

## Lawyers React To High Court's Decision To Hear Trading Case

*Law360, New York (January 19, 2016, 8:16 PM ET)* -- On Tuesday, the U.S. Supreme Court agreed to consider the question of what sort of personal benefit needs to be shown in order to hold someone liable for trading on inside information. Here, attorneys tell Law360 why the court's decision to hear *Salman v. U.S.* is significant, as well as why the court may have opted to hear *Salman* instead of reviewing the Second Circuit's landmark *Newman* decision.

### **Ross A. Albert, Morris Manning & Martin LLP**

"The Supreme Court announced today that it will review the Ninth Circuit's decision in *U.S. v. Salman*, in which the Ninth Circuit, arguably in dicta, declined to adopt the exacting interpretation of the 'personal benefit' to a tipper required for insider trading liability announced by the Second Circuit in *Newman*. Predicting the ultimate decision from a grant of certiorari is at best an imprecise science, but the omens are not good for the government, given that the Supreme Court denied review sought by the government in *Newman*, a victory for the defense, and granted review in *Salman*, a victory for the government, over the government's objection."

### **Robert Anello, Morvillo Abramowitz Grand Iason & Anello PC**

"The 'personal benefit' requirement imposed by the Second Circuit in *Newman* represented a sea change in insider trading jurisprudence. In *Salman*, the Ninth Circuit takes a different approach, and although a circuit split existed when the solicitor general asked SCOTUS to review the Second Circuit's decision, the conflict with *Newman* and state of uncertainty among lawyers and investment professionals no doubt propelled the Supreme Court to step in to clarify the law. Interestingly, the *Salman* decision was penned by SDNY Judge Jed S. Rakoff, sitting by designation on the Ninth Circuit, who previously expressed concern over *Newman* in connection with an SDNY case."

### **Jeffrey J. Ansley, Bell Nunnally & Martin LLP**

"*Newman* arose from a nonfamilial original tip. In contrast, *Salman*, arguably a stronger government case, involved an original tip between brothers by marriage. Under *Salman*, the analysis will focus on whether a close familial relationship can constitute a personal benefit, and if so, under what circumstances. By hearing *Salman*, it now has the chance to send a clear message on what constitutes a personal benefit in a tipping case. This also could pave the way for *Newman* to be expanded to include familial relationships — which would not have been an option if the court granted certiorari to *Newman* instead."

**Bruce Bowman, Godwin PC**

"This case allows the Supreme Court a great fact situation to define what type of personal benefit, if any, is required for an 'insider/tipper' to create a securities law violation. To me, this case has family, personal and other factors that can be addressed that Newman did not have."

**Kristen Lake Cardoso, Kopelowitz Ostrow Ferguson Weiselberg Gilbert**

"The Supreme Court's decision to review *Salman* indicates its reluctance to adopt a broad interpretation of its 'personal benefit test,' as set forth in *Dirks v. SEC*, that would make it easier for prosecutors to pursue insider trading charges against those receiving material nonpublic information from insiders (tippees). Under *Salman*, a 'personal benefit' to the insider (required to find insider trading liability) could be inferred where there exists a casual or social relationship between the insider and tippee, without any pecuniary (i.e., financial) benefit to the insider. Based on the court's declining to review *Newman* (which held that in order to infer a 'personal benefit' arising from a personal relationship, the relationship must, among other things, 'represent at least a potential gain of pecuniary or similarly valuable nature'), the broad interpretation in *Salman* is apparently not what the court intended."

**Brian Casey, Barnes & Thornburg LLP**

"The court chose *Salman* because it raised the same issue *Newman* raised, i.e., whether insider trading can arise simply from a close family relationship between the insider and tippee, while also comporting with how the court accepts cases. *Salman's* petition, and the *Newman* opposition, both argued that *Salman* was a better vehicle than *Newman* to address this question. Deciding the issue in *Salman*, unlike in *Newman*, would be outcome-determinative. The *Salman* petition quoted heavily from the government's *Newman* petition to show that even the government thought this issue was cert.-worthy. The government's response scarcely disputed that the court should address this issue."

**Jeffrey Coopersmith, Davis Wright Tremaine LLP**

"The Supreme Court's decision today to grant certiorari in *Salman v. United States* adds a new wrinkle to the judicial debate about the standard for tippee liability in insider trading cases. The Supreme Court likely agreed to hear Bassam *Salman's* case to resolve a split between the Second and Ninth Circuits regarding the nature of the personal benefit that the tipper must receive in order for the tippee to be liable for trading on the information provided by the tipper. ... The Supreme Court likely sees this circuit split as an opportunity to clarify insider trading law in the tipper-tippee context."

**Timothy Crudo, Coblenz Patch Duffy & Bass LLP**

"No surprise that the court passed on *Newman* since there was no evidence that the remote tippee was aware of a personal benefit to the tipper regardless of how 'benefit' was defined, so an appeal wasn't going to change the outcome. I'm curious to see how much of a bright line the court draws: If *Salman's* close family relationship is sufficient, how close is close? If it adopts the *Newman* test, what gain other than a 'pecuniary' one is enough? Although the question presented tees up the issue as a choice between the *Newman* and *Salman* tests, I'm betting that the court comes up with its own articulation of

factors that is more clear than what we have now but still broad enough to leave a lot of wiggle room for argument."

**Michael Dicke, Fenwick & West LLP**

"The court may want to draw an explicit distinction between the types of proof necessary to meet the 'personal benefit' test in a close-knit family situation, like in *Salman*, with the proof needed in a business relationship setting, like in *Newman*. The *Newman* court correctly reasoned that in a business setting where people have all sorts of motives for their actions, there needs to be a limiting principle that the tipper receive something akin to a monetary return. But that monetary quid pro quo test makes less sense in a family setting, where it makes sense to infer that a tipper benefits from passing information to a close relative."

**Brian Neil Hoffman, Holland & Hart LLP**

"*Salman* provides the Supreme Court with an important opportunity to clarify insider trading tipping liability. The Second Circuit, in *Newman*, raised the government's bar by requiring proof that a tipper received an objectively valuable benefit for the tip. *Newman*'s attenuated tipping chain and other procedural issues, however, made it a poor candidate for certiorari. *Salman* is cleaner, involving tips among a few family members. The Supreme Court thus may now clarify the required evidence of personal benefit in light of the parties' relationship. Precision is critical; even the specter of insider trading liability carries life-changing financial, professional and personal ramifications."

**Randall D. Lehner, Kelley Drye & Warren LLP**

"With the increasing attention from prosecutors and regulators on bringing insider trading cases, the Supreme Court may have agreed to hear *Salman*'s appeal to clarify its decision in *Dirks* that is over 30 years old. There are some potentially key differences between the *Newman* and *Salman* cases, including the familial relationship and the tippee's relatively greater level of closeness to the tipper in *Salman*, that could be a basis for the Supreme Court's decision to hear the *Salman* case."

**Brendan McGarry, Kaufman Dolowich & Voluck LLP**

"The U.S. Supreme Court's decision to consider Bassam *Salman*'s appeal of his conviction for insider trading indicates the court is finally going to interpret what benefits a corporate insider must receive for the passing of material nonpublic information to be considered illegal in the wake of the landmark decision in *U.S. v. Newman*. The court is likely reviewing *Salman* because of the broad scope of potential relationships and 'benefits' that would give rise to charges of insider trading under that case as decided. Should *Salman* stand, tippees could face insider trading charges for giving family members 'love and affection.'"

**Matt McGinnis, Ropes & Gray LLP**

"Today's order confirms that the defense bar's celebration over the denial of certiorari in *Newman* may have been premature. The *Salman* case gives the court an opportunity to ask just how broad the insider

trading laws are. What's at stake is whether insider trading laws can be used to pursue informational imbalances in the market, or whether something more is required."

**Lathrop B. Nelson, Montgomery McCracken Walker & Rhoads LLP**

"Salman presented the court with another and perhaps juicier bite at the insider trading 'personal benefit' apple than Newman. Salman turned the Justice Department's arguments in its Newman petition against the DOJ in his case, adopting the department's prior argument that enforcement of the insider trading laws would be uneven and disorderly without court guidance. Salman also argued that while the Second Circuit provided an alternative ground for reversal, the Ninth Circuit's 'personal benefit' holding was outcome determinative. With the DOJ previously on record that this issue warranted review, the court had no trouble granting certiorari when given a clean opportunity to do so."

**Sean Prosser, Perkins Coie LLP**

"A knee-jerk reaction may be that the SCOTUS believed the Second Circuit got it right in Newman so left it undisturbed, and now is taking a look at Salman because the Ninth Circuit got it wrong. However, the personal relationships among the tipper and tippees in Salman appear to have been much closer than in Newman, so I believe this is an opportunity for the SCOTUS to harmonize those decisions without necessarily reversing Salman. Regardless, the ideal result will provide prosecutors and defense counsel a more clear-cut nationwide standard for the personal benefit requirement in these cases."

**Claire Rauscher, Womble Carlyle Sandridge & Rice PLLC**

"While some see this development as bad news for the government and others think the Supreme Court's cert. grant will lead to the overturn of Salman, the Supreme Court clearly sees the circuit split as ripe for their determination. The Newman and Salman decisions have created a question that needs to be resolved quickly. All parties need to understand what constitutes a 'personal benefit' under the insider trading statute since compelling arguments can be made in support of either perceived definition. Hopefully, their decision will be clear, so everyone will understand how to prosecute and defend insider trading cases."

**Justin Roberts, Vorys Sater Seymour and Pease LLP**

"The Supreme Court's granting of cert. in Salman shows that the 'benefit' standard for liability is still very much in flux. As with other areas of the law, this court has demonstrated a willingness to re-examine its own precedents; here, that of *Dirks v. SEC*. The procedural posture of Salman may have been more appealing than Newman, in addition to the fact that it involves an individual who remains convicted of felony charges. Salman also presents a more direct examination of the language from the *Dirks* decision, which stated that liability attaches when 'an insider makes a gift of confidential information to a trading relative or friend.' The Salman cert. petition points out that limiting principles are particularly important in criminal cases, 'where liberty is at stake and where the prohibition against vague judge-made laws is at its greatest.' Several current members of the court have expressed concern about this very issue. Since there is no statute that defines insider trading, the court will examine skeptically whether the language from *Dirks* alone is enough for criminal liability to attach."

### **Chad Ruback, Appellate Lawyer**

"Insider trading prosecutions where defendants did not personally profit are on the perimeter of the law, which requires some 'personal benefit' for a conviction. Consequently, the boundaries of what constitutes 'personal benefit' are regularly being tested in trial courts, and Supreme Court review of this issue is not surprising. The court likely chose to review Salman over Newman because, at the time that the Second Circuit decided Newman in 2014, that was the only circuit to have written on the issue. The Supreme Court often waits to grant review of an issue until at least two circuits have weighed in."

### **Rose Schindler, Greenspoon Marder Law**

"I credit U.S. District Judge Jed Rakoff for the Supreme Court's decision to hear the Salman case. Judge Rakoff, writing for the Ninth Circuit Court of Appeals, upheld Salman's insider trading conviction. He wrote that 'to the extent Newman can be read to go so far, we decline to follow it.' Those words manufactured a split of the circuits on the insider trading tipping issue. If the Supreme Court upholds the conviction, the SEC will likely bury its hatchet with Judge Rakoff, who has severely criticized the SEC for refusing to name names in its settlement agreements against Wall Street firms."

### **Peter Stokes, Norton Rose Fulbright**

"While the Supreme Court did not explain its reasoning for why it granted review in Salman but not in Newman, the fact that the Salman decision arguably creates a circuit split was likely a significant factor in the Supreme Court's decision to grant review here. The Supreme Court is often more likely to grant review when there is a circuit split. The Salman decision raises the possibility that a person could be convicted and incarcerated in the Ninth Circuit for conduct that would be insufficient to permit a conviction in the Second Circuit — an unwelcome possibility that the Supreme Court likely wants to avoid. In addition, the increased focus by federal prosecutors on pursuing insider trading-related claims further raises the possibility of future inconsistent rulings if the circuit split is not resolved."

### **William D. Wilmoth, Steptoe & Johnson PLLC**

"It's frequently hard to figure out why the Supreme Court takes a particular case, and not another seemingly similar one. Perhaps SCOTUS prefers Salman to Newman because the personal benefit link was even more scanty than in Newman. In any event, their taking Salman is probably a bad omen for the feds' expanding focus on insider trading outside the traditional definition."

--Editing by Mark Lebetkin.

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