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LEGAL ADVICE

Insider trading ‘minefields’ abound

CASE OF FORMER ORIOLE DECINCES IS A CAUTIONARY TALE FOR INVESTORS

If you own publicly traded securities, you likely know that you generally cannot buy or sell them using confidential, non-public information. You may also have noticed that prosecutors are being rebuffed in high-profile insider trading cases – a trend that may create a more relaxed attitude among investors.

But, as the case of former Orioles All-Star third-baseman Doug DeCinces demonstrates, insider trading minefields continue to abound. DeCinces was a longtime friend of James Mazzo, the former CEO of Advanced Medical Optics Inc. Prosecutors allege DeCinces learned from Mazzo that AMO would be acquired by Abbott Laboratories at nearly triple what AMO shares were trading at the time. When the Abbott offer was made public, DeCinces allegedly made a \$1.3 million profit.

DeCinces was sued by the Securities and Exchange Commission in 2011 and eventually settled that civil case. But that turned out to be only the beginning of his ordeal.

In 2012 he was indicted, along with Mazzo and two others, for the same conduct. DeCinces’s years-long and ongoing criminal fight highlights how recent government losses in insider trading cases have possibly created an even



Adam Abelson focuses on civil litigation, white-collar criminal defense and government investigations for Zuckerman Spaeder LLP in Baltimore. He can be reached at aabelson@zuckerman.com.

more uncertain environment for investors.

In the most significant of such cases, the U.S. Court of Appeals for the Second Circuit in December 2014 overturned the convictions of two hedge fund traders in *U.S. v. Newman*.

In *Newman*, the court held that when a “tippee” like DeCinces (as opposed to a “tipper” like Mazzo) trades on non-public information, the government must prove that the tippee not only knew the information was non-public and was disclosed in breach of the insider’s duties to the company, but also that it was

disclosed in exchange for a “personal benefit” to the tipper. The court also held that the benefit must be clear and consequential.

The requirement to prove the insider’s substantial personal benefit and the tippee’s knowledge of that benefit was a major setback to the government. But just because the SEC and federal prosecutors have been stymied doesn’t mean investors can relax. Far from it.

First, a corporate insider is still strictly prohibited from trading on, or disclosing to others, material non-public information, so long as it meets the Second Circuit’s new personal benefit test.

Second, the requirement that the government prove that a tipper such as Mazzo expected something akin to a quid pro quo when disclosing information may prove illusory.

DeCinces has argued that the *Newman* decision requires dismissal of the charges against him. But the Second Circuit decision created new questions for juries and little legal certainty, particularly on the question of what constitutes a personal benefit and how it relates to the receipt of inside information.

While DeCinces may very well be acquitted, the fact that he must spend years of his life fighting for his freedom and reputation should serve as a cautionary tale.