Last Friday, July 17, 2009, Chief Judge Fitzwater of the United States District Court for the Northern District of Texas dismissed the SEC's enforcement action against Mark Cuban for insider trading. The Court held that an agreement to maintain the confidentiality of information does not, by itself (i.e., in the absence of a relationship creating the duty), create a duty of trust and confidence sufficient to support misappropriation theory insider trading liability under *Chiarella*[1] and *O'Hagan*[2] — the Court held that in order to support insider trading liability "[t]he agreement, however, must consist of more than an express or implied promise merely to keep information confidential. It must also impose on the party who receives the information the legal duty to refrain from trading on or otherwise using the information for personal gain." The Court concluded that Rule 10b5-2(b)(1), which provides that a "duty of trust or confidence" sufficient to result in insider trading liability exists "[w]henever a person agrees to maintain information in confidence", "exceed[s] the SEC's §10(b) authority to proscribe conduct that is deceptive."

The Court's holding also creates a gap in Regulation FD, which permits selective disclosure "[t]o a person who expressly agrees to maintain the disclosed information in confidence"[3]; the Staff has confirmed in a telephone interpretation[4] that the issuer can rely on this provision even if the agreement does not by its terms restrict the recipient of the information from using it to trade the issuer's securities:

> 10. If an issuer gets an agreement to maintain material non-public information in confidence, must it also get the additional statement that the recipient agrees not to trade on the information in order to rely on the exclusion in Rule 100(b)(2)(ii) of Regulation FD?
>
> *No. An express agreement to maintain the information in confidence is sufficient. If a recipient of material nonpublic information subject to such a confidentiality agreement trades or advises others to trade, he or she could face insider trading liability.*

The effect of the Court's decision in *SEC v. Cuban* is difficult to assess. If followed by other courts, it effectively immunizes conduct that the SEC believes constitutes insider trading subject to enforcement action. However, the SEC may file an amended complaint alleging an agreement by Mr. Cuban not to use the information to trade securities.[5] The Court's decision is also subject to appeal and even if affirmed may not be followed in other Circuits. At this point, it would be dangerous to rely on this decision, which is in direct conflict with an SEC rule and a Staff interpretation, to trade while in possession of material, nonpublic information obtained under a

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[1] *Chiarella v. United States*, 445 U.S. 222 (1980).
[2] *United States v. O'Hagan*, 521 U.S. 642 (1997).
[3] Regulation FD, Rule 100(b)(2)(ii).
[4] May 30, 2001 Interim Supplement, available at http://www.sec.gov/interps/telephone/phonesupplement4.htm.
[5] The "confidentiality agreement" in this case is oral and there may therefore be uncertainty or dispute as to its precise terms.

confidentiality agreement. The decision does demonstrate the significance of the common practice of including express use restrictions and trading prohibitions in confidentiality agreements.

A copy of the opinion is available at:

http://www.kayescholer.com/email/memorandum_sec_v_cuban_july_17_2009.pdf.

Chicago Office
+1.312.583.2300

Frankfurt Office
+49.69.25494.0

London Office
+44.20.7105.0500

Los Angeles Office
+1.310.788.1000

New York Office
+1.212.836.8000

Shanghai Office
+86.21.2208.3600

Washington, DC Office
+1.202.682.3500

West Palm Beach Office
+1.561.802.3230