

## US

Morrison &amp; Foerster LLP

## The maverick, the SEC and insider trading

In September 2010, the US Fifth Circuit Court of Appeals vacated the district court opinion and instructed the district court to make findings of fact relating to the SEC's allegations that Mark Cuban traded unlawfully on inside information. While some of the facts of this case are yet to be established, the SEC's view of the facts and the law are clear. The SEC alleges that in 2004 Cuban sold shares of an internet company after receiving a call from the company's CEO advising that the company would soon announce a PIPE (private investment in public equity) transaction and inviting him to participate. Prior to the call, Cuban had been a large stockholder.

The SEC alleges that at the start of this call with the CEO, Cuban agreed to keep the information confidential and that Cuban reacted angrily to receipt of this non-public information because possession of the information would impact his trading of the security. Nonetheless, Cuban sold his stake in the company by the time the company announced the transaction.

Cuban is an interesting fellow. This case is likely to make him even more so. By the time it has been concluded, most, if not all, of the following questions will have been asked and answered in a way that will define aspects of the conduct of securities professionals for years to come.

In the absence of an express agreement not to trade while in possession of non-public information, should one be implied? If not, what's left of Regulation FD? Should an obligation to keep information confidential and refrain from trading be implied only where there are express duties owed by the recipient to the company? When are such duties owed, or presumed to be?

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