

## DOJ's Newman Stance May Aid Foes In Next High Court Fight

By **Ed Beeson**

*Law360, New York (November 23, 2015, 9:32 PM ET)* -- Nearly a year after the Second Circuit reshaped the insider trading landscape with its landmark Newman decision, an Illinois man has made a long-shot bid to get the U.S. Supreme Court to weigh in on the issue. But while Bassam Salman's chances are slim, he may actually benefit from the government's failed attempt at a high court review.

Salman is fighting a Ninth Circuit decision to uphold his conviction for having traded on inside information he learned from a friend, who himself was tipped off by his brother, a former investment banker.

According to Salman, the government showed no proof that Michael Kara had bestowed any significant personal benefit to his brother Mahar Kara in exchange for the information, even though the Second Circuit had stated that such an exchange was necessary for a finding of illegal insider trading. Instead, the Ninth Circuit upheld his conviction on the grounds that Mahar Kara, who was also Salman's future brother-in-law, had made a gift of confidential information to his brother, in line with a holding in the Supreme Court's seminal 1983 decision on insider trading, known as *Dirks*.

In his cert. petition, Salman asks the court to resolve what he sees as a circuit split and answer whether there always needs to be an exchange of significant personal benefit in cases involving tippers and tippees, or if it is enough for an insider to simply have a close family relationship with his or her tippee.

"This case presents an ideal vehicle for resolving the important question on which the Solicitor General [Donald Verrilli] sought review in *Newman*," an attorney for Salman wrote in his Nov. 10 petition.

It remains to be seen if the Supreme Court would agree, though attorneys said they have serious doubts. After all, the federal government marshaled its resources and took extraordinary steps to try to get the high court to take a look at the *Newman* decision, which overturned the insider trading convictions of two former hedge fund managers and ultimately led to a dozen other reversals. And yet the justices declined the invitation without so much as a word why.

"Given that the Supreme Court declined to grant cert. in *Newman*, I think it is unlikely they would grant cert. in *Salman*," said David I. Miller, a partner at Morgan Lewis & Bockius LLP.

And yet there are two reasons that the court could find compelling.

For one, Salman argues that, unlike in the *Newman* case, whichever way the court might answer the

question he presents, he would be directly impacted. If the court were to find that a close family relationship is enough to establish a personal benefit, “then Salman loses.” But if the court decides there must be an “objective, consequential” and potentially pecuniary benefit traded for confidential information, “then Salman prevails,” his attorneys wrote.

On the other hand, defense attorneys in the Newman matter argued to the high court that even if it ruled in favor of the government, the two traders would still be free because they had no knowledge of any personal benefits exchanged for the inside information at the heart of their case.

In other words, “this is a clean case,” said Jonathan Schmidt, counsel at Ropes & Gray LLP. The issues are “well-articulated for the court to take.”

Another aspect that may be compelling to the high court is that both the defense and the government, through its long appellate record in the Newman matter, are on the record as saying that there is a circuit split in need of resolution. Having said so much on the significance and impact of the Newman decision, and citing extensively to the Salman decision as evidence of the split, the government has few arguments against the Supreme Court taking up this case.

“That’s the brilliance of this. The government is in a corner,” Schmidt said.

A spokesman for the U.S. Attorney’s Office for the Northern District of California, which brought the underlying case against Salman, declined to comment. A message seeking comment from the U.S. Department of Justice was not returned immediately.

“Both parties agree that it’s an important issue and there is a conflict in the circuits. The only question is, does the Supreme Court want to take up the issues?” Schmidt said.

The court will have reasons not to, attorneys said.

In evaluating the Newman decision, the justices likely looked at whether it could be read as inconsistent with their decision in *Dirks*.

“They will look at Salman the same way,” said Robert Appleton, partner at Day Pitney LLP. “If the decision can be read consistently, there is no need to revisit.”

“They may also think [Salman’s petition] is too much in the weeds,” he added. “If you look at the language in this cert. petition, and the way they frame the issue, it is too narrow, too fact-specific.”

Even if it passes on the Salman matter, attorneys still expect the Supreme Court will eventually have to deal with insider trading again and the ambiguous definition of a personal benefit that the Second Circuit created in the Newman decision. Until then, it is business as usual.

“I don’t think that the Supreme Court’s declination of cert. in Salman would make the law any more complicated than it already is,” said Miller of Morgan Lewis. “After the Supreme Court declined to hear Newman, there is a substantial disagreement among practitioners, as well as a disagreement among courts, as to what constitutes a personal benefit.”

Salman is represented by John D. Cline of the Law Offices of John D. Cline.

Counsel information for the government was not immediately available.

The case is Bassam Yacoub Salman v. U.S., case number 15-628, in the Supreme Court of the United States.

--Editing by Jeremy Barker and Mark Lebetkin.

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