

First Circuit: Country Club Member Expected to Receive a “Personal Benefit,” as Defined in the Supreme Court’s Decisions in *Dirks* and *Salman*, for Tipping a Fellow Club Member

03.22.17



(Article from *Securities Law Alert*, March 2017)

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On February 24, 2017, the First Circuit affirmed the insider trading conviction of a country club member (the “tippee”) who received a tip about an upcoming bank acquisition from a fellow country club member. *United States v. Bray*, 2017 WL 727556 (1st Cir. 2017) (Stahl, J.). The court found evidence of a friendship between the tipper and the tippee, together with the tipper’s testimony that he believed the tip would enhance his reputation with the tippee, provided a reasonable basis for the jury to conclude that the tipper expected to receive a “personal benefit” for his tip as required under the Supreme Court’s decision *Dirks v. SEC*, 463 U.S. 646 (1983).

Jury Had Sufficient Evidence to Find the Tipper Expected a “Personal Benefit” for the Tip

The First Circuit explained that tippee liability “hinges on whether the tipper breached a duty of trust and confidence by disclosing the inside information, which in turn depends on whether the tipper ‘personally will benefit, directly or indirectly, from [the] disclosure.’” *Id.* (quoting *Dirks*, 463 U.S. 646). The First Circuit noted that “a personal benefit can ‘often’ be inferred where ‘a relationship between the [tipper] and the recipient . . . suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient.’” *Id.* (quoting *Dirks*, 463 U.S. 646). “A personal benefit can likewise be inferred where a tipper makes a gift of ‘inside information to a trading relative or friend.’” *Id.* (quoting *Salman v. United States*, 137 S. Ct. 420) (internal quotation marks and citation omitted).^[1]

In the case before the First Circuit, the tippee contended that “an informational exchange between casual, as opposed to close, friends does not meet *Dirks*’s personal benefit requirement without some other evidence of a *quid pro quo* exchange.” The First Circuit found that it did not have to “determine . . . how ‘close’ a tipper-tippee relationship must be before a jury can infer a gift-based personal benefit.” Here, the tipper testified that he and the tippee were “‘good friends’ who, at the time of the . . . tip, had known each other for fifteen years.” The court also found testimony concerning the tippee’s “bond” with the tipper’s son “demonstrated that [the tippee] knew [the tipper] well enough to extend favors to [the tipper’s] extended family.” The First Circuit held “the government [had] presented enough evidence for a reasonable jury to conclude that [the tippee] and [the tipper] had a close relationship, and not one that was ‘of a casual or social nature.’” *Id.* (quoting *United*

States v. Newman, 773 F.3d 438 (2d Cir. 2014)). [2]

The First Circuit further held the tipper’s “testimony . . . provided a sufficient basis for the jury to conclude that [the tipper] disclosed the tip in expectation of a personal benefit.” The tipper testified that he “‘figured [the tip] would enhance’ his reputation with [the tippee].” Although the tipper represented that he “did not expect anything at the exact time” of the tip, the First Circuit found “a reasonable jury could infer that he expected a benefit ‘down the road.’” The First Circuit observed that the tippee’s “later offers to bring [the tipper] into [one of the tippee’s real estate projects] for free . . . show[ed] that these expectations were warranted.”

Jury Also Had Sufficient Evidence to Find the Tippee Knew the Tipper Expected a “Personal Benefit” for the Tip, and Breached a Duty of Confidentiality in Passing Along the Tip

The First Circuit determined that there was “sufficient evidence in the record to support a finding that [the tippee] knew [the tipper had] tipped him in expectation of a personal benefit” even though the tippee “may not have known the exact benefit [the tipper] sought in exchange for the tip.” The court found it significant that shortly after receiving the tip, the tippee offered the tipper an opportunity to invest in a real estate project—something he had never done prior to receiving the tip.

The First Circuit further held that “[a] reasonable jury could also infer that [the tippee] knew [the tipper] had breached a duty of confidentiality by giving him the . . . tip.” The tipper provided the tip “in a surreptitious manner” (scribbled on a cocktail napkin), “after which [the tippee] neither made any comments nor asked any questions.” The tippee then proceeded to acquire tens of thousands of shares of the company the tipper mentioned, and these shares ultimately accounted for more than half of the tippee’s portfolio.

The First Circuit concluded that “all of the evidence regarding the tip and its aftermath show that there was a sufficient basis from which a jury could reasonably conclude beyond a reasonable doubt that [the tippee] knew [the tipper] had anticipated a benefit and breached a fiduciary duty to his employer.”

[1] Please [click here](#) to read our prior discussion of the Supreme Court’s decision in *Salman*.

[2] Please [click here](#) to read our prior discussion of the Second Circuit’s decision in *Newman*.

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