This file contains all the study materials, including the debriefing survey, used in study reported in Holger Spamann, Lawyers' Role-Induced Bias Arises Fast and Persists Despite Intervention, Journal of Legal Studies.

Spring 2016 Study Materials

In the prior class five days before the study, a printout of the following document was distributed to students. While the document was passed around, the instructor explained orally that students should prepare to argue this case in the next week in the role of petitioner, respondent, or justice, as instructed by an email that an automated system sent to them as the instructor was speaking (with the simple text: "You have been assigned the role of ___.").

"**US v. Newman**

"For our class on Monday, 3/28, please come prepared to argue your assigned side (government-petitioner, defendant-respondent, or your favorite Justice) in a mock Supreme Court oral argument in *U.S. v. Newman*. The case is described below. You will receive your role assignment by e-mail.

To prepare for the mock argument, you will have to read not only the decision below but also the relevant Supreme Court precedents *Chiarella*, *Dirks*, and *O'Hagan*, as assigned on the syllabus and available on [course website] and in print. If you want, you can read more than the passages excerpted on [course website], but I do not expect you to.

Please note: In actuality, the Supreme Court did not grant the government's petition for certiorari in *U.S. v. Newman*. But it recently granted certiorari in a case that presents the same legal question in a less relevant setting. That case will be heard later this term.

QUESTION PRESENTED

In *Dirks v. SEC*, 463 U.S. 646 (1983), this Court held that a corporate insider breaches his fiduciary duty and subjects himself to insider-trading liability when he personally benefits from the selective disclosure of material, nonpublic information for securities trading—including when he "makes a gift of confidential information to a trading relative or friend." Id. at 664. "The tip and trade," the Court explained, "resemble trading by the insider himself followed by a gift of profits to the recipient." Ibid.

The question presented is whether the court of appeals erroneously departed from this Court's decision in Dirks by holding that liability under a gifting theory requires "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which was appellee in the court of appeals. Respondents are Todd Newman and Anthony Chiasson, who were appellants in the court of appeals."

The original instructions then included a printout of an edited version of the 2nd Circuit's opinion in the case, which is available at https://h2o.law.harvard.edu/collages/40640.

Study materials other than for spring 2016

"**U.S. v. Newman**

The question in this case is whether a conviction for "tippee" insider trading under SEC rule 10b-5 requires that the tipper received at least a potential gain of a pecuniary or similarly valuable nature in exchange for the leaked information.

The Government brought charges against Todd Newman, a portfolio manager at Diamondback Capital Management, LLC, and Anthony Chiasson, a portfolio manager at Level Global Investors, L.P. At the six-week jury trial, the Government presented evidence that a group of financial analysts exchanged information they obtained from company insiders, both directly and more often indirectly. Specifically, the Government alleged that these analysts received information from insiders at Dell and NVIDIA disclosing those companies' earnings numbers before they were publicly released in Dell's May 2008 and August 2008 earnings announcements and NVIDIA's May 2008 earnings announcement. These analysts then passed the inside information to their portfolio managers, including Newman and Chiasson, who, in turn, executed trades in Dell and NVIDIA stock, earning approximately $4 million and $68 million, respectively, in profits for their respective funds.

Newman and Chiasson were several steps removed from the corporate insiders and there was no evidence that either was aware of the source of the inside information:

- With respect to the Dell tipping chain, the evidence established that Rob Ray of Dell's investor relations department tipped information regarding Dell's consolidated earnings numbers to Sandy Goyal, an analyst at Neuberger Berman. Goyal in turn gave the information to Diamondback analyst Jesse Tortora. Tortora in turn relayed the information to his manager Newman as well as to other analysts including Level Global analyst Spyridon "Sam" Adondakis. Adondakis then passed along the Dell information to Chiasson, making Newman and Chiasson three and four levels removed from the inside tipper, respectively.

- With respect to the NVIDIA tipping chain, the evidence established that Chris Choi of NVIDIA's finance unit tipped inside information to Hyung Lim, a former executive at technology companies Broadcom Corp. and Altera Corp., whom Choi knew from church. Lim passed the information to co-defendant Danny Kuo, an analyst at Whittier Trust. Kuo circulated the information to the group of analyst friends, including Tortora and Adondakis, who in turn gave the information to Newman and Chiasson, making Newman and Chiasson four levels removed from the inside tippers.

The Government charged that Newman and Chiasson were criminally liable for insider trading because, as sophisticated traders, they must have known that information was disclosed by insiders in breach of a fiduciary duty, and not for any legitimate corporate purpose.

At the close of evidence, Newman and Chiasson moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. They argued that there was no evidence that the corporate insiders provided inside information in exchange for a personal benefit which is required to establish tipper liability under *Dirks v. S.E.C.*, 463 U.S. 646 (1983). Because a tippee's liability derives from the liability of the tipper, Newman and Chiasson argued that they could not be found guilty of insider trading. Newman and Chiasson also argued that, even if the corporate insiders

had received a personal benefit in exchange for the inside information, there was no evidence that they knew about any such benefit. Absent such knowledge, appellants argued, they were not aware of, or participants in, the tippers' fraudulent breaches of fiduciary duties to Dell or NVIDIA, and could not be convicted of insider trading under *Dirks.* In the alternative, appellants requested that the court instruct the jury that it must find that Newman and Chiasson knew that the corporate insiders had disclosed confidential information for personal benefit in order to find them guilty.

The district court denied the appellants' Rule 29 motions and did not give Newman and Chiasson's proposed jury instruction. The district court relied on language in *Dirks* (at 659) that "a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information … when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." Holding that a tipper could breach a duty to the corporation even if the tipper did not receive a personal benefit, the district court gave the following instructions on the tippers' intent and the personal benefit requirement:

> Now, if you find that Mr. Ray and/or Mr. Choi had a fiduciary or other relationship of trust and confidence with their employers, then you must next consider whether the Government has proven beyond a reasonable doubt that they intentionally breached that duty of trust and confidence by disclosing material, nonpublic information for their own benefit.

On the issue of the appellants' knowledge, the district court instructed the jury:

> To meet its burden, the Government must also prove beyond a reasonable doubt that the defendant you are considering knew that the material, nonpublic information had been disclosed by the insider in breach of a duty of trust and confidence. The mere receipt of material, nonpublic information by a defendant, and even trading on that information, is not sufficient; he must have known that it was originally disclosed by the insider in violation of a duty of confidentiality.

The jury returned a verdict of guilty on all counts. The district court sentenced Newman and Chiasson to prison terms of 4.5 and 6.5 years, respectively.

On appeal, the U.S. Court of Appeals for the Second Circuit vacated the convictions and remanded for the district court to dismiss the indictment with prejudice for insufficiency of evidence. The Court of Appeals held that in order to sustain a conviction for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit. Moreover, the Court of Appeals held that the existence of a benefit could not merely be assumed. Rather, the Court of Appeals held that insider trading liability under a gifting theory requires proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In support of its position, the Court of Appeals relied on *Dirks*, which had held (at 661-662): “All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders. … Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. … [T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach."

The Government petitioned the Supreme Court for a writ of certioari. It argued that the Court of Appeals misapplied Dirks. According to the Government, the facts in *Dirks* are distinguishable, and the benefit test of mere evidentiary nature specific to the facts in *Dirks*."

Only in fall 2016:

["The Supreme Court granted cert and the case is scheduled for oral argument this term (fall 2016).[1]"]

[1] Actually, the Supreme Court granted cert in a different case raising the same legal question, and oral argument was held a month ago. But pretend this is the real case and oral argument is yet to come, with you doing the argument or the questioning.

Survey Instrument

Screen 1:

Please answer a couple of anonymous questions about U.S. v. Newman, which you have just argued/heard.

[If your role was one of petitioner or respondent: Please bear in mind that your role was that of an advocate, whereas we are now stepping back out and I am asking your opinion as a neutral, sober observer.][2]

How do you predict the Supreme Court will decide? Who is more likely to win? [Petitioner (Government)/Respondents (Newman and Chiasson)]

How certain are you of your prediction, from 50% (50/50 chance, not at all certain) to 100% (completely certain)? [slider with choices 50-100]

Screen 2:

[Spring 2016:] What was your assigned role, as per the email? [Petitioner/Respondent/Justice]

Did you play your assigned role in the mock argument? [Yes/No]

[If answer to last question was "No":] What was your actual role in the mock argument? [Petitioner/Respondent/Justice]

[All other semesters:] What was your assigned role? [Petitioner/Respondent/Justice]

Screen 3:

What was your petitioner-respondent-judge group? Please write the group number.

Screen 4:

What is your gender? [Female/Male/Prefer not to say]

Screen 5:

Last question: would you allow me to use your anonymous answers for research purposes? (The answer to this question is completely anonymous as well, and you are of course completely free to answer no.) [Yes/No]

[2] Randomly shown to 50% of participants only in fall 2018 and spring 2019.