High Court Lets Circuit Ruling on Insider Trading Stand

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Southern District U.S. Attorney Preet Bharara has lost his last chance to reverse a decision that makes it more difficult for prosecutors to win convictions in insider trading cases.

The U.S. Supreme Court denied the government's petition for a writ of certiorari in *U.S. v. Newman,*13-1837*,* where the U.S. Court of Appeals for the Second Circuit in 2014 vacated the convictions of hedge fund portfolio managers Todd Newman and Anthony Chiasson (NYLJ, Dec. 11, 2014), based on their lack of knowledge on whether the tippers of the inside information received a personal benefit for its disclosure.

Bharara, in an afternoon conference call with reporters, said of the Second Circuit decision, "You can think of this as a potential bonanza for friends and family of rich people with access to material non-public information."

But he also expressed confidence that, out of the 100 insider trading cases brought by his office, with more "in the pipeline," prosecutors "still expect to have a 90 percent conviction rate."

In *Newman*, Judges Barrington Parker, Ralph Winter and Peter Hall said the government failed to produce sufficient evidence that Newman, of Diamondback Capital Management, and Chiasson, of Level Global Investors, were either guilty of willful insider trading or knew that the source of their information about Dell and NVIDIA received a personal benefit.

The *Newman* decision, which overturned the 2012 convictions of the two men before Judge Richard Sullivan and corrected Sullivan on the law, sent white-collar criminal defense attorneys scrambling to challenge existing convictions or win dismissal of ongoing cases.

One of the first cases to feel the impact was *U.S. v. Conradt*, 12 Cr. 887, where prosecutors were forced to dismiss charges against five men in connection with a 2009 acquisition of a software company by IBM. Information on the transaction was passed from a former Cravath, Swaine & Moore associate to analysts at Royal Bank of Scotland Group and then downstream to traders at Euro Pacific (NYLJ, Jan. 26).

Another case expected to be undercut by *Newman* is that of Michael Steinberg, a portfolio analyst for SAC Capital Advisors who was convicted in 2013. Steinberg lawyer Barry Berke, a partner at Kramer Levin Naftalis & Frankel, has argued that the facts of *Steinberg* match those of *Newman.* The appeal of Steinberg, who was sentenced in 2014 by Sullivan to three-and one-half years in prison, has been held in abeyance pending resolution of *Newman*.

"Today's decision by the Supreme Court will now require that Michael Steinberg's conviction be thrown out as well since it confirms he did not commit any crime," Berke said in a statement.

Bharara said the *Newman* case would hamper the ability of the government to successfully prosecute insider trading, but he also cautioned that its holding would affect only a limited number of cases. He asked the full Second Circuit to rehear *Newman* en banc, but the court declined in April (NYLJ, April 6) and Bharara asked the Justice Department to seek review of the Supreme Court.

Gregory Morvillo of Morvillo LLP, who represented Chiasson along with Mark Pomerantz, of counsel at Paul, Weiss, Rifkind, Wharton & Garrison, in a statement Monday hailed the Supreme Court's decision to turn down the case. But Morvillo lamented the loss of jobs for Chiasson's colleagues at his "thriving fund, which became the collateral damage of this ill-conceived prosecution."

Shearman & Sterling partners Stephen Fishbein and John Nathanson, who represent Newman, issued a statement saying they were "thrilled" with the decision and blasting "nearly five years of baseless prosecution" of their client.

"The Second Circuit not only reversed Mr. Newman's conviction, but it found that there was no evidence that he knew there was anything wrong with the information he received," they said. "That result has now survived government challenge all the way to the highest court in the land."

The government's brief submitted in *United States v. Newman*, 15-137 by Solicitor General Donald Verrilli, said both Newman and Chiasson "had ample reason to believe, and took steps suggesting they understood," that the information on both Dell and NVIDIA "came from insiders who were acting for personal reasons" and not in the interests of those companies or their shareholders.

Sullivan was correct, the government argued, in instructing the jury that the benefit received by a tippers in the case "does not need to be financial or tangible in nature."

And the Second Circuit was wrong, the government said, to hold that the government may not "prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature."

This, Verilli said, applied "novel gloss" to the existing case law—*Dirks v. SEC*, 463 U.S. 646 (1983) —and set up the Second Circuit to find there was insufficient evidence to convict Newman and Chiasson.

The circuit, he said, was directly at odds with *Dirks* because the circuit, in its words, required "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."

Bharara during his conference call said the Second Circuit's language was far from clear.

In their brief, Fishbein and Nathanson, said the Second Circuit did not clash with *Dirks*, in holding that an insider trading liability requires a tippee to know the tipper received a personal benefit.

"While the government opposed such a requirement in the trial court and on appeal, it does not challenge that ruling now," they stated. "Instead, the petition seeks review of a single, fact-based sufficiency determination regarding whether there was a personal benefit in the first place."

This was pointless, the lawyers said, because the Second Circuit had already determined that the defendants "'knew next to nothing' about the insiders or the circumstances of their disclosures, and the government 'presented absolutely no testimony or any other evidence that Newman and Chiasson knew … that those insiders received any benefit in exchange for such disclosures.'"

Morvillo and Pomerantz also said the circuit was faithful to *Dirks* and urged the Supreme Court to deny certiorari because there was no conflict among the circuits. "This case is a poor vehicle for deciding the question presented," they said, noting "this court's review would not benefit the securities markets."

Bharara on Monday said he would not discuss individual cases, including the cases of those who pleaded guilty under cooperation agreements, then helped convict people like Newman and Chiasson, but he said the impact will be felt soon.

Bharara said that prosecutors, the public and investors need clarity on the issue, and that's why he pressed to go to the Supreme Court.

"As we think about what kind of cases we can and cannot prosecute—if you have a CEO who has access to material nonpublic information about earnings or anything else of a very sensitive nature and he decides that he wants to give it to a relative or a buddy or a crony knowing that person is going to trade on it to the tune of millions of dollars ... we would have to think long and hard, given*Newman*, whether to prosecute a person like that."