

## New York Cases To Watch In 2022

By **Pete Brush**

*Law360 (January 3, 2022, 12:32 PM EST)* -- The coming year's highest-profile cases developing in New York courts include a foreign-lobbying probe of Rudy Giuliani, an "espionage lite" indictment targeting real estate billionaire and fellow Trump supporter Thomas Barrack, and possible criminal groping charges against former Gov. Andrew Cuomo.

The U.S. Securities and Exchange Commission also will be busy this year, with litigation that includes a claim that telecom giant AT&T selectively leaked earnings information to favored sources.

Here's a rundown of Empire State litigation that lawyers around the country will be watching in 2022.

### **Potential Criminal Jeopardy for Giuliani**

With a former federal judge vetting materials seized in an FBI raid on Giuliani's Manhattan dwelling, many will be watching for next steps.

Pace Law School professor Bennett Gershman, a former prosecutor and author of a review of the former New York City mayor's false 2020 election claims, says there is a good chance Giuliani will be indicted on charges of violating the Foreign Agents Registration Act.

Among other things Giuliani is being investigated for his election-season dealings with Ukraine, when he admittedly sought the ouster of then-U.S. Ambassador Marie Yovanovitch, and pressed prosecutors there to investigate President Donald Trump's political rival Joe Biden.

The now former president himself remains under investigation as well in a probe being conducted by the Manhattan district attorney's office.

A key question may be whether Giuliani — currently suspended from practicing law — was representing foreign interests in his dealings, which FARA criminalizes, or whether he was representing domestic interests, namely those of the ex-president.

"If Giuliani represented both interests simultaneously, which appears to be the case, then he would likely be in trouble," Gershman said.

The case is *In re: Search Warrants Executed on April 28, 2021*, case number 1:21-mc-00425, in the U.S. District Court for the Southern District of New York.

## **Billionaire Trump Ally Charged in 'Espionage Lite' Case**

Former Trump adviser and real estate billionaire investor Thomas Barrack could go before a Brooklyn federal jury in 2022 to defend himself against charges that he acted as an undeclared agent of a foreign government.

The feds say Barrack secretly lobbied on behalf of the United Arab Emirates along with two others, including alleged Emirati middleman Rashid Sultan Rashid al-Malik Alshahhi. The case is pending before U.S. District Judge Brian M. Cogan.

Barrack is charged under a statute referred to as Section 951, which is seen by experts as FARA's lesser-known cousin. FARA charges typically allege that a defendant unlawfully attempted to sway U.S. policy, while Section 951, nicknamed the "espionage lite" statute, alleges that a defendant attempted to provide intelligence back to a foreign government.

The Giuliani probe and the Barrack case come amid a Department of Justice effort to clarify the FARA statute's reach in order to give clear guidance to foreign lobbyists, said Michael Atkinson of Crowell & Moring LLP, a former inspector general of the intelligence community.

"The DOJ will continue to focus on foreign agent investigations and prosecutions in 2022," Atkinson said.

The case is USA v. al-Malik Alshahhi et al., case number 1:21-cr-00371, in the U.S. District Court for the Eastern District of New York.

## **SEC Eyes Beltway Bigs' Stock Sales During Pandemic Onset**

A Manhattan federal judge in November ordered Gerald Fauth, a Trump-era appointee to the National Mediation Board, to give testimony to the U.S. Securities and Exchange Commission as part of its insider trading investigation into his stock sales, which were executed as COVID-19 began to spread in the U.S. in February 2020.

U.S. District Judge Andrew L. Carter Jr. expressed sympathy for health problems Fauth said should have precluded his testimony, but held that the SEC was well within its rights to take a deposition.

"This seems to be something that the SEC is taking quite seriously," said Brian Blais of Ropes & Gray LLP, a former prosecutor. "It's a pretty aggressive step to seek court intervention and take the deposition of someone who is clearly pretty sick."

Sen. Richard Burr of North Carolina, Fauth's brother-in-law, called Fauth after taking \$1.6 million out of the stock market in early 2020, according to an SEC filing. Not long after that call, Fauth also dumped stock, the SEC has said in filings. By March of that year, COVID-19-related shutdowns were roiling the markets.

Burr has said that the DOJ has cleared him as a criminal suspect, but the SEC is investigating both men.

The case is SEC v. Fauth, case number 1:21-mc-00787, in the U.S. District Court for the Southern District of New York.

## **SEC Goes After AT&T on Selective Earnings Disclosure Theory**

In a March suit, the SEC alleged that AT&T unlawfully tried to selectively massage securities analysts' forecasts, leaking information about its earnings in early 2016 in an effort to get them to lower their expectations so that it could hit earnings targets.

AT&T has strenuously denied liability. The case is pending before Manhattan U.S. District Judge Paul A. Engelmayer.

Kathleen Marcus of Stradling Yocca Carlson & Rauth, a former SEC enforcement lawyer, says cases involving the commission's so-called Regulation FD, which governs such disclosures, are "quite rare" and can have a big impact on the way companies interact with the public.

"Companies should use great care to stay within their public statements and carefully document the communications," she said.

The case is SEC v. AT&T et al., case number 1:21-cv-01951, in the U.S. District Court for the Southern District of New York.

## **An Electric Truck Impresario Called to Account**

In a big-money criminal securities fraud case pending before Manhattan U.S. District Judge Edgardo Ramos, the feds in July charged Nikola Corp. founder and onetime chairman Trevor Milton with seeking to prop up his multibillion-dollar stake by lying to the investing public.

Milton says accusations that he lied to drive demand for Nikola stock amount to the government trying to "criminalize" normal business conduct.

A trial would pit prosecutors against a well-known and charismatic businessman, according to former prosecutor Kevin O'Brien of Ford O'Brien LLP.

"The Trevor Milton indictment has to be one of the most specific charging instruments ever — a 49-page speaking indictment in which the defendant does much of the speaking," O'Brien said. "Milton liked to brag about his company, in social media, investor calls, podcasts, and television and print interviews. The question at trial is whether the government can back up its exhaustive allegations."

Milton is currently appealing a decision by Judge Ramos that says the case properly belongs in New York — as opposed to Utah, where Milton is from, or Arizona, where the company is based.

In late December Nikola agreed to pay \$125 million to settle fraud charges brought by the SEC and to continue cooperating in an ongoing investigation.

The case is USA v. Milton, case number 1:21-cr-00478, in the U.S. District Court for the Southern District of New York.

## **Lawyers Accused of Personal Injury Lawsuit Scam**

Two New York lawyers, George Constantine and Marc Elefant, stand charged with filing fraudulent suits in a sprawling personal injury scam operation.

The lawyers have denied guilt and have hinted that they will argue that they acted in good faith, relying on information provided to them by others.

White-collar defense lawyer Michael Weinstein of Cole Schotz PC, a former DOJ trial attorney, said the two lawyers could have a viable defense unless the Manhattan U.S. attorney can successfully use documents and testimony from cooperators to undermine them.

"Lawyers have obligations not to bring frivolous suits," he said. "There's no gray area there."

U.S. District Judge Sidney H. Stein has handled cases against lower-level defendants in the scheme and has handed out stiff prison sentences. That, according to Weinstein, could serve as an incentive for the two charged lawyers to go to trial.

"They may say, 'Let's roll the dice, I've got nothing to lose,'" he said.

The case is USA v. Constantine et al., case number 1:21-cr-00530, in the U.S. District Court for the Southern District of New York.

### **Former NY Governor Cuomo Accused of Groping**

Cuomo, who resigned as New York governor in August under intense political pressure amid allegations that he sexually harassed women in his Albany orbit, is scheduled to be arraigned Jan. 7 on a misdemeanor count of forcible touching.

The incident that gave rise to the charge is widely reported to have been an encounter between the then-governor and a former assistant, Brittany Comisso, in which Cuomo allegedly groped her in the executive mansion.

Cuomo has denied the accusations. Barring some fatal case defect — there has been some controversy over the way the case was charged — Cuomo is likely to fight to the end, according to Stephanie Bonnes, a professor of criminal justice at the University of New Haven.

Bonnes also thinks Cuomo could face more serious charges.

"This is a relatively low charge for the pervasive climate of sexual harassment that he created in his office and got away with for so long," she said.

Federal prosecutors are also widely reported to be investigating Cuomo.

The case is People v. Cuomo, docket number CR-02517-21, in Albany City Criminal Court.

--Editing by Robert Rudinger.