Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Rule Of Law Trumps Rhetoric In Chevron's 2nd Circ. Win

Law360, New York (August 19, 2016, 12:50 PM ET) --
The Second Circuit's unanimous decision in Chevron Corp. v. Donziger, Case No. 14-826 (Aug. 8, 2016), is an important victory for the rule of law. In affirming the lower court's judgment granting Chevron Corporation equitable relief, the court ensured that U.S. and Ecuadorian plaintiffs' lawyers (and their clients) cannot profit from their scheme to procure a bogus $9.5 billion Ecuadorian judgment against Chevron through fraud, bribery and other acts of corruption.


William E. Thomson


Kahn A. Scolnick


Dylan Mefford

The facts of the Chevron Corp. v. Donziger case are extraordinary — indeed, as the district court put it, the evidence included "things that normally come only out of Hollywood."[1] The Wall Street Journal has dubbed the scheme against Chevron the "legal fraud of the century."[2] And Forbes has referred to the case an "Epic Battle for the Rule of Law."[3] The Donziger decision should serve as a powerful warning to other U.S. lawyers who are tempted to leave their ethics at the border when seeking to recover huge transnational judgments against U.S. corporations.

The Second Circuit's 127-page opinion addressed numerous topics, including an extensive recap of the overwhelming evidence by which Chevron proved the multibillion-dollar scheme against it at trial. As the court noted repeatedly, the defendants — New York lawyer Steven Donziger and his clients — declined to challenge any of the evidence against them on appeal, effectively conceding the district court's factual findings, which show those suing Chevron in Ecuador turning to fraud when they realized that the evidence did not support their theories.

The Second Circuit focused primarily on the four legal questions that Donziger and his clients raised: (1) Does the federal RICO statute authorize private parties to obtain injunctive or other equitable relief; (2) does New York common law provide equitable remedies to the victim of a fraudulent foreign judgment; (3) do principles of international comity bar relief where U.S. courts have personal jurisdiction over the perpetrators, and the relief is domestic in nature; and (4) to what extent may courts hold clients accountable for the misconduct of their attorneys? These topics are addressed in greater detail below.

The Lago Agrio Litigation Against Chevron

As the Second Circuit explained, the underlying dispute is one of "the most extensively [chronicled] in the history of the American federal judiciary."[4]

The Ecuadorian case against Chevron was filed in 2003 on behalf of a group of 48 Ecuadorians (the Lago Agrio plaintiffs or LAPs) represented by U.S. and Ecuadorian plaintiffs lawyers — including Donziger — alleging environmental harm. Chevron never operated in Ecuador, but the LAPs asserted the company was responsible for alleged conduct by a Texaco subsidiary that operated in the region from 1964 to 1992. Between 1995 and 1998, the Texaco subsidiary completed a $40 million environmental remediation program reflective of Texaco's approximate one-third share of the oil-producing consortium with Ecuador's state-owned oil company PetroEcuador.

In 1998, the government of Ecuador declared and certified that the remediation met Ecuadorian and international standards and released Texaco from future obligations or liabilities. In addition, the municipalities in the area of the drilling operations signed a negotiated settlement that released the company from any future claims and obligations. Since 1992, PetroEcuador has been the sole oil producer in that region, amassing a dreadful environmental record.

In February 2011, the trial court in Ecuador entered a $17.2 billion judgment against Chevron — $8.6 billion in compensatory damages and another $8.6 billion in punitive damages for Chevron's refusal to "apologize."[5]

The District Court's Decision

Through discovery in the U.S., Chevron uncovered extensive evidence of fraud on the part of the LAPs' lawyers and agents in procuring the multibillion-dollar Ecuadorian judgment. Chevron then filed suit in the Southern District of New York and sought, among other things, relief under the Racketeer Influenced and Corrupt Organizations Act and New York common law.

In March 2014, after a seven-week trial, which included the testimony of more than 50 witnesses and more than 4,000 exhibits, U.S. District Judge Lewis A. Kaplan ruled in Chevron's favor and issued a 485-page opinion.[6] The court found that Donziger and his co-conspirators engaged in racketeering under federal law by means of extortion, obstruction of justice, witness tampering, wire fraud, money laundering and violations of the Foreign Corrupt Practices Act.[7] The court ordered the defendants to disgorge any profits traceable to the fraudulent Ecuadorian judgment, imposed a constructive trust on any future judgment proceeds, and prohibited the defendants from enforcing the judgment in the U.S.[8] The defendants appealed.

The Second Circuit Decision

In an opinion authored by circuit Judge Amalya L. Kearse and joined by circuit Judges Barrington D. Parker and Richard C. Wesley, the Second Circuit repeatedly underscored that the defendants had not challenged the evidence against them or the district court's extensive factual findings. Observing that the "record in the present case reveals a parade of corrupt actions by the [Ecuadorians'] legal team"[9] the Second Circuit noted that the defendants' wrongful conduct included fabricating evidence, bribing foreign officials in violation of the Foreign Corrupt Practices Act, and even ghostwriting the multibillion-dollar judgment against Chevron and bribing the Ecuadorian judge to issue it.

The Second Circuit devoted more than 50 pages of its opinion to describing the district court's unchallenged factual findings and the underlying evidence.[10] Among those undisputed facts:

- In the Ecuadorian lawsuit, the LAPs' team repeatedly publicized huge damages figures even though their scientific expert who made the estimate sent them a cease-and-desist letter, telling them the estimate was wildly overstated and should not be used.[11] At the LAPs' request, their scientists stopped testing for certain compounds that showed "more recent contamination" caused by PetroEcuador's ongoing operations.[12] When another of their experts found no environmental or health risk at judicial inspection sites, the LAP team forged his reports to claim falsely there were "highly toxic chemicals" present and the environmental remediation was "inadequate or insufficient."[13] And, recognizing independent inspection of the sites would favor Chevron, the LAPs' team secretly hired experts to pose as purported "independent monitors" of the court-ordered inspections, with the task of criticizing and undermining the inspection reports.[14] The LAP team did all of this with the aim of having "an in terrorem effect" on Chevron that would "impel[] [it] to agree to a settlement."[15]

- When these tactics did not work, Donziger and the LAP team "coerced" the Ecuadorian judge with threats to appoint "Donziger's choice" as the purportedly neutral global damages expert.[16] This expert was far from neutral, however, as Donziger and his team secretly paid him and, in fact, wrote the report to which he simply affixed his name.[17] Donziger and the LAP team then secretly came to an agreement with a former Ecuadorian judge — who later testified to this effect at trial in New York — for him to ghostwrite orders for the then-presiding judge.[18]

- When Chevron started uncovering evidence of the scheme through discovery in U.S. courts, defendants told "half-truths or worse to U.S. courts in attempts to prevent exposure of that [fraud] and other wrongdoing."[19] Among other things, the defendants resisted discovery by arguing that their conduct was "innocuous" and "of no relevance to anything," while at the same time they acknowledged to each other in internal emails that the evidence was "so serious that we could lose everything."[20] Similarly, in another internal email, one of the LAPs' legal team members "admitted that if documents exposing just part of what they had done were to come to light, 'apart from destroying the proceedings, all of us, your attorneys, might go to jail.'"[21]

- The defendants' scheme reached its climax when they bribed the Ecuadorian judge with a promise of $500,000 and then ghostwrote the multibillion-dollar judgment itself. Chevron proved this judgment ghostwriting scheme at trial with a painstaking forensic analysis, comparing the Ecuadorian judgment with unfiled work product from the LAPs' team's files; the judgment contained substantial passages and references which are nowhere in the court record, but which appeared verbatim (including with the same typographical errors) in the LAPs' internal emails and files.[22] This forensic evidence was corroborated at trial in numerous respects, including by documents and testimony from the former Ecuadorian judge who facilitated the bribery scheme and edited the judgment before it was issued.[23]

Having chronicled some of the undisputed facts, the Second Circuit quickly dispensed with Donziger's principal argument — that Chevron lacked standing — finding it "without merit" and holding that "Chevron clearly met the requirements for Article III standing when it commenced the present action."[24] The court similarly rejected Donziger's mootness argument and dismissed as "untenable" the assertion that there was no connection between the "corrupt conduct at the trial level" and the judgment because of a subsequent Ecuadorian appellate process.[25] In fact, the court stressed that the multibillion-dollar Ecuadorian judgment is "clearly traceable to the LAPs' legal team's corrupt conduct."[26]

The Second Circuit also affirmed in full the district court's grant of equitable relief, which included enjoining Donziger and his clients from attempting to enforce the judgment in any court in the U.S., and placing a constructive trust over any proceeds they might collect from the judgment.

RICO Authorizes Equitable Relief for Private Plaintiffs

The Second Circuit held that the federal civil RICO statute, 18 U.S.C. § 1964, authorizes private civil plaintiffs to obtain equitable relief in proper cases. The court noted that the U.S. Supreme Court had not addressed this issue and the two circuits that had — the Seventh and the Ninth — reached conflicting conclusions.[27] The Second Circuit held that "a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant's violation of § 1962, largely for the reasons stated by the Seventh Circuit opinion in" National Organization for Women Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001).[28]

According to the Second Circuit, 18 U.S.C. § 1964(a) "expansively authoriz[es] federal courts to exercise their traditional equity powers" in private RICO suits and "neither states that any category of persons may not obtain relief that is within the powers granted to the federal courts nor specifies the persons in whose favor the courts are authorized to exercise the powers there granted."[29] Thus, in the Second Circuit's view, "Congress did not intend to limit the court's subsection (a) authority by reference to the identity or nature of the plaintiff."[30]

As for the remaining subsections of § 1964, the court interpreted subsection (b) as limiting the availability of "restraining orders" "only to the United States, not to a private person," and subsection (c) "as not authorizing awards of treble damages or attorneys' fees to the United States" but to only private persons.[31] The court, however, did not view either subsection as limiting the types of relief "that the federal courts are authorized to grant under subsection (a)."[32]

In affirming the ability of private parties to obtain equitable relief under RICO, the decision ensures that victims of complex criminal schemes have an adequate remedy. This is particularly important because, in many instances, a RICO plaintiff's primary objective is to end ongoing criminal conduct, making injunctive relief essential. In contrast, damages may fail to address adequately ongoing criminal schemes and defendants may be insolvent or money judgments otherwise practically uncollectable.

NY Common Law Provides Equitable Relief from Fraudulent Foreign Judgments

In addition, the Second Circuit held that "New York common law has long recognized that equitable relief may be granted to a person victimized by the procurement of a judgment through fraud that is extrinsic to the gravamen of the cause of action," and that such relief may be granted by a court with personal jurisdiction over the parties, "even through the fraudulent judgment was entered in a different

jurisdiction."[33]

The court also rejected the defendants' argument that Chevron had an adequate remedy at law — namely, a money judgment and/or the ability to defend against individual enforcement actions.[34] Noting that the defendants' professed strategy was to "inundate" Chevron with multiple enforcement actions, thereby "forcing it to incur sizeable legal fees," the court held that Chevron's ability to defend itself in these actions was not an adequate remedy at law.[35]

The ruling is significant in rejecting defendants' argument that the New York Recognition Act "supplanted the common-law cause of action for relief from a judgment procured by fraud."[36] It ensures that parties facing fraudulent foreign judgments retain their common law rights to raise the fraud in the jurisdiction of their choosing — provided personal jurisdiction exists and the relief sought is domestic in nature.

International Comity

The Second Circuit also rejected appeals to "international comity" as a basis to deny otherwise available remedies provided by U.S. law. Emphasizing the in personam nature of the relief entered by the district court, the court noted that the injunction was "directed at only three persons ... over whom the district court has personal jurisdiction" (namely, Donziger and the two appearing LAPs), and that its application was "limited to the United States."[37] The court also noted that there was no risk of "international friction" where the Ecuadorian appellate courts expressly "deferred to the courts of the United States" on Chevron's allegations of corruption.[38]

The principle that, where a court has personal jurisdiction over the persons to be bound and the relief sought is domestic in nature, international comity does not bar equitable relief from a fraudulently procured judgment and should strengthen the rule of law by providing remedies for at least some of the worst abuses in foreign judicial systems.

Clients Accountable for Their Attorney's Misconduct

Finally, the Second Circuit rejected the LAPs' arguments regarding personal jurisdiction and the appropriateness of enjoining them from enforcing the judgment based on the conduct of their lawyers and agents. The court affirmed the district court's sanction against the LAPs — the striking of their personal jurisdiction defense — for their repeated failure to comply with discovery orders, finding their challenges "meritless."[39]

The court also reasoned that not holding the LAPs accountable for the actions of their lawyers would violate basic lawyer-client principles and "run afoul of the Supreme Court's warning that fraud 'is a wrong against the institutions set up to protect and safeguard the public ...'"[40] The court found "ampl[e]" support for the district court's conclusion that the LAPs "retained Donziger as their attorney and gave [their Ecuadorian lawyer] power of attorney," thereby ratifying all of their fraudulent conduct.[41] Assuming for argument's sake that the LAPs had not been personally involved in the wrongdoing, the court explained, "[e]ven innocent clients may not benefit from the fraud of their attorney."[42]

Conclusion

The extraordinary undisputed evidence by which Chevron proved the "legal fraud of the century"

renders Chevron Corporation v. Donziger important in the history of American jurisprudence. The outcome of this case should have broader implications for civil RICO actions, transnational litigation and attorney ethics. And it serves powerfully to strengthen the rule of law, by making it more difficult for lawyers (or their clients) to exploit the weaknesses of other countries' judicial systems for their own illicit gain.

As the Second Circuit aptly stated, quoting the district court, "The ends do not justify the means. There is no 'Robin Hood' defense to illegal and wrongful conduct. And the defendants' 'this-is-the-way-it-is-done-in-Ecuador' excuses — actually a remarkable insult to the people of Ecuador — do not help them."[43]

—By William E. Thomson, Kahn A. Scolnick and Dylan Mefford, Gibson Dunn & Crutcher LLP

DISCLOSURE: The authors were part of the team representing Chevron at trial and on appeal in Chevron Corporation v. Donziger.

William Thomson is a partner in Gibson Dunn's Los Angeles office, where he is co-chairman of the firm's transnational litigation practice group and a member of the firm's appellate and constitutional law and securities litigation practice groups.

Kahn Scolnick is a partner in Gibson Dunn's Los Angeles office, where he is a member of the firm's appellate and constitutional law, transnational litigation, class actions, and securities litigation practice groups.

Dylan Mefford is an associate in Gibson Dunn's Los Angeles office, where he is a member of the firm's litigation and transnational litigation practice groups.

[1] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014).

[2] The Wall St. J., Legal Fraud of the Century (March 4, 2014).

[3] Forbes, Chevron v. Donziger: The Epic Battle for the Rule of Law Hits the Second Circuit (April 21, 2015).

[4] Op. at 11 (brackets in original).

[5] The punitive damages aspect of the judgment was later eliminated on appeal as being contrary to Ecuadorian law.

[6] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

[7] Id.

[8] Id.

[9] Op. at 85.

[10] Id. at 14-74.

[11] Id. at 18-20.

[12] Id. at 20-21.

[13] Id. at 21-23.

[14] Id. at 23-24.

[15] Id. at 17.

[16] Id. at 24-28.

[17] Id. at 28-38.

[18] Id. at 61-62.

[19] Id. at 70.

[20] Id. at 40.

[21] Id. at 15-16.

[22] Id. at 51-57.

[23] Id. at 60-64.

[24] Id. at 75-77.

[25] Id. at 82.

[26] Id. at 85.

[27] Op. at 103.

[28] Id.

[29] Id. at 104-05.

[30] Id. at 105.

[31] Id. at 105-06.

[32] Id. at 106.

[33] Op. at 109.

[34] Id. at 112-13.

[35] Id. at 113.

[36] Id. at 108-09.

[37] Op. at 114.

[38] Id. at 115.

[39] Op. at 121-23.

[40] Id. at 124 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)).

[41] Id. at 125.

[42] Id.

[43] Op. at 15.
