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Salman V. US: Will It Change The 'Personal Benefit' Test?

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This fall, the U.S. Supreme Court will hear argument in Salman v. United States, one of the most closely watched insider trading cases in decades. Salman will address a split between the Second and Ninth Circuits regarding key elements of tipper/tipper liability first articulated by the Supreme Court more than 30 years ago in Dirks v. U.S. Securities and Exchange Commission, 463 U.S. 646 (1983). In particular, the court is expected to resolve the issue of what constitutes a "personal benefit" to a tipper sufficient to satisfy the Dirks standard for insider trading under Section 10(b) of the Securities Exchange Act.


Nicolas Morgan

The United States, through the U.S. Department of Justice and the SEC, filed its appellate brief Monday, urging the court to affirm the Ninth Circuit appellate decision in United States v. Salman, 792 F.3d 1087 (9th Cir. 2015), which set forth a stricter standard than that adopted by the Second Circuit in United States v. Newman, 773 F.3d 438 (2d Cir. 2014), cert. denied, No. 15-137 (U.S. Oct. 5, 2015). Predictably, the government argued that Salman correctly interpreted Dirks' personal benefits test, while Newman did not. While it remains to be seen what direction the court will take, the potential for far-reaching implications from the court's holding is high, making the final decision heavily anticipated for white collar attorneys and finance professionals alike.


Thomas A. Zaccaro

United States v. Salman

The Salman case involves a tangle of extended familial relationships. On Sept. 1, 2011, defendant-appellant Bassam Yacoub Salman was indicted on five insider trading counts under the Dirks tipper liability standard. The alleged tipper was Maher Kara, Salman's future brother-in-law, who worked at Citigroup's health care investment banking group. Maher allegedly disclosed information about Citigroup clients' upcoming mergers and acquisitions to his older brother, Mounir "Michael" Kara, who traded on that information and shared it with Salman as the two families grew closer. Salman also traded on the information (through a brokerage account of another brother-in-law) and made close to $1 million in profits. To satisfy the "personal benefit" standard, the government presented evidence of Salman's knowledge of the source of the information and Michael and Maher's close and mutually beneficial relationship.


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The jury found Salman guilty on all five counts. Salman appealed and challenged, among other things, the sufficiency of the personal benefit evidence. In particular, Salman focused on Newman's narrow "personal benefit" test, which held that the exchange of insider information must include "at least a potential gain of a pecuniary or similarly valuable nature." Salman argued that the evidence in his case was insufficient under the Newman "personal benefit" test and urged the Ninth Circuit to adopt the Second Circuit's standard.

The Ninth Circuit, evaluating the case under Dirks v. SEC, 463 U.S. 646 (1983), found the evidence sufficient for conviction. In Dirks, the Supreme Court held that an insider could not provide information "to an outsider for … improper purpose of exploiting the information for their personal gain." Thus, it held, "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure." The Dirks court went on to define what constitutes the "personal benefit" to include "a pecuniary gain or a reputational benefit that will translate into future earnings." However, the Dirks court also held that "[t]he 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 Ninth Circuit, focusing on Dirks' gift language, found that the facts of Salman fit precisely into the type of personal benefit that Dirks had envisioned. Addressing Newman, the Ninth Circuit noted that the decision was not binding upon them and declined to follow Newman to the extent that the holding could be read to mandate "at least a potential gain of a pecuniary or similarly valuable nature." Doing so, the Ninth Circuit held, would require a departure from the "clear holding" of Dirks.

The Supreme Court Grants Certiorari

Petitioning for certiorari, Salman requested that the court address whether "personal benefit" test requires proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as Newman held, or whether a close family relationship shared by the insider and the tippee is enough to satisfy Dirks, as the Ninth Circuit held. Despite opposition from the government, the Supreme Court granted review on Jan. 19, 2016, which was somewhat surprising given that the court denied certiorari in Newman just months earlier.

The Briefing Filed in Support of and Against Salman

The first round of briefing was completed in May 2016. Salman's opening brief urged the court to restrict liability in insider trading cases to situations where the tipper sought to obtain money or property, arguing that the Ninth Circuit standard was "indeterminate" and provided a breeding ground for prosecutorial overreach. Amici briefs in support of Salman were also filed by others such as the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers, the Cato Institute and Mark Cuban.

The Securities Industry and Financial Markets Association and the NYU Center on the Administration of Criminal Law also submitted amici briefs. Despite being submitted "in support of neither party," SIFMA's brief — like Salman's — argued that the Supreme Court should adopt the Newman standard because insider trading "should focus on proof that the tipper obtained, directly or indirectly, something of a "pecuniary or similarly valuable nature." Conversely, the NYU Center's amicus brief proposed an entirely different standard, one "more firmly grounded in the statutory text." In a nutshell, the NYU Center contended that the law should require a showing that (1) the tipper made a disclosure of material nonpublic information for an "improper purpose" (e.g., one not intended to benefit the source of the information); and (2) that the tipper knew that the tippee would trade on the disclosed nonpublic information. This test, if adopted, would eliminate the "personal benefit" requirement altogether.

The government's responding brief advocated on behalf of stare decisis — in other words, standing by the

Dirks' personal benefit test. It contended that there was no legitimate reason to "rewrite" Dirks, which was abundantly clear when it held that the requisite personal benefit exists when "an insider makes a gift of confidential information to a trading relative or friend." Further, the government contended that this half of the personal benefit test was necessary because it addressed insider trading for "personal" purposes, as opposed to the "corporate" purposes, which would be encompassed in any "pecuniary gain" analysis. Though the government's brief spent little time on Newman, it did note that the Second Circuit made an "erroneous decision" that "has been subject to withering criticism" for failing to properly apply Dirks.

The Potential Implications of the Supreme Court's Decision in Salman

The Supreme Court's decision may provide much-needed clarity to an area of insider trading law made murky by aggressive government prosecutions and unharmonious court decisions. It is likely that the court will address, at a minimum, the original "personal benefit" test outlined in Dirks, regardless of whether it sides with Newman or Salman on the issue. If the court agrees with Newman, then it likely will impose stricter standards on the government by requiring objective proof of a personal gain, or at least the potential for such a gain. On the other hand, if the court sides with Salman, then the government would be allowed to prove tipper liability merely by showing a gift of confidential information between trading relatives of friends, without evidence of the potential for personal gain. Clearly, the approach ultimately adopted by the Supreme Court will dictate the aggressiveness of future government prosecutions.

It is also possible, however, that the Supreme Court can reconcile Salman and Newman without providing any further clarification of tipper liability. For example, in Salman, the government presented testimony that Maher intended to benefit Michael and had a close personal relationship with him. This evidence was absent in Newman, in which the Second Circuit found the personal benefit unclear because the relationships between the tippers and tippees were so attenuated. Thus, if the Supreme Court were simply to affirm Salman on the basis that the evidence sufficiently established a personal benefit to the insider, Newman, which did not contain similar evidence, could potentially be unaffected.

While historically the court has not shied away from resolving circuit splits and providing guidance, the current makeup of the court may force it toward a narrower holding. After Justice Antonin Scalia's death in February 2016, the court has been functioning with only eight justices. While the court has had only two 4-4 deadlocks in the last term, it largely has been able to do so by issuing more narrow, consensus holdings in cases that could have otherwise produced decisive precedential decisions. If the court follows such an approach here, the clarity that those following Salman are seeking may continue to remain elusive.

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