Blogs

In an apparent circuit split that may well garner attention from the Supreme Court, a Ninth Circuit panel issued an opinion in *United States v. Salman* affirming that the requisite "personal benefit" for insider trading liability is established where an "insider makes a gift of confidential information to a trading relative or friend."

In doing so, the Ninth Circuit rejected the Second Circuit's narrower holding in *United States v. Newman* that a "personal benefit" may only be inferred from a personal relationship where the exchange of information "represents at least a potential gain of a pecuniary or similarly valuable nature." Notably, the *Salman* opinion owes its authorship to SDNY's Judge Rakoff, who has previously questioned the Second Circuit's decision in *Newman*, and now--when sitting by designation--adopts a view in tension with his home Circuit. ***"Personal Benefit" Standard*** The Ninth Circuit's opinion turned on a straightforward application of the "personal benefit" standard articulated by the Supreme Court in *Dirks v. Securities and Exchange Commission*. In *Dirks*, the Court set forth the elements necessary to impose liability on a "tippee" or recipient of inside information for insider trading under Section 10(b). Specifically, a "tippee" has a duty not to trade on material, non-public information where: (1) the insider (or "tipper") has breached his duty to shareholders of a corporation by disclosing the information, **and** (2) the tippee "knows or should know" of the breach. As to the first element, unless the insider "personally benefits" from the disclosure, there is no breach of duty. Such a "personal benefit" could be a pecuniary gain or a "reputational benefit that will translate into future earnings." *Dirks* also held that the "elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." It was this aspect of *Dirks* that governed the outcome in *Salman* . In *Salman*, the tipper worked at an investment bank and allegedly provided confidential information to his brother, who in turn gave the information to the defendant "tippee." The Ninth Circuit held that the tipper's disclosure of confidential information to his brother, knowing that he intended to trade on it, was precisely the "gift of confidential information to a trading relative" that *Dirks* envisioned. ***Rejection of Newman*** The Ninth Circuit also rejected *Newman's* higher burden to establish "personal benefit." In *Newman*, the defendant argued that evidence of a friendship or familial relationship between tipper and tippee, standing alone, is insufficient to demonstrate a benefit. The Second Circuit held that an inference of a personal benefit from such a relationship "is impermissible in the absence of 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." The Ninth Circuit disagreed, holding that following *Newman* would "depart from the clear holding of *Dirks* that the element of breach of fiduciary duty is met where an 'insider makes a gift of confidential information to a trading relative or friend.'" Instead, the Ninth Circuit held that proof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of duty. ***Hope for Prosecutors?*** The Ninth Circuit's decision is thus seemingly at odds with the Second Circuit's decision in *Newman*, which was a setback to federal prosecutors' continuing crackdown on insider trading. The apparent Circuit split on this critical element of insider trading liability should substantially increase the possibility that the Government will seek Supreme Court review in *Newman*.

Authors

[Alexis E. Danneman]

Partner
ADanneman@perkinscoie.com 602.351.8201

Explore more in

White Collar & Investigations
Blog series

White Collar Briefly

Drawing from breaking news, ever changing government priorities, and significant judicial decisions, this blog from Perkins Coie’s White Collar and Investigations group highlights key considerations and offers practical insights aimed to guide corporate stakeholders and counselors through an evolving regulatory environment.

View the blog