

OPINION

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Julian Ku and George Conway: When Corporate Defendants Go on Offense

How an \$18 billion judgment against Chevron in Ecuador turned into a battle royal with a top U.S. law firm.

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In defending against an \$18 billion judgment levied by Ecuadorean courts, oil giant [ChevronCVX +1.13%](#) has played more offense than defense. It has sued the plaintiffs' U.S. and Ecuadorean attorneys, and several of the plaintiffs' expert witnesses. Last month, Chevron even filed counterclaims alleging fraud and misconduct by Patton Boggs, a well-respected U.S. law firm involved in the case.

While unusual, Chevron's "offensive" defense strategy is beginning to pay off, and it may offer a playbook for future corporate defendants facing foreign lawsuits they view as abusive. That playbook may also serve as a cautionary note for American law firms like Patton Boggs that assist or promote such litigation.

Litigation in foreign courts may become more common for American multinationals because the Supreme Court has severely restricted lawsuits in U.S. courts arising out of overseas conduct. Yet as Chevron discovered in Ecuador, corporate defendants may face much more dangerous litigation in foreign jurisdictions.

The dispute began with charges that a consortium consisting of Petroecuador (Ecuador's state-owned oil company) and Texaco (which Chevron later acquired) caused serious environmental harm as a result of their oil exploration and development. The Ecuadorean plaintiffs originally filed suit in federal court in New York, but Chevron/Texaco convinced the court that the case should be brought in Ecuador instead. In the Ecuadorean court, however, Chevron wound up on the losing end of a stunning \$18 billion judgment. Since that 2011 judgment, Chevron has battled actions by the plaintiffs to enforce the judgment in other jurisdictions around the world.

The problem for Chevron is that U.S. courts take a generous view toward foreign judgments and will generally enforce them as long as there is no evidence of serious unfairness or fraud in the foreign court proceeding. For this reason, if Chevron had adopted a standard defense strategy attempting to block enforcement of the judgment, it probably would have been forced to settle for a substantial amount.



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Instead the company went on the offensive. First, it initiated an international arbitration against Ecuador at the Permanent Court of Arbitration in The Hague under the U.S.-Ecuador bilateral investment treaty. In that proceeding, Chevron alleged, among other things, that Ecuador had failed to provide a fair trial proceeding. The arbitration also enabled Chevron to invoke a federal law that allowed it to

demand documents and to depose witnesses to support its case in the arbitration.

The company uncovered evidence in this discovery process that it believes shows that the plaintiffs' attorneys were involved in ghostwriting key portions of the Ecuadorean court's expert report finding Chevron liable. Chevron then launched a civil racketeering lawsuit in federal court against the plaintiffs' chief U.S. lawyer, Steven Donziger, his Ecuadorean counsel, and their expert consultants, Stratus. The racketeering lawsuit enabled Chevron to seek more evidence to support its allegations of fraud in the underlying Ecuadorean court judgment.

Over the past year, the company's aggressive strategy has begun to pay off. A judge involved in the Ecuador judgment filed a declaration supporting Chevron's allegations of fraud. The plaintiffs' expert consultants, Stratus, also settled Chevron's lawsuit against it by filing declarations supporting some of Chevron's allegations. [Burford Capital, BUR.LN 0.00%](#) a major litigation finance company that had funded litigation to enforce the Ecuadorean court judgment, also pulled out of the case and declared that it had been misled by the plaintiffs' lawyers. Mr. Donziger, his co-counsel and Patton Boggs denied Burford's accusations and have continued to deny all of Chevron's allegations of fraud in the Ecuadorean court judgment.

It is in this context that Chevron's unusual battle with Patton Boggs must be considered. The large law and lobbying firm based in Washington, D.C., usually represents corporate clients like Chevron, and not individual plaintiffs like the Ecuadoreans. When Patton Boggs became involved in the case in 2010 to help enforce the \$18 billion judgment, court documents uncovered by Chevron show that it took its fees, in part, on a contingency worth up to \$450 million. (It also received fees directly from hedge funds financing the litigation.)

Patton Boggs then took the rare step of suing Chevron, in its own name, in three separate actions. Two of the lawsuits sought to establish that Patton Boggs had no conflict of interest with Chevron and alleged misconduct by Chevron in interfering with Patton Boggs's efforts to seek investments to finance the litigation. Both were

dismissed. The third lawsuit, which is still pending, sought to block Chevron from collecting on a bond it had posted for an appeal, and alleged that Chevron engaged in "malicious prosecution" by naming Patton Boggs as a co-conspirator in the oil company's RICO lawsuits.

Patton Boggs has also denounced Chevron for using its "limitless resources to intimidate and harass anyone that dares to help" the plaintiffs. While its resources are not limitless, Chevron's offensive strategy against the Ecuadorean judgment has been enormously expensive; some reports suggest that the company has hired as many as 2,000 lawyers in the various litigations. But Chevron deserves credit for fighting back instead of settling a claim it believes to be fraudulent. By turning the tables on the plaintiffs' attorneys, who usually are the beneficiaries of extensive discovery, Chevron has changed the entire nature of the case against it.

Even as the major funder of the litigation to collect on the judgment against Chevron pulled out of the case, Patton Boggs has continued to battle. And no wonder: A \$450 million contingency fee is at stake, the litigation so far has been expensive and the firm's reputation must be defended.

Not all corporate defendants will be able to replicate Chevron's aggressive and costly defense strategy. Nor will all foreign court cases against corporate defendants be as vulnerable to push-back as the Ecuadorean one. Still, Chevron's experience in Ecuador shows that offense may indeed yield the best defense.

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