

Mark Cuban Insider Trading Ruling Could Blemish SEC

By Shannon Henson

Law360, New York (August 03, 2010) -- A federal appeals court could deliver a blow to the U.S. Securities and Exchange Commission if it rules against the regulator in the high-profile insider trading case against Mark Cuban, self-made billionaire and owner of the Dallas Mavericks, lawyers said.

A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit heard arguments Monday in the case, which centers on whether it was fraudulent for Cuban to trade on information that he — as a shareholder — orally agreed to keep confidential.

Cuban is not the SEC's typical adversary in an insider trading action in two respects: He does not have a classic fiduciary relationship with the company, and he's a man with "the means and personality" to fight the commission, said Nicholas I. Porritt, a partner with Akin Gump Strauss Hauer & Feld LLP.

So no matter how the Fifth Circuit rules, "it is not the last word," Porritt said. "It's round two in a potentially four-round fight."

The SEC lodged the case in November 2008, accusing Cuban of selling 600,000 shares in Mamma.com based on nonpublic information he had learned about an impending private investment in public equity offering.

Cuban owned 6.3 percent of the company, a publicly traded Internet search engine entity now known as Copernic Inc., according to the suit. The company's then-CEO told Cuban about the PIPE the day prior to the offering, saying the information was confidential prior to disclosing the news, the complaint claims.

The SEC contends that Cuban sold all his Mamma.com stock by the end of the next day, June 29, 2004. Mamma.com announced the PIPE after the markets closed that day, prompting its stock to open June 30 at \$11.89, down 9.3 percent from the prior day's close of \$13.10. Cuban allegedly avoided a loss of more than \$750,000.

In July 2009, Judge Sidney A. Fitzwater of the U.S. District Court for the Northern District of Texas dismissed the case. He ruled that the SEC adequately pled that Cuban entered into a confidentiality agreement, but did not allege that Cuban agreed to refrain from trading on or using for his own benefit the information the CEO was about to share.

"Absent a duty not to use the information for personal benefit, there is no deception," Judge Fitzwater said.

The SEC appealed the case to the Fifth Circuit, which heard oral arguments Monday. Randall Quinn, a lawyer for the commission, told the judges that Cuban agreed to not use the information he gleaned, so his trades were, in fact, a “deception.”

But Cuban's lawyer, Lyle Roberts, a partner with Dewey & LeBoeuf LLP, told the court that the SEC does not have an actionable fraud case against Cuban.

Judge Carolyn D. King asked him, “You don’t think there is a little fraud here? Fraud in the air, so to speak?”

Roberts said no, arguing that Cuban's trade was not deceptive, and that the SEC could not point to a confidentiality agreement case that resulted in fraud.

Randall Sunshine, a partner at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP, said Tuesday that as Judge King put it, there is “fraud in the air” in the case against Cuban.

“Whether that is sufficient to constitute an insider trading violation is up to those judges to now decide,” Sunshine said.

Porrirt, who penned an amicus brief for four law professors on behalf of Cuban, said it will serve as an “important reminder” that federal securities laws don't generally prohibit “conduct we think is somehow wrong” should Cuban prevail.

“Whatever you think of Mr. Cuban's behavior should be beside the point. Did he violate securities laws? There is no doubt this enforcement action is a stretch of existing laws,” Porrirt said.

Kenneth B. Winer, a partner with Foley & Lardner LLP, said the decision could have a lasting effect on some confidentiality agreements should the appeals court rule it is insufficient to just say information is confidential.

To the extent that some parties weren't doing so before the district court's finding, “it's likely that parties going forward will obtain not only an agreement that the information is confidential, but an agreement that the information will not be used for trading purposes,” Winer said.

A ruling for Cuban — who also owns Landmark Theaters and HDNet, and is a likely bidder for the bankrupt Texas Rangers at auction Wednesday — would also be a headline-grabbing loss for the SEC, Porrirt said.

The case is “an important part of a very high-profile program against insider trading,” Porrirt said. “If the SEC loses it, it will be a PR blow.”

The judges who sat on the panel for the Fifth Circuit Monday were Judges Carolyn D. King, Patrick E. Higginbotham and Emilio Garza.

Cuban is represented by Dewey & LeBoeuf LLP.

The case is SEC v. Mark Cuban, case number 09-10996, in the U.S. Court of Appeals for the Fifth Circuit.