

Cuban Verdict Likely The Last Word In SEC Case

By **Jess Davis**

Law360, Dallas (October 16, 2013, 8:41 PM ET) -- After a Texas jury on Wednesday found the U.S. Securities and Exchange Commission had proven none of the essential elements of its insider trading case against billionaire Mark Cuban, it will be "nearly impossible" for the agency to win on appeal, securities lawyers say.

The jury deliberated for less than four hours before handing Cuban what his lawyers said was a "100 percent win," finding in his favor on all five of the disputed elements of the SEC's insider trading claim, which accused the Dallas Mavericks owner of dumping 600,000 shares in Canadian search engine Mamma.com in June 2004 after the company's CEO told him about an upcoming private financing deal. The complete loss, compared to a mixed verdict, makes it unlikely and unwise for the SEC to appeal the case to the Fifth Circuit, securities lawyers said after the verdict.

The SEC is also facing strong criticism from some securities lawyers, who say the agency shouldn't have devoted so many of its resources to investigating and litigating a weak case. But defenders of the agency say the SEC still fulfilled its mission — to protect investors — and that its tenacity in litigating the case will be a deterrent to would-be insider traders who don't want to face regulatory scrutiny.

After a **seven-day trial**, the jury rejected the SEC's argument Cuban had agreed to keep confidential and abstain from trading on material, nonpublic information about the financing, and found Cuban, then the company's largest shareholder, had fully disclosed his plans to sell his stock.

"This is absolutely devastating for the SEC," David Marder of Robins Kaplan Miller & Ciresi LLP said. "At this point an appeal is nearly impossible."

Marder said the SEC won't be able to convince the Fifth Circuit to reverse a ruling from U.S. District Judge Sidney A. Fitzwater that the misappropriation theory of insider trading requires proof Cuban agreed not to trade on the information as well as proof he agreed to keep it confidential. When the Fifth Circuit in 2010 reversed Judge Fitzwater's dismissal of the case, it declined to rule on the question, and now has a way to avoid deciding what duties the SEC must prove in similar insider trading cases because the SEC lost on all grounds, Marder said.

"If they're smart, they'll shut it down just like the jury told them to," said Thomas M. Melsheimer of Fish & Richardson PC, Cuban's defense attorney, immediately after the verdict was announced.

But although an appeal is less likely now than it would have been under a mixed verdict, Scott Kimpel of Hunton & Williams LLP said he's not counting the SEC out yet.

"The SEC has gone 'all in' on this case so I think they will still study the record carefully to see if there are any plausible grounds for appeal," Kimpel said. "I would be surprised if the agency just walked away given the significant investment in the case to date."

One factor the SEC will consider is whether it wants the Fifth Circuit to issue binding precedent interpreting the misappropriation theory, which covers noninsiders who violate a duty of confidentiality to a company. Insider trading laws are far less developed in the Fifth Circuit than in the Second and Ninth circuits, and the SEC may not want to risk a negative interpretation of its rules in a case that had such weak facts, said Arnold Spencer of Akin Gump Strauss Hauer & Feld LLP.

"Given these adverse jury findings, I think the SEC would be concerned a panel of judges would use these findings to limit the misappropriation theory," Spencer said. "That will act as a deterrent and likely discourage the SEC from pursuing an appeal."

A trial win against Cuban would have been a trophy for the agency, which is **coming off a July victory** against former Goldman Sachs Group Inc. trader Fabrice Tourre. The loss provides more fuel for SEC critics who say its record of trial losses demonstrates it put too much energy into bringing cases and not enough resources into actually winning them.

"The SEC is becoming like a toothless old bear," Marder said. "It's got a really loud growl but its bite is getting weaker and weaker."

Jeff Ansley of Bell Nunnally & Martin LLP said appealing the Cuban verdict "would run the risk of compounding and extending a very public defeat," which the politically sensitive SEC would want to avoid.

"This just became a case that the SEC wants to get behind it as quickly as possible," Ansley said.

But as Cuban acknowledged in a news conference after the verdict, he spent millions of dollars and more than five years fighting the SEC's allegation he committed insider trading, and he said he never thought winning the case would feel good.

That sentiment shows the SEC is doing its job and that trying the case against Cuban, even with a fact-intensive record and circumstantial evidence, demonstrates the agency's enforcement power, Spencer said. He said a policy change from the SEC that won't allow defendants to settle cases without admitting misconduct is likely to lead to more trials in the coming years.

Forcing more people to go to trial means the SEC is going to win a "disproportionate amount" of those cases because the agency will have solid cases against defendants with much weaker defenses than Cuban had, he said.

Kimpel said the Cuban trial does put traders and investors on notice the SEC will take a case as far as it can, even against a defendant who wants to litigate instead of settle. But a string of losses hurts the agency's reputation, he said.

"Having scored a moral victory doesn't do much to advance the law or put other scofflaws on notice they'll get caught and punished," Kimpel said. "If anything, it sends the counter message that the SEC loses when they go to trial."

Ed Tomko of Dykema Gossett PLLC said Cuban's vigorous fight against the SEC's claims won't make the agency concerned about bringing similar cases against people like Cuban, who has celebrity and deep pockets that make him a difficult target.

"I think that if you believe in the case and think you have the evidence, you bring it," Tomko said. "The fact is, if you believe in the case, you bring the case, not because of the punishment but to make the point that the law applies to everybody," Tomko said.

--Editing by John Quinn and Richard McVay.

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