Trapping Insider Trading Perpetrators with Misappropriation Theory, Is That Possible?

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Abstract. In Indonesia, insider trading is a crime that the perpetrators do not easily catch. This is sourced from the theory of fiduciary obligations in Article 95 of Law no. 8 of 1995 concerning the Capital Market and restrictions on insider trading. In the United States, using the abuse theory in Sections 10(b) and Sections 10b-5, the Securities and Exchange Act of 1934 can reach anyone, without limitation, which is categorized as an insider trader. The main purpose of this paper is to find new ideas about the existing obstacles to ensnare insider trading actors that have been happening in Indonesia so far. For this reason, the method used is to compare regulations and insider trading cases in the two countries. This study shows that it is time for Indonesia to adopt the theory of misappropriation as an alternative to trapping insider trading actors in the capital market. This urgency is needed to foster investor confidence in the growth and development of the Capital Market in Indonesia.

1 Introduction

In the Capital Market, the main problem in dealing with Insider Trading crimes lies in applying the theory used to ensnare Insider Trading actors. Based on Law No. 8 of 1995 concerning the Capital Market. This law has implicitly acknowledged that the Fiduciary Duty Theory is part of the process of handling Insider Trading in the Indonesian Capital Market. In the Capital Market Law, the existence of Fiduciary Duty Theory can be found in Article 95 of the Capital Market Law; the article regulates that insiders from Issuers or Public Companies who have inside information are prohibited from buying or selling Securities from Issuers. or the said Public Company, as well as other companies conducting transactions with the Issuer or Public Company concerned. As for the Elucidation of Article 95 of the Capital Market Law, the parties that can be categorized as Insiders have been determined, namely:

a. Commissioner, director, or employee of the issuer;
b. The main shareholder of the issuer;
c. An individual who, because of his position or profession or because of his business relationship with an issuer or public company, allows that person to obtain information; or; A party which within the last 6 (six) months is no longer a party as referred to in letter a, letter b, or letter c above.

Academician of the Faculty of Law, University of Indonesia Arman Nefi, in his book entitled "Insider Trading Indications, Evidence, and Law Enforcement," states that the provisions in Article 95 of the Capital Market Law which adhere to Fiduciary Duty Theory, require Insiders not to act recklessly in carrying out their duties (duty of care). In addition, they must not take advantage of themselves for the company (duty of loyalty). [1].

The formulation of Insider Trading regulations in the Indonesian Capital Market, which is based on applying Fiduciary Duty Theory in determining the perpetrators of Insider Trading crimes, has not been able to reach parties outside the Insider category as stipulated in Article 95 of the Capital Market Law. This can be seen from one of the alleged Insider Trading cases in the Capital Market, namely the alleged Insider Trading case of PT. Semen Gresik Tbk.

In the case of alleged Insider Trading PT. Semen Gresik Tbk, the parties, suspected of conducting Insider Trading are known to be not bound by a Fiduciary Duty relationship as regulated in Article 95 of the Capital Market Law. So that the insider element (Insider) as one of the elements of Insider Trading that must be fulfilled accumulatively is not fulfilled, and based on the applicable rules, the Parties are considered not to have violated the provisions of Insider Trading. In the end, the formulation of the Insider Trading regulations in Indonesia has caused the allegations of Insider Trading to be unresolved. [1].

Unlike the case with the handling of Insider Trading in the United States. In the United States, it is known as the Misappropriation Theory, a theory used by the Securities Exchange Commission (referred to as the "SEC") in ensnaring Insider Trading actors in the Capital Market. Misappropriation Theory is a theory initiated by Chief Justice Warren Burger through a

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dissenting opinion in the Chiarella v. case. In the United States, in that case, Warren Burger, through a dissenting opinion, initiated Misappropriation Theory as a theory used to hold accountability for violations of Articles 10b-5. [2]. Against this theory, the meanings given according to Black's Law Dictionary are: [3].

"The doctrine that a person who wrongfully uses confidential information to buy or sell securities in violation of a duty owed to the one who is the information source is guilty of securities fraud."
In dealing with Insider Trading in the United States, the SEC applies the Misappropriation Theory because of its ability to trap Insider Trading actors, both insiders and outsiders. So it can be said that this theory is very comprehensive in ensnaring Insider Trading actors. Misappropriation Theory does not pay attention to the regulation of who conducts securities transactions but focuses on the nature of the material information used for these transactions. So if the material information is still confidential, then anyone who conducts securities transactions to gain profits by using the information will be considered Insider Trading [4].

Based on the problems in the background above, the authors will raise the main issues in writing this journal as follows: (1) What are the implications of handling Insider Trading in the Indonesian Capital Market based on the application of Fiduciary Duty Theory? (2) What if Misappropriation Theory becomes an alternative in handling the crime of Insider Trading in the Indonesian Capital Market?

2 Methods

In this research process, the author uses data collection techniques obtained from library research and interviews and uses a typology of comparative law research to find out the similarities and differences of each law studied. [5]. The capital market authorities can use the results of this legal comparison in responding to the handling of Insider Trading crimes that occurred in Indonesia.

3 Result and Discussion

Insider Trading may be restricted as securities transactions carried out by Insiders by utilizing insider information that has not been announced to the public. Provisions regarding insider trading violations in the Capital Market Law are regulated in Articles 95 to 99 of the Capital Market Law. However, the specific regulation regarding Insider Trading actors categorized as Insiders is contained in Article 95 of the Capital Market Law. The provisions of Article 95 Capital Market Law are:

"*Insiders from Issuers or Public Companies who have inside information are prohibited from buying or selling Securities:*

(1) the Issuer or Public Company in question; or
(2) other companies conducting transactions with the Issuer or Public Company concerned".

As for making it easier for readers to understand Article 95 of the Capital Market Law, it can be seen from the following flow chart:

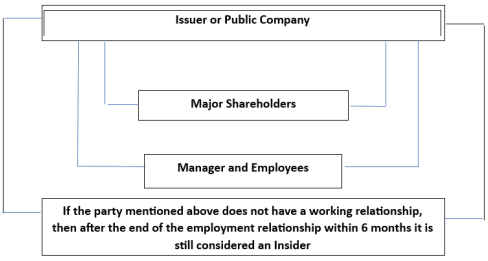

Figure 1. Insider Trading Actors based on Article 95 of the Capital Market Law [12]

By further analyzing Article 95 and looking at the picture above. So, it can be understood that three elements must be met for someone to be said to be practicing Insider Trading, namely: [6]

a) First, the parties prohibited from conducting transactions on securities are Insiders from issuers or public companies, such as commissioners, directors or employees, major shareholders, people with their positions, or parties who have had a relationship with the company within the last six months.
b) Second, regarding inside information, Article 1 number (7) of the Capital Market Law stipulates that:Material Information or Facts are important information or facts relevant to events, occurrences, or facts that may affect the price of Securities on the Stock Exchange and the decisions of investors, potential investors, or other parties with interest in such information or facts.
c) Third, it is prohibited to buy or sell securities from issuers or public companies and securities from other companies that conduct transactions with the issuer or public company concerned.

The alleged Insider Trading case in Indonesia, namely PT Semen Gresik Tbk, was the largest alleged Insider Trading case in the history of the Indonesian capital market at that time [7]. In this case, it is known that the entrapment of Insider Trading actors based on the application of Fiduciary Duty Theory as regulated in Article 95 cannot reach Insider Trading actors. [8]. The brief chronology of the alleged Insider Trading case of PT Semen Gresik Tbk will be explained through the following description:

- This case was discovered in stock trading on June 22, 1998, shortly before the Chairman of Bapepam I Putu Gede Ary Suta resigned his position. Bapepam indicated that the Insider Trading case stemmed from a sharp increase in the share price of PT Semen Gresik Tbk. This increase is considered unreasonable because, within 2 (two) weeks, the price has increased by 60%. This can be seen in the

stock trading on June 3, 1998; the stock price was recorded at Rp. 4,850 per share and on 16 June 1998 it rose sharply to Rp. 7,800 - per sheet even touched Rp. 10,000- per sheet.

- The increase in share prices is in line with the plan to privatize SOEs, including PT Semen Gresik Tbk, which will divest 65%. Meanwhile, the legal concept of the divestment capital market is a material fact, which was announced in the mass media with news of the entry of foreign investors as strategic partners to buy shares of PT Semen Gresik Tbk on June 19, 1998, and the government accepted this offer.
- In the period from May 1998 to June 18, 1998, it was discovered that several securities companies were very prominent in trading shares, namely PT Danareksa Securities, PT Bahana Securities, and PT Jardine Fleming Nusantara. The three securities companies are financial advisors to PT Semen Gresik Tbk and accompany their clients in the due diligence process by potential strategic partners, such as Cement Mexico, Holderbank, and Heidelberger. Whereas according to the rules of the game on the Stock Exchange, they are classified as insiders who are prohibited from participating in transactions, in reality, the brokers are actively involved in transactions. [7]
- In the period from May 1998 to June 18, 1998, it was discovered that the three securities companies had transactions in shares of PT Semen Gresik Tbk with the following transactions: [8].

Table 1. Total Transactions of PT. Danareksa Securities, PT Bahana Securities, PT Jardine Fleming Nusantara.

No.	Securities Company	Number of Transactions
1	PT Danareksa Securities	703
2	PT Bahana Securities	225
3	PT Jardine Fleming Nusantara	535

- Based on the actions taken by the three securities companies, the Chairman of Bapepam announced a violation of the principle of openness, in this case, the crime of Insider Trading. However, looking at the Insider Trading regulations in the Indonesian Capital Market, the problem is the inadequacy of these regulations to determine the management of the three securities companies involved in trading SG shares as Insiders [1].
- The management of the three securities companies involved in trading the shares of PT. Semen Gresik Tbk is not reachable as a party categorized as an Insider. The investigation into the alleged Insider Trading in the SG case was dismissed at the behest of Bapepam-LK. [6]

Table 2. Fulfillment of the Elements of Article 95 of the Capital Market Law in the Case of Alleged Insider Trading PT Semen Gresik Tbk

Unsur-unsur	Keterangan
There are people inside.	Article 95 does not categorize the management of a securities company that is not bound by a Fiduciary Duty relationship with PT Semen Gresik Tbk as an Insider.
There is material information that is not yet available to the public or has not been announced.	The plan is to privatize SOEs, including PT. Semen Gresik Tbk to be divested 65%
A transaction is carried out because it is triggered by the Material Information, which is still closed.	The news of the entry of foreign investors as strategic partners to buy shares of PT Semen Gresik Tbk was announced in the mass media on June 19, 1998. However, from May 1998 to June 18, 1998, it was discovered that the three securities companies that served as financial advisors to PT. Semen Gresik Tbk is very active in trading shares of PT. Semen Gresik Tbk, namely: a. PT Danareksa Securities made 703 Transactions b. PT Bahana Securities conducted 225 Securities Transactions c. PT Jardine Fleming Nusantara conducted 535 Securities Transactions

Based on the table above, it can be seen that the first element is "the presence of insiders" as regulated in Article 95 of the Capital Market Law; in the alleged case of Insider Trading, PT Semen Gresik Tbk is not being fulfilled because the provisions of Article 95 of the Capital Market Law do not categorize the management of securities companies who are not bound by the relationship of Fiduciary Duty to PT Semen Gresik Tbk as Insider category. Although the second element, "There is material information that is not yet available to the public or has not been announced to the public." has been met, namely inside information in the form of plans for the privatization of SOEs, including PT. Semen Gresik Tbk, which will be divested 65%. As well as the third element, "There is a transaction carried out because it is triggered by the Material Information which is still closed." has been fulfilled, namely based on stock trading conducted through securities companies PT Danareksa Securities, PT Bahana Securities, PT Jardine Fleming Nusantara. So it is reasonable to suspect that the transactions carried out by

the three securities companies were triggered by material information that is still closed. However, the failure to fulfill the first element, namely "the presence of insiders," causes the handling of the alleged Insider Trading case of PT Semen Gresik to be unsuccessful because of the three elements of Article 95 of the Capital Market Law must be fulfilled cumulatively. So that if one of the elements is not met, then the perpetrator cannot be considered to have committed an Insider Trading crime.

It is different from the handling of Insider Trading in the United States, which uses Misappropriation Theory. Misappropriation Theory is a theory initiated by Chief Justice Warren Burger (Chairman of Supreme Court Justice Warren Burger) in a dissenting opinion in the case of Vincent Chiarella v. the United States in 1980. [9].

In that case, Vincent Chiarella made securities transactions based on material information he obtained as an employee at a printing company in the financial sector. For his actions, the government thinks that: [10].

"secret conversion of confidential information operated as a fraud on the corporation that entrusted him with that information" and that his "purchase of securities based on material nonpublic information obtained by misappropriation constituted fraud on the sellers of those securities."

In line with the opinion above, Warren Burger, in a dissenting opinion, stated that:

"In particular, the rule should give way when an informational advantage is obtained, not by superior experience, foresight, or industry, but unlawful means."

In the case of Vincent Chiarella, Warren Burger, through a dissenting opinion, introduced Misappropriation Theory as a theory used to hold accountability for violations of Article 10b-5. Warren Burger agrees that a violation of Article 10b-5, based on Misappropriation Theory, can be held liable to anyone who unlawfully obtains or alters nonpublic information for his benefit, which he then uses in connection with the purchase or sale of securities. So based on this theory, Warren Burger agrees that Vincent Chiarella is declared responsible for violating Article 10b-5. Finally, the idea of Misappropriation Theory in the case of Vincent Chiarella v. the United States has eliminated the need for a fiduciary duty relationship between Insider Trading actors and Issuers or Public Companies to be declared as having practiced Insider Trading. [2].

Based on this understanding, to make it easier for readers to understand the difference between these two theories, the author writes a comparison of the elements of Insider Trading based on the application of Fiduciary Duty Theory and Misappropriation Theory in ensnaring Insider Trading actors, which can be seen in the following table:

Table 3. Comparison of Elements of Application of Fiduciary Duty Theory (Article 95) and Misappropriation Theory in determining Insider Trading actors

***Fiduciary Duty Theory* (Pasal 95 UUPM)**	***Misappropriation Theory***
There are people inside.	Material information that has not been disclosed to the public.
The material inside information has not been published to the public.	Securities transactions are made based on this information.
The existence of securities trading transactions by insiders based on such information.	Personal gains are obtained by the party conducting the transaction.

Looking at the success of the United States in ensnaring the perpetrators of Insider Trading crimes by applying Misappropriation Theory in their handling. So the author believes that it is time for Misappropriation Theory to be adopted into the Indonesian Capital Market Law. This opinion is in line with Bismar Nasution's opinion, which states that the application of Misappropriation Theory will make the concept of Insider very comprehensive, namely by regulating everyone who uses information that is not yet available to the public (Inside Information) and conducts securities transactions on the information categorized as Insider in Insider Trading, even though the person conducting the securities transaction is not bound by the Fiduciary Duty relationship with the company. [11].

4 Conclusion

Applying the Fiduciary Obligation Theory cannot reach actors outside of insiders (Insiders). As a result, the handling of Insider Trading by the Financial Services Authority (OJK) is weak. Indonesia urges to adopt Misappropriation Theory as an alternative to trapping Insider Trading actors. This is due to two things:

1. The Abuse Theory stipulates and strictly regulates the misuse of material non-public information used for the personal benefit of those who have obtained the information as a benchmark for determining the perpetrators of Insider Trading so that the application of the Abuse Theory in dealing with Insider Trading crimes can ensnare anyone who misuses material non-public information for the benefit of securities transactions as Insider Trading actors.
2. The theory of misuse has indirectly imposed responsibility on each party to maintain the confidentiality of information. The material is non-public information and cannot make securities transactions based on the information obtained.

Therefore, the "spirit" of the Abuse Theory needs to be adopted to regulate insider trading in Indonesia.

By studying the success of the United States in dealing with the crime of insider trading, namely by adopting the Misappropriation Theory as a weapon used by the SEC in ensnaring the perpetrators of Insider Trading. For this reason, we urge the Financial Services Authority to immediately propose amendments to the new Capital Market Law and the Financial Services Authority Law in the national legislation program, namely by adopting Misappropriation Theory as an alternative theory used to ensnare Insider Trading actors in the Capital Market. By incorporating three elements of Misappropriation Theory, namely; the first relates to material information that has not been announced to the public, the second relates to securities transactions carried out based on that information, and the third relates to personal gains obtained by the parties conducting the transactions which have become the norm formulation in the Capital Market Law Draft so that with the existence of "spirit" Misappropriation Theory in the regulation of Insider Trading, it is hoped that the Financial Services Authority can ensnare any party who misuses material non-public information to transact securities as Insider Trading actors.

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