ARTICLE: WOMEN SHOULD NOT NEED TO WATCH THEIR HUSBANDS LIKE [A] HAWK: MISAPPROPRIATION INSIDER TRADING IN SPOUSAL RELATIONSHIPS

Autumn, 2020

Reporter
15 Tenn. J. L. & Pol'y 162 *

Length: 35190 words

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Text

[*163] Insider trading law regulates the market effects of informational and human networks as they relate to transactions in financial investment instruments known as securities. Information relevant to securities transactions moves from person to person in various ways and in myriad contexts. Those contexts may be professional or personal, public or private. Regardless, the information conveyed may incentivize or underlie purchase or sale transactions in those securities. That is where insider trading regulation steps in. This article features a particular insider trading story that helps illuminate aspects of insider trading regulation in the United States and behaviors that may generate civil or criminal liability for violations of U.S. insider trading law. [1]

The top-line narrative of the insider trading story told and examined in this article is exceedingly simple. The basic asserted facts are as follows:

[*164] . Wife is a finance manager for a corporate acquiror;

. Husband overhears wife talking on the telephone about a forthcoming acquisition of a specific target firm;

. Wife tells husband there is a trading blackout in her employer's equity securities as a result of an impending transaction; and

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[1] Criminal enforcement of the federal securities laws, including those governing insider trading, requires willful conduct. *See* 15 U.S.C. § 78ff(a) (2018) (authorizing criminal penalties for enforcement against "[a]ny person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . "). Criminal liability for insider trading also requires the U.S. government's satisfaction of its high, "beyond a reasonable doubt," burden proof. *See, e.g.*, United States v. Corbin, 729 F. Supp. 2d 607, 619 (S.D.N.Y. 2010) (noting the government's "heavy burden to prove each element of illicit insider trading beyond a reasonable doubt at trial").

. Husband buys shares of the target firm's publicly traded equity before public disclosure of the target firm's acquisition by wife's employer and nets $ 150,000 by selling the shares into the market after the acquisition is announced.

Based on these facts, the U.S. Securities and Exchange Commission ("SEC") engages in enforcement activity against the husband. He settles with the SEC in connection with the announcement of the filing of its complaint against him (without admitting or denying the allegations in that complaint).

The SEC's position? Pure and simple: the husband's transactions represent unlawful misappropriation insider trading, as cognizable under Section 10(b) of the Securities Exchange Act of 1934, as amended ("Section 10(b)"),[2] and Rule 10b-5 promulgated by the SEC under Section 10(b) ("Rule 10b-5").[3] The husband deceived the wife by breaching a duty of trust and confidence he owed to her as his spouse--and the inadvertent source of material nonpublic information. He knew or should have known that he was expected to keep the information he learned from his wife in trust and confidential and, specifically, that he was to refrain from trading while that information remained nonpublic.

[*165] Although it may seem difficult to conceive that a husband would betray spousal trust and good faith in this manner,[4] the case from which the stated facts are derived, *SEC v. Hawk*,[5] is not unique. In fact, the SEC announced the filing and settlement of the *Hawk* case[6] at the same time as the filing and settlement of *SEC v. Chen*,[7] another SEC enforcement action in which a husband misappropriated information from his wife. The related press announcement offered further information about past enforcement activity in similar circumstances.[8]

The SEC has brought other insider trading cases involving individuals who traded on material, nonpublic information **[*166]** misappropriated from spouses. For example, last year the SEC charged a Houston man with insider trading ahead of a corporate acquisition based on confidential details that he gleaned from his wife, a partner at a large law firm that was consulted on the deal. In 2011, the SEC charged an Illinois man who bought the stock of an acquisition target of a company where his wife was an executive despite her requests that he keep the merger information confidential. In a different 2011 case, the SEC charged the spouse of a

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2 *Id.* § 78j(b) (2018).

3 17 C.F.R. § 240.10b-5 (2020).

4 *See* Greg Farrell, *Pillow talk*, CHI. TRIB. (Dec 12, 2012), https://www.chicagotribune.com/opinion/ct-xpm-2012-12-12-ct-perspec-1212-couples-20121212-story.html ("Couples sometimes share pillow talk about work, of course, but the wives victimized in these insider cases made it clear they didn't expect their spouses to trade on it in the morning.").

5 Complaint, *S.E.C. v. Hawk*, No. 5:14-cv-01466 (N.D. Cal.), https://www.sec.gov/litigation/complaints/2014/comp-pr2014-61-hawk.pdf [hereinafter Hawk Complaint]; *see also* S.E.C. v. Hawk, Litigation Release No. 22957 (March 31, 2014), https://www.sec.gov/litigation/litreleases/2014/lr22957.htm [hereinafter Hawk Litigation Release].

6 *See* Sec's & Exch. Comm'n, *SEC Charges Two Men With Insider Trading on Confidential Information From Their Wives*, Release # 2014-61 (March 31, 2014), https://www.sec.gov/news/press-release/2014-61#.Uzqzvvk7um6 [hereinafter Hawk Press Release].

7 S.E.C. v. Chen, Litigation Release No. 22958 (March 31, 2014), https://www.sec.gov/litigation/litreleases/2014/lr22958.htm.

8 Hawk Press Release, *supra* note 6; *see also* Ellen Rosen, *Rise in Insider-Trading Cases Shows the Perils of Pillow Talk*, N.Y. TIMES (Aug. 24, 2007), https://www.nytimes.com/2007/08/24/business/24trading.html.

CEO with insider trading on confidential information that he misappropriated from her in advance of company news announcements. [9]

The factual setting of these cases, sometimes referred to as "pillow talk" cases, [10] compelled a compliance blogger to quip that, through these cases, "[t]he Securities and Exchange Commission [had] decided to emphasize that working wives can be a source of material non-public information." [11]

The *Hawk* case and the facts reported in the related complaint and press release beg a number of questions. These questions emanate from the somewhat **[*167]** attenuated foundation for misappropriation liability, which itself is rooted in squirrely doctrinal rules, inexact policy foundations, and theoretical tensions. [12] Importantly, the questions raised by *Hawk* and cases like it offer opportunities to consider whether misappropriation insider trading liability, as currently fashioned, contributes positively to preventing, correcting, or punishing socioeconomic wrongs.

For example, the SEC's enforcement action against Tyrone Hawk (the husband in the *Hawk* case) is predicated on the view that Hawk had a fiduciary or fiduciary-like duty to abstain from trading--or from otherwise using the information he learned from his wife for personal market gain--until the material information in his possession was publicly disseminated and absorbed. Did Hawk have a fiduciary or fiduciary-like duty to disclose or abstain? What did he understand about any trust and confidentiality obligations he had at the time he decided to trade? "Kinship alone does not create the necessary relationship." [13]

More generally, is Tyrone Hawk's conduct the type of conduct that we desire to classify and punish as wrongful insider trading? [14] What harms and benefits **[*168]** inure to treating marriages as relationships of trust and confidence, generally and as a foundation for securities regulation and liability? To approach those questions and others like them, it would be useful to know more about Hawk's relationship with his wife and the decisions that he made, culminating in his decision to buy and sell securities. Did he understand that his trading was or might be unlawful? If so, why did he buy and sell the target firm's public securities and risk damage to his marital relationship? Why would he risk personal liability or civil or criminal punishment? Why would he chance reputational harm and personal shame to himself and his wife? One judge summarized--in granting probation to a misappropriating husband (who was a Lehman Brothers stock broker): "He betrayed the trust of Lehman Brothers,

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[9] Hawk Press Release, *supra* note 6.

[10] *See, e.g.*, Farrell, *supra* note 4; Rosen, *supra* note 8; Stephen Taub & Dave Cook, *Pillow Talk Gone Wild*?, CFO (May 14, 2007), https://www.cfo.com/risk-compliance/2007/05/pillow-talk-gone-wild/; Debra Cassens Weiss, *Insider Trading by Pillow Talk*?, ABA J. (May 11, 2007), http://www.abajournal.com/news/article/insider-trading-by-pillow-talk.

[11] Doug Cornelius, *The SEC Shows Some Respect for the Working Woman*, Compliance Building (March 31, 2014), https://www.compliancebuilding.com/2014/03/31/the-sec-shows-some-respect-for-the-working-woman/.

[12] *See, e.g.*, Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017, 1045 ("There is no single unifying theory of insider trading liability that has been accepted by U.S. lawmakers--legislative, administrative, or judicial. Moreover, there is no statute, regulation, or judge-made rule clearly and simply outlining the conduct prohibited.").

[13] United States v. Chestman, 947 F.2d 551, 570 (2d Cir. 1991); *see also* 17 C.F.R. § 240.10b5-2(b)(3) (2020) (establishing a rebuttable presumption that a "duty of trust or confidence" exists "whenever a person receives or obtains material nonpublic information from his or her spouse).

[14] Professor Jill Fisch asked similar questions nearly 30 years ago. *See* Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 215 (1991) ("Is the sanctity of the marital relationship really the basis for . . . [a] determination that . . . [the defendant's] conduct constituted insider trading? Should insider trading prosecutions be a tool to enforce the maintenance of spousal confidences?").

his responsibility to his profession and he betrayed the trust of his spouse, all of it completely tragic and senseless for a sum of money, to his benefit, that was a rounding error in his compensation." [15]The cumulative impacts represent a veritable parade of horribles that a person typically would not want to unleash on himself or herself--or his or her spouse. That a marriage may withstand such trials and tribulations is remarkable. Because Tyrone Hawk settled the SEC enforcement action against him [16]and few details currently are publicly available about him or the specific **[*169]** allegations made by the SEC in his case, we may never know the answers to these questions.

In addition, there is a potential gender story to be told by looking at insider trading law through the lens of cases like *Hawk*. As alluded to in the blogger's comment noted above, all of the spousal misappropriation [17]enforcement actions reported or mentioned in the press release announcing the *Hawk* complaint and settlement involve husbands misappropriating information from their wives. Is that representation consistent with an empirical truth: Do men typically misappropriate information received from women as opposed to the reverse? [18]If so, why do husbands misappropriate information from their wives in connection with securities trading more often than wives misappropriate information from their husbands? What about gay and lesbian couples: are there differences in the incidences of misappropriation in female versus male same-sex marriages? Are men more risk-taking and women more **[*170]** risk-averse? Are women more effectively deterred by existing regulation than men? Do men and women have different conceptions of duty or the harm caused by trading while in possession of misappropriated information? The U.S. federal securities laws are not evidently constructed to be gendered in application or impact. In earlier work, I observed--in the context of securities fraud more generally--that "there is no apparent policy-based reason why securities fraud doctrine should better protect women than men, or men than women. Neither investor protection nor market integrity maintenance demand that female and male investors receive different treatment . . . ." [19]The analysis provided in this article does not address these or other gender questions in any direct way. A deeper analysis is required to fully respond. Nevertheless, gender questions and differences do exist. [20]Their presence and relative salience may signal, influence, or catalyze changes in

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[15] Farrell, *supra* note 4.

[16] Hawk Litigation Release, *supra* note 5 ("Hawk has settled the SEC's charges without admitting or denying the allegations. He has agreed to the entry of a judgment enjoining him from future violations of the relevant provisions of the Exchange Act, and to pay disgorgement and prejudgment interest of $ 154,134.50, and an additional penalty equal to his profits of $ 151,480.00.").

[17] References in this article to "spousal misappropriation" describe a specific type of U.S. insider trading liability that involves the misuse of information obtained by a spouse directly or indirectly in the course of the marital relationship. Spouses may misappropriate cash or other marital assets, but those misappropriations are beyond the scope of this paper. *See, e.g.*, Clingerman v. Sadowski, 519 A.2d 378, 381 (Pa. 1986) (referring to a spouse's "implied agreement to terminate a tenancy by the entireties resulting from a misappropriation of entireties property"); Carol S. Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 HASTINGS L.J. 227, 232 (1982) (referring to "compensation for the other spouse's deliberate misappropriation of community or quasi-community property."); Michael Schlesinger, *Obtaining Innocent Spouse Relief in the Face of the Service's Propensity to Litigate*, 109 J. TAX'N 102, 109 (2008) (referring to spousal misappropriation of "funds intended for the payment of tax").

[18] *See infra* note 86 and accompanying text.

[19] Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman*?, 15 WM. & MARY J. WOMEN & LAW 291, 334 (2009).

[20] *See, e.g.*, *infra* note 86 and accompanying text.

the regulatory landscape and likely underlie congressional, judicial, and regulatory activity and forbearance in spousal misappropriation cases and in U.S. insider trading regulation more generally. [21]

[*171] Finally, in thinking about potential regulatory consequences flowing from an examination of the *Hawk* case and cases like it, it may be useful to know how common these types of cases are--and how/why they may be different from other cases involving friend and family information networks. It may be that the *Hawk* case, the *Chen* case, and the other legal actions involving spousal misappropriation mentioned in the SEC's 2014 press release on the *Hawk* and *Chen* enforcement actions, while not unique, are relatively rare. [22] In that event, we should be cautious about placing too much emphasis on those cases in suggesting relevant changes to the regulatory landscape.

This article endeavors to sort through and begin to resolve key unanswered questions regarding spousal misappropriation, some of which apply to insider trading more broadly. It proceeds by identifying and describing misappropriation insider trading liability under U.S. law, recounting and analyzing probative doctrine and policy relevant to spousal misappropriation cases, and (before briefly concluding) offering related observations about the impact of that doctrine and policy on the *Hawk* case and other spousal misappropriation cases. The descriptions, analysis, and observations not only reflect on the *Hawk* case and what we know about its background, but also draw on U.S. data from an ongoing proprietary research project.

I. Misappropriation Cases under U.S Insider Trading Law

The federal regulation of insider trading in the United States primarily occurs through the specific application of general securities fraud precepts under **[*172]** Section 10(b) and Rule 10b-5. [23] Neither the statute nor the rule gives clear direction to market actors or regulators. As a result, the developed doctrine is heavily dependent on decisional law and, to a lesser extent, SEC rulemaking and guidance.

Unlawful insider trading under Section 10(b) and Rule 10b-5 can take one of several forms. Each type of insider trading liability typically requires the breach of a fiduciary or fiduciary-like duty of trust and confidence. [24]

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[21] *See* Judith G. Greenberg, *Insider Trading and Family Values*, 4 WM. & MARY J. WOMEN & L. 303, 371 (1998) ("[A] gender conscious analysis would lead us to reconsider our approach to both relationships and access to information in deciding insider trading cases."); *id.* at 367 ("Ideas about gender roles, the family, and the market are important to the structure of insider trading law in multiple interconnected ways. . . . [C]ourts decide cases with reference to these gender roles."); *id.* at 368 ("A gender-conscious analysis is . . . important because it allows us to identify issues in insider trading law that might otherwise appear to have been resolved.").

[22] *See infra* notes 84 & 85 and accompanying text.

[23] *See* Chiarella v. United States, 445 U.S. 222, 226 (1980) ("Although the starting point of our inquiry is the language of the statute, § 10(b) does not state whether silence may constitute a manipulative or deceptive device. Section 10(b) was designed as a catch-all clause to prevent fraudulent practices." (citations omitted)); S.E.C. v. Kara, No. C 09-01880 MHP, 2009 WL 3400662, at *3 (N.D. Cal. Oct. 20, 2009) ("[I]insider trading inherently involves fraud"); Zachary J. Gubler, *Insider Trading As Fraud*, 98 N.C. L. REV. 533, 561 (2020) ("[I]nsider trading law under Rule 10b-5 is based on fraud"); Kevin S. Haeberle & M. Todd Henderson, *Making A Market for Corporate Disclosure*, 35 YALE J. ON REG. 383, 397 (2018) ("Insider trading is mainly restricted by the joint prohibition on securities fraud found in Section 10(b) and Rule 10b-5. Ultimately, those laws stop trading when it involves deceit." (footnotes omitted)).

[24] *See, e.g.*, Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. Rev. 1589, 1590 (1999) ("Since the Supreme Court's decision in *United States v. Chiarella*, insider trading liability has been based on a breach of fiduciary duty."); Sung Hui Kim, *Insider Trading As Private Corruption*, 61 UCLA L. REV. 928, 934 (2014) (noting that "decades ago the Supreme Court originally mandated the breach of fiduciary duty element for an insider trading violation and has since maintained that requirement."); Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1324 (2009) ("[U]nder either of the Supreme Court's theories, the existence of a fiduciary-like relationship is essential."); Steven R. Salbu, *Tipper Credibility, Noninformational Tippee Trading, and Abstention from Trading: An Analysis of Gaps in the Insider Trading Laws*, 68 WASH. L.

[*173] This Part I briefly describes each type of insider trading and contextualizes misappropriation liability within the overall U.S. insider trading regulation framework.

Classical insider trading involves one or more transactions in the securities of a firm conducted by a person who is in possession of material nonpublic information and owes a fiduciary or fiduciary-like duty of trust and confidence to the firm's shareholders. [25]The U.S. Supreme Court explained the rationale for this form of U.S. insider trading liability as follows:

> [S]ilence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b) . . . . [S]uch liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction. Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder's welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information. [26]

This duty to disclose material nonpublic information in one's possession or abstain from trading until that disclosure has been made is the bedrock of classical insider trading liability. Although the typical duty **[*174]** bearers are officers, directors, and others who work inside the four walls of the firm, temporary or constructive insiders--including professionals who work with the firm--also may be subject to a duty to disclose or abstain. [27]Because the duty holder's disclosure of the material nonpublic information without the consent or participation of the beneficiary of the duty (or other compelling legal justification) will breach the operative duty of trust and confidence, the duty to disclose or abstain effectively is a duty to abstain from trading.

If a person with a duty of trust and confidence conveys information improperly (in violation of that duty, including because of the duty holder's receipt of a personal benefit) to someone else and the person to whom the information is conveyed then trades, the contravention of U.S. insider trading prohibitions under Section 10(b) and Rule 10b-5 is labeled as a tipper-tippee violation. [28]The Court explained U.S. insider trading proscriptions on tippers and tippees as follows:

> Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain. Similarly, the transactions of those who knowingly participate with the fiduciary in such a breach are "as forbidden" as **[*175]** transactions "on behalf of the trustee himself." [29]

The U.S. Supreme Court most recently reviewed and interpreted tipper-tippee liability in *Salman v. United States*, [30]a 2016 opinion focusing on the nature of a personal benefit that, when received by a tipper from a tippee, may support a claim that information was shared improperly as a matter of U.S. insider trading law.

REV. 307, 311 (1993) (explaining that, "[w]here there is no express misrepresentation, the fraud must be inferred from the act of silently trading despite a fiduciary duty either to disclose the relevant information or to abstain from dealing in the relevant securities." (footnotes omitted)).

25 *See Chiarella*, 445 U.S. at 226-30.

26 *Id.* at 230.

27 *See* Dirks v. S.E.C., 463 U.S. 646, 655 n.14 (1983) ("Under certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders.").

28 *See id.* at 659-64.

29 *Id.* at 659 (citations omitted).

Misappropriation liability under insider trading law--the type of liability at issue in the *Hawk* case--exists when a person who is in possession of material nonpublic information and who owes a fiduciary or fiduciary-like duty of trust and confidence to the source of the information engages in a securities trading transaction (or, if we include tipper liability in this context, improperly shares the nonpublic information) in breach of that duty of trust and confidence. [31]An insider trading misappropriator

> commits fraud "in connection with" a securities transaction, and thereby violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and **[*176]** purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information. [32]

The most recent form of insider trading liability to be recognized by the U.S. Supreme Court, misappropriation liability has been somewhat divisive and raises many legal and practical questions. [33]

Indeed, misappropriation liability is perhaps the least known type of insider trading liability and the type most difficult to conceptualize. Among other things, misappropriation liability can exist without the involvement of anyone typically considered to be a firm insider. [34]As a result, it is sometimes referred to as (or considered a form of) "outsider trading" liability. [35]Its **[*177]** force derives most specifically from the desire to encourage capital

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[30] 137 S. Ct. 420 (2016).

[31] *See* United States v. O'Hagan, 521 U.S. 642 (1997).

[32] *Id.* at 652.

[33] *See* James J. Park, *Insider Trading and the Integrity of Mandatory Disclosure*, 2018 WIS. L. REV. 1133, 1184 (2018) ("The misappropriation doctrine has been controversial because it extends insider trading regulation beyond the context of information generated by the corporation.").

[34] *See* S.E.C. v. Cherif, 933 F.2d 403, 409 (7th Cir. 1991) ("The misappropriation theory extends the reach of Rule 10b-5 to outsiders who would not ordinarily be deemed fiduciaries of the corporate entities in whose stock they trade.").

[35] *See, e.g.*, United States v. Kim, 184 F. Supp. 2d 1006, 1012 (N.D. Cal. 2002) ("Misappropriation theory is targeted at 'outsider' trading, i.e., breaches that do not involve a duty to the traded company and its shareholders."); Ian Ayres & Stephen Choi, *Internalizing Outsider Trading*, 101 MICH. L. REV. 313, 324 n.36 (2002) ("Present mandatory restrictions against informed outsider trading include the misappropriation theory of insider trading prohibitions and Rule 14e-3 of the Exchange Act's limits on the ability of any trader other than the acquirer to trade on nonpublic material information related to a tender offer."); Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 HASTINGS L.J. 881, 894 (2010) ("The misappropriation cases provided a case-by-case rather than systematic analysis of the scope of the misappropriation theory of outsider trading liability."); Kim, *supra* note 24, at 939 ("[I]nsider trading in violation of the misappropriation theory--and not the classical theory--is often referred to as 'outsider trading.'"); Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post*-O'Hagan *Suggestion*, 59 OHIO ST. L.J. 1223, 1225 (1998) (" *O'Hagan*'s misappropriation theory now extends liability under Section 10(b) and Rule 10b-5 to cover such instances of 'outsider trading . . . .'"); Robert A. Prentice, *Clinical Trial Results, Physicians, and Insider Trading*, 20 J. LEGAL MED. 195, 206 (1999) ("The misappropriation theory creates what is often called 'outsider trading' liability because the liability is based not on a relationship with the company whose shares are traded but instead upon a breach of fiduciary duty owed to the source of the information.").

formation by protecting markets from harm (rather than by protecting specific investors from harm in specific transactions). [36]

Because alleged insider trading misappropriators are not firm insiders subject to traditional business entity law fiduciary duties, the establishment of the requisite duty is key to misappropriation cases. [37]Although there **[*178]** is a relative "paucity of jurisprudence on the question of what constitutes a relationship of 'trust and confidence,'" [38]a number of federal courts have addressed this element of a misappropriation action in various ways both before and after the U.S. Supreme Court expressly endorsed the misappropriation theory in 1997. For example, a well-cited opinion of the U.S. Court of Appeals for the Second Circuit offers a list of "hornbook fiduciary relations" that helps guide an analysis of the type of relationship that, in the event of a violation of fiduciary duties of trust and confidence inherent in the relationship, may provide the foundation for a successful misappropriation insider trading action. [39]The listed relationships include: "attorney and client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder." [40]An additional formative Second Circuit opinion explains when and why a duty of trust and confidence owed by an employee to an employer may be sufficient to support misappropriation liability:

> [O]ne may gain a competitive advantage in the marketplace through conduct constituting skill, foresight, industry and the like. . . . But one may not gain such advantage by conduct constituting secreting, stealing, purloining or otherwise misappropriating material non-public information in breach of an employer-imposed fiduciary duty of confidentiality. **[*179]** Such conduct constitutes chicanery, not competition; foul play, not fair play. [41]

A more recent federal district court opinion analyzed whether members of a professionally oriented social club who pledge confidentiality have fiduciary or fiduciary-like duties of trust and confidence to each other that could provide a foundation for misappropriation insider trading liability, determining as a matter of law that no duties of that kind existed. [42]These judicial opinions all help to frame the origin of duties of trust and confidence that, if breached in connection with a purchase or sale of securities, may provide a basis for insider trading liability.

In 2000, the SEC intervened in the development of this body of decisional law by adopting Rule 10b5-2, [43]which identifies three contexts in which a duty of trust and confidence exists for purposes of misappropriation

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[36] *See O'Hagan*, 521 U.S. at 653 ("The misappropriation theory is . . . designed to 'protec[t] the integrity of the securities against abuses by "outsiders" to a corporation who have access to confidential information that will affect th[e] corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders.'") (quoting from the U.S. government's brief); *id.* at 658 ("The theory is . . . well tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence." (citation omitted)).

[37] *See* United States v. Chestman, 947 F.2d 551, 567 (2d Cir. 1991) ("After *Carpenter*, the fiduciary relationship question takes on special importance. This is because a fraud-on-the-source theory of liability extends the focus of Rule 10b-5 beyond the confined sphere of fiduciary/shareholder relations to fiduciary breaches of any sort, a particularly broad expansion of 10b-5 liability if the add-on, a 'similar relationship of trust and confidence,' is construed liberally.").

[38] S.E.C. v. Cuban, 620 F.3d 551, 558 (5th Cir. 2010).

[39] Chestman, 947 at 568.

[40] *Id.*

[41] United States v. Carpenter, 791 F.2d 1024, 1031 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987).

[42] *See* United States v. Kim, 184 F. Supp. 2d 1006, 1013 (N.D. Cal. 2002) (finding that the relationship between members of the organization "was not the functional equivalent of a fiduciary relationship. While the rules of the club may have forbid defendant's actions, the federal securities laws--at least in this instance--did not.").

[43] 17 C.F.R. § 240.10b5-2 (2020).

insider trading liability. The three contexts include: (1) the existence of an agreement "to maintain information in confidence," [44](2) a situation in which there is "a history, pattern, or practice of sharing confidences, such that the recipient of . . . information knows or reasonably should know that the person communicating . . . material nonpublic information expects that the recipient will maintain its confidentiality," [45]and (3) information sharing in close family situations--specifically those **[*180]** involving a "spouse, parent, child, or sibling." [46]The duty of trust and confidence arising from family relationships under the rule is qualified in an important way, however. Specifically:

> the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information. [47]

This qualification transforms the rule's articulated duty of trust and confidence in the specified family relationships into a rebuttable presumption. [48]

Rule 10b5-2 has been challenged in a number of court opinions, but it has never been invalidated. [49]In **[*181]** particular, a highly publicized case, *S.E.C. v. Cuban*, [50]required the U.S. Court of Appeals for the Fifth Circuit to evaluate whether an oral promise of confidential treatment made to the chief executive of a corporation by a significant shareholder of the corporation could be the source of the requisite duty. Although the district court found that the SEC could not premise liability in the case on Rule 10b5-2(b)(1) (which establishes a duty of trust and confidence based on an agreement to keep information confidential), [51]the Fifth Circuit found to the contrary. [52]At issue in the case was whether the agreement to keep information confidential also included an understanding that the recipient was not to trade while the information remained nonpublic. [53]Deciding that the evidence could support the existence of an understanding that trading was prohibited, the Fifth

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[44] *Id.* § 240.10b5-2(b)(1).

[45] *Id.* § 240.10b5-2(b)(2).

[46] *Id.* § 240.10b5-2(b)(3).

[47] *Id.*

[48] *See* S.E.C. v. Yun, 327 F.3d 1263, 1273 n.23 (11th Cir. 2003); Mitchell A. Agee, *Friends in Low Places: How the Law Should Treat Friends in Insider Trading Cases*, 7 CHARLESTON L. REV. 345, 363 (2013); Bradley J. Bondi & Steven D. Lofchie, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance*, 8 N.Y.U. J.L. & BUS. 151, 190 n.147 (2011); Hazen, *supra* note 35, at 896-97; Allan Horwich, *The Clinical Trial Research Participant As an Inside Trader: A Legal and Policy Analysis*, 39 J. HEALTH L. 77, 114 n.132 (2006).

[49] *See* Agee, *supra* note 48, at 364-65; Joanna B. Apolinsky, *Insider Trading As Misfeasance: The Yielding of the Fiduciary Requirement*, 59 U. KAN. L. REV. 493, 533 n.264 (2011); Hazen, *supra* note 35, at 895.

[50] 620 F.3d 551, 552 (5th Cir. 2010).

[51] S.E.C. v. Cuban, 634 F. Supp. 2d 713, 730-31 (N.D. Tex. 2009), ("Because Rule 10b5-2(b)(1) attempts to predicate misappropriation theory liability on a mere confidentiality agreement lacking a non-use component, the SEC cannot rely on it to establish Cuban's liability under the misappropriation theory."), *vacated and remanded*, 620 F.3d 551.

[52] 620 F.3d 551, 557 ("The allegations, taken in their entirety, provide more than a plausible basis to find that the understanding between the CEO and Cuban was that he was not to trade, that it was more than a simple confidentiality agreement.").

[53] *See supra* note 51; 620 F.3d 551, 556.

Circuit vacated the district court's opinion and remanded the case for further consistent proceedings. [54]A jury eventually found that the recipient of the information **[*182]** was not liable for insider trading under the misappropriation theory. [55]

Given the general nature of the three duty-bound contexts described in Rule 10b5-2, continuing interpretations of the contours of each of the three can be expected. [56]Moreover, the rebuttable presumption provided in Rule 10b5-2(b)(3) for intra-family communications makes it a veritable playground for litigators at the trial and appellate levels. As a result, exchanges of material nonpublic information in close family relationships that precede trades by the recipient of the information continue to be potential, yet uncertain, bases for insider trading liability under Section 10(b) and Rule 10b-5.

[*183] II. Spousal Misappropriation

As the general doctrinal survey in Part I demonstrates, personal relationship contexts, including marital relationships, present particularly thorny issues in determining the existence of the duty requisite to misappropriation insider trading liability. A focused review of decisional law and regulatory principles provides important insights into the way that courts and the SEC have undertaken to resolve these issues. Ultimately, however, this review illustrates that it is easy to lose sight of the forest for the trees. A focus on first principles may offer additional insights that provide a foundation for further guidance in resolving this important duty question in spousal misappropriation enforcement actions like the *Hawk* case.

A. Decisional Law and Regulatory Principles Applicable to Spousal Misappropriation

In an influential 1991 opinion, *United States v. Chestman*, [57]the U.S. Court of Appeals for the Second Circuit took on the specific task of determining whether spouses owe a fiduciary or fiduciary-like duty of trust and confidence to each other. In its opinion, the *Chestman* court's analysis begins by noting the need for restraint in taking the notion of fiduciary and fiduciary-like duties too far in this context [58]and proceeds by articulating two foundational propositions: that (1) "a fiduciary duty cannot be imposed unilaterally by entrusting a person with confidential information" [59]and (2) "marriage does **[*184]** not, without more, create a fiduciary relationship." [60]Having established these matters, the court then proceeds to an analysis of whether the marital relationship at the center of the action was fiduciary or fiduciary-like.

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[54] 620 F.3d 551, 558.

[55] *See, e.g.*, Erin Fuchs, *Why The SEC Lost Its Big Case Against Mark Cuban*, BUS. INSIDER (Oct. 17, 2013, 3:54 PM), https://www.businessinsider.com/how-mark-cuban-defeatedthe-sec-2013-10; Andrew Harris & Tom Korosec, *SEC Loses as Mark Cuban Triumphs in Insider-Trading Trial*, BLOOMBERG (Oct. 17, 2013, 7:48 PM EDT), https://www.bloomberg.com/news/articles/2013-10-16/billionaire-mark-cuban-found-not-liable-in-sec-lawsuit; Jana J. Pruet, *Billionaire Mark Cuban Cleared of Insider Trading; Blasts U.S. Government*, REUTERS (Oct. 16, 2013, 3:44 PM), https://www.reuters.com/article/us-usa-sec-cuban-verdict/billionaire-mark-cuban-cleared-of-insider-trading-blasts-u-sgovernment-idUSBRE99F0ZM20131016.

[56] Hazen, *supra* note 35, at 897 ("We must await further judicial clarification . . . before being able to judge whether the courts will in fact recognize the proper breadth of Rule 10b5-2."); *Accord*, Agee, *supra* note 48, at 378 (" . . . [T]he SEC's attempt to clarify other non-business fiduciary relationships provides valuable and reasonable parameters that the Supreme Court has yet to address in a case among friends.").

[57] United States v. Chestman, 947 F.2d 551, 567 (2d Cir. 1991).

[58] *Id.* at 567 ("[W]e tread cautiously in extending the misappropriation theory to new relationships, lest our efforts to construe Rule 10b-5 lose method and predictability, taking over 'the whole corporate universe.'").

[59] *Id.*

[60] *Id.* at 568.

In summary fashion, the *Chestman* court finds that the marital relationship in that case is not a "traditional" fiduciary relationship. [61]This determination leaves the court with the more difficult analytical task of determining whether the marriage constituted a fiduciary-like relationship or more precisely, as stated in the *Chestman* opinion, a "similar relationship of trust and confidence." [62]The court reasons that the relationship must be "the functional equivalent of a fiduciary relationship" [63]for potential insider trading liability to attach. As a result, it relies heavily on agency law in identifying the attributes of a fiduciary relationship to which aspects of the marital relationship in the case must then be compared. [64]

Ultimately, the *Chestman* court determined that the husband and wife in the case did not enjoy the requisite fiduciary or fiduciary-like relationship. [65]The court's reasoning is summarized in the following paragraph from its opinion:

> Keith's status as Susan's husband could not itself establish fiduciary status. Nor, **[*185]** absent a pre-existing fiduciary relation or an express agreement of confidentiality, could the coda--"Don't tell." That leaves the unremarkable testimony that Keith and Susan had shared and maintained generic confidences before. The jury was not told the nature of these past disclosures and therefore it could not reasonably find a relationship that inspired fiduciary, rather than normal marital, obligations. [66]

In sum, under *Chestman*, an express request to a spouse for confidential treatment of material nonpublic information affecting the market for a security, despite evidence of other similar confidentiality requests made in the past, is insufficient to establish the fiduciary or fiduciary-like duty that, if breached in connection with the purchase or sale of a security, forms the basis of insider trading liability under Section 10(b) and Rule 10b-5. [67]

Yet, *Chestman* was decided six years before the U.S. Supreme Court endorsed the misappropriation theory in *United States v. O'Hagan*. [68]The *O'Hagan* Court summarizes misappropriation liability as set forth below.

> Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and **[*186]** purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information. [69]

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61 *Id.*

62 *Id.* at 566. This language appears to come from the U.S. Supreme Court's opinion in *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (quoting from the RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976) in referring to " . . . a fiduciary or other similar relation of trust and confidence . . . ").

63 *Chestman*, 947 F.2d at 568.

64 *Id.* at 568-70.

65 *Id.* at 571.

66 *Id.*

67 *Id.*

68 521 U.S. 642 (1997).

69 *Id.* at 652.

O'Hagan's depiction of misappropriation liability is narrowly focused on a fiduciary relationship. [70]This is perhaps unsurprising given that the *O'Hagan* facts related to the breach of a private firm attorney's obligation of trust and confidence to his law firm partners and the firm's client--role-based fiduciary duties (one legally recognized under business associations law and the other under agency law and professional responsibility rules). [71]However, what is important in the **[*187]** *O'Hagan* Court's analysis is that the duty--or, more precisely, the breach of that duty--represents a deceptive act in connection with a securities trading transaction.

Several spousal misappropriation cases have been decided since the Court's decision in *O'Hagan*. [72]Each addresses the *Chestman* opinion and, after its adoption in 2000, Rule 10b5-2(b)(3). For example, in *S.E.C. v. Goodson*, [73]decided shortly after the adoption of Rule 10b5-2, the SEC prevailed in asserting a potential fiduciary duty between spouses rooted in Georgia statutory law. [74]The *Goodson* court also noted that "Rule 10b5-2(b)(3), which does not apply retroactively, essentially creates a federal fiduciary duty between spouses for securities law purposes." [75]A few years later, in *S.E.C. v Yun*, a 2003 SEC enforcement action alleging tipping of information obtained through spousal misappropriation, the U.S. Court of Appeals for the Eleventh Circuit found that "the SEC presented evidence upon which a jury could find that a duty of **[*188]** loyalty and confidentiality existed" between the married couple in that case. [76]The court reasoned as follows:

> In our view, a spouse who trades in breach of a reasonable and legitimate expectation of confidentiality held by the other spouse sufficiently subjects the former to insider trading liability. If the SEC can prove that the husband and wife had a history or practice of sharing business confidences, and those confidences generally were maintained by the spouse receiving the information, then in most instances the conveying spouse would have a reasonable expectation of confidentiality such that the breach of the expectation would suffice to yield insider trading liability. [77]

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70 *Id.*

71 *Id.* at 653 ("In this case, the indictment alleged that O'Hagan, in breach of a duty of trust and confidence he owed to his law firm, Dorsey & Whitney, and to its client, Grand Met, traded on the basis of nonpublic information regarding Grand Met's planned tender offer . . . "); *see* MODEL RULES OF PROF 'L CONDUCT r. 1.6(a) (AM . BAR ASS'N 2016) (providing that, subject to specified exceptions, "[a] lawyer shall not reveal information relating to the representation of a client"); REV. UNIF. P'SHIP ACT § 404(b)(1) & (c) (1997) (providing, among other things, that a partner owes a duty to the partnership and his fellow partners "to account to the partnership and hold as trustee for it any . . . benefit derived by the partner in the conduct . . . of the partnership business or derived from a use by the partner of partnership property" and to refrain "from engaging in . . . intentional misconduct, or a knowing violation of law.") RESTATEMENT (THIRD) OF AGENCY § 8.05 (AM. LAW INST. 2006) ("An agent has a duty. . . not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party."); *see also* Deborah A. DeMott, *The Faces of Loyalty: A Comment on Hillman, Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 1041, 1042 (1998) ("[A] lawyer is . . . an agent of the lawyer's clients and owes fiduciary duties to them as well as to the firm."); Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .*, 81 NEB. L. REV. 1320, 1321-22 (2002) ("Beginning about 100 years ago, both the attorney-client privilege and the agency duty of confidentiality became incorporated into lawyer codes as the obligation not to divulge the confidences and secrets of a client.").

72 S.E.C. v. Yun, 327 F.3d 1263, 1274 (11th Cir. 2003); United States v. Corbin, 729 F. Supp. 2d 607 (S.D.N.Y. 2010); S.E.C. v. Goodson, No. 99CV2133, 2001 WL 819431 (N.D. Ga. Mar. 6, 2001).

73 S.E.C. v. Goodson, No. 99CV2133, 2001 WL 819431 (N.D. Ga. Mar. 6, 2001).

74 *Id.* at *3 ("[D]espite defendants' contentions, courts have repeatedly found that O.C.G.A. § 23-2-58 does create a fiduciary duty between spouses.").

75 *Id.*

76 S.E.C. v. Yun, 327 F.3d 1263, 1274 (11th Cir. 2003).

77 *Id.* at 1272-73.

In addition, nine years after *Goodson* and seven years after *Yun*, in *U.S. v. Corbin*, [78]the U.S. District Court for the Southern District of New York concluded that the marriage at issue in that case was a fiduciary-like relationship, citing to *Chestman*. [79]The *Corbin* court also **[*189]** found the promulgation of Rule 10b5-2 to be a valid exercise of SEC authority and determined that the rebuttable presumption in Rule 10b5-2(b)(3) passes constitutional muster. [80]

The foregoing review of judicial opinions and SEC regulatory pronouncements relating to spousal misappropriation offers important context. Yet, while this review reveals that SEC rules and more recent reported decisional law find or presume a fiduciary-like duty of trust and confidence in marriage for purposes of misappropriation liability under Section 10(b) and Rule 10b-5, there remains a lack of clarity on that issue. For example, one law weblog post, in responding to the public announcement of the *Hawk* and *Chen* cases, commented that the SEC's assertion of the requisite duty in these cases represents "a questionable legal theory, and a continued expansion, beyond all logical bounds, of 10b-5 liability, but a theory that the SEC continues to pursue." [81]Certainly, without more facts on the nature of the Hawk's marital relations over time, it would be difficult for us to assess the SEC's probability of success on the merits in the *Hawk* case. The unclear nature of the **[*190]** requisite duty in the spousal misappropriation context deserves additional consideration and analysis.

This additional analytical attention is especially useful because spousal misappropriation cases constitute an identifiable, recurring subset of insider trading actions brought by the SEC and the U.S. Department of Justice. [82]Many of these cases, like other legal actions, never make it to trial or generate published legal opinions; we have few fully litigated examples from which we can draw additional descriptive information. [83]However, data gathered for an as-yet unpublished study of friends-and-family insider trading actions brought over an eleven-year period that includes the *Hawk* and *Chen* cases provides evidence that a relatively small, but significant, number

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78 United States v. Corbin, 729 F. Supp. 2d 607 (S.D.N.Y. 2010).

79 *Id.* at 616-7. Specifically, the court stated:

> The Indictment charges that the Devlins had a spousal relationship that involved the repeated disclosure of business secrets. Accordingly, the Court finds that the Government's allegations fall within the purview of behavior that, as alleged, demonstrates "the functional equivalent of a fiduciary relationship." Thus, the Court concludes that the Indictment here alleges a relationship between the Devlins sufficient to support a prosecution under misappropriation liability.

Id at 617. (citations omitted).

80 *Id.* at 617-19; *see also* S.E.C. v. De La Maza, No. 09-21977-CIV, 2011 WL 13174213, at *13-15 (S.D. Fla. Feb. 16, 2011).

81 *SEC Expanding the Scope of Insider Trading*, THE SECURITIES LAW BLOG, https://seclaw.blogspot.com/2014/04/sec-expanding-scope-of-insider-trading.html (last visited April 5, 2020); *see also* Perino ("Critics charge that enforcers take too broad a view of such duties and that they expand them to fit the needs of the actions they want to file. The result is a vague and uncertain liability standard. These non-traditional duties of trust and confidence have involved . . . familial relationships . . . ." (footnotes omitted)).

82 *Cf.* Sec's & Exch. Comm'n, Selective Disclosure & Insider Trading, Release No. 7881, 65 Fed. Reg. 51716, 51730 (Aug. 24, 2000) [hereinafter SEC Adoption Release] ("Our experience in this area indicates that most instances of insider trading between or among family members involve spouses, parents and children, or siblings; therefore, we have enumerated these relationships and not others."); Sec's & Exch. Comm'n, Selective Disclosure & Insider Trading, Release No. 7787, 64 Fed. Reg. 72590, 72602 (Dec. 28, 1999) [hereinafter SEC Proposing Release] ("We have investigated and prosecuted a large number of insider trading cases that involved trading by friends or family members of insiders.").

83 *See SEC Expanding the Scope of Insider Trading*, THE SECURITIES LAW BLOG, https://seclaw.blogspot.com/2014/04/sec-expanding-scope-of-insider-trading.html (last visited April 5, 2020) ("Unfortunately, because these cases settle, the questionable legal theory is not being tested.").

of these cases are brought. [84] **[*191]** Specifically, seventeen of the 66 friends-and-family misappropriation cases identified for purposes of the study involved spousal misappropriation. [85]Sixteen of these seventeen cases involve allegations of husbands misappropriating information from wives. [86]The recurrent nature of spousal misappropriation cases requires a look beyond historical judicial and regulatory pronouncements for answers to the spousal duty questions raised by these cases.

B. First Principles Applicable to Spousal Misappropriation

First principles emanating from both insider trading doctrine and the legal treatment of information conveyed in spousal relationships outside the insider trading context hold promise to provide helpful guidance. **[*192]** Basic assumptions underlying two separate things--U.S. insider trading law as a type of securities fraud and the norms of marital relationships--are fundamental to spousal misappropriation actions. With that in mind, this Part II.B offers a closer inspection of both (1) suppositions fundamental to the deception requirement that is at the heart of misappropriation liability under U.S. insider trading law and (2) the policy underpinnings of one of the two testimonial spousal privileges--the privilege regarding communications between spouses made in confidence during the course of their marriage--in the hope that they may offer important insights.

1. Deception as a Foundation for Misappropriation Liability

For insider trading liability to be cognizable under Section 10(b), there must be either manipulation or deception. [87]Section 10(b) is express on this point; it makes unlawful the use or employment, in connection with a securities transaction, of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." [88]Misappropriation liability **[*193]** is expressly based on deception. [89]Specifically, a

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[84] The study analyses a propriety data set of publicly available insider trading cases reported between 2008 and 2018 that involve information exchanges occurring outside the workplace--between friends and family. The cases include civil (federal court and administrative) enforcement actions culled from a review of SEC litigation releases and complaints and criminal enforcement actions identified from date-restricted content-based searches on Bloomberg Law. Additional information about the data set and the study are available from the author.

[85] The seventeen cases include thirteen federal court actions brought by the SEC, two administrative court actions brought by the SEC, and two criminal prosecutions.

[86] The sole enforcement action identified in which a wife misappropriated information from a husband was brought as an SEC administrative court action. *See In re* Jo Ann Myers & Hollis W. Pickett, Jr., Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities [sic] Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Exchange Act Release No. 79581 (Dec. 16, 2016), *available at* https://www.sec.gov/litigation/admin/2016/34-79581.pdf. A separate study similarly identified husbands as common recipients of information from wives in insider trading actions, although it did not differentiate between tipping and misappropriation cases. *See* Kenneth R. Ahern, *Information Networks: Evidence from Illegal Insider Trading Tips*, 125 J. FIN. ECON. 26 (2017) ("[C]ompared to non-family associates, husbands are more likely to be tipped, while wives, sisters, and in-laws are less likely to be tipped.").

[87] 17 C.F.R. § 240.10b-5 (2020).

[88] 15 U.S.C. § 78j(b) (2018); *see also* Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017, 1027-28 (2009). In a prior work, I described insider trading's roots in deceptive conduct as follows:

> [I]nsider trading in the United States is illegal because it is deceptive as a betrayal of a relationship of trust and confidence relating to material nonpublic information about a corporation or its securities. This kind of trading deceives those who trust the holder of the material nonpublic information--those who trust the holder not to use the information improperly and selectively for his or her or its advantage.

misappropriator deceives the source of information by using it improperly--in contravention of a fiduciary or fiduciary-like duty of trust and confidence owed to that source. [90]

In essence, "the deception essential to the misappropriation theory involves feigning fidelity to the source of information." [91]It represents an intentional disregard for the confidentiality borne of a trust relationship--an intentional disregard that is designed to give the misappropriator an advantage over market investors. [92]Importantly, the Supreme Court has expressly averred that "the theory is limited to those who breach a recognized duty." [93]

Existing decisional law, as illustrated by the court opinions described *supra* Part II.A, does not offer clear guidance on the extent to which marriage may be the source of that "recognized duty" in any individual case. Court opinions part ways on the facts--most particularly **[*194]** the extent to which there is a pattern of confidential treatment of business matters in the specific marriage. Yet, the conduct of a spouse in duplicitously obtaining, and then disclosing or using, information conveyed or obtained under circumstances that indicate its nonpublic nature and confidentiality is a violation of the trust inherent in an archetypal marriage. [94]

Section 10(b)'s deception requirement is not inherently bound to omissions to state material fact in fiduciary contexts; nothing in the statute itself or in Rule 10b-5 mandates that deception occur in a fiduciary context. It is in decisional law, as described in Part II.A, that establishes the requirement of a fiduciary or fiduciary-like duty in specific contexts. Deception may therefore be construed to have a more capacious meaning--one that extends beyond fiduciary or fiduciary-like duties to obligations of candor and integrity in wider contexts imbued with extralegal content. [95]In fact, deception has been defined broadly as "the act of causing someone to accept as true or valid what is false or invalid." [96]Essentially, deception involves false pretense--tricking or hoodwinking another--achieved by **[*195]** concealing the full truth from someone through words or action in a context where complete truth is reasonably expected. The common law tort of deceit recognizes this more holistic meaning. [97]Although many expressions of deception in legal causes of action focus on misrepresentations, concealment of

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Id. (footnotes omitted).

89 *See* United States v. O'Hagan, 521 U.S. 642, 659 (1997) ("The misappropriation at issue here was properly made the subject of a § 10(b) charge because it meets the statutory requirement that there be 'deceptive' conduct 'in connection with' securities transactions.").

90 *See id.* at 652 ("[T]he misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.").

91 *Id.* at 655.

92 *See id.* at 658-59 ("An investor's informational disadvantage vis-á-vis a misappropriator with material, nonpublic information stems from contrivance, not luck; it is a disadvantage that cannot be overcome with research or skill.")

93 *Id.* at 666.

94 *See infra* Part II.B.2 for an exploration of societal norms and expectations relating to marital relationships.

95 *See, e.g.*, Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 160 (2001) ("[T]he definition of what constitutes deception in offenses like mail fraud, securities fraud, and the Model Penal Code's theft by deception exhibits a much more flexible formal structure and moral content than ever could have been anticipated at common law."); *id.* at 182 (noting that "[i]n contrast to perjury and false declarations--which . . . require both an assertion and literal falsity--offenses such as fraud . . . reflect a more flexible concept of deception.").

96 Deception, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/deception (last visited April 11, 2020).

the truth through omissions (as well as other conduct) also may constitute actionable deception in various legal contexts. [98]

The language of Rule 10b-5 certainly allows for a more all-inclusive approach to defining deception--one not limited to fiduciary or fiduciary-like relationships. Although Rule 10b-5(b) expressly governs misstatements **[*196]** and misleading omissions to state material fact relating to existing disclosed facts, [99]Rules 10b-5(a) and (c) articulate a wider scope of proscribed conduct. Specifically, Rule 10b-5(a) makes unlawful "any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security," [100]and Rule 10b-5(c) prohibits "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . in connection with the purchase or sale of any security." [101]While Rule 10b-5(a) is limited to vehicles used to commit fraud, the use of the terms "would operate" and "deceit" in Rule 10b-5(c) may implicate even wider-ranging conduct related to transactions in securities. Notably, the SEC's complaint in the *Hawk* case alleges violations of all three clauses of Rule 10b-5. [102]

Context is therefore important. [103]Deception underlies, pervades, and cuts across numerous different types of legal rules and claims, both civil and criminal. [104] **[*197]** Judicial opinions in misappropriation actions

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[97] RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST.1977) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."). A comment to this rule in the *Restatement* clarifies that ". . . words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist." *Id.* cmt. B.

[98] One legal scholar in this area helpfully explains the range of deceptive conduct in the following way:

> Falsehoods are but one way that a person can cause a false belief in another. Thus false advertising law recognizes that a literally truthful advertisement can cause consumers to draw false inferences; tort law recognizes that concealing a fact can be as wrongful as lying about it; and disclosure duties recognize that the failure to act can also cause false beliefs in others. The law of deception includes these and other laws that target deceptive acts and omissions.

Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707 708 (2018).

[99] 17 C.F.R. § 240.10b-5(b) (2020).

[100] 17 C.F.R. § 240.10b-5(a).

[101] 17 C.F.R. § 240.10b-5(c).

[102] Hawk Complaint, *supra* note 5, at P 17.

[103] John Bliss, *The Legal Ethics of Secret Client Recordings*, 33 GEO. J. LEGAL ETHICS 55, 68 (2020) ("[D]eceit is difficult to define without context.").

[104] *See, e.g.*, Green, *supra* note 95, at 159 (offering "an account of the structural and moral differences among three different kinds of deception" common to legal and moral wrongs); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 452 (2012) (identifying, examining, and applying "three methods the law uses to regulate deception between private parties, which correspond to three types of laws of deception: interpretive, purpose-based, and causal-predictive."). Klass collectively labeled the myriad laws in this area "the law of deception," discussing the laws which "address the flow of information between private parties," further stating,

> Familiar examples include the torts of deceit, negligent misrepresentation, nondisclosure, and defamation; criminal fraud statutes; securities law, which includes both disclosure duties and penalties for false statements; false advertising law; labeling requirements for food, drugs, and other consumer goods; and, according to recent scholarship, information-forcing penalty defaults in contract law and elsewhere. Taken together, these and similar laws constitute what I will call the "law of deception." They regulate the flow of information between private parties to prevent dishonesty, disinformation, artifice, cover-up, and other forms of trickery, or to avert mistake, misunderstanding, miscalculation, and other types of false belief.

brought under Section 10(b) and Rule 10b-5 can and should recognize and accept broad notions of deception to the extent that they serve the policy objectives underlying the misappropriation theory--namely, promoting market integrity as a means of encouraging investment activity. [105]"[U]sing misappropriated information could thereby create liability, not because a duty to disclose has been imposed but because use of the information is deceptive in and of itself." [106]

Broader notions of deception are sometimes present in decisional law under Section 10(b) and Rule 10b-5, although the Supreme Court has not specifically endorsed them in the insider trading context. Significantly, Supreme Court jurisprudence does recognize the importance of candor in federal securities law, noting that "[a] fundamental purpose, common to these statutes, was to substitute a philosophy of full **[*198]** disclosure for the philosophy of caveat emptor." [107]As an implementation of that philosophy of full disclosure, some lower federal courts have begun to embrace the inherent and potential breadth of deception in the insider trading context. [108]

For example, in *S.E.C. v. Rocklage*, [109]a wife fully disclosed to her husband her intention to inform her brother of material nonpublic information misappropriated from the husband, which would, based on Supreme Court dicta in the *O'Hagan* opinion, [110]seemingly foreclose misappropriation liability because of a lack of deception. The *Rocklage* court acknowledged this impediment to the SEC's case. [111]Yet, the court's **[*199]** opinion in *Rocklage* further recognized that the timing of the wife's disclosure to the husband (after he already had afforded her the information in confidence) in combination with the wife's preconceived plan to make the information available to her brother did constitute the requisite deception.

> [B]efore her husband's initial disclosure about the clinical trial, Mrs. Rocklage did absolutely nothing to correct his mistaken understanding that she would keep the trial results confidential. This was so even though Mrs. Rocklage knew that her husband had this (mis)understanding, and even though she had a preexisting arrangement to disclose certain confidential information to her brother. [112]

Id. at 449-50.

105 *See supra* note 36 and accompanying text.

106 Apolinsky, *supra* note 49, at 525.

107 Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (emphasis omitted).

108 *See* Nagy, *supra* note 24, at 1340 ("Although several lower courts have adhered strictly to the Supreme Court's dictate that insider trading liability must be predicated on deception by a fiduciary, a growing number of courts simply disregard this fiduciary dictate when it forecloses liability against a defendant who has traded securities based on wrongfully obtained information." (footnote omitted)).

109 470 F.3d 1 (1st Cir. 2006).

110 *See* United States v. O'Hagan, 521 U.S. 642, 655 (1997) ("[F]ull disclosure forecloses liability under the misappropriation theory: Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation . . . .").

111 *Rocklage*, 470 F.3d at 8. The court's specific acknowledgement included a reference to the *O'Hagan* opinion:

> Had Mrs. Rocklage never made any disclosure of her intent to tip her brother, there would have been deception in connection with a securities transaction when she did tip her brother, without her husband's consent, to enable her brother to trade in securities. Under *O'Hagan*, this would have been the case irrespective of the means by which Mrs. Rocklage acquired the information.

112 *Id.*

Ultimately, the *Rocklage* court expressly found that, although the wife's tip was not deceptive under the reasoning set forth in *O'Hagan*, her acquisition of the information from her husband--an independent course of conduct from the associated tipping of her brother--was deceptive. [113]

Broad-based notions of deception also have begun to influence legal scholarship on insider trading. In particular, Professor Donna Nagy has argued compellingly that deception can occur outside the construct of fiduciary and fiduciary-like duties. [114]She **[*200]** suggests, on the basis of *Rocklage* and other cases founded in deception that may be deemed to be outside the context of fiduciary and fiduciary-like relationships, that "courts could recognize an insider trading theory based on the deceptive acquisition of confidential information." [115]She points out that this theory, while used in *Rocklage* in a misappropriation context, represents a broader liability scheme not necessarily confined to misappropriation cases. [116]Nevertheless, the deceptive acquisition theory of liability is useful in the spousal misappropriation setting where confidentiality may well be expected, even if that confidentiality is not borne of a legally recognized fiduciary or fiduciary-like relationship. It illustrates an important application of broader notions of deception in the spousal misappropriation context.

2. The Policy Underlying Spousal Privilege

An additional first principle--one relating to information conveyed in spousal relationships generally--also is in play in spousal misappropriation cases. Specifically, marital relationships enjoy distinctive treatment under federal and state rules of evidence because of their innate capacity to include confidential communications. This distinctive treatment exists in the form of a spousal confidential communications privilege that proscribes testimony about confidential marital communications. [117]This marital privilege is one of two **[*201]** recognized under the Federal Rules of Evidence as common law marital privileges. [118]

At the outset, the two spousal privileges were not seen as separate. The U.S. Supreme Court first recognized a spousal privilege in 1839 in *Stein v. Bowman*, [119]a legal action in which a wife was called to testify about facts relating to communications with her husband, who was no longer alive at the time of the trial in the case. In its opinion, the Court expressly acknowledged that "[i]t is a general rule that neither a husband nor wife can be a

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113 *Id.* ("We agree that this acquisition of information was deceptive.").

114 Nagy, *supra* note 24; *see also* Apolinsky, *supra* note 49, at 522 ("[T]he fiduciary relationship is no longer the *sine qua non* of insider trading liability--other kinds of relationships implicate the broader policies of section 10(b) and Rule 10b-5.").

115 Nagy, supra note 24, at 1322.

116 *Id.* at 1369 ("[A] theory of deceptive acquisition is analytically distinct from the misappropriation theory endorsed in *O'Hagan*."

117 *See* Naomi Harlin Goodno, *Protecting "Any Child": The Use of the Confidential-Marital-Communications Privilege in Child-Molestation Cases*, 59 U. KAN. L. REV. 1, 3 (2010); Katherine O. Eldred, Comment, *"Every Spouse's Evidence": Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials*, 69 U. CHI. L. REV. 1319, 1319-20 (2002).

118 *See generally* FED. R. EVID. 501 (providing, subject to exceptions for express constitutional, statutory, or court rules to the contrary, that "[t]he common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege . . . ."). The second of the two common law marital privileges currently recognized is "the adverse spousal testimonial privilege, also known as the antimarital facts privilege" which applies, at least in criminal proceedings, regardless of the confidential nature of the spousal communications. Eldred, *supra* note 117, at 1319-20; *see also* Goodno, *supra* note 117, at 3. The two privileges are distinct and individually applicable, based on context. *See* Wolfle v. United States, 291 U.S. 7, 14 (1934) ("[T]he privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved.").

119 38 U.S. 209 (1839).

witness for or against the other. This rule is subject to some exceptions; as where the husband commits an offence against the person of his wife." [120]The *Stein* Court noted specifically what later were recognized as the two distinct spousal privileges: "[T[he wife is not competent, except in cases of violence upon her person, directly to criminate her husband; or to **[*202]** disclose that which she has learned from him in their confidential intercourse." [121]

Although various policy rationales for the spousal privilege have been forwarded over time, the privilege itself, as articulated in *Stein*, recognizes the confidentiality of information conveyed in marital relationships--"the confidence that subsists between husband and wife." [122]The *Stein* Court explained its understanding of the policy roots of the spousal privilege in the following way:

> This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence. [123]

[*203] This policy rationale offers insights into the reasonable expectations of a marital relationship. It is expected to be a relationship in which confidences can be and are enjoyed, and there is a societal benefit to be gained from preserving that bond of trust and confidence. [124]

In fact, some courts--including the U.S. Supreme Court--have expressly acknowledged that confidentiality is presumed in marital relationships. In 1951, for example, the Court expressly averred that "marital communications are presumptively confidential." [125]The presumption is, however, rebuttable by the litigant seeking to

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120 *Id.* at 221 (citations omitted).

121 *Id.* at 222; *see also* Eldred, *supra* note 117, at 1334 (footnote omitted) ("The Stein rule combined spousal incompetence to testify with a privilege rule that appears to match with the modern confidential communications privilege. American law had not yet separated a confidential communications privilege from an adverse testimonial privilege.").

122 *Stein*, 38 U.S. at 223. Although many cases refer to spouses as husband and wife, it should be noted that the U.S. Supreme Court has recognized same-sex marriages and expressly noted that the spousal privilege is a right attendant to marriage. *See* Obergefell v. Hodges, No. 14-556, slip op. at 16-17 (U.S. June 26, 2015).

123 *Stein*, 38 U.S. at 223; *see also* Eldred, *supra* note 117, at 1323 n.28 ("The policy justifications for the spousal confidential communications privilege in American law are much the same as for the others: the privilege is needed to encourage marital confidences, which in turn promotes marital harmony.").

124 *See, e.g.*, Hawkins v. United States, 358 U.S. 74, 77 (1958), *holding modified by* Trammel v. United States, 445 U.S. 40 (1980) ("The basic reason the law has refused to pit wife against husband or husband against wife . . . was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well."); Wolfle v. United States, 291 U.S. 7, 14 (1934) (citations omitted) ("The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."); State v. Freeman, 276 S.E.2d 450, 453 (N.C. 1981) (footnote omitted) ("[S]pouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage. This holding allows marriage partners to speak freely to each other in confidence . . . .").

125 Blau v. United States, 340 U.S. 332, 333 (1951).

introduce the testimony. [126]In an earlier case, **[*204]** the Court first noted the presumption and its rebuttable nature.

> Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication. [127]

The presumption of confidentiality in a marriage stems from the bond of trust commonly generated and assumed to exist in a marriage and is an integral incentive to full disclosure. [128]

Support for the spousal privilege relating to confidential communications has not been consistent or uniform, however. Some may, in fact, believe it is eroding. In 1975, in eliminating this privilege from express codification in the Federal Rules of Evidence, "the Advisory Committee reasoned that because most married couples were unaware of the marital-communications **[*205]** privilege, it probably had little influence on how spouses conducted themselves inside the marriage." [129]Moreover, New Mexico recently judicially abolished its codified spousal communication privilege. [130]In doing so, the New Mexico Supreme Court used relatively strong language asserting the lack of a foundation for the rule in current times.

> This Court has a constitutional duty to ensure that the pursuit of truth is not unduly undermined by a procedural rule that has outlived its justification. Having carefully examined the spousal communication privilege, we cannot accept that it meaningfully encourages marital confidences, promotes marital harmony, or produces any substantial public benefit that justifies its continued recognition. Rather, we believe that the privilege is a vestige of a vastly different society than the one we live in today and has been retained in New Mexico simply through inertia. [131]

In dissenting from this part of the New Mexico Supreme Court's opinion, one of the justices reaffirmed the policy justifications for the privilege. [132]

[*206] Nevertheless, the long history of the spousal confidential communications privilege and its relatively strong roots in the presumed existence of a relationship of trust and confidence between spouses offers us another lens for inspection of spousal misappropriation cases under U.S. insider trading law. The relationship between spouses

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126 *Id.* (noting that "The Government made no effort to overcome the presumption."); *see also* Goodno, *supra* note 117, at 10 ("[T]he party seeking to introduce the privileged communication bears the burden to overcome this presumption.").

127 *Wolfle*, 291 U.S. at 14 (1934).

128 Courts allude to the confidential, trusting nature of a marriage relationship in various contexts outside the spousal privilege. *See, e.g.*, Beller v. Tilbrook, 571 S.E.2d 735, 736 (Ga. 2002) (citations omitted) ("As husband and wife, Beller and Tilbrook enjoyed a confidential relationship. Thus, Tilbrook was entitled to repose confidence and trust in Beller."); Miller v. Paul Revere Life Ins. Co., 501 P.2d 1063, 1067-68 (Wash. 1972) ("The relationship of trust and confidence which is presumed to exist between spouses should result in their mutual disclosure *inter se* of all matters pertaining to community property . . . .").

129 Goodno, *supra* note 117, at 11.

130 State v. Gutierrez, No. S-1-SC-36394, 2019 WL 4167270, at *9 (N.M. Aug. 30, 2019).

131 *Id.*

132 *Id.* at *17 (Vigil, J., concurring in part, dissenting in part) ("As a solemn vow of unity, marriage creates for many a sacred space to share oneself with a chosen other. That space should remain free from state intrusion and compulsion that would demand one spouse to reveal the intimate secrets of the other.").

may not be fiduciary or fiduciary-like, but its status as a relationship of trust and confidence is well embedded in the law of evidence through the spousal communications privilege. The lengthy, relatively strong heritage of that privilege provides indirect support in judicial efforts to confidently move beyond the *Chestman* court's narrow view of the type of relationships that generate a duty of trust and confidence in spousal misappropriation cases. [133]

III. The *Hawk* Case and U.S. Insider Trading Regulation

The foregoing summaries of existing decisional law and regulation and related inquiries into deception and spousal privilege are highly relevant to the *Hawk* case and others like it. Although the applicable law and regulation have begun to provide more clarity regarding the existence of a fiduciary-like duty of trust and confidence in marital relationships for purposes of misappropriation liability under existing interpretations of Section 10(b) and Rule 10b-5, doubt lingers. Much of the doubt can be attributed to the fact that the regulatory presumption of the requisite duty under Rule 10b5-2 is rebuttable and the grounds for the rebuttal remain relatively untested. However, the overall uncertainty in spousal misappropriation cases is undoubtedly exacerbated by, among other things, lingering ambivalence about (and, indeed, some hostility toward) the misappropriation theory of U.S. insider trading **[*207]** liability as ordained by the U.S. Supreme Court in *O'Hagan* and uncertainty about the nature and scope of relevant spousal confidentiality obligations under the Second Circuit's *Chestman* opinion, which took a narrow view of the spousal duty required to constitute the requisite deception for insider trading liability.

In the absence of new decisional law and additional SEC guidance, this article offers and develops two additional ways to ponder and instigate future doctrinal development. They involve delving deeper into the contextual meaning of deception as the doctrinal basis for misappropriation liability and looking at decisional law and policy relating to marital relationships in a different legal context: the spousal confidential communications privilege in the law of evidence. Deception and the marital context are critical elements of the puzzle surrounding spousal misappropriation. The resulting insights offer bases for both expanding spousal misappropriation liability beyond fiduciary-like relationships and substantiating a relatively strong presumption of trust and confidence in marital relationships.

A more comprehensive, searching exploration of the potential contours of the deception element of a claim under Section 10(b) and Rule 10b-5 offers opportunities to re-evaluate the requirement of a fiduciary or fiduciary-like duty of trust and confidence as a precursor to spousal misappropriation (and other) liability under U.S. insider trading law. Although the breach of a duty of trust and confidence is accepted and understood as a deceptive practice, other conduct connected to the purchase or sale of a security also may be deceptive. In particular, the acquisition of material nonpublic information may occur by deceptive means. The *Hawk* case provides an example of a non-consensual, and likely deceptive, acquisition of information from a spouse in connection with securities trading.

[*208] The SEC's complaint against Tyrone Hawk alleged that he both overheard [134] and was the express recipient of [135] material nonpublic information relating to a possible near-term acquisition by his wife's employer. The information overheard apparently was acquired covertly; his wife did not knowingly elect or expect to share it with him. The information expressly imparted to him, which related to a trading blackout concerning the stock of his wife's employer due to a pending acquisition, indicates both the confidential nature of any information he may have obtained about the acquisition and its important connection to securities trading. Yet, according to the SEC's complaint, Tyrone Hawk nevertheless purchased securities in the target firm while in possession of that material nonpublic information [136] -- information he had surreptitiously acquired from his wife and knew was

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133 *See supra* notes 62-66 and accompanying text.

134 Hawk Complaint, *supra* note 5, at P 1. The complaint also alleges that additional information may have become "available to Hawk because his wife frequently worked from home." *Id.* at P 11.

135 *Id.* at PP 1, 11.

136 *Id.* at PP 1, 12.

material, nonpublic, and confidential. He later sold those securities for a profit. [137]Tyrone Hawk's alleged conduct deceived his wife because he affirmatively concealed his furtively gained knowledge and trading intentions from his wife under circumstances in which she reasonably expected that he understood the strictly confidential nature of any information he might have about the acquisition. [138]Tyrone Hawk's conduct **[*209]** should be recognized as deceptive under the misappropriation theory of U.S. insider trading liability, regardless of whether the duty he owed to his wife is fiduciary or fiduciary-like in nature. A failure to recognize deception in spousal misappropriation cases erodes market integrity in the same way that allowing a trade or affirmative tip by the wife would, even though the deceived person is different.

Parenthetically, it would seem that the investing public reasonably expects confidentiality to be maintained in these circumstances. A husband should not be able to engage in securities trading or related activities prohibited as to the wife, or vice versa. However, misappropriation liability as currently conceived does not expressly recognize the expectation of market participants. Rather, it recognizes deception of the source of information.

At its core, spousal misappropriation liability is concerned with more than deception, however. It involves assessment of the institution of marriage. There may be marriages in which established norms of trust and confidence do not exist. This raises the question of whether, under existing misappropriation law, deception should always be found when a spouse either acquires or uses material nonpublic information obtained from a spouse without consent.

An analysis of the policy underpinnings of the spousal confidential communications privilege offers support for the SEC's adoption of a regulatory presumption of a fiduciary-like spousal duty of trust and confidence. The SEC's proposing and adoption releases for Rule 10b5-2 do not expressly mention the spousal communications privilege. [139]However, the proposing **[*210]** release touches on common ground with that spousal privilege in the following passage justifying the SEC's choice of spousal relationships, among other family relationships, for special treatment in establishing the duty of trust and confidence necessary to liability in misappropriation cases:

> Our enforcement experience demonstrates that these are the relationships in which family members most commonly share information with a legitimate expectation of trust or confidentiality. These also are normally the types of close familial relationships in which the parties have a history, pattern, or practice of sharing confidences that would lead to a reasonable expectation of confidentiality. [140]

Thus, the rebuttable presumption set forth in Rule 10b5-2(b)(3)--that a duty of trust and confidence is presupposed in a spousal relationship--appears to be founded on the same or a substantially similar understanding of the marital

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[137] *Id.* at PP 1, 13.

[138] The SEC alleged from these facts that Tyrone Hawk "was expected to maintain in confidence the nonpublic information" concerned the acquisition. *Id.* at P14. Although the SEC's allegation in this regard was based on the existence of a fiduciary or fiduciary-like duty owed by Tyrone Hawk to his wife, this expectation of confidence remains a salient observation based on the underlying facts alleged, even independent of that duty.

[139] *See* SEC Adoption Release, *supra* note 82; SEC Proposing Release, *supra* note 82. Interestingly, few reported insider trading opinions mention the spousal privilege. *See, e.g.*, United States v. Pinto-Thomaz, 352 F. Supp. 3d 287, 309 n.12 (S.D.N.Y. 2018), *reconsideration denied*, No. S2 18-CR-579 (JSR), 2019 WL 1460216 (S.D.N.Y. Jan. 10, 2019); S.E.C. v. Melvin, No. 1:12-CV-2984-CAP, 2014 WL 11833265, at *4 (N.D. Ga. Feb. 19, 2014); S.E.C. v. De La Maza, No. 09-21977-CIV, 2011 WL 13174213, at *3 n.2 (S.D. Fla. Feb. 16, 2011).

[140] SEC Proposing Release, *supra* note 82, at 72604 (footnote omitted).

relationship as the spousal privilege relating to confidential communications established under the rules of evidence. [141]

[*211] Assumed confidential relations in marriage--a trust relationship--provide a key, basic foundation for the spousal confidential communications privilege. The existence of communications shared exclusively in a legally valid marriage must be proven to initially invoke the privilege. If credit is given to the presumed existence of trust and confidence in marital relations in one area of legal inquiry (evidentiary rules), it seems anomalous to fail to give credit to the same presumption of trust and confidence in another area of legal inquiry (insider trading regulation), even if underlying policy may give different credence to the trusting and confidential nature of that relationship in context. It is important to note that the spousal communications privilege does not exist only for personal or familial (as opposed to business or professional) information shared in a marriage. [142]

Although a specific allegation as to the legally valid nature of Tyrone Hawk's marriage is not included in the SEC's complaint in its insider trading enforcement action against him, the complaint otherwise alleges facts sufficient to suggest the applicability of the spousal confidential communications privilege. [143]These same facts should be sufficient to effectively assert the presumed duty of trust and confidence under Rule 10b5-2(b)(3) for purposes of misappropriation liability under Section 10(b) and Rule 10b-5. A tortured judicial or regulatory analysis of the fiduciary-like nature of that duty should not be required. [144]This was the SEC's **[*212]** essential purpose in proposing the adoption of Rule 10b5-2(b)(3). [145]In its adoption release, the SEC articulated two key benefits associated with adoption of the rule.

> First, the rule will provide greater clarity and certainty to the law on the question of when a family relationship will create a duty of trust or confidence. Second, the rule will address an anomaly in current law under which a family member receiving material nonpublic information may exploit it without violating the prohibition against insider trading. By addressing this potential gap in the law, the rule will enhance investor confidence in the integrity of the market. [146]

The SEC's adoption of Rule 10b5-2 sensibly aligns the marital relations policy underpinnings for spousal misappropriation with those for the spousal confidential communications privilege.

The combined forces of this policy alignment and a broad interpretation of Section 10(b)'s deception requirement compel recognition of and respect for the presumption of a spousal duty of trust and confidence as a basis for spousal misappropriation liability under Section 10(b) and Rule 10b-5. Thus, the regulatory **[*213]** presumption in

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[141] *Cf*. Charles W. Murdock, *The Future of Insider Trading After* Salman: *Perpetuation of a Flawed Analysis or a Return to Basics*, 70 HASTINGS L.J. 1547, 1581 (2019) (asking, in decrying the Second Circuit's view of marriage in the *Chestman* opinion, how the court would "explain the marital privilege that one spouse need not testify against another").

[142] This is noted because the *Chestman* court placed emphasis in its opinion on the absence of a "repeated disclosure of business secrets between family members." United States v. Chestman, 947 F.2d 551, 569 (2d Cir. 1991).

[143] *See* Hawk Complaint, *supra* note 5, at PP 1, 2, 10, 11, 12, 14, 15 (mentioning the husband-wife relationship between Tyrone Hawk and his wife as it relates to other factual allegations relevant to the case).

[144] One scholar notes a judicial conflation of fiduciary and confidential relationships in the marriage context. Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 26 (2012) (footnotes omitted) ("In disputes over marital agreements, courts frequently expound on the meaning of marriage as a "confidential" or "fiduciary" relationship. While the terms carry distinct meanings in trust law, they are often used interchangeably when used to describe the special nature of the marital relationship.").

[145] *See* SEC Proposing Release, *supra* note 82, at 72602 (noting that the *Chestman* decision leads to anomalous results that Rule 10b5-2(b)(3) is intended to correct).

[146] SEC Adoption Release, *supra* note 82, at 51734.

Rule 10b5-2(b)(3) should be accorded due deference. Moreover, rebutting the presumption should require a high threshold level of evidentiary proof. Specifically, to effectively rebut the presumption, the defendant spouse should be compelled to produce evidence establishing that the spousal source of the material nonpublic information was not deceived in either the acquisition of that information by the defendant spouse or its use by the defendant spouse in tipping or trading.

Overall, the analysis forwarded in this article demonstrates that, under current U.S. insider trading law, a spouse should not be able to obtain material nonpublic information from a spouse and lawfully engage in securities trading or tipping of that information to others without affirmatively justifying those actions to a trier of fact. Decisional law should recognize that, absent unusual countervailing facts, either the clandestine or underhanded acquisition of material nonpublic information from a spouse or undisclosed trading or tipping while in possession of material nonpublic information obtained from a spouse constitutes the deception necessary to misappropriation liability under Section 10(b) and Rule 10b-5. This conception of deception recognizes that "[t]he intimacy inherent in the marriage relationship demands trust and results in the exchange of information." [147]

IV. Conclusion

Spousal misappropriation cases like *S.E.C. v. Hawk* have generated numerous questions and analytical difficulties for litigants, jurists, and regulators. This **[*214]** article offers a specialized legal analysis of these recurrent insider trading scenarios. The analysis supports enforcement actions based on a strong threshold presumption of a relationship of trust and confidence in spousal relations, as recognized by the SEC through its adoption of Rule 10b5-2(b)(3). This support derives from a focus on two fundamental building blocks of spousal misappropriation cases--a broad understanding of deception as it is relevant to these cases and longstanding accepted sociolegal wisdom on the nature of marital relationships as evidenced in the spousal communications privilege.

Simply put, marriage is a relationship of trust and confidence; to the extent a spouse's breach of that trust or confidence is deceptive and occurs in connection with the purchase or sale of securities, the breach should be deemed to provide a basis for insider trading enforcement. Market integrity is damaged through marital deception in the same way that it is damaged through the deception by an attorney of a client or the attorney's law firm partners. Market actors depend on the confidentiality of information shared in marriages as well as information shared in attorney-client relationships and partnerships.

Nonetheless, spousal misappropriation cases raise other questions that remain unanswered. In particular, many traits of the individual spouses involved in alleged spousal misappropriation are unknown, and the motives for marital breaches of trust and confidence in spousal misappropriation cases are unclear. We do not know much at all from publicly available information, for example, about the spouses who engage in misappropriation (or conduct that may constitute misappropriation) under Section 10(b) and Rule 10b-5. Other than their gender, are there particular attributes of these marital partners that make them more likely to be subject to or engage in alleged or actual spousal misappropriation? Also, publicly available information **[*215]** gives us little information about why a spouse would engage in securities trading while possessing, or tip another about, material nonpublic information faithlessly or faithfully obtained through the marital relationship. Is the conduct always directed toward making money, or is there some other benefit or detriment that we may not recognize or properly weigh in understanding behavioral motivations or other instrumental causes? The gathering, assembly, and analysis of information of this kind would require an empirical study of spousal misappropriation cases and their participants that is beyond the scope of this article--but within the scope of the overall research agenda of this author and others. Only with more information about spousal information sources, spousal misappropriators, and the motivations of spousal misappropriators can we determine whether U.S. insider trading regulation is properly calibrated to deter unwanted behaviors and incentivize compliance.

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[147] Meghan McCalla, *The "Socially Endorsed, Legally Framed, Normative Template": What Has in Re Marriage Cases Really Done for Same-Sex Marriage*?, 1 EST. PLAN. & COMMUNITY PROP. L.J. 203, 226 (2008).

It is important to recognize that the current basis of U.S. insider trading liability--as a part of the doctrine of securities fraud--underlies the need for proving deception in spousal misappropriation and other contexts. Indeed, U.S. insider trading regulation is opaque and complex. Many have suggested that the regulation of insider trading in the United States would be more coherent if federal regulators (legislative and administrative) rewrote it from scratch with a clear policy foundation and accountability to market theory. [148] **[*216]** Most note that a legislative codification of insider trading is doubtful (at best). [149]Some have suggested deregulating insider trading entirely. [150]These proposals are acknowledged and appreciated, although their validity and desirability depend on a deeper understanding of market participants and their behaviors that continues to be developed.

This article therefore represents only a start--but an important one--in understanding spousal misappropriation liability and its role in shaping insider trading regulation. It offers information useful to courts, enforcement agents, and regulators, as well as market actors and their legal counsel, as they interpret and apply existing legal doctrine and policy to spousal misappropriation as a recurrent type of insider trading context. Limited changes to insider trading law may result from these interpretations and applications. **[*217]** However, until quantitative and qualitative empirical work, including potentially ethnographic studies, reveal more about the actors involved in the information exchanges and securities transactions comprising spousal misappropriation, more comprehensive law reform efforts--those addressing, for example, the root causes or deterrents of spousal misappropriation--must wait for another day.

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148 *See, e.g.*, Bruce W. Klaw, *Why Now Is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory*, 7 WM. & MARY BUS. L. REV. 275, 345 (2016) (proposing "a new statutory provision in the United States that will define insider trading under an 'equality of access' theory"); Andrew W. Marrero, *Insider Trading: Inside the Quagmire*, 17 BERKELEY BUS. L.J. 234, 234 (2020) (recommending the adoption of "a statutory framework prohibiting insider trading on the basis of knowing possession of material nonpublic information . . . situated under the strict liability principle embodied in Section 16 of the 1934 Act").

149 *See, e.g.*, John F. Olson et al., *Recent Insider Trading Developments: The Search for Clarity*, 85 NW. U. L. REV. 715, 738 (1991) ("[T]he law of insider trading is likely to continue to develop through case decisions, not by legislative definition."); Robert Steinbuch, *Mere Thieves*, 67 MD. L. REV. 570, 613-14 (2008) ("Almost every other country that prohibits insider trading uses statutes that specifically define the relevant terms. . . . Only the United States refuses to legislatively define its terms, allowing the judiciary significant discretion in developing the prohibition against insider trading. [F]uture legislative action seems unlikely." (footnotes omitted)).

150 *See, e.g.*, HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966) (arguing that unregulated insider trading, absent fraudulent misrepresentation, creates market efficiencies and represents compensation to insiders); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 861 (1983) (assessing the rationales for insider trading regulation and suggesting the deregulation of insider trading as an efficient means of compensating corporate management).