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New York Cases To Watch In 2017

By **Stewart Bishop**

Law360, New York (January 2, 2017, 1:03 PM EST) -- Court watchers in New York and elsewhere will enter the new year with plenty of Empire State action to keep an eye on, from key Second Circuit decisions on class actions and out-of-court restructurings, to high-profile trials of former Dewey & LeBoeuf LLP executives and notorious pharma entrepreneur Martin Shkreli — the state's reputation as a business-litigation hot spot isn't going away anytime soon.

Here's a rundown of some of the biggest New York cases practitioners will be paying close attention to in 2017.

The ExxonMobil Investigation, With a Twist

New York Attorney General Eric Schneiderman's probe and related investigations over whether Exxon Mobil Corp. lied to investors about climate-change-related risks to its business have been ongoing for over a year, and has even prompted a lawsuit by the oil giant accusing Schneiderman and Massachusetts Attorney General Maura Healey of launching a politically motivated attack on the company for expressing its views about climate change.

The multistate effort came after investigative reports in the Los Angeles Times and InsideClimate News said that ExxonMobil knew of the climate change risks of fossil fuel use from the company's own research since the 1970s, yet the company extensively funded politicians and campaigns that expressed doubt over climate change science.

But the investigations and any potential enforcement actions are about to get a whole new kind of spotlight on the world stage, given President-elect Donald Trump's nomination of ExxonMobil CEO Rex Tillerson to serve as U.S. secretary of state.

Tillerson is an ExxonMobil lifer, having joined the company as a production engineer out of college in 1975. He's steadily ascended the corporate ladder through his 40-year-career, becoming chairman and CEO in 2006.

That raises the prospect that a sitting Trump cabinet official could wind up being deposed about ExxonMobil's alleged knowledge and cover-up of climate change risks. Trump has said "nobody really knows" if climate change is real and has raised the prospect of withdrawing the U.S. from the Paris Agreement, a multi-nation accord designed to combat climate change and adapt to its effects.

James A. Cohen, a professor at Fordham University School of Law, said if ExxonMobil did indeed know of climate-change-related risks to its business, and lied about it to investors, it would be hard to believe that Tillerson didn't know about it.

"If he's as competent a CEO as he's been touted, it's impossible to believe he didn't know what Exxon knew just about the same time that Exxon knew it," Cohen said. "He has to have asked some questions during a relevant time period, which may now be five, six, seven, eight years ago, when people were really beginning to talk about it. And if he didn't ask some relevant questions, then he's really not competent."

Tillerson couldn't hide behind executive privilege either, Cohen said, if the CEO were asked about events that occurred prior to his assuming office.

Attorneys for ExxonMobil, Schneiderman and ExxonMobil auditor PricewaterhouseCoopers LLP have been duking it out in court in recent months over claims from the New York AG that the oil company has been uncooperative with his investigation.

Schneiderman's office is represented by Manisha M. Sheth, Katherine C. Milgram, John Oleske and Jonathan Zweig.

ExxonMobil is represented by Theodore V. Wells Jr., Michele Hirshman, Justin Anderson and Michelle Parikh of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is New York v. PricewaterhouseCoopers LLP, case number 451962/2016, in the Supreme Court of the State of New York, County of New York.

Dewey, One More Time

More than a year after the nearly five-month-long trial of former Dewey & LeBoeuf LLP Chairman Steven Davis, Executive Director Stephen DiCarmine and Chief Financial Officer Joel Sanders ended in partial acquittals and a mistrial, Manhattan District Attorney Cyrus R. Vance Jr.'s office is about to give it another shot.

While Davis and former Dewey client relations manager Zachary Warren — who was due to be tried separately — both secured deferred prosecution agreements with Vance's office after the first trial, DiCarmine and Sanders weren't so fortunate, and both have spurred plea offers from the government.

Vance originally accused Davis, DiCarmine and Sanders of masterminding a yearslong scheme to falsely inflate Dewey's books to access to $250 million in financing for Dewey from lenders and investors, which lost tens of millions of dollars when the firm imploded in May 2012 amid a wave of partner defections.

But the case has shrunk significantly since its inception. Gone are the most serious charges of grand larceny, which New York Supreme Court Judge Robert Stolz dispensed with after the first trial on the grounds that the evidence was insufficient for a jury to find larcenous intent by the executives to steal from the firm's lenders and investors. Absent too are dozens of falsifying business records charges, some due to acquittals and the rest dropped by the DA's office after the first jury deadlocked.

DiCarmine and Sander still face charges of conspiracy, scheme to defraud and securities fraud.

Jurors in the first proceeding heard testimony of 41 witnesses and saw an ocean of emails and other documentary evidence before beginning their 22 days of deliberations to weigh roughly 50 charges against each of the three men.

Bennett Gershman, a professor at Pace University's Elisabeth Haub School of Law, said that while the next trial will likely be more or less a rerun of the first, he expects the prosecution to pare down its case significantly.

"By doing that they're going to enhance their chances to get a conviction tremendously," Gershman said.

While there will be the same issues such as accounting questions and whether or not the executives were acting on a good faith basis to save the law firm, Gershman said, the chances of prosecutors' securing a conviction for this type of case on retrial is higher.

"They have a sense of how their witnesses did, how they can refine, polish up places in the case where they were weak and unclear, sharpen the proof, sharpen the issues," Gershman said. "So I think the prosecutor has an advantage here. Davis is out of the case, so you don't have that problem of his marginal involvement."

Jury selection is due to begin Feb. 7.

The Manhattan district attorney's office is represented by Peirce Moser, David Drucker, Sarah Sacks and Gregory Weiss.

Sanders is represented by Andrew Frisch, Jason Wright and Cesar de Castro. DiCarmine is represented by Rita M. Glavin and David Driscoll of Seward & Kissel LLP.

The case is New York v. Davis et al., case number 00773/2014, in the Supreme Court of the State of New York, County of New York.

Rakoff Goes Rogue on Foreign Class Members

U.S. District Judge Jed S. Rakoff made waves last year when he certified two classes of investors claiming Brazilian oil giant Petrobras concealed billions of dollars in bribes and kickbacks, finding a class action is still appropriate even though hundreds of investors have filed their own suits.

The investors claim that their Petróleo Brasileiro SA shares lost value after the decadelong scheme was revealed, and that the multiple individual suits filed by over 400 potential class members are evidence that a class action is appropriate.

Judge Rakoff certified two classes of investors who claim their Petrobras shares lost value after the scheme was revealed, one making allegations under the Exchange Act and the other, under the Securities Act.

Despite the fact Petrobras shares were "bought and sold in over-the-counter aftermarkets around the world, and never traded on a U.S. exchange," Judge Rakoff defined class members of those who engaged in "domestic transactions." Petrobras appealed the ruling to the Second Circuit, saying Judge

Rakoff's mistakes in the closely watched case could have a broad impact on U.S. securities law.

But Judge Rakoff went a step further on the question of whether foreign members of a class should be part of the suit, finding that overseas courts might not be as troubled by the inclusion of foreign class members in class actions.

Linda Martin of Freshfields Bruckhaus Deringer said a lot of overseas jurisdictions either don't have or are new to class action regimes, especially the kind of opt-out classes found in the U.S.

"In recent years, class members have been excluded from a class because a class action judgment would not be recognized in the country from which they come from," Martin said. "And Rakoff decided that was no longer going to be the rule, unilaterally, which is perhaps typical for Judge Rakoff."

Judge Rakoff reasoned in part that in light of the U.S. Supreme Court's Morrison directive that cases asserting violations of U.S. federal securities laws must involve U.S. transactions, there is a more strict determination about which cases will be heard in the U.S.

Martin said Judge Rakoff's position is that many of the concerns foreign countries have about whether they would recognize U.S. judgments have probably been mitigated, because U.S. courts are not taking jurisdiction over as broad a group of cases as they once did.

However, she said the problem that Judge Rakoff is perhaps not recognizing or appreciating is that foreign courts likely have serious due process concerns.

"The idea that someone sitting in the south of France in a little sleepy beach town who is a member of this class, is going to receive a class notice, appreciate what it is without being familiar with the concept of an opt-out class action, and not really knowing what to do with that notice, would nonetheless receive it and have their rights quashed by a class action judgment, I think there is still a due process concern that foreign courts are going to have," Martin said.

The investors are represented by Jeremy A. Lieberman, Marc I. Gross, Brenda Szydlo, Emma Gilmore, John Kehoe, Patrick V. Dahlstrom and Jennifer Pafiti of Pomerantz LLP and Thomas A. Dubbs and Louis Gottlieb of Labaton Sucharow LLP.

The Petrobras defendants are represented by Lewis J. Liman and Roger A. Cooper of Cleary Gottlieb Steen & Hamilton LLP.

The case is In re: Petrobras Securities, case number 16-1914, in the U.S. Court of Appeals for the Second Circuit.

Out-of-Court Restructurings Are Feeling the Heat

The Second Circuit is expected to issue a ruling this year on the application of the Trust Indenture Act, a Depression-era law meant to protect bondholders in out-of-court corporate restructurings.

The case is over whether for-profit college operator Education Management Corp.'s proposed, $1.5 billion out-of-court restructuring violated the TIA. EDMC is challenging a 2015 decision by U.S. District Judge Katherine Polk Failla that the company's restructuring impaired the rights of a creditor, private equity firm Marblegate Asset Management LLC, which had opposed the restructuring deal.

Judge Failla's ruling has led to considerable consternation in the corporate loan industry and shined new light on the TIA, a 1939 law that industry watchers claim could be used as a club by minority bondholders to exact higher recoveries when a financially distressed company is attempting to restructure its debt outside of court.

EDMC appealed, and a three-judge Second Circuit panel heard arguments in May. EDMC argued that Judge Failla's decision has roiled bond markets and slowed down out-of-court restructurings over concerns that opposing creditors, no matter how small, can now allege that any proposed transaction violates the TIA if the creditors don't receive a 100 percent recovery.

Freshfields' Martin said that until attorneys know how that appellate decision comes down, we will continue to see some real limitations on the ability to effectively reach out-of-court restructurings.

"The concern is that it's really going to chill the bond market, and I think law firms right now are just too afraid to issue opinions on whether or not certain actions will meet the requirements of the [Trust Indenture] Act," Martin said. "Until there's a little more certainty about which way the Second Circuit will come out, you are not seeing as much action as you would expect to see."

EDMC is represented by Wachtell Lipton Rosen & Katz.

Marblegate is represented by Akin Gump Strauss Hauer & Feld LLP.

The case is Marblegate Asset Management LLC et al. v. Education Management Finance Corp. et al., case number 15-2124, in the U.S. Court of Appeals for the Second Circuit.

Corruption, Thy Name Is New York

It was a banner year for Manhattan U.S. Attorney Preet Bharara with respect to his track record on political corruption cases, securing the convictions of former New York Assembly Speaker Sheldon Silver and former New York Senate Majority Leader Dean Skelos, as well as hefty prison terms for the pair.

Bharara in September also inched closer to the office of New York Gov. Andrew Cuomo, accusing two former Cuomo aides, another state official and executives from energy and development companies of a slew of corruption charges, over claims of bribery connected to the award of hundreds of millions of dollars in state contracts.

Far from slowing down in the new year, federal and state grand juries have also been convinced as a result of investigations into the campaign fundraising activity of New York City Mayor Bill de Blasio, according to The New York Times.

Dan Stein of Mayer Brown LLP, said he'll be keeping a close eye on Silver's and Skelos' appeals in the Second Circuit, to see how the court addresses the implications of the U.S. Supreme Court's landmark ruling last year overturning the corruption conviction of former Virginia Gov. Bob McDonnell.

The high court in June had rebuffed the U.S. government's definition of an "official act" that can support a bribery charge as too broad. In a unanimous decision, the justices held that an official act is a decision or action that must involve a formal exercise of governmental power, and has to be something specific that is pending or may be brought before a public official. Arranging a meeting, talking to another

government official or organizing an event, without more action, does not fit that definition, according to the opinion written by Chief Justice John Roberts.

Stein said Silver's and Skelos' appeals are centered on the jury instructions and what constitutes an official act.

"This may be an early opportunity to see how the Second Circuit construes McDonnell with the facts of other cases," Stein said.

Silver is represented by Joel Cohen of Stroock & Stroock & Lavan LLP and Steven F. Molo, Robert K. Kry and Justin V. Shur of MoloLamken LLP. Skelos is represented by Alexandra A.E. Shapiro, Daniel J. O'Neil and Fabien Thayamballi of Shapiro Arato LLP and G. Robert Gage Jr. and Joseph B. Evans of Gage Spencer & Fleming LLP.

The government is represented in the Silver case by Andrew Goldstein, James M. McDonald, Howard Master and Karl Metzner and in the Skelos case by Margaret M. Garnett and Thomas McKay, all of the U.S. Attorney's Office for the Southern District of New York.

The cases are U.S. v. Silver, case number 16-1615, and U.S. v. Skelos, case number 16-1697, both in the U.S. Court of Appeals for the Second Circuit.

The Shkreli Trial, or How I Learned to Stop Worrying and Blame My Lawyer

Controversial former Turing Pharmaceuticals Inc. CEO Martin Shkreli is accused of running a Ponzi scheme by funneling money from biopharmaceutical company Retrophin Inc. — which he headed until his ouster in 2014 — to deceived investors in his ailing hedge funds, while his former lawyer at Katten Muchin Rosenman LLP is charged with aiding the alleged scam.

Shkreli, who generated outrage last year by jacking up the price of a drug often used to treat HIV patients, and Evan Greebel, formerly of Kaye Scholer LLP and Katten Muchin before that, were arrested last year and charged with defrauding investors in MSMB Healthcare LP and MSMB Capital Management LP by lying about the funds' past performance, assets under management and existing liabilities; and by then preventing investor redemptions. Shkreli and Greebel subsequently misappropriated Retrophin's assets to pay off Shkreli's personal and business debts, according to the government.

Brafman & Associates PC's Benjamin Brafman, Shkreli's lead attorney, has told U.S. District Judge Kiyo A. Matsumoto they expect to present a reliance-on-counsel defense at trial, and Shkreli's attorneys are further expected to file a motion to sever the case from Greebel.

Pace Law School's Gershman said everyone is watching the Shkreli case due to his status as "the most high-profile villain" in modern fraud cases.

Gershman said Shkreli's attorney makes a good case for severing the actions, if the court allows the reliance-on-counsel defense to go forward

"I think it weighs in favor of severance If he's claiming that his lawyer helped him, that they decided that this is the best course of action. Obviously, it would be difficult to assert that at a joint trial," Gershman said. "But it's a difficult claim to make, reliance on counsel."

Judge Matsumoto has set the trial for June 26 and penciled in a backup trial date of Oct. 7 for Greebel, in case the lawyer's case gets severed from the action against Shkreli.

The prosecution is represented by Winston M. Paes, Alixandra E. Smith, David K. Kessler and Jacquelyn M. Kasulis.

Shkreli is represented by Benjamin Brafman, Marc A. Agnifilo and Andrea L. Zellan of Brafman & Associates PC. Greebel is represented by Reed M. Brodsky, Lisa H. Rubin, Joel M. Cohen and Winston Y. Chan of Gibson Dunn.

The case is U.S. v. Shkreli et al., case number 1:15-cr-00637, in the U.S. District Court for the Eastern District of New York.

--Editing by Edrienne Su.
