

April 25, 2017

In Praise of the Martin Act and the Attorney General's

Use of It to Investigate Exxon's "Tobacco Strategy"

Deception by business corporations is nothing new. Recently, Michael Powell of the New York Times reminded us of the National Football League's decade-long disinformation campaign to cover up its deliberate destruction of the brains of its players in pursuit of profit, waving off talk of a concussion epidemic as a "pack journalism issue."

Aware since the 1920s that lead paint caused serious dangers to children, in the form of permanent brain damage, school failure, loss of intelligence and even death, the lead industry engaged for decades in vigorous marketing campaigns aimed at counteracting public concerns over these lead dangers, even claiming lead paint was safe, sanitary and useful on children's walls, furniture and toys.

And then there was the "Tobacco Strategy," -- hugely successful in preserving tobacco industry profit until, suddenly, it wasn't. Despite overwhelming scientific research demonstrating strong links between tobacco smoking and lung cancer and cardiovascular disease, and the tobacco industry's knowledge of the science since the 1950s, the industry developed a strategy of using scientists for hire in a disinformation campaign to mislead the public by sowing seeds of doubt regarding the scientific evidence linking smoking to death.

The Tobacco Strategy leads directly to Exxon's approach to climate change. Decades of sound scientific research led Exxon to believe that the burning of fossil fuels was causing the climate to change in ways dangerous to the planet. Yet, in the late 1980s, Exxon exchanged its efforts at honest research for the Tobacco Strategy of buying scientists willing to use misinformation to instill doubt in the public mind as to whether climate change was occurring and whether, if it was, the burning of fossil fuels was a causative factor.

Harm from corporate deception comes in many forms. Products like tobacco or lead destroy lives. Products like fossil fuels warm the planet, threatening in time to harm it and all its inhabitants in irreversible ways. Products like securities issued by corporations engaged in deceptions to protect their markets cause mispricing, followed by investor loss upon discovery of the deception.

It is the role of all institutions dedicated to the public interest, be they local, state or federal agencies of government or the press, to use the powers granted to them to prevent these corporate deceptions -- deceptions that history has shown most powerfully, occur over and over again, causing great harm if allowed to persist. Our capitalistic system of profit maximization in competitive environments makes corporate deception an ever-present temptation. Agencies at the Federal level, like the FTC, the SEC, the CFTC, the Pension Office of the Department of Labor and the recently formed Consumer Financial Protection Bureau, have both the power and the duty to expose corporate deception. So, too, do the Attorney Generals of our States.

In the case of Eric Schneiderman, the Attorney General for the State of New York, the powers invested in him under New York's Martin Act, for use in protecting the public against false statements and omissions affecting investment choice, are, in important respects, the most powerful in the country. This Act gives him not just the opportunity, but the duty to deploy those powers in service to the investing public. And, to his credit and the public's benefit, Attorney General Schneiderman, following in the footsteps of worthy predecessors, is using those powers with force and creativity.

Of special importance to this discussion is his investigation of the claim against Exxon. Pared of massive detail, the serious and plausible claim is simply that Exxon, for years, has used the Tobacco Strategy to breed public doubt over the established science of climate change and the dangers to life and property threatened by continued carbon emissions, while at the same time being deeply knowledgeable about the science and fully informed and aware that what it was causing to be promulgated was a big lie. The collection of first-hand evidence assembled under the title *Exxon: the Road Not Taken*, published in 2015 by Inside Climate News, a series of articles of similar import published in the Los Angeles Times by the Columbia School of Journalism and further evidence adduced in *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* by Naomi Oreskes and Erik M. Conway (Bloomsbury Press 2010), would seem, without more, to provide probable cause to believe a deliberate deception was undertaken by Exxon around 1989 under the leadership of CEO Lee Raymond and continued for many years thereafter.

If proven, this deception could provide a solid basis for either a civil or criminal proceeding under the Martin Act. Unlike the elements necessary for a violation of Rule 10b-5 of the Securities Exchange Act of 1934, which requires not only a misstatement of a material fact or an omission of a material fact, but findings of intent to defraud by the accused, reasonable reliance by investors on the misstatements or omissions, and a showing of actual damages, the Martin Act requires only a misrepresentation or omission of material fact in connection with securities transactions. The New York Court of Appeals put the matter simply in 1926: " 'Fraud' under the Martin Act includes all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public, whether or not the product of scienter or intent to defraud."

Enforcement of the Martin Act, in light of what is known of Exxon's past behavior, would seem to be compelled by the Attorney General's duties of office. It is most reassuring to learn that he has, in fact, for some time been engaged in precisely this important undertaking. Corporate deception regarding the impact of fossil fuels on the planet is a matter of life or death. To the degree effective, the consequences of such deception are disastrous and now, or very soon, are or will become irreversible. Harm to investors, through what evidence adduced by the Attorney General may show was a serious mispricing of Exxon's reserves and its capital stock, is only a small part of the gross harm being caused. But it would suffice to bring suit under Martin. Please, Attorney General Schneiderman, for the welfare of all let the Exxon investigation continue full tilt.

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[Mr. Longstreth was appointed Commissioner of the Securities and Exchange Commission in 1981 by President Ronald Reagan and reappointed in 1982.]