Cert Denied! Supreme Court Lets the Newman Decision Stand

On Monday, October 5th the Supreme Court announced that it would not consider an appeal of a major insider trading case from the Second Circuit. The case, U.S. v Newman[1], is widely considered to be a landmark decision which narrows the definition of insider trading. The Second Circuit overturned the conviction of two former hedge fund managers on the basis of insufficient evidence. The Supreme Court's refusal to hear the Justice Department's appeal means that the Second Circuit opinion remains in force.

Newman held that in order to find criminal liability in an insider trading case, the dissemination of material non-public information must be in the form of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[2] The tipper must stand to benefit from transmitting the insider information to the tippee in order for a jury to conclude that the tipper has breached his fiduciary duty, and the tippee must have actual knowledge that the tipper received such a benefit and that the information they have received is insider information.[3]

The defendants in Newman, Todd Newman and Anthony Chiasson,[4] portfolio managers at two different hedge funds, were several layers removed from the tippers. The insider tippers were casual friends with the initial tippees (employees of the Defendants), a relationship the Second Circuit found to be insufficient to show receipt of a personal benefit.[5] The Court stated the benefit must be more concrete, involving actual or potential pecuniary gain or something similarly valuable in nature.[6]

The Court also held that, even if the government had presented sufficient evidence that the original tippers received a personal benefit, there was insufficient evidence to support a conclusion that the Defendants *knew* they were trading on information obtained from insiders and that those insiders received any benefit from transmitting such information.[7] It ruled that that the Defendants could not be held criminally liable as tippees unless they had actual knowledge (or purposefully avoided knowledge) of the breach and the corresponding benefit received.

The Supreme Court's refusal to review the Newman ruling means that the opinion remains in place. However, a recent case in the 9th Circuit, U.S. v. Salman,[8] declined to follow the Newman ruling. On appeal, the defendant in that case argued there was insufficient evidence that the tipper received a personal benefit when they disclosed confidential information to the tippee. In this case, the tippers and tippees were family relatives and the defendant argued that the tipper received no tangible benefit, asking the court to follow Newman and overturn his conviction.[9] The 9th Circuit declined to do so, citing an earlier Supreme Court decision, Dirks v. S.E.C.[10] which ruled that a benefit is gained when "an insider makes a gift of confidential information to a trading relative or friend."[11] Because the tipper and tippee were family, their relationship met the burden of proof required by

1 U.S. v. Newman, 773 F.3d 438 (2d Cir. 2014).
2 See, Id., at 452.
3 See, Id.
4 Collectively, the "Defendants."
5 See, Newman, at 452.
6 See, Id.
7 See, Id., at 453.
8 792 F.3d 1087 (9th Cir. 2015).
9 Id. at 1093.
10 463 U.S. 646 (1983).
11 Id. at 1092 (quoting Dirks at 664).

the government to show that a personal benefit was incurred and a breach of fiduciary duty took place. Unlike in Newman, the 9th Circuit saw the transmission of information itself to incur a benefit on the tipper because the transmission benefitted the relationship and by extension conveyed a personal benefit to the tipper. In sum, an intention by one family member to make a gift to another family member satisfies the "personal benefit" requirement.

Decisions such as Salman show that the implications and consequences of the Newman ruling are still being debated, and different standards may be applied by different courts. The Supreme Court's denial of certiorari means that the uncertainties surrounding the law of insider trading are likely to continue.

For more information on the topic discussed, contact **Ralph Siciliano** at **siciliano@thsh.com** or **Daniel Altabef** at **altabef@thsh.com**.

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