

## New York Cases To Watch In 2016

By **Stewart Bishop**

*Law360, New York (December 24, 2015, 8:38 PM ET)* -- The Manhattan District Attorney's continued prosecution of former executives of Dewey & LeBoeuf LLP, the New York Attorney General's Martin Act investigation of ExxonMobil Corp. and a Supreme Court case that could deal a devastating blow to public-sector unions are among the biggest cases Empire State court watchers will be eyeing in 2016.

Here's a rundown of these and other cases of note taking place in and affecting New York this year.

### **The Dewey & LeBoeuf Criminal Trial: Round Two**

The landmark trial against the former top executives of Dewey & LeBoeuf ended in an October mistrial with the jury deadlocking on most of the charges, and acquitting all three defendants of numerous counts of falsifying business records but the office of Manhattan DA Cyrus R. Vance Jr. is not letting go of the case just yet.

While prosecutors have said they won't retry former Dewey Chairman Steven Davis, who is on the verge of striking a deferred prosecution deal that would not include any guilty plea or admission of wrongdoing, a new trial against former Executive Director Stephen DiCarmine and Chief Financial Officer Joel Sanders is expected this year, unless both men accept a pair of plea offers.

Vance contends Davis, DiCarmine and Sanders engineered a yearslong conspiracy to falsify Dewey's books and records in order to feign compliance with strict lending agreements requiring the firm to maintain a high level of income. Lenders and investors were left holding the bag when Dewey imploded in May 2012 amid a wave of partner defections, the prosecutor claims.

In addition to falsifying business records, all three of the executives were tried on charges of grand larceny, scheme to defraud, securities fraud and conspiracy.

Assistant District Attorney Peirce Moser has said if there is to be a retrial, the government would present a more streamlined version of the case to a jury, which stands in contrast to the nearly five-month-long proceeding that took place in 2015.

Bennett L. Gershman, a professor at Pace Law School and a former prosecutor with the Manhattan DA's office, said Vance appears to have learned his lesson from the first trial and is pursuing a middle way forward.

For instance, getting rid of Davis as a defendant may help Vance's case against the other two since the evidence against Davis was quite extenuating, Gershman said.

"Trimming the charges, narrowing the scope, all of that will make it a leaner, cleaner and more effective prosecution," Gershman said. "Vance is behaving prudently. He's not throwing in the towel and he shouldn't. He's reshaping the case in a way that maybe it should have been shaped in the first place. He sees the errors that he's made in judgment."

The next hearing is scheduled for Jan. 8.

The Manhattan District Attorney's Office is represented by Peirce Moser, Steve Pilnyak, Christopher Conroy and Gregory Weiss.

Davis is represented by Elkan Abramowitz, Lawrence Bader, Jasmine Juteau and Priya Raghavan of Morvillo Abramowitz Grand Iason & Anello PC. DiCarmine is represented by Austin Campriello and Anne Redcross of Bryan Cave LLP. Sanders is represented by Andrew Frisch, Cesar de Castro and Amanda Bassen.

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.

### **New York AG Eric Schneiderman's Martin Act Probe of ExxonMobil**

Exxon revealed in November that Schneiderman has subpoenaed the company under state securities laws, demanding the energy giant turn over documents covering climate change knowledge that it has been accused of covering up.

News of the investigation came quickly on the heels of articles published in InsideClimate News and the Los Angeles Times that assert the company knew since the 1970s that the fossil fuel industry contributed to global warming, but covered it up. Members of Congress have called for a similar action from the U.S. Securities and Exchange Commission.

Schneiderman issued the subpoena under the Martin Act, New York's powerful securities law that allows the state's attorney general to bring fraud cases against companies without forcing it to prove that there was a conspiracy to commit fraud or knowledge that fraud was going on.

The managing partner of Crowell & Moring LLP's New York office, Edwin Baum, said Schneiderman's investigation is characteristic of a wave of current and expected enforcement actions focused on climate change.

Baum said in the past, environmental cases were typically directed toward potential toxic issues, meaning hazards to the ground water, soil or air and impact on property. The modern era, however, is heavily focused on the reduction of carbon emissions, which is only going to accelerate in light of the December signing of the climate accord in Paris accord, he said.

"We're seeing a series of actions already evolving which are directed at that topic in which AGs are using the very powerful tools they have in their hands, which don't necessarily pertain directly to carbon emissions, to take activity directed to those," Baum said.

Exxon has steadfastly defended itself, saying it has included information about the business risk of climate change for many years in its 10-K, Corporate Citizenship Report and other reports to shareholders.

### **High Court Fight Over Union Fees For Nonunion Public Employees**

The U.S. Supreme Court has agreed to revisit its 1977 *Abood* ruling, which gave states approval to require public workers to pay union agency fees, a case which could have a disparate impact in the union-heavy Empire State and jeopardize a state law enshrining the practice.

The case was brought by a group of California teachers challenging the precedent and validity of so-called agency shop fees, which are protected by state law in New York.

The justices granted a petition for certiorari from Rebecca Friedrichs and other teachers that said recent Supreme Court decisions had “shattered the intellectual foundation” underlying the high court’s 1977 *Abood v. Detroit Board of Education* ruling.

The *Abood* ruling allowed public employers to require all employees — both union and nonunion members — to pay union fees, so long as workers were not forced to pay a portion of the fees that covers political or ideological activities.

Alvaro Hasani, an attorney specializing in labor and employment as well as appellate matters at Fisher & Phillips LLP, said if the Supreme Court sides with the petitioning teachers, New York could feel outsized effects.

“I think it would have a definite significant impact in New York. There are a lot of union jobs in the state and the city,” Hasani said. “New York is right up there with California.”

While New York has a state law, the Public Employees Fair Employment Act, also known as the Taylor Law, which provides for the payment of agency shop fees by nonunion public employees, depending how the High Court rules, that might not be enough, according to Hasani.

“My suspicion is that if the Supreme Court rules in favor of the plaintiffs, the Taylor Law is going to be in jeopardy,” he said.

In their opening brief, the petitioners said that in the past four Supreme Court terms, the high court has hinted that *Abood* didn’t do a great job of interpreting the First Amendment rights at stake when governments compel workers to pay fees to unions that might advocate for positions they’re against.

They also argued that basic First Amendment principles that the high court reaffirmed in at least two cases require states to minimize the burden they impose on teachers’ established right to not subsidize political activities.

The case has attracted dozens of friend of the court briefs, including by New York City and the state.

The high court is due to hear oral arguments in the case on Jan. 11.

The petitioners are represented by Michael Carvin, James Burnham and William Coglianese of Jones Day and Michael Rosman of the Center For Individual Rights.

The unions are represented by Jeremiah Collins, John West and Laurence Gold of Bredhoff & Kaiser PLLC, among others.

The case is Friedrichs v. California Teachers Association, et al., case number 14-915 at the U.S. Supreme Court.

### **Fallout From The Corruption Trials Of Sheldon Silver And Dean Skelos**

The landmark trials of the former speaker of the New York State Assembly and former New York State Senate Majority Leader Dean Skelos and his son Adam ended in convictions for all three men, but they have vowed to continue the fight with post-trial motions and appeals seem all but inevitable.

Silver was convicted on corruption charges for what prosecutors say was a scheme to gain nearly \$5 million in referral fees from a cancer doctor and real estate developers in exchange for legislative action and state funding.

The jury of eight women and four men found Silver guilty of honest services fraud, extortion and money laundering after roughly two days of deliberations.

Skelos and his son Adam were found guilty of using the former lawmaker's powerful perch in Albany to squeeze illegal payments out of real estate, insurance and environmental consulting businesses in a verdict the jury foreperson said was not a close call.

The convictions of what were once two of the most powerful politicians in the state may also spur legislative action in Albany, according to Gershman, the Pace Law School professor.

Gershman said it seems the pressure has built to such a point that it's now going to boil over, with many public outcries about the need to do something.

"I think there is going to be some action taken. I think the governor is going to present some kind of package and the legislature will respond. I think they have to," he said. "I think the public is so outraged, more so than ever before when they saw Silver and Skelos go down like that in ways that are so blatant and so brazen."

Gov. Andrew Cuomo has said that the cases highlight a need for campaign finance and ethics reform.

Silver is due back in court on Jan. 10. Skelos and his son are due to be sentenced on March 3.

Dean Skelos is represented by G. Robert Gage Jr. and Joseph B. Evans of Gage Spencer & Fleming LLP. Adam Skelos is represented by Christopher P. Conniff, Alicia G. Suarez and Jon A. Daniels of Ropes & Gray LLP.

The government in that case is represented by Jason A. Masimore, Rahul Mukhi, Tatiana R. Martins and Thomas A. McKay.

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.

The government in the Silver case is represented by Carrie Cohen, Andrew Goldstein, James M. McDonald and Howard Master of the U.S. Attorney's Office.

The cases are U.S. v. Silver, case number 1:15-cr-00093, and U.S. v. Dean Skelos et al., case number 1:15-cr-00317, both in the U.S. District Court for the Southern District of New York.

### **Litigation Over Post-Hurricane Sandy Damage Mitigation**

The destructive toll of Hurricane Sandy in late 2012 is still affecting many New Yorkers, but some have taken umbrage at mitigation efforts to prevent damage from future storms, and more litigation is expected to follow.

In one case filed in October, nonprofit Defend H2O has challenged a dune-building project in Montauk by the United States Army Corps of Engineers. Other projects by the Army Corps are slated for the South Shore of Long Island, including a dune-building effort on Fire Island that will require the destruction or relocation of numerous houses.

Edwin Baum of Crowell & Moring LLP said those projects are now at a stage of development that significant litigation is likely in the coming year.

"Whenever projects of that nature are proposed, litigation challenging those projects follows," Baum said.

Once the projects start to move forward, Baum said to expect challenges from environmental groups, property owners and others who customarily challenge efforts to alter the natural landscape on the shoreline.

In the Montauk case, U.S. District Judge Arthur D. Spatt of the Eastern District of New York in November denied the plaintiffs' bid for a preliminary injunction that would have halted the dune-building project, finding they are unlikely to succeed in their claims.

"I think this case is illustrative of the type of cases we're going to see as these various projects move forward," Baum said.

Defend H2O is represented by Carl Andrew Irace.

The Army Corps is represented by Assistant U.S. Attorney Edwin R. Cortes.

The case is Defend H2O et al. v. United States Army Corps of Engineers et al., case number 2:15-cv-05735 in the U.S. District Court for the Eastern District of New York.

--Editing by Ian Thoms and Kelly Duncan.

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