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# “Hello, Newman" Government Continues to Litigate Reversed Insider Trading Convictions

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The U.S. Attorney for the Southern District of New York, Preet Bharara, has decided not to go down without a fight. Following a Second Circuit panel’s reversal of Bharara’s signature achievement, the insider-trading convictions of former hedge fund managers Todd Newman and Anthony Chiasson, the U.S. Attorney’s office has petitioned the court for rehearing and rehearing en banc. The Securities and Exchange Commission has also weighed in on the U.S. Attorney’s side, arguing in an amicus brief that the panel seriously erred in its decision. Meanwhile, in other cases, particularly outside the Second Circuit, the Justice Department, and the SEC have argued strenuously that the Second Circuit’s panel decision should not be followed.

In the Second Circuit, the battle lines are being drawn. Bharara’s office has asked both the panel and the full Second Circuit to rehear the case. The US Attorney’s office has argued that the panel erred by imposing two requirements that are purportedly contrary to law– first, that a tipper act for a “personal benefit” of financial consideration, or something at least akin to monetary gain; and second, that the tippee know that the tipper supplying the inside information acted for such a benefit. The SEC has concurred with this assessment, elaborating on Newman’s conclusion that evidence of friendship between tipper and tippee is insufficient to prove the “personal benefit” necessary for tipping liability. The Commission contends that this contradicts Dirks v. SEC, the Supreme Court’s seminal insider trading decision. Both the U.S. Attorney and the SEC contend that, if Newmanremains the law, it will seriously threaten the integrity of the securities markets, and government regulators will be dramatically limited in their ability to prosecute “some of the most common, culpable, and market-threatening forms of insider trading.”

In opposition, Newman and Chiasson, along with various law professors, the criminal defense bar, and even Marc Cuban, have argued that the Second Circuit panel got it right when it imposed an important, objective outer bound to an otherwise amorphous illegal activity. The defendants even engaged in ad hominem criticism of Bharara, analogizing him to a “Chicken Little” complaining that the sky is falling, or more precisely, a “petulant rooster whose dominion has been disturbed.” Those supporting the opinion assert that any perceived difficulty created by the decision can, and should, be rectified by Congress.

Even as the Newman case continues forward, its repercussions are being felt within the Second Circuit and beyond. In the Southern District alone, at least a dozen defendants, who were convicted

or pleaded guilty underpre-Newman law, have argued that their cases need to be revisited in light of Newman. No court yet has agreed with that argument, but most of these motions remain pending.

Outside the Second Circuit, the Government is looking to ring-fence the Newman decision and limit its applicability elsewhere. Federal prosecutors, for example in North Carolina, have argued that Newman is not the law in the Fourth Circuit and therefore should not be followed. Meanwhile, defendants in other jurisdictions are invokingNewman in pending, and even resolved, insider trading matters, both civil and criminal.

Defendants are even arguing Newman's applicability within the SEC's administrative courts – with success. In In re Peixoto, an SEC administrative proceeding related to Herbalife, the Commission voluntarily dropped its case against Peixoto after Newman. Other cases in the agency's courts (including against SAC founder Steven Cohen) remain on holding pending final resolution of Newman. And in In re Ruggieri, the administrative law judge said that he would require the SEC to demonstrate the Newman standard of "personal benefit."

Clearly, the Newman saga has not reached its conclusion, but the fall-out already demonstrates what a momentous decision the Second Circuit panel made.



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