Once More Unto The Breach — Rehearing In Newman?

Law360, New York (January 24, 2015, 5:20 PM ET)

Eugene Ingoglia

The U.S. Attorney's Office for the Southern District of New York **has decided to seek appellate review** of several aspects of the recent insider-trading decision by the U.S. Court of Appeal for the Second Circuit in United States v. Newman and Chiasson, 13 Cr. 1837 and 13 Cr. 1917, (2d Cir. Dec. 10, 2014). On Jan. 23, 2015, the USAO filed a Petition of the United States of America for Rehearing and Rehearing En Banc of the original panel decision. Based on the historical numbers, the relief the government seeks is rarely granted.

So what is an en banc rehearing, what is the process that governs it, and is this the rare kind of case in which the Second Circuit will grant rehearing?[1]

In federal cases within the Southern District of New York, appeals from district court decisions are heard by judges of the U.S. Court of Appeals for the Second Circuit. Most often, appeals are decided by a panel of three Second Circuit judges, the panelists having been randomly selected from among the sitting Second Circuit judges, and sometimes including judges from outside the circuit, sitting by designation. See 28 U.S.C. § 46 (2006). In Newman, the panel consisted of the Honorable Peter H. Hall, the Honorable Barrington D. Parker and the Honorable Ralph K. Winter.

An "en banc rehearing" (sometimes referred to as an "in banc" rehearing) happens when the full eligible membership of the court reconsiders the panel's decision. Rule 35 of the Federal Rules of Appellate Procedure sets forth the procedures for en banc rehearings.

An en banc rehearing will only take place if a majority of the eligible judges that make up the Second Circuit agree that a panel's decision should be reconsidered by the entire court. Such a rehearing can be requested by one of the parties to the panel's decision, by way of petition, or can be initiated by the judges themselves without request of a litigant (a process referred to as "nostra sponte"). If a petition is made, and at least one judge calls for a vote, a vote will occur on whether to grant an en banc rehearing. Fed. R. App. P. 35(f). A petition for an en banc rehearing will be successful only if a majority of nondisqualified, active judges, favors a rehearing. Fed. R. App. P. 35(a); 28 U.S.C. § 46(c). Senior status judges do not have a vote on the question of whether to rehear the case en banc.

If an en banc hearing is granted, the original decision by the three-judge panel is vacated and replaced with a new opinion by all the circuit judges in active service, as well as any judge in senior status who either participated in the original panel or who took senior status after the en banc hearing (but before the decision). 28 U.S.C. Section 46(c). The different rules governing which judges are eligible to decide whether to grant a rehearing, and which judges decide the merits of a rehearing, could yield interesting results. In Newman, because two judges of senior status (Judge Parker and Judge Winter) were on the deciding panel, it would be expected that (active) Judges Katzmann, Jacobs, Cabranes, Pooler, Raggi, Wesley, Hall, Livingston, Lynch, Chin, Lohier, Carney and Droney would, absent any recusals, decide the question of whether or not to hear the case en banc (seven of them would need to be in favor for an en banc hearing to be granted). Those same 13, plus Judges Parker and Winter, would decide the merits of any en banc hearing, with eight votes needed for a majority opinion. The fact that voting members of the court grant rehearing does not necessarily mean that reversal of the original panel decision is assured, just as a decision granting bail pending appeal does not necessarily mean that a petitioner will prevail on the merits of his or her appeal.

If a rehearing is granted, no oral argument or rebriefing by the parties is required, and en banc rehearings can be decided on the original papers. However, the circuit has set briefing and argument schedules for the parties when it desires briefing. See, e.g., United States v. Gupta, 2011 U.S. App. LEXIS 26487 (setting a schedule for en banc briefing and oral argument by the parties.)

If an en banc rehearing is not granted, the original panel decision typically remains, although on some occasions the original panel decision is nonetheless modified. J. Newman's Second Circuit Review, 50 Brook. L. Rev. 365, 380. It is not unusual for a decision denying a petition for en banc rehearing to come complete with concurring and dissenting opinions by the voting judges. See, e.g., U.S. v. Stewart, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J., concurring in denial of rehearing petition, and noting that such denials have become "an occasion for any active judge who disagrees with the panel to express a view on the case even though not called upon to decide it" and that "what they may say about [the panel decision where a petition has been denied] has as much force of law as if those views were published in a letter to the editor of their favorite local newspaper."); see also M. Lucero, The Second Circuit's En Banc Crisis, 2013 Card. L. Rev. De Novo, 32, 44-48 (2013).

How likely is it that an en banc rehearing will be granted? En banc rehearing petitions are rarely granted in any circuit, and are particularly rare in the Second Circuit, which hears the fewest number of rehearings of any circuit in the country. See Federal Bar Council, Second Circuit Courts Committee, En Banc Practices in the Second Circuit, Time for a Change? (hereafter, the "FBC report"), at 5-8 (July 2011). Between the years 2000 and 2010, out of the approximately 27,856 appeals that were terminated on the merits in the Second Circuit, the circuit heard (depending on how one counts) a total of eight to 10 cases en banc. Compare id. at 4 (counting 10 rehearings), with M. Lucero, The Second Circuit's En Banc Crisis, 2013 Card. L. Rev. De Novo 32 (finding a total of eight rehearings, because one case counted by the Federal Bar Council was granted but dissolved before hearing, and two of the cases were consolidated for briefing and oral argument) — less than 3/100 of one percent of the cases. FBC Report at 4. Since 2010, the rate has appeared to slow even further.

Rule 35(a) itself states that en banc review is "not favored" and will only be ordered if review is "necessary to secure or maintain uniformity of the court's decisions" or if the issues on appeal have raised a question of "exceptional importance." Fed. R. App. P. 35(a). In the Second Circuit, Chief Judge Katzmann has noted the circuit's "longstanding tradition of general deference to panel adjudication" and stated that "we have proceeded to a full hearing en banc only in rare and exceptional circumstances." Ricci v. DeStefano, 530 F. 3d 88, 89-90 (2d Cir. 2008)(concurring in the denial of rehearing en banc). In denying a petition for rehearing en banc in 2009, the circuit issued a per curiam opinion in which it stated that "[e]n banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice." Watson v. Geren, 587 F.3d 156, 160 (2d Cir. 2009)(per curiam).

Commentators have observed that some circuit courts — including the Second Circuit — have developed an informal practice of circulation by the panel of a draft opinion to the active judges prior to the opinion's publication, at least in certain circumstances. See M. Lucero, The Second Circuit's En Banc Crisis, 2013 Card. L. Rev. De Novo 32 (referencing the discussion in Amy E. Sloan, The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeal, 78 Fordham L. Rev. 713, 714-15 (2009)). The Second Circuit appears to be among the more vigorous practitioners of this procedure among the various circuits. Id. at 43. Such a practice has at least the potential to make the granting of an en banc rehearing less likely, as active judges with strong concerns would have had the ability to voice them, internally, and the panel an opportunity to address any such concerns, prior to the issuance of the panel's final opinion.

Now that the U.S. Attorney's Office has sought en banc review, the threshold question is whether the office can convince a majority of the nondisqualified, active judges that the Newman decision presents an issue of "exceptional importance" or is "necessary to secure or maintain uniformity of the court's decisions" — a high bar for the office, or any petitioner, to overcome. The government's petition attempts to hurdle that bar by arguing that (1) the

panel's decision set forth a "new definition" of the personal benefit element of insider trading that will "engender confusion among market participants, parties, judges and juries"; (2) the aspect of the decision finding the government's proof insufficient, denied the government the ability to retry its case[2]; and (3) the decision threatens the integrity of securities markets by limiting the government's ability to prosecute insider trading. Petition at 2-3. The petition also argues that the panel's "new definition" of personal benefit is inconsistent with Second Circuit and Supreme Court precedent. Petition at 1-2. The government is not seeking a rehearing with respect to the panel's decision that knowledge of personal benefit is required, which had been the main issue on appeal before the panel.

Will the government's arguments be enough to persuade a majority of the active judges that this is the rare case for which rehearing en banc is appropriate? It is difficult to determine a clear answer from the Second Circuit's history of petition grants and denials as to what kind of case crosses that threshold of "exceptional importance." It may be, in the end, that the circuit simply knows exceptional importance when it sees it.

—By Eugene Ingoglia and Gregory Morvillo, Morvillo LLP

Disclosure: Gregory Morvillo represented former hedge fund manager Anthony Chiasson in the case discussed in this article.

Eugene Ingoglia, a partner at Morvillo, recently joined the firm after serving as an assistant U.S. attorney in the Southern District of New York for nine years, and as a member of the Securities and Commodities Fraud Unit from 2010 to 2014. Ingoglia represented the government in the trial and conviction of former SAC Capital portfolio manager Mathew Martoma and was the lead prosecutor in the so-called "London Whale" case.

Gregory Morvillo is a partner at Morvillo LLP. Most recently, he represented former hedge fund manager Anthony Chiasson in his criminal insider-trading trial and subsequent appeal before the U.S. Court of Appeals for the Second Circuit. He also advises clients on criminal law, securities, regulatory, civil, administrative and corporate governance issues.

[1] The USAO"s petition also seeks panel rehearing. A request for panel rehearing seeks reconsideration by the three-judge panel that issued the decision.

[2] The petition argues that remand for a new trial, rather than dismissal of the indictments, would have been the proper remedy for the panel to have imposed. The petition does not seek reinstatement of the convictions.