

February 4, 2016

## White Collar Roundup - February 2016

### Supreme Court Jumps Into Insider-Trading Fray

The U.S. Supreme Court granted certiorari in *Salman v. United States* to address what the government must prove to win an insider-trading case. In the case below, [United States v. Salman](#), the U.S. Court of Appeals for the Ninth Circuit took a different tack from that of the Second Circuit in [United States v. Newman](#). In *Newman*, the Second Circuit clarified what the government must prove to win a conviction for insider trading. *Salman* gave the Ninth Circuit an opportunity to follow suit. Sitting by designation on the Ninth Circuit panel that considered the case, Southern District of New York Judge Jed S. Rakoff penned the panel opinion affirming the conviction. In the case, defendant Bassam Yacoub Salman was trading on inside information he knew was coming from his brother-in-law. Salman was convicted, and he appealed. While his appeal was pending, the *Newman* decision came out, and Salman urged the Ninth Circuit to adopt *Newman* and argued the evidence in his trial was insufficient to find that the original tipper disclosed the information to Salman's brother-in-law in exchange for a personal benefit. Relying on the Supreme Court's opinion in *Dirks v. SEC*, the Ninth Circuit noted that a "personal benefit" amounting to breach of fiduciary duty in an insider-trading case "exist[s] when an insider makes a gift of confidential information to a trading relative or friend." The court held that this provision applied in this case. Salman argued that *Newman* required a tangible benefit and that "evidence of a friendship or familiar relationship between tipper and tippee" would not suffice. The Ninth Circuit refused to follow that interpretation of *Newman* because "[d]oing so would require us to 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.'" Salman sought a writ of certiorari, which was granted. To review the filings with the Supreme Court, click [here](#).

### SEC Sets Its 2016 Exam Priorities

The Securities and Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) announced its examination priorities for 2016. OCIE's "priorities reflect certain practices and products that OCIE perceives to present potentially heightened risk to investors and/or the integrity of the U.S. capital markets." In 2016, OCIE plans to focus on the following areas: (1) "[e]xamining matters of importance to retail investors," (2) "[a]ssessing issues related to market-wide risks" and (3) "[u]sing [its] evolving ability to analyze data to identify and examine registrants that may be engaged in illegal activity." To review OCIE's memo on its priorities for the year, click [here](#).

### Not to Be Outdone ...

The Financial Industry Regulatory Authority (FINRA) issued its regulatory and examination priorities too. FINRA will focus on the following broad issues: (1) "culture, conflicts of interest and ethics"; (2) "supervision, risk management and controls"; and (3) "liquidity." In its release, available [here](#), FINRA fleshed out its planned approach to these issues and also noted its plan to focus on sales practices, financial and operational controls, and market integrity.

### "Criminalizing Negotiations" at the Seventh Circuit

At oral argument before the Seventh Circuit in *United States v. Weimert*, one of the judges pressed the government attorney about the nature of the crime. Defendant David Weimert had been convicted of fraud related to the sale of property owned by a subsidiary of a company Weimert oversaw. In particular, the government alleged that Weimert committed fraud by convincing the buyer to ask for a fee and property interest as part of the sale. At oral argument, Judge David Hamilton grilled the government lawyer. At one point, he said, "Let me be very frank about what concerns me about this: It looks to me like this case comes dangerously close to criminalizing negotiations." He also added, "These are capitalistic acts among

consenting adults." The other judges were silent, however, so it is unclear what the panel will decide. To listen to the oral argument, click [here](#).

### **Rejecting Dismissal With Prejudice for Not-Speedy-Enough Trial**

The Tenth Circuit in [United States v. Koerber](#) reinstated charges against alleged Ponzi schemer Claud Koerber. Koerber was indicted in May 2009 for mail fraud, wire fraud and tax evasion. In August 2014, the case had been pending for more than five years without a trial. The [Speedy Trial Act](#) requires that a defendant be tried within 70 days of indictment, unless days are excluded from the calculation by the court. After finding a violation of the act, the court may dismiss the case with or without prejudice in its discretion. In this case, Koerber moved to dismiss because of a violation of the act, and the district court agreed. The government appealed, and the Tenth Circuit reversed, concluding the district court had abused its discretion in two ways: "(1) by including improper factors in its consideration of the seriousness-of-the-offense factor, and (2) by failing to fully consider Koerber's own actions that may have contributed to the speedy-trial delay." As a result, the case was remanded for reconsideration of whether to dismiss the case with or without prejudice.

### **Madness in Manhattan**

As has been widely reported, General Motors Co. (GM) entered into a [deferred-prosecution agreement](#) with the U.S. Attorney's Office for the Southern District of New York related to a failure of ignition switches in certain cars. GM also has been sued by numerous plaintiffs for alleged injuries resulting from those alleged failures. The cases were consolidated by the Multidistrict Litigation Panel before Southern District of New York Judge Jesse M. Furman. The parties agreed to hold several bellwether trials in the litigation to help assess the value of the claims. The first bellwether trial took a bizarre turn after the named plaintiffs in that suit – Robert Scheuer and his wife – testified. The Scheuers testified the crash caused Mr. Scheuer to suffer from memory loss and to misplace a \$49,500 check for a down payment on their home. As a result, they were evicted. But then GM's counsel learned the Scheuers were evicted because a real estate agent discovered Mr. Scheuer had faked a \$441,430.72 check stub from his government retirement account as "proof of funds" to close on the house. The real estate agent also had communications showing Mr. Scheuer was on vacation after the accident and not bedridden as he claimed. GM's attorneys filed a motion to call rebuttal witnesses to demonstrate that Mr. Scheuer and his wife committed perjury. That prompted the judge to ask that Ms. Scheuer appear in court so he could advise her of her Fifth Amendment rights. The Scheuers hired criminal counsel. After the judge granted GM's motion, the Scheuers ultimately withdrew their case. So much for the bellwether. For news articles on this strange turn of events, click [here](#).

### **DOJ Urges the Senate Not to Heighten the Mens Rea Standard**

U.S. Department of Justice Assistant Attorney General Leslie Caldwell testified at the U.S. Senate Committee on the Judiciary hearing against a bill that would establish a default "state of mind" or mens rea standard for all existing federal criminal laws. The bill would require the government to prove in all federal prosecutions "that the person acted with knowledge that the person's conduct was unlawful." Caldwell expressed concern in the strongest of terms that such a change "would unleash sweeping changes across the *entire* United States Code," would "undermine the enforcement of a multitude of criminal laws," and would "allow defendants charged with serious crimes – including terrorism, violent crime, sexual offenses, immigration violations and corporate fraud – to embroil federal courts in extensive litigation and potentially escape liability for egregious and very harmful conduct." In the white collar context in particular, Caldwell noted that "applying a default mens rea to these statutes might insulate culpable individuals, especially senior corporate executives, who deliberately close their eyes to what otherwise would be obvious to them." She also noted that prosecutors might not be able to use theories of "conscious avoidance" or "willful blindness," which are often critical to obtaining convictions in white collar cases. For Caldwell's prepared statement, click [here](#).

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