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A. Introduction

No significant traditional oil and gas cases occurred in New York this year, due to the state's moratorium on the hydro-fracturing operations necessary for modern unconventional oil and gas drilling in the Marcellus Shale formation and the subsequent lack of oil and gas operations in New York. The case we have included in this year's update does not fit within the ambit of traditional oil and gas law, relating as it does to claims by the New York Attorney General against ExxonMobil Corporation for allegedly making false corporate statements relating to risks from climate change. However, given the scarcity of traditional oil and gas law cases, this case remains a notable example of the New York government's continuing hostility towards oil and gas operators and operations.

B. People v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771 (N.Y. Sup. Ct. Dec. 10, 2019).*

- Public disclosures by ExxonMobil regarding how it treated climate change risk were not fraudulent and did not violate the Martin Act or Executive Law § 63(12).

The Supreme Court of New York County denied the New York Attorney General's claims under the Martin Act and Executive Law §63(12) with prejudice.[1] The Attorney General alleged that "beginning with the December 2013 meeting, continuing with the publication of the two March 2014 reports (*Managing the Risks* and *Energy and Climate*), and continuing further through 2016, ExxonMobil made various material written and oral misrepresentations and omissions that tended to mislead the public in violation of the Martin Act and Executive Law §63(12)."[2] The court pointed that although the disclosures at issue dealt with climate change, "this is a securities fraud case, not a climate change case."[3]

The Martin Act[4] prohibits the usage of "any device, scheme or artifice... deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise" connecting to the "issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution" of securities," and is liberally construed.[5] Liability under the

1. *People v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771 (N.Y. Sup. Ct. Dec. 10, 2019).
2. *Id.*at *1.
3. *Id.*at *2.
4. N.Y. Gen. Bus. Law § 352 (McKinney 2019).
5. *People v. Federated Radio Corp*., 244 N.Y. 33, 38-39 (N.Y. 1926).

Martin Act requires the state to prove a "misrepresentation of material facts,"[6] or omission of material facts.[7] New York applies the federal standard of materiality in securities cases.[8] Thus, in New York a material misstatement must assume "actual significance in the deliberations of the reasonable shareholder."[9] Actual reliance by the investor does not need to be established by the state.[10]

Executive Law § 63(12) prohibits "repeated fraudulent or illegal acts" and "persistent fraud or illegality in the carrying on, conducting or transaction of business."[11] The definitions of fraud under § 63(12) and the Martin Act are "virtually identical."[12] "Repeated" fraud or illegality is defined in § 63(12) to include "repetition of any separate and distinct fraudulent ... act, or conduct which affects more than one person." "Persistent" fraud is defined by § 63(12) to include the "continuance or carrying on of any fraudulent act." Ultimately, "the test for fraud" under § 63(12) "is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud."[13]

The basis of the Attorney General's allegations was that ExxonMobil made misrepresentations and omissions to investors from 2013 to 2016, regarding ExxonMobil's management of climate change risks and increasing related regulations. The misrepresentations allegedly occurred in two publications dated March 31, 2014, titled "*Energy and Carbon - Managing the Risks*" ("*Managing the Risks*") and "*Energy & Climate*" (together, the "March 2014 Reports") as well as investor presentations in 2013 and 2014 and at the March 25, 2016, shareholder meeting.[14]

According to the court, "there was no evidence adduced at trial that the publication of the March 2014 Reports had any market impact at the time they were published or that investment analysts took note of the contents of these documents which were widely disseminated on ExxonMobil's website and otherwise."[15] Neither party disputed that ExxonMobil took climate policies and regulations and their effect on its business into account when

6. *Id.* at 41.
7. *People v. Sala,* 258 A.D.2d 182, 194 (N.Y. App. Div. 1999).
8. *State v. Rachmani Corp*., 71 N.Y.2d 718, 727 (N.Y. 1988).
9. *Id.* at 726.
10. *State v. Sonifer Realty Corp*., 212 A.D.2d 366, 367 (N.Y. App. Div. 1995).
11. N.Y. Exec. Law § 63(12) (McKinney 2019).
12. *Rachmani,* 71 N.Y.2d at 721.
13. *People v. General. Elec. Co*., 302 A.D.2d 314 (N.Y. App. Div. 2003).
14. *Exxon Mobil Corp.*, 2019 WL 6795771, at *4.
15. *Id*. at *5.

making investment decisions for some time. ExxonMobil had a team called the Corporate Planning Group, which developed greenhouse gas cost assumptions that could apply as expense items in evaluations of specific investments which, if funded, would emit greenhouse gases. The proprietary and undisclosed results of the work that the Corporate Planning Group circulated internally in ExxonMobil's Corporate Planning DataGuide which remained non-public except to the extent it was reported in the Outlook and in the March 2014 Reports and related presentations and publications."[16]

After examining ExxonMobil's public disclosures, the court found that "there was no proof offered at trial that established material misrepresentations or omissions contained in any of ExxonMobil's public disclosures that satisfy the applicable legal standard."[17] The Attorney General failed to prove "that ExxonMobil made misrepresentations and that ExxonMobil investors would have considered any alleged misrepresentations important in light of the 'total mix of information' available to them."[18] The public disclosures containing forward-looking language supported the court's finding.[19]

However, the public documents did contain information regarding a proxy cost for greenhouse gas issues, which was not always the same as the proxy costs used internally by Exxon Mobil. The internal proxy costs were part of the annual Corporate Plan DataGuide.[20] The Court held that it would be inappropriate to rule either that ExxonMobil's default GHG assumptions for future projects (none were ever disclosed to the public) should apply uniformly, or that they should have the same proxy cost value of carbon used for a different purpose and not specifically disclosed.[21]

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16. *Id*. at *5.

17. *Id*. at *5.

18. *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, 449 (1976).

19. *Exxon Mobil Corp.*, 2019 WL 6795771, at *15.

20. *Id*. at *13 ("The DataGuide is a document that provides the planning basis by which the various ExxonMobil business units should prepare their annual planning budgets. The DataGuide contains a variety of guidance information, including the proxy cost of carbon, pricing information, as well as guidance about projected GHG costs that might relate to specific projects in particular jurisdictions. …The proxy costs of carbon in the DataGuide were generally higher than the GHG costs in the DataGuide, because the proxy costs of carbon anticipated the cost of all climate related policies, while GHG costs, on the other hand, capture only the subset of climate regulatory costs that might relate to future potential projects in specific jurisdictions.").

21. *Id*. at *15.

The Attorney General failed to prove that any alleged misrepresentation was material to investors:

> There is no allegation in this case, and there was no proof adduced at trial, that anything ExxonMobil is alleged to have done or failed to have done affected ExxonMobil's balance sheet, income statement, or any other financial disclosure. More importantly, the Office of the Attorney General's case is largely focused on projections of proxy costs and GHG costs in 2030 and 2040. No reasonable investor during the period from 2013 to 2016 would make investment decisions based on speculative assumptions of costs that may be incurred 20+ or 30+ years in the future with respect to unidentified future projects.[22]

Lastly, the Attorney General failed to prove misleading statement's materiality as "there is no evidence that any misleading statements in these publications inflated the price of ExxonMobil stock."[23] For these reasons, the court dismissed the Attorney General's claims with prejudice.

22. *Id*. at *20.
23. *Id*. at *24.