

Bharara Shows Path To Post-Newman Wins In Stewart Trial

By **Stewart Bishop**

Law360, New York (August 18, 2016, 9:26 PM ET) -- The trial and conviction of former JPMorgan Chase & Co. banker Sean Stewart for leaking confidential information about health care mergers to his father shows the Manhattan U.S. attorney's anti-insider trading effort remains strong, experts say, despite fears of a dampening effect caused by the Second Circuit's landmark Newman decision.

On Wednesday morning, after more than five days of deliberations, jurors convicted Sean Stewart of conspiracy, securities fraud and tender offer fraud, even after signaling a possible deadlock to the court days earlier.

Sean Stewart, 35, a former investment banker for JPMorgan and Perella Weinberg Partners, was accused of illegally tipping off his father, Robert Stewart, 61, about five deals that took place from 2011 to 2015 involving Kendle International Inc., Kinetic Concepts Inc., Gen-Probe Inc., Lincare Holdings Inc. and CareFusion Corp.

The guilty verdict was an important win for the office of Preet Bharara, the U.S. attorney for the Southern District of New York, according to former federal prosecutor David I. Miller of Morgan Lewis & Bockius LLP, as it demonstrates that the government's insider trading enforcement effort is very much alive and well, even in the wake of the Second Circuit's December 2014 decision in *U.S. v. Newman*.

In *Newman*, the Second Circuit held that in order to sustain a conviction for insider trading, the government must prove that the tippee knew that an insider disclosed confidential information and that the insider did so in exchange for a personal benefit.

Of particular relevance to the Sean Stewart case, the court further said that to the extent that a personal benefit may be inferred from a personal relationship between the tipper and tippee, there must be proof of a meaningfully close personal relationship that generates a consequential exchange that represents at least a potential gain of a pecuniary or similarly valuable nature.

After the U.S. Supreme Court declined to review the *Newman* decision, Bharara derided the Second Circuit ruling as a "potential bonanza for friends and family of rich people with material nonpublic information," and said the decision will cause his office to think "long and hard" about bringing certain types of cases involving tippers who make a gift of inside information to such friends and family.

Miller said while *Newman* has obviously had an effect on the government's insider trading enforcement effort, the Sean Stewart case is an example of how Bharara's office has strategized and addressed

Newman in the tipping context.

"I think this shows that the Southern District is being careful in bringing cases in which there is some kind of monetary benefit being offered in exchange for the confidential information," Miller told Law360.

Prosecutors at trial showed jurors evidence that Robert Stewart paid over \$10,000 in alleged profits from the insider trading scheme to pay for a photographer for his son's wedding. The elder Stewart's repayment of part of a loan from his son was also cited as a financial benefit for Sean Stewart from the the alleged scheme.

For his part, Sean Stewart testified at trial that he had no idea that his father was trading on names that came up in casual conversations about his work at JPMorgan and Perella Weinberg.

While some might argue Bharara's office could have brought this prosecution even if Robert Stewart had provided nothing in exchange for the alleged inside information, according to Miller, prosecutors provided evidence of the alleged pecuniary quid pro quo.

"This demonstrates that the Southern District is bringing cases with Newman in mind, they are bringing cases with evidence that arguably satisfies the personal benefit standard as described in the Newman case," Miller said.

Going forward, prosecutors of insider trading cases in this circuit will have to prove there is a considerable personal benefit, and now there is a jury charge to that effect on the books by U.S. District Judge Laura Taylor Swain, said former Manhattan federal prosecutor Carrie H. Cohen of Morrison & Foerster LLP.

"You're going to see the government putting on evidence of whether it's a pecuniary gain, the money, and then how that money transferred into a personal gain of some considerable value for the defendant," Cohen said. "That's going to be an element forward now, at least in the Second Circuit. Judge Swain gave very specific instructions to the jury about that element."

That said, clearly the defense will bring up on appeal the issue of whether or not a father picking up wedding expenses for his son qualifies as a considerable personal benefit, Cohen said.

"I think that it's twofold — one, that it's not the type of personal benefit contemplated by Newman, and [two] that it wasn't a personal benefit here. It was something the dad was going to do anyway, that it was independent, and because you can't track the money because it was commingled, it wasn't a benefit," Cohen said.

Another point of contention cited by Sean Stewart's lawyers after trial, and likely to be raised on appeal, were adverse rulings concerning Robert Stewart.

The jury heard a clandestine recording taken of a meeting between Robert Stewart and a cooperator, Richard Cunniffe — a former co-worker of Robert Stewart who traded on his behalf — in which Robert Stewart quoted Sean Stewart as saying he handed his father a tip "on a silver platter," but statements Robert Stewart made to investigators denying his son's knowledge of his trading activity were kept out of the trial.

Robert Stewart — who along with Cunniffe, 62, pled guilty in the case — also invoked his Fifth Amendment right against self-incrimination and Judge Swain refused a defense request to compel his testimony.

That created a tough barrier for the defense to crack, according to Glen Kopp of Bracewell LLP, a former prosecutor for the Manhattan U.S. attorney's office.

"It's obviously a very hard thing to have a recording of someone saying somebody said something and not being able to cross-examine that person on the circumstances of that conversation they are relaying," Kopp said.

But outside of some legal mistake by Judge Swain, Kopp said he doesn't think from an equitable standpoint that it would influence the Second Circuit on whether to uphold the verdict.

What will likely have a major impact on Sean Stewart's appeal is the U.S. Supreme Court's forthcoming decision in *U.S. v. Salman*, in which the court is expected to take up the split between the Second and Ninth circuits regarding elements of tipper-tippee liability raised by the Supreme Court in *Dirks v. SEC*.

Miller said the Supreme Court will be deciding whether a gift of confidential information to a family member without a pecuniary quid pro quo is a sufficient personal benefit under *Dirks*.

In the Sean Stewart case, even without the \$10,000 gift from the tippee to the tipper, Miller said, you had a tipper giving confidential information to his father.

"This kind of gift of confidential information to a close family member is what is squarely at issue in the *Salman* case currently before the Supreme Court," Miller said. "The Supreme Court's decision in *Salman* could be pivotal."

The government is represented by Brooke Cucinella and Sarah McCallum of the U.S. Attorney's Office for the Southern District of New York.

Sean Stewart is represented by Mark B. Gombiner, Martin Cohen and Christopher Greene of the Federal Defenders of New York Inc.

The case is *U.S. v. Sean Stewart*, case number 1:15-cr-00287, in the U.S. District Court for the Southern District of New York.

--Editing by Mark Lebetkin and Katherine Rautenberg.