

Martin Act Will Remain A Player, Even With New AG

By **Shannon Henson**

Law360, New York (October 14, 2010) -- Eliot Spitzer may be long gone from the office, but with two new candidates vying to be New York's attorney general, defense attorneys are still fighting back against one of Spitzer's favorite weapons, the Martin Act, and there appears to be no end in sight.

The powerful 1921 financial fraud law took center stage over the past decade, thanks in large part to Spitzer dusting it off to accuse Merrill Lynch & Co. Inc.'s stock analysts of having conflicts of interest.

After Spitzer won a \$100 million settlement with the firm in 2002, he levied the Martin Act against the rest of Wall Street, altering the regulatory landscape for years.

While the current candidates for attorney general – Republican Dan Donovan and Democrat Eric Schneiderman – have signaled differing views on the use of the Martin Act, defense attorneys said both may find the law too powerful to resist once in office.

“Schneiderman wants to use the law to try to react to the financial crisis, and Donovan appears to want to focus on other things,” said Matthew Levine, principal at Fish & Richardson PC. “But at the end of the day, whoever wins will face certain issues ... and the question is, 'Then what do you do?’”

The Martin Act gives the attorney general broad subpoena power, and allows him or her to choose between a civil or criminal investigation, lawyers said. More importantly, the Martin Act has a low standard of proof, putting securities sellers on the hook even if they did not intend or make a willful decision to commit misconduct.

“It's very hard to find a parallel anywhere” in the law, said Barry Mandel, a partner at Foley & Lardner LLP. “From the defense perspective, it's the worst; and from the prosecutor's perspective, it's the best.”

Spitzer used the Martin Act to earn the nickname “Sheriff of Wall Street” during his time in the attorney general's office from 1999 to 2006.

Current officeholder Andrew Cuomo has also utilized the law, though not to the same extent as Spitzer, going after the sellers of auction rate securities, alleged fraud related to the Ponzi scheme of Bernie Madoff and Bank of America's takeover of Merrill Lynch, among other things.

“Cuomo wanted to differentiate himself and not be the Sheriff of Wall Street, but you can see he used the powers broadly and expansively, too,” Levine said.

Representatives of the two men now seeking election to the attorney general's office did not respond to requests for interviews, but both candidates have hinted as to how they might use the law to handle Wall Street.

Schneiderman calls the Martin Act the “most effective securities regulation law ever written” in his policy statement, hailing it as addressing the gap created by federal authorities' “enforcement abdication.”

“Today, after repeated regulatory failures, the federal government is completely remaking its enforcement apparatus, promulgating new rules, new responsibilities, and even creating entirely new agencies,” he said. “It is particularly important that the attorney general be vigilant and fight for progressive reform during this uncertain transitional time.”

Scaring defense attorneys even further, Schneiderman appears willing to expand on the law as it stands. As a New York state senator, he sponsored legislation that would allow private institutional investors to sue under the Martin Act.

While most securities fraud suits filed in New York state court have been dismissed because judges interpreted the law to be a tool of the attorney general and district attorneys, not private investors, such a broad interpretation of the law is alarming for defense counsel, according to Michael Campion Miller, a partner at Steptoe & Johnson LLP.

Though Donovan, currently the Staten Island district attorney, has remained mum on the Martin Act, he has repeatedly taken a stance against demonizing Wall Street.

“The attorney general of New York has a long history of protecting investors and consumers from financial crimes, but we must promote fair markets and not bring cases simply to get headlines,” Donovan said on his Web site. “Wall Street is the financial backbone of our state, and we must ensure that it continues to create jobs and remain the economic generator our state depends on.”

That attitude suggests Donovan would not wield the act to the same extent as Schneiderman, but defense lawyers remain skeptical that anyone would walk away from its powers.

“The Martin Act is among the most potent tools in the toolbox of the attorney general,” Miller said. “Given that they wield that tool in the financial capital of the world, it is not likely that Donovan or Schneiderman would radically depart from their predecessor's use of the Martin Act.”