

Lawyers Weigh In On DOJ's Newman Appeal To High Court

By **Cristina Violante**

Law360, New York (July 30, 2015, 6:14 PM ET) -- The U.S. Department of Justice has petitioned the U.S. Supreme Court to overturn its ruling in *U.S. v. Newman et al.* that raised the bar for prosecuting insider trading cases. Here, attorneys tell Law360 why the appeal is significant.

Ross A. Albert, Morris Manning & Martin LLP

"In my view, the government's decision to seek Supreme Court review of Newman was something of a foregone conclusion. If Newman stands, and particularly if it is followed in other federal circuits, the SEC's ability to reach remote tippees in insider trading cases will be severely curtailed, if not eliminated. It may be, however, that the Supreme Court will decline to take up the issue now, to allow for other federal appeals courts to weigh in."

Robert Anello, Morvillo Abramowitz Grand Iason & Anello PC

"No federal statute defines insider trading, leaving the securities industry to cobble together guidance from a hodgepodge of court decisions. The Supreme Court unfortunately has weighed in only sparingly. The Second Circuit, though a thought-leader in this area, has taken unduly strong anti-defendant views concerning such important elements as knowledge, intent and materiality. This has allowed prosecutors to cast a wide net in insider trading cases. The Newman decision, however, clarified the government's burden in remote tippee cases, calling into question many convictions. Because Newman arguably conflicts with precedent from other circuits, the government's petition for certiorari provides an opportunity for the high court to inject sanity and clarity into this ever-expanding area of the law."

Timothy Belevetz, Holland & Knight LLP

"Cert petitions initiated by the Justice Department in criminal cases are few and far between. Typically, there are anywhere from zero to a small handful each year. The solicitor general's office is very selective with regard to the criminal cases it decides to take up to the Supreme Court. There has to be an issue affecting a significant law enforcement interest. Here, the Second Circuit's ruling in many ways pulled the rug out from under the government, and it wants to find a way to reverse what it sees as a real threat to its ability to prosecute insider trading."

Phil Bezanson, Bracewell & Giuliani LLP

"It has been pretty clear, over the last seven months, that the government was unhappy with the Second Circuit's opinion in Newman — it makes it harder to successfully bring insider trading cases and

it has spent the last six months working to preserve convictions and other criminal resolutions that have been challenged as a result of the Second Circuit's ruling. So, the government's decision to seek Supreme Court review is not that great a surprise, especially following its application for an en banc rehearing in the Second Circuit (and seeking an extension from the Supreme Court). Of course, the Ninth Circuit's recent decision in *Salman* gave the government even more incentive to challenge Newman as inconsistent, or arguably inconsistent, with the new Ninth Circuit precedent. If the Supreme Court grants the government's petition, it will set the stage for a very interesting and important opportunity to clarify improper insider trading."

Rob Braceras, Goodwin Procter LLP

"The underlying facts of the Newman case do not make it the strongest or most attractive case to put this issue before the Supreme Court. The department runs the risk that the court could affirm — or even broaden — the Newman ruling. But the department is obviously willing to take that risk. This shows that the government views Newman as a real threat, likely because of the number of insider trading cases that are brought in New York and the importance and influence of the Second Circuit across the country. Although, interestingly, the influence of the Second Circuit apparently was not sufficient to convince Judge Rakoff, a senior district court judge from the SDNY who refused to follow his own circuit's reasoning when he sat by designation in the Ninth Circuit in the *U.S. v. Salman* case. Indeed, the department has relied on the *Salman* decision in its petition as proof of a split among the circuits on the 'intangible benefit' issue."

Glenn Colton, Dentons

"No federal statute expressly criminalizes insider trading. Rather, the law in this area has been a hodgepodge of court decisions and inventive enforcement theories that has resulted in substantial confusion in both the markets and the courts. While the Newman decision provided much needed clarity in the Second Circuit, a nationwide answer would be far more desirable. Hopefully the Supreme Court takes the case and makes clear once and for all that unless Congress passes a specific act to the contrary, the law of the land is and has been that not all trading on material nonpublic information is illegal. That said, if the Supreme Court does affirm the Newman decision, I would not be surprised to see Congress respond with a specific insider trading statute."

John Despriet, Womble Carlyle Sandridge & Rice PLLC

"We can only hope that the Supreme Court weighs in on this important and murky area of the securities laws. In a broader sense, a decision by the Supreme Court can have an impact on what many lawyers criticize as the criminalization of everything. As more knee-jerk laws are passed and as the government continues to overregulate everything, DOJ follows that trend and creates widening liability, both criminal and civil, at every opportunity. Newman reduces the reach of the insider trading laws and restores some logic to it. Remote tippees who are not insiders and who receive no benefit are not logically a target of the statutory scheme and should not be criminally liable. If cert is granted, the case will have far-reaching consequences."

John Donovan, Ropes & Gray LLP

"The investment world wants to know with clarity and predictability the rules of the road. This petition for cert gives the Supreme Court the opportunity to provide clear green lights or red lights in a circumstance where the Second Circuit's decision has given everyone an ambiguous flashing yellow. What's at stake here is how tippees are characterized. We had always thought our clients could mine sources for information, so long as they did so honestly — that they were 'ferrets,' not 'weasels.'

Newman changed that and seemed to let hedge funds trade on information they knew was from an insider.”

Stuart Glass, Choate Hall & Stewart LLP

“The New York U.S. attorney’s office has made insider trading investigations and prosecutions a significant focus the past several years — with more than 80 convictions and guilty pleas — so it comes as no surprise that the solicitor general has petitioned the Supreme Court to take the Newman case. While certiorari is rarely granted, the petition has focused on two factors that might appeal to the court: a split among circuits on the standard for insider trading liability and an alleged conflict with prior Supreme Court precedent (*Dirks*) from more than 30 years ago. However, the government now runs the risk that the Supreme Court takes the case and agrees with the Second Circuit’s ruling on inside trading. Apparently, the government decided it was worth the gamble because if Newman stands it will be more difficult for them and the SEC to succeed in insider trading cases.”

Eugene Goldman, McDermott Will & Emery LLP

“There is great likelihood that the court will grant cert. The solicitor general petitions only in the most important cases, and the petition here emphasizes that the meaning of the court’s own decision in *Dirks* is center stage: whether Newman went too far in holding that the requisite personal benefit to the tipper under a gifting theory requires something akin to a *quid pro quo*.”

Jason Halper, Orrick Herrington & Sutcliffe LLP

“The government’s petition is notable for what it does not request: It does not ask the court to revisit the requirement that a tipper receive a personal benefit in order to breach a fiduciary duty and it does not take issue with the requirement that the tippee/trader know that the tipper received a benefit. It also is questionable whether there actually is a split with the Ninth Circuit’s *Salman* decision (and therefore whether the court will take the case). Arguably the defendant in *Salman* would be liable for insider trading even under the Newman standard. Lastly, if the court grants certiorari, it could adopt a position on personal gain different than the one advocated by the government or articulated in Newman given that *Dirks* involved very different facts and did not delve as deeply into the issue as would be necessary if it hears Newman.”

Brian Hoffman, Holland & Hart LLP

“This appeal provides the Supreme Court with an opportunity to squarely reassess the contours of insider trading liability, an area haunted with ambiguities. Newman reversed the criminal convictions of two downstream tippees — recipients of information passed down a long chain of others — and curtailed future enforcement by requiring proof of a tangibly valuable benefit in exchange for the tip. The critical question is whether the Supreme Court’s decision in a case involving an attenuated tipper-tippee chain will significantly impact future government insider trading enforcement in cases involving differing fact patterns.”

Robert A. Horowitz, Greenberg Traurig LLP

“The Newman decision raised the bar substantially for the prosecution of insider trading cases, but only in the Second Circuit. In deciding to seek Supreme Court review, the DOJ has accepted the risk the Supreme Court might affirm Newman and therefore make Newman the law of the land. Why take the risk? The DOJ obviously believes it will win the appeal. But even if it loses and Newman becomes the law throughout the country, the impact would not be that great because most insider trading prosecutions are in the Second Circuit anyway.”

Lindsay Kelly, Irell & Manella LLP

“As a prosecutor, it is difficult to obtain DOJ authorization to appeal even a clearly erroneous ruling by a court of appeals. A difference in statutory interpretation between two circuits would normally be allowed to 'percolate' longer, to allow other circuits to address the issue. Solicitor General Verrilli's decision to petition for certiorari now, and his request for the Supreme Court to weigh in before any other circuits adopt Newman, clearly conveys how important the theory of insider trading rejected by the Second Circuit is to the government.”

Robert Lamm, Gunster Yoakley & Stewart PA

“I'm not surprised that the Newman case is to be appealed. If it were left standing, it would be much more difficult to conduct prosecutions for insider trading, and past convictions could be overturned; in fact, that has already happened. Longer term, I believe that the law of insider trading needs to be rethought; as it stands, it's unclear whether the goal is to create a level playing field or to protect business confidentiality. However, that may not happen, and until it does the Newman case creates uncertainty — not a good thing for the capital markets.”

Daniel N. Marx, Foley Hoag LLP

“It is no big surprise that the DOJ has petitioned for cert, given all of the controversy around United States v. Newman. But in its effort to conjure a circuit split, the DOJ has misread what Judge Rakoff recently wrote in Salman. Writing for the Ninth Circuit, Judge Rakoff rejected only the defendant's reading of Newman, not the Second Circuit's decision. Moreover, notably absent from the petition is any indication that the sky is falling on insider trading prosecutions. Since Newman, cases are still brought, and convictions continue to be affirmed. Rather than push the envelope on what constitutes insider trading, the DOJ should focus on heartland cases of criminal activity, where there is actual evidence of 'personal benefits' to the tippers, including gifts to trading relatives or close friends.”

Brian McEvoy, Polsinelli PC

The government has prosecuted more than 80 federal criminal insider trading cases in the Southern District of New York since 2009, often where there was no financial benefit to the tipper, but involved simply friends or colleagues exchanging inside information. The significance of the government appealing the Newman decision underscores the DOJ's aggressive stance in prosecuting insider trading cases. This sends a clear message that the government seeks to continue to prosecute insider trading cases where material, nonpublic information is passed in exchange for both direct benefit such as money, or as in Newman, in exchange for an indirect benefit like friendship.”

George Meierhofer, Kaufman Dolowich & Voluck

“The Newman decision placed onerous restrictions on the ability of the SEC and DOJ to allege insider trading by 'tippees' of material, nonpublic information. It requires stronger evidence of a personal benefit obtained by the tipper and casts into doubt the government's theory that 'constructive knowledge' of a breach suffices to impose liability. After the Second Circuit denied an en banc rehearing, the DOJ was forced to appeal. However, since the Newman court purported to follow closely the reasoning of SEC v. Dirks, 463 U.S. 646 (1983), I would expect Newman to be affirmed and the number of future insider trading cases (both civil and criminal) to be significantly reduced.”

Mark S. Olinsky, Sills Cummis & Gross PC

“The recent Ninth Circuit decision in *Salman* — authored by Southern District of New York Judge Jed S. Rakoff sitting by designation and declining to follow the Newman requirement that an insider-tippee have received a pecuniary or other valuable benefit — created an apparent circuit split and put wind in the sails of the Justice Department’s desire to seek Supreme Court review and overturn Newman. The Ninth Circuit essentially held that further evidence is unnecessary for tippee liability when inside information passes among family members or close friends, while the Second Circuit held that evidence of such relationships is not enough. The Newman petition and *Salman* decision will allow the Supreme Court, if it chooses, to reconsider its opinion in *Dirks* 30 years ago and provide clarity in what has become a murky area: whether/what kind of a benefit must a tippee receive and does evidence of a family or other close relationship establish sufficient proof?”

David Parker, Kleinberg Kaplan Wolff & Cohen PC

“It is particularly interesting that a judge from the Southern District of New York, which is part of the Second Circuit, sat by designation on and wrote the opinion for the panel of the Ninth Circuit in *United States v. Salman*, which criticized the Second Circuit’s decision in *United States v. Newman*, thereby creating the split among the circuits and increasing the likelihood that the Supreme Court would grant certiorari and therefore that the government would petition for certiorari in Newman.”

Mike Piazza, DLA Piper

“The decision to appeal Newman demonstrates that the DOJ is willing to risk a decision by the Supreme Court that, if the DOJ loses, would make Newman applicable nationwide. The recent Ninth Circuit decision in *Salman* likely provided the final impetus for DOJ to pull the trigger on the appeal, as they now can point to a circuit split. If the Supreme Court accepts the appeal, its decision will impact all insider trading cases going forward, and may well clip the wings off both the DOJ’s and the SEC’s expansive insider trading theories.”

Justin Roberts, Vorys Sater Seymour and Pease LLP

“The decision to appeal Newman shows the importance of this theory of tippee liability to the government. In doing so, the DOJ runs the risk of the Supreme Court granting such review and affirming the Second Circuit holding as the law of the land. Given some of the recent comments by Justice Scalia, expressing skepticism about criminal prosecutions based on language arising out of the SEC rulemaking process, that is a very real possibility. On the other hand, even an unfavorable ruling could give the government a roadmap for what is and is not permissible in future prosecutions.”

Daniel S. Ruzumna, Patterson Belknap Webb & Tyler LLP

“Considering the impact that Newman already has had on cases in New York, it is not surprising that the Justice Department sought review of the decision before the Supreme Court. The Second Circuit has tremendous influence on other courts, particularly on financial and securities issues. The DOJ may have felt that an adverse decision by the Supreme Court would not likely make the law substantially worse, and that a favorable decision could make tippee liability cases far easier to prove at trial. The Ninth Circuit’s recent *Salman* decision, authored by the Southern District’s Jed Rakoff, which breaks with Newman’s personal benefit standard, also must have given the government added confidence in its chances of success if certiorari is granted.”

Rimma Tsvasman, Montgomery McCracken Walker & Rhoads LLP

“If the Supreme Court decides not to hear the case or, after Supreme Court review, the court affirms the Second Circuit’s decision, it would represent an important clarification to the securities law landscape,

raising the bar on prosecution of one of the most common forms of insider trading, which involves downstream tipping to individuals somewhat removed from the 'insider.' It would also be a blow to U.S. Attorney Preet Bharara's legacy in aggressively policing Wall Street in the area of insider trading."

Larry Weiss, Michelman & Robinson LLP

"The Second Circuit's Newman decision sharply narrowed the scope of 'tipper/tippee' liability in rejecting the government's broad application of the language from the Supreme Court's earlier SEC v. Dirks decision; it is not surprising that the government is seeking review. The Ninth Circuit's recent U.S. v. Salman decision, rejecting a pro-defendant reading of Newman, appears to create a circuit split that the Supreme Court likely will need to resolve. While the government obviously would like to see Newman reversed, from a potential defendant's standpoint, any Supreme Court decision that provides clarity to the vague insider trading rules would be helpful."

Daniel Zelenko, Crowell & Moring LLP

"The appeal demonstrates how vital this issue is to the prosecution of future insider trading cases in 2015 and beyond. The stakes are very high and you can bet there was vigorous debate at the Department of Justice before pursuing this appeal, which is never done without serious consideration of all of the ramifications."

--Editing by Mark Lebetkin.