40] The Commission's Sourcebooks for prior years are *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/.

[41] Nate Raymond, Insider traders in U.S. face longer prison terms, Reuters analysis shows (Sept. 2, 2014), *available at* https://www.reuters.com/article/us-insidertrading-prison-insight/insider-traders-in-u-s-face-longer-prison-terms-reuters-analysis-shows-idUSKBN0GX0A820140902.

"why sentences for insider trading are reaching levels once considered impossible for something that was not even prosecuted until the late 1970s."[42] Studies by the Wall Street Journal and Bloomberg News corroborated this trend, similarly finding an increase in the sentences imposed on insider trading defendants around this time.[43]

In recent years, however, the average insider trading sentence appears to be dropping somewhat: For the calendar year 2018, of the 31 insider trading defendants sentenced, the average sentence was 14.3 months,[44] which is materially lower than the 17.3 average Reuters reported just a few years ago. Time will tell whether we are in the midst of a broader downward trend.

Regardless of whether the average sentence for insider trading is dropping again, insider trading defendants sentenced under Section 2B1.4 of the Guidelines still receive below-Guidelines sentences at far higher rates than defendants convicted of other white-collar crimes. The question is why.

III. WHAT JUDGES HAVE SAID ABOUT THE SERIOUSNESS OF THE OFFENSE

Under Section 3553(a) of Title 18, United States Code, judges must consider a variety of factors when sentencing defendants to ensure that the sentence is "sufficient, but not greater than necessary." In particular, the judge must consider the nature and circumstances of the offense, and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense to promote respect for the law and to provide just punishment for the offense; and to afford adequate deterrence to criminal conduct. Judges must also consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. At recent insider trading sentencings, judges have consistently highlighted the extraordinary seriousness of insider trading crimes, while at the same time showing a willingness to impose below-Guidelines sentences.

In the Eastern District of New York, Judge Joan M. Azrack sentenced defendant Tibor Klein, whose Guidelines range was 37 to 46 months.[45] Judge Azrack highlighted how Mr. Klein's conduct "was not a single act or single poor decision," but rather "was a concerted effort over time to profit from an insider trading scheme." Worse, when "confronted, Defendant Klein did not immediately take responsibility, and he lied to the SEC and the Government." Nevertheless, after a brief reference to Mr. Klein's "family circumstances" and the loss of his ability to earn a living as a financial advisor, Judge Azrack sentenced Mr. Klein principally to a term of six months' imprisonment, to be followed by six months' house arrest.

In the Southern District of New York, Judge Katherine Polk Failla sentenced defendant Walter C. Little, a Florida lawyer whose Guidelines range was 37 to 46 months and who pled guilty to illegally trading on information that belonged to his firm's clients.[46] Judge Failla said that Mr. Little's conduct

> "is extraordinarily bad on a number of levels. It persisted for well over a year. It involved real damage to the financial markets and to their integrity. As Mr. Little certainly understands, there were so many oaths that were broken in the course of committing this offense. Not just his confidentiality oaths or the oath he committed when he joined the Florida Bar, but the oaths that he made to the firm for which he worked, the annual certifications he made regarding material nonpublic information, the implicit oaths that he had to the clients of the firm, and as he recognized, and I really appreciated his candor in this regard, there really is no excuse for the conduct in which he engaged."

On balance, after considering Mr. Little's mental health issues, Judge Failla imposed a below-Guidelines sentence of principally 27 months' imprisonment.

In the District of New Jersey, Judge Michael A. Shipp sentenced Daniel Perez, whose Guidelines range was 18 to 24 months.[47] Judge Shipp explained that "the public may lose faith in the integrity of the market if insider trading schemes like these continue to persist." He noted that "there was a conscious decision on the part of

[42] Peter J. Henning, Punishments for Insider Trading Are Growing Stiffer, New York Times Dealbook (Sept. 9, 2014), *available at* https://dealbook.nytimes.com/2014/09/09/punishments-for-insider-trading-are-growing-stiffer/.

[43] Conniff *et al.*, *supra* note 35, at 44.

[44] *Insider Trading, Annual Review, 2018*, *supra* note 12.

[45] *United States v. Klein*,16 Cr. 442 (JMA) (E.D.N.Y.), Docket Entry 183 (Sentencing Transcript, Feb. 12, 2018).

[46] *Little*, *supra* note 8.

[47] *United States v. Perez*, 17 Cr. 538 (MAS) (D.N.J.), Docket Entry 24 (Sentencing Transcript, Aug. 10, 2018).

the defendant to engage in such activity on not one, but on two occasions," and that "[i]nsider trading is an all-too-common occurrence and is not only difficult to detect, but also difficult to prosecute." Nevertheless, recognizing that the defendant was "truly remorseful," Judge Shipp imposed a below-Guidelines sentence principally of probation for one year.

In the Northern District of California, Judge Lucy H. Koh sentenced Peter Chang, whose Guidelines range was 46 to 57 months, to a below-Guidelines term of 24 months, saying "this is a significant crime" and "was totally out of pure greed."[48]

In the District of Massachusetts, Judge William G. Young sentenced Robert Gadimian, whose Guidelines range was 37 to 46 months, to 27 months' imprisonment, saying, of the trust people had placed in him, "that you threw that all away for greed. Nothing more. Greed."[49] Judge Young went on to explain that the offense conduct threatened "[o]ur whole system of capital formation and investment," which "depends on honesty," and which requires a "sanction" that is "real" and "rigorously imposed."

Many other recent insider trading sentencings follow the same pattern of including remarks on the extraordinary seriousness of the offense, and yet ultimately imposing below-Guidelines sentences on a diverse range of defendants who do not share any one characteristic that would explain this outcome.

IV. HOW JUDGES HAVE JUSTIFIED BELOW-GUIDELINES SENTENCES

Recent insider-trading case law provides little explicit guidance as to what may be driving the broader pattern of below-Guidelines sentences described above. But a close reading of what judges have said and not said in recent cases provides clues as to the motivating factors.

As noted, judges have readily acknowledged at recent sentencings the harm that makes insider trading a serious offense, explaining how "[i]t involve[s] real damage to the financial markets and to their integrity,"[50] how "the public may lose faith in the integrity of the market if insider trading schemes like these continue to persist,"[51] and how "[o]ur whole system of capital formation and investment"[52] depends upon honesty in the markets. A recent report by the Bharara Task Force on Insider Trading — an expert review of the state of insider trading law — similarly described the seriousness of the offense: "The rationale for prohibiting insider trading is straightforward — protecting the fairness and integrity of our securities markets and holding wrongdoers accountable."[53]

But at recent insider trading sentencings, in addition to looking at the general seriousness of the offense of insider trading, courts have also looked at the seriousness of the conduct of the specific defendant before them. The ultimate sentencing decisions in these recent cases appear to turn in part on whether the offense at issue was, at one end of the spectrum, an isolated, rash decision, or at the other, a calculated pattern of misconduct over a long period of time.

By way of reference, several years ago, a former attorney named Matthew Kluger received what remains the longest sentence ever imposed for insider trading, a Guidelines sentence of 12 years' imprisonment. In Mr. Kluger's case, Judge Katharine S. Hayden in the District of New Jersey noted a number of insider trading cases in which defendants received below-Guidelines sentences, but distinguished them, stating, "[i]n this case [the] conduct is not just a trade, not just a series of trades over one company. . . . but 17 years of trades and money laundering and obstruction of justice. . . . And therefore I don't find the stories of the cases that yielded below guideline sentences [] particularly instructive. Mine is a more thuggish, a more thuggish, more direct example of taking other people's stuff."[54]

In several recent cases, judges have looked to whether, on the one hand, the defendant's conduct involved something akin to what Judge Hayden described as "just a trade" or some other element that mitigates culpability, or on the other hand whether the conduct involved a more calculated course of conduct over a period of time. For example, in *United States v. Bonthu*, the court explained, in the course of giving a below-Guidelines sentence of home confinement, that the defendant's decision to engage in a couple of trades

[48] *Chang*, *supra* note 6.

[49] *United States v. Gadimian*, 16 Cr. 10285 (WGY) (D. Mass.), Docket Entry 93-1 (Judge's Findings, June 20, 2018).

[50] *Id.*

[51] *Perez*, *supra* note 47.

[52] *Gadimian*, *supra* note 49.

[53] *Report of the Bharara Task Force on Insider Trading* at 3 (Jan. 2020), *available at* https://www.bhararataskforce.com/.

[54] *United States v. Kluger*, 11-858 (KSH) (D.N.J.), Docket Entry 53 (Sentencing Transcript, June 4, 2011).

seemed "more rashness than moral turpitude," stemming from "unfortunately the infection of capitalism," in conduct that was "aberrational."[55] Assessing a similar factor, in *United States v. Yan*, Judge Katherine B. Forrest observed — in the course of imposing a 15-month sentence in the middle of the Guidelines range of 12-18 months — that "[t]his is not one where you proceeded on a lark, just trying to see, hey, how does this work?"[56]

Other recent cases similarly highlighted aspects of defendants' conduct that mitigate its seriousness. For example, in *United States v. Yu*, Judge Shipp explained, before imposing a below-Guidelines sentence of probation, that "involving another individual in an insider trade shows Mr. Yu did not fully understand the gravity of what he was doing and also demonstrates the seriousness of the offense."[57] In another case, *United States v. Fishoff*, Judge Shipp imposed a more serious sentence of 30 months' imprisonment — still below the Guidelines range of 46 to 57 months — noting that until recently, insider trading in the context of secondary offerings (as occurred in the case) was "considered a gray area."[58] In *United States v. Chan*, Judge Indira Talwani imposed a sentence of 36 months' imprisonment, below a Guidelines range of 63 to 78 months, saying on the one hand that the defendant tried to "cheat the system" not "on just one occasion but repeatedly," which is a "serious challenge to the market," but at the same time recognizing that the defendant wasn't "driven by" anything "antisocial" or "intentions of greater wrongdoing."[59]

On the whole, although no single factor appears to drive courts to impose below-Guidelines sentences in insider trading cases, recent sentencings do show courts wrestling with the degree to which a defendant's conduct could be said to be "rash," "aberrational," or a "lark," versus ongoing, deliberate, and systematic.

V. CONCLUSION

In advance of imposing below-Guidelines sentences, courts in the past year have called insider trading serious,"[60] "significant,"[61] "inexcusable,"[62] and "extraordinarily bad on a number of levels,"[63] among other things. Yet, insider trading defendants have nevertheless received below-Guidelines sentences at a higher rate than defendants sentenced under other sections of the Guidelines. Based on a review of recent sentencings, one factor driving the sentencing outcomes appears to be an effort by sentencing judges not only to articulate and account for the seriousness of the offense of insider trading generally, but also the degree to which the individual defendant's conduct was a serious example of insider trading. ■

[55] *United States v. Bonthu*, 18 Cr. 237 (AT), Docket Entry 19 (Sentencing Transcript, Oct. 17, 2018).

[56] *Yan*, *supra* note 5.

[57] *United States v. Yu*, 17 Cr. 349 (MAS) (D.N.J.), Docket Entry 14 (Sentencing Transcript, Aug. 10, 2018).

[58] *United States v. Fishoff*, 15 Cr. 586 (MAS) (D.N.J.) (Sentencing Transcript, Nov. 5, 2018).

[59] *United States v. Chan*, 16-10268-IT (D. Mass.), Docket Entry 396 (Sentencing Transcript, Nov. 5, 2018).

[60] *See, e.g.*, *Yan*, *supra* note 5; *Kosinski*, *supra* note 1; *Xie*, *supra* note 5.

[61] *Chang*, *supra* note 6.

[62] *Berke*, *supra* note 7.

[63] *Little*, *supra* note 8.

CURRENT TRENDS IN INDEMNIFICATION PROVISIONS IN ACQUISITION AGREEMENTS

The growing use of representation and warranty insurance ("RWI") has led to significant changes in the negotiation and drafting of indemnification provisions in purchase agreements. The authors discuss the current insurance market, the significance of such insurance for negotiations, and its effect on specific indemnification provisions. They close with a note on protecting the attorney-client privilege in acquisitions and a "big question" about the future.

By Jennifer Wisinski and Rachael Apfel *

Indemnification provisions serve a critical role in private acquisition agreements by allocating risk between buyer and seller. In recent years, M&A lawyers have witnessed a significant shift in the content of these provisions. Notably, many of the changes can be attributed not to whether it is a "buyer's market" or "seller's market," but whether the buyer purchased representation and warranty insurance ("RWI") for the transaction. Who would have expected that RWI would have had such a significant impact on the negotiation and drafting of a purchase agreement? And, what will happen if and when this insurance is not as available or affordable as it is today — will we see a shift back?

This article summarizes recent trends in indemnification provisions, as well as recent developments on how to protect the seller's attorney-client privilege for deal communications following a sale. Although the attorney-client privilege provision generally is not considered to be part of the indemnification provisions, it can nonetheless have a significant impact on post-closing disputes.

BACKGROUND TO RWI MARKET

RWI is an insurance policy used in M&A transactions to protect against losses from a seller's breach of representations and warranties in the acquisition agreement. Twenty years ago, RWI was relatively new in the United States. At that time, RWI was not widely used for several reasons: (1) only a few insurers participated in the market; (2) policies tended to have high premiums and retention amounts, together with broad exclusions to coverage; (3) insurers generally required significant lead time to conduct due diligence; and (4) with little claims data, parties were uncomfortable about the likelihood that claims would be paid.

Today, the landscape looks dramatically different, with approximately 24 primary underwriters writing RWI policies. The increased competition has not only reduced costs significantly, but also has resulted in parties having leverage to negotiate more favorable coverage terms. Characteristics of today's market include:

Pricing. Pricing has declined from approximately 3-4% of the coverage limit to an average primary rate of approximately 2.7% of the coverage limit.

Full Walk. There are an increasing number of transactions where the seller has a "clean exit" with little or no indemnity. In exchange for a clean exit, RWI carriers often charge only a moderate increase in the RWI premium.

Coverage. The number of exclusions in policies has declined over the years with the specific coverage being generally negotiable. RWI often includes survival periods that are longer than those in acquisition agreements (three years vs. one year for non-fundamental representation breaches).

Timing. The length of the underwriting process has decreased and can be completed in as little as 10 days today.

Insured. Most policies today are purchased by the buyer in the acquisition (although the buyer and seller

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may split the cost). Although initially financial buyers purchased most of the RWI policies, today strategic buyers frequently use RWI as well.

Use of Towers. Some buyers purchase a tower of coverage to spread the risk among multiple insurers — especially for larger transactions.

Importantly, as noted in an annual report published by AIG for several years, insurers have consistently paid on RWI claims. AIG reported earlier this year that approximately one in five policies resulted in a claim — consistent with prior years.[1] Claim frequency is consistently the highest for large, complex deals. Common types of claims include those based on a breach of the representations covering financial statements, compliance with law, or taxes. The length of time it takes to resolve a claim varies, but many are resolved within six to eight months.

The result is that today RWI is a widely accepted method of protecting buyers from unknown risks of the type historically allocated to sellers under an acquisition agreement. This is evidenced by the dramatic increase in the number of RWI policies issued in recent years — from 40 RWI policies issued in 2013 to 1,611 policies issued in 2018.[2] Nevertheless, the market for issuing policies and the claims resolution process continue to evolve, especially as serial buyers who have been through a claims process use that experience to shape the policy terms in their subsequent transactions.

SIGNIFICANCE OF RWI TO ACQUISITION AGREEMENT NEGOTIATIONS

Every seller's primary goal in a sale is to "take the money and keep it." No seller wants to worry about whether it will have to return purchase proceeds to the buyer in the event of an indemnification claim.

Historically, buyers and sellers (and their respective lawyers) spent considerable time negotiating the representations and warranties, balancing the tension between seller's desire to limit its post-closing exposure against buyer's desire to have sufficient disclosure and protection regarding the business. Buyers and sellers spent even more time negotiating the indemnification provisions — survival periods, caps, baskets, and escrows.

When a buyer purchases RWI for an acquisition, the parties shift a significant portion of the post-closing risk to the insurer, letting the seller "off the hook." As a result, buyers may be more likely to agree to certain seller-friendly terms, such as (1) very low post-closing liability exposure (0.5% enterprise value) or even a complete "walk;" (2) a smaller escrow or no escrow at all; (3) the absence of a pro-sandbagging clause; and (4) the inclusion of a non-reliance and/or "no other representations" clause. These are discussed below. In addition, when most of the risk has been transferred to the insurer, sellers are more willing to accept certain buyer-friendly terms in the agreement, such as materiality scrapes, and a broader set of representations and warranties (also discussed below).

Shifting the risk to the insurer allows buyers to submit a seller-friendly bid in an auction or other competitive process by offering limited or no post-closing liability. RWI can also reduce tensions with continuing management post-closing because the buyer can seek recovery for losses from the insurer rather than making a claim against the seller, who might be part of continuing management.

From a risk profile standpoint, historically, it was common to see risk allocated as follows:

- first, a buyer would assume risk in an amount equal to 1% of enterprise value through a deductible in the indemnification provisions;
- from there, the seller would assume risk up to approximately 10% of enterprise value as represented by the indemnity cap; and
- the buyer would then be responsible for any losses beyond the indemnity cap.

With RWI, the risk of a breach of non-fundamental representations and warranties is often allocated as follows:

- first, buyer would assume risk in an amount equal to 0.5% of the enterprise value (representing one-half of the RWI retention amount) through the deductible;
- then seller would assume risk in an amount equal to the next 0.5% of the enterprise value through an

[1] *Taxing Times for M&A Insurance*, AIG (2019), https://www.aig.com/content/dam/aig/america-canada/us/documents/insights/aig-manda-claimsintelligence-2019-r-and-w.pdf.

[2] Source: Advisen — Hemenway, Chad. "Transaction Insurance takes the 10-year challenge." *Advisen*, 6 Feb. 2019. https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/330996328.html?rid=330996328&list_id=1#.XHRha21CsSI.twitter.

indemnity cap (representing the remainder of the RWI retention amount);

- from there, the insurer would assume risk up to the 10% of the enterprise value; and
- finally, the buyer would be responsible for any remaining losses.

It is interesting to note that today many acquisition agreements include an express reference to the fact that RWI will be purchased in connection with the acquisition. While approximately 29% of publicly reported private acquisition agreements referenced RWI in 2016-17, the percentage has increased to approximately 52% in 2018-19.[3]

FOCUS ON SPECIFIC INDEMNIFICATION PROVISIONS

To Indemnify, or not Indemnify

Indemnification provisions traditionally have served as the exclusive remedy for breaches under an acquisition agreement. One of the most notable impacts of RWI on acquisition agreements is the elimination of indemnity provisions altogether in an increasing number of deals — with RWI (and sometimes an escrow fund) serving as the exclusive source of recovery. The acquisition agreements in several transactions inked last year provide for no survival of representations and warranties (or survival only for limited items, including fundamental representations or specific items, such as tax) and consequently, no (or very limited) indemnity. A few of these transactions included a small indemnity escrow, which likely correlated to the retention amount, or a portion thereof, for the RWI.

This shift is extraordinary for sellers because it provides a clean walk, or very close to that. In particular, private equity sellers are able to exit ownership of a portfolio company without recourse to the fund. From the buyer's perspective, the ability to offer a clean walk to the seller dramatically improves a bid proposal. In addition, where there is no indemnity, the parties can negotiate the acquisition agreement and close the transaction more quickly.

However, buyers are not always willing to rely exclusively on RWI for recovery because RWI policies may include exclusions to coverage that are significant in the context of a particular transaction. For example, RWI policies typically exclude claims based on "known" circumstances, covenant breaches, and purchase price adjustment. While pre-closing taxes often are covered by RWI, the coverage does not generally extend to "known" pre-closing taxes. As a result, a buyer must determine the primary risks that are not covered by the policy, and then determine whether to require the seller to provide indemnity for these losses through a line-item indemnity. As with other negotiated provisions, it is a matter of balancing and allocating the risk.

Escrows

Escrows have long been used to secure payment of breach claims. Escrows historically covered 10% of the purchase price (consistent with the indemnification cap) and stayed in place for 12 to 24 months.

Today, agreements that contemplate RWI tend to include small escrows, or even no escrow at all. According to SRS Acquiom Buy-Side Representations and Warranties Insurance Deal Terms Study, in transactions that identified RWI, the average escrow size was 2.4% and the median escrow price was 1.0% — a significant reduction from 10%.[4]

In an acquisition with RWI, the escrow for indemnity claims generally correlates with the retention amount under the RWI (or the portion of the retention amount that the seller agrees to cover as between the buyer and seller). Because this amount is very low (0.5-1.0%), today buyers often request a separate escrow to secure the payment of purchase price adjustments (an obligation that is typically not covered by RWI). A separate escrow for the purchase price adjustment may be larger than the indemnity escrow and will be subject to negotiation between buyer and seller. Interestingly, separate purchase price adjustment escrows have become common even if the acquisition does not contemplate RWI.

Exclusive Remedy Provisions

It has long been common for the indemnification to state that the provisions serve as the "sole and exclusive remedy" for breaches of representations, warranties, and

[3] Jessica Pearlman & Tatjana Paterno, *Private Target Mergers & Acquisitions Deal Points Study*, ABA (2019), https://www.americanbar.org/groups/business_law/committees/ma/deal_points/.

[4] Matthew Unterlack & Sara Wilcox, *Buy-Side Representations and Warranties Insurance (RWI) Deal Terms Study*, SRS Acquiom (2019), https://www.srsacquiom.com/resources/2019-buy-side-reps-warranties-insurance-deal-terms-study/.

covenants in the acquisition agreement. Typical carveouts include fraud (increasingly, a defined term), the right to specific performance or other equitable remedies and claims based on the purchase price adjustment provision. Since 2004, the percentage of agreements with an exclusive remedy provision has risen from 76% to 95% in 2018-19.[5]

The inclusion of an exclusive remedy provision is critical to a seller — especially if the agreement provides for no indemnity, or very little post-closing liability. As a result, we expect to continue to see exclusive remedy provisions in almost all acquisition agreements, especially in deals with RWI where the seller's post-closing liability is limited.

Definition of "Losses"

The definition of "losses" covered by indemnification provisions is often broad, but one aspect that is often highly negotiated is whether consequential damages, or damages based on multiples of earnings, or diminution in value are covered. A buyer wants these damages to be included so that it may seek recovery for a loss in value to the business where it has not suffered out-of-pocket losses. Sellers generally strongly resist the inclusion of these damages.

Interestingly, many RWI policies today are silent as to whether losses include consequential or similar damages, as long as the acquisition agreement itself it also silent on this issue. As a result, especially in deals with RWI, today it is common for the acquisition agreement to be silent as to consequential or similar damages.

Materiality Scrapes

The recent rise of RWI has been paralleled by a similarly dramatic rise in the use of materiality scrapes. In 2005, only 14% of private M&A transactions in the United States had a materiality scrape, but by 2019, over 90% of transactions included one.[6]

A "materiality scrape" is a provision that stipulates ignoring (for certain indemnity purposes) any materiality qualifiers in the seller's representations and warranties. With a single materiality scrape, materiality is taken into account when determining whether a breach had occurred, but is disregarded in determining the amount of indemnified losses resulting from that breach. With a double materiality scrape, materiality is disregarded both in determining whether a breach has occurred and in determining the amount of indemnified losses resulting from that breach. The result is the buyer can much more easily establish a claim for breach and recover all related losses (subject to the baskets and cap).

Most RWI policies will "read out" materiality qualifiers in the representations and warranties, but if the seller provides indemnity under the agreement, the insurer may disregard materiality qualifiers only if the acquisition agreement includes a double materiality scrape. As a result, buyers will push hard for a double materiality scrape in the agreement to obtain better coverage under the RWI policy. Sellers, on the other hand, have become more willing to agree to a double materiality scrape when their post-closing liability exposure is limited by RWI. As a result, transactions with RWI are likely to include a materiality scrape and that scrape is likely to be a double materiality scrape.

Sandbagging

In a private M&A transaction, "sandbagging" refers to a situation in which a buyer knows about a breach by seller prior to closing, yet proceeds to close, and then seeks indemnification from the seller post-closing for the breach. Sandbagging can be handled in one of three ways in an acquisition agreement:

- by including a "pro-sandbagging" provision, the parties agree that buyer's prior knowledge of a breach will not affect buyer's ability to bring a claim against the seller after the closing;
- if the parties agree to an "anti-sandbagging" provision, the buyer cannot pursue a claim if it had knowledge of the breach prior to the closing; and
- finally, the agreement may be silent with respect to sandbagging, leaving the issue to be determined by the governing law of the agreement.

Most acquisition agreements are silent as to sandbagging. However, if the transaction includes RWI, it is much less likely that the agreement will contain a pro-sandbagging provision. Only about 29% of the acquisition agreements that contemplate RWI include a

[5] Jessica Pearlman & Tatjana Paterno, *supra* note 3.

[6] American Bar Association, M&A Market Trends Subcommittee, Mergers & Acquisitions Committee, *2019 Private Target Mergers and Acquisitions Deal Point Studies*, https://www.americanbar.org/groups/business_law/committees/ma/deal_points/.

pro-sandbagging provision (compared to 59% of acquisition agreements that do not contemplate RWI).[7]

This trend is consistent with the fact that RWI policies generally exclude known breaches from coverage. Therefore, a pro-sandbagging provision would be relatively useless for claims otherwise covered by a RWI policy because, if buyer knew of a breach prior to closing, the policy would exclude coverage of the claim, regardless of whether the matter otherwise would be covered by the policy. Thus, buyers would have little incentive to push for a pro-sandbagging provision.

Baskets and Caps

In M&A transactions, a "basket" is the dollar amount that damages or losses must exceed before a seller has an obligation to indemnify the buyer. Baskets can be structured either as a deductible or a tipping basket. With a deductible, the seller is responsible only for losses exceeding the amount of the deductible. With a tipping basket, once the basket amount is reached, the seller is responsible for all losses (including those in the now-full basket).

In transactions with RWI, sellers' indemnification obligations are more likely to be structured as deductibles than as tipping baskets, and the deductible generally will be consistent with the retention amount in the RWI (or the portion seller is responsible for under the agreement). In addition, the use of "mini-baskets" or "eligible claim thresholds" has increased in recent years to establish a floor (below the deductible) that must be reached before any one claim can be counted for purposes of the deductible.

A typical indemnity cap traditionally was 10% of purchase price. However, today caps have trended down significantly, especially in deals with RWI, to approximately 1% of the purchase price — an amount that generally coincides with the retention amount under the RWI policy. A buyer may insist that certain losses not be subject to the cap, including breaches of fundamental representations, breach of covenants, and fraud.

Non-Reliance; No Other Representations/10b-5/Full Disclosure Representations

Sellers often negotiate to include a representation that the seller has provided no representations outside the agreement to limit the buyer's ability to bring a claim based on a representation not included in the agreement. Sellers also may ask for the buyer to disclaim reliance on any representations outside the agreement. By disclaiming such reliance, the buyer may waive tort-based fraud or misrepresentation claims based on representations and warranties outside the agreements because the buyer will not be able to prove (or will have a hard time proving) reliance, a required element of these claims.

Buyers, on the other hand, may ask for a full disclosure or "10b-5" representation. A full disclosure representation places significant responsibility on the seller to advise the buyer of anything that is material to the business that may not otherwise be disclosed in the agreement, and ensure the buyer that all information is complete and correct in all material respects, and does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statement not misleading.

Today, it is rare for an acquisition agreement that contemplates RWI to include a 10b-5 or full disclosure representation. RWI policies typically will not cover claims for the breach of a 10b-5 or full disclosure representation, and sellers will strongly resist taking on liability for claims not covered by the RWI policy.

In contrast, most acquisition agreements that contemplate RWI will include a non-reliance or "no other representations" clause. According to SRS Acquiom's Buy-Side Representations and Warranties Insurance Deal Terms Study, 78% of agreements that contemplate RWI included both a non-reliance and a no other representations clause, vs. 41% of transactions that did not contemplate RWI.[8] The correlation of these provisions with RWI is likely a result of sellers seeking to ensure that the scope of liability under the agreement is not broader than is covered by the RWI policy.

Line-Item Indemnities

One exception to the trend of eliminating or lessening a seller's post-closing liability is the inclusion of line-item indemnities. As mentioned above, in general, RWI policies will not cover known liabilities or covenant breaches. Further, RWI policies typically have standard exclusions from coverage, such as asbestos and other environmental related matters. Policies may also exclude other items, such as FLSA/wage and hour claims, product liability/warranty/recall claims, data

[7] Matthew Unterlack & Sara Wilcox, *supra* note 4.

[8] *Id.*

privacy/security claims, FCPA, NOLs, and deferred tax assets. If a buyer wants to protect against a risk that will not be covered by the RWI policy, the buyer must obtain a line-item indemnity in the acquisition agreement that requires the seller to indemnify the buyer for those losses. In this circumstance, the buyer also will need to consider whether the proposed escrow, baskets, and caps are appropriate to protect against these possible losses.

Certain customary line-item indemnities are common in many transactions, including pre-closing taxes, debt (to the extent not otherwise paid at closing), transaction expenses, and known, existing litigation. But in the current indemnity landscape shaped by the rise of RWI, there are other, less traditional matters that may be strong candidates for inclusion as a line-item indemnity, including known liabilities that cannot be addressed through a purchase price adjustment, whether it is because the scope of liability is unknown or the parties cannot come to an agreement on the amount of liability, as well as contingent liabilities.

Sellers may be willing to agree to specific line-item indemnities for a number of reasons. For example, a seller may prefer a line-item indemnity where liability is not yet known or fixed, as compared to a one-time, irreversible reduction in the purchase price. In addition, by addressing potential risks, the buyer may be more willing to use an equity sale structure, which is generally more favorable to sellers, vs. an asset sale.

Protection of Privilege

Although not technically an indemnification provision, another significant development impacting post-closing disputes is the inclusion of a provision in the acquisition agreement providing for seller's retention of the attorney-client privilege following the closing. The general rule in Delaware is that, absent a specific provision in the acquisition agreement, in a merger, the attorney-client privilege passes to the buyer. Section 259 of the Delaware General Corporation Law provides that following a merger, "all property, rights, privileges, power, franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation."[9]

Two recent cases in Delaware provide further guidance on this issue. In 2013, the Delaware Chancery Court held that a seller waived its right to the attorney-client privilege for pre-closing matters because the seller did not take any affirmative steps to prevent the transfer of the privilege to the buyer.[10] In this case, the acquisition agreement did not include any provision that would have preserved the privilege for the seller, and the seller did not stop the buyer from taking physical possession of the privileged communications. The court noted that the parties could "use their contractual freedom . . . to exclude from the transferred assets the attorney-client communications they wish to retain as their own."[11]

In May 2019, the Delaware Chancery Court reviewed whether a particular contract provision was sufficient to preserve the privilege for seller on a post-merger basis.[12] The merger agreement included a provision that: (1) preserved any privilege attaching to pre-merger communications as a result of counsel's representation of seller in connection with the merger; (2) assigned control over the privilege to seller's shareholder representative; (3) required both parties to take steps necessary to ensure the privilege stayed in effect; and (4) prevented the buyer from using or relying on any privileged communications in post-closing litigation with seller. Despite this provision, the buyer argued that the privilege had been waived. The court disagreed and noted that even if the privilege had been waived, permitting the buyer to use privileged communications would be contrary to the plain meaning of the express language that prohibited the buyer from using or relying on the communications. The court also noted that the covenant required "all parties" to take steps to preserve the privilege on behalf of seller.

Courts in other states have also considered the transfer of privilege in the context of an acquisition. Regardless of which governing law applies to the acquisition agreement, today it is prudent to include a specific provision describing who owns the privilege following the closing. It is useful for sellers to also include a provision whereby buyer waives any objection to seller continuing to use its counsel in any post-closing dispute.

THE FUTURE

The big question is — what happens in the future when RWI is either not as available or not as cost

[9] Del. Code tit. 8, § 259.

[10] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, C.A. No. 7906-CS, 2013 WL 6037329 (Del. Ch. Nov. 15, 2013).

[11] *Id*. at 161.

[12] *Shareholder Representative Services LLC v. RSI Holdco*, 2019 WL 2290916 (Del. Ch. 2019).

effective? It seems inevitable that at some point there will be large RWI claims or other events that will make insurers reevaluate the current terms of RWI policies and their willingness to continue in the market.

If and when RWI is no longer available on the terms it is today, it will be interesting to see if and how long it takes to see a shift back in indemnification provisions. M&A lawyers who have been trained in today's RWI market will be accustomed to not only the easier negotiation dynamics that result from RWI but also to the types of indemnification provisions common in transactions with RWI where significant portions of sellers' traditional risk was shifted to the insurer. In a transaction without RWI, it will be critical for attorneys to rethink many provisions which will have become very common — including, for example, the double materiality scrape which can have a significant impact on a seller's post-closing liability. A buyer will need to rethink many provisions, including escrows, caps, and survival periods to ensure that it is reasonably protected against losses. A seller, on the other hand, will need to work hard to limit its post-closing exposure. Or will someone create a new product to allocate risk in M&A transactions? ■

CLE QUESTIONS on Jacobs and Bussen, *Sentencing in Recent Insider Trading Cases: What Judges Have Said and Done.* Circle the correct answer to each of the questions below. If at least four questions are answered correctly, there is one credit for New York lawyers (nontransitional) for this article. Complete the affirmation, evaluation, and type of credit, and return it by e-mail attachment to rscrpubs@yahoo.com. The cost is $40, which will be billed to your firm. To request financial aid, contact us by e-mail or fax, as provided above.

1. In the *Kosinski* case the U.S. Sentencing Guidelines called for a minimum term of imprisonment of 33 months, but the court sentenced him to six months in prison.
True **False**

2. Compounding the confusion in insider trading law, the Second Circuit held in 2019 in the *Blaszczak* case that when prosecutors use the general wire and securities fraud statutes in Title 18 to prosecute insider trading, they need not even try to establish the "personal benefit" element that has bedeviled courts in recent years. **True** **False**

3. Under the current version of the Sentencing Guidelines, the offense level in insider trading cases is measured by the victims' losses, as in fraud cases generally. **True** **False**

4. The average sentence in insider trading cases appears to be dropping: in 2018 it was 14.3 months, compared with the 17.3 average reported by Reuters a few years ago. **True** **False**

5. In 2018, defendants in insider trading cases received below-guideline sentences at about the same rate as other white-collar crime defendants. **True** **False**

A F F I R M A T I O N

_____, Esq., an attorney at law, affirms pursuant to CPLR
[Please Print]
2106 and under penalty of perjury that I have read the above article and have answered the above questions without the assistance of any person.

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E V A L U A T I O N

This article was (circle one): Excellent Good Fair Poor

T Y P E O F C R E D I T

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