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In a recent decision showing how courts evaluate insider trading in the marital context, the First Circuit Court of Appeals affirmed a Massachusetts real estate investor's conviction on insider trading securities fraud and related conspiracy offenses arising from his role in passing information he learned from his corporate insider wife to two of his friends.

The government's theory of the case was that defendant Amit Kanodia violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 when he misappropriated material, nonpublic information obtained from his wife to whom he owed "a duty of trust and confidence that prohibit[ed] [him] from secretly using such information for [his] personal advantage." On appeal, Kanodia argued that there was insufficient evidence to show that a legal duty of trust and confidence arose between him and his wife because their marital relationship did not involve a history, pattern, or practice of sharing confidences. The First Circuit, however, found that the government presented ample evidence for a jury to conclude that Kanodia and his wife shared confidences in the history of their marriage and also in their business and advisory relationships. ***Factual Background*** On October 17, 2016, a jury convicted Kanodia for his role in passing information he learned from his then-wife, the general counsel of Apollo Tyres Ltd. ("Apollo"), to two of his friends regarding Apollo's acquisition of Cooper Tire & Rubber Co. ("Cooper Tire"). Kanodia and his wife resided together in a hotel room during the several week period in which his wife was conducting confidential deal due diligence on the Cooper-Apollo transaction. Kanodia disclosed to two close friends that Apollo intended to acquire Cooper Tire, as well as the planned purchase price and announcement date. Both friends bought Cooper Tire shares and short-term call options that turned profitable once the acquisition was publicly announced, and they deposited profits into a bank account Kanodia had created under the guise of a charitable foundation. ***Prevailing Views on Spousal "Duty of Trust and Confidence"*** In considering whether the jury was presented with sufficient evidence to reasonably conclude that Kanodia and his wife had "a history, pattern, or practice of sharing confidences," the First Circuit acknowledged that the Second and Eleventh Circuits have held that a marital relationship *alone* is insufficient to establish the requisite "duty of trust and confidence." For example, in the Second Circuit's *United States v. Chestman* opinion, a majority of the *en banc* court held that an express confidentiality agreement or a fiduciary-like relationship was required to impose a duty of trust and confidence between spouses for purposes of an insider trading prosecution. The *Chestman* court found no such relationship because the spouses in that case merely shared and maintained "generic confidences." And while agreeing that marriage alone does not establish a duty of trust and confidence, the Eleventh Circuit in *SEC v. Yun* considered whether one spouse granted the other "access to confidential information in reasonable reliance on a promise" that the receiving spouse would "safeguard the information." What was required in *Yun* was proof "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." The *Yun* court found sufficient evidence of a duty of trust and confidence where the wife testified that her husband "always told me, anything that he talks to me in regards to the company is confidential and can't go past he or I," and "repeatedly shared confidential information about" his company with her. ***The Approach in* Kanodia** The First Circuit found it unnecessary to reach whether marriage alone suffices to create a duty of trust and confidence between spouses because the jury in *Kanodia* was not required to rest its findings solely on the fact of the marriage. The court pointed to evidence that Kanodia "helped" his wife obtain prior employment unrelated to Apollo and introduced her to certain business contacts not at issue in the case. Further, in sharing her hotel suite with her husband during the period in which she was conducting the deal due diligence, Kanodia's wife allowed him access to confidential papers concerning the acquisition, even though his presence created "a reportable confidentiality risk." The First Circuit concluded that the tips shared by Kanodia with his friends "were a species of confidential business information that the jury could reasonably infer were regularly shared" between Kanodia and his wife. ***Conclusion*** While *Chestman* may still insulate spouses sharing only "generic confidences," confidences that can create the "business and career advisory relationship" sufficient under *Kanodia* need not relate to the corporate insider's company or position as such. Although the First Circuit left untouched the principle that marriage alone does not create a duty of trust and confidence under insider trading misappropriation theories—for better or for worse—courts' fact-specific analyses of marital relationships may swallow that rule.

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