OPEN SOCIETY FOUNDATIONS

LEGAL REMEDIES FOR GRAND CORRUPTION

Legal Remedies for Victims of Bribery under U.S. Law

Richard E. Messick

June 2016

This paper is the fifth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

Richard E. Messick consults for international organizations, development agencies, and non-governmental organizations on legal development and anticorruption issues. As an attorney in the United States he advised political parties, office holders, corporations, and political committees on campaign finance and ethics issues and represented individuals and corporations in state and federal matters involving fraud and corruption. After serving as Chief Counsel of the Senate Committee on Foreign Relations, he joined the World Bank where he worked until his retirement on legal and judicial reform and anticorruption projects.

Published by Open Society Foundations
224 West 57th Street
New York, New York, 10019 USA

Contact:
Ken Hurwitz
Senior Legal Officer
Anticorruption
Open Society Justice Initiative
Ken.Hurwitz@opensocietyfoundations.org

Litigation in the United States to recover damages for bribery was until recently rare—perhaps the occasional suit between merchants when one caught the other bribing its employee. But what was once a narrow, sleepy corner of the law is now expanding rapidly thanks to passage of the Foreign Corrupt Practices Act (FCPA). By making it illegal for those subject to American law to bribe a "foreign official," the act created a new class of claimants, foreign governments injured when their employees were bribed. It has also prompted a wave of suits by the shareholders, business partners, and competitors of those who bribed an employee of a foreign government. All have filed "follow on" actions in the wake on FCPA conviction, asserting the violation caused them compensable injury.

Most of this litigation is quite recent, brought since the surge in FCPA enforcement actions in the mid-2000s,[1] and most cases have either been settled out of court or await final disposition. Many questions about the legal remedies available when a foreign official is bribed thus remain to be decided. Is the foreign government that employed the bribe-taker always entitled to compensation? Even if senior officials were complicit in the bribery scheme? If compensation is appropriate, how should damages be computed? Are shareholders really harmed if the company paid a bribe? How much oversight must a corporation's officers and directors exercise to avoid liability when the employees are caught paying bribes? Does the payment of a bribe harm the bribe payer's competitors?

Cases underway today in both criminal and civil courts raise these and related questions. In criminal court this is because, as part of the resolution of an FCAP enforcement action, a foreign government can petition for compensation for the losses suffered from the bribery. In civil court it happens in cases where, to the various damage theories taken from commercial bribery law, private parties are pressing new ones based on securities fraud, antitrust violations, and racketeering. How such cases are faring as of early 2016, and how remedies for bribery victims are likely to evolve in the future?

---

[1] Through 2004 the Justice Department and Securities and Exchange Commission filed 71 enforcement actions between them. From 2004 through 2015 the number more than quadrupled. Calculated from U.S. Department of Justice Foreign Corrupt Practices Act, Related Enforcement Actions, https://www.justice.gov/criminal-fraud/related-enforcement-actions; U.S. Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

I. Compensating Foreign Governments for FCPA Violations

The 1977 enactment of the Foreign Corrupt Practices Act coincided with a sea change in American criminal law. Traditionally, the adjudication of a criminal case in the United States had been a two-party affair—between the prosecutor on one side and the defendant on the other. Save for appearing as a witness, victims of the crime had no place in the process. A prosecutor might require a defendant to return stolen property as part of a plea bargain, but a victim had no right to its return. Nor indeed did the victim have any rights at all: not the right to know the progress of case, nor where and when the defendant would be tried, nor even to be protected from intimidation by defendants or their cohorts.

Holding the victim at arm's length throughout the criminal process is now history thanks to the victims' rights movement, a grass-roots effort that arose in the 1960s to give crime victims a voice the criminal justice system. At the federal level the movement prompted a trio of statutes -- the 1982 Victims and Witness Protection Act, the 1996 Mandatory Victim Restitution Act, and the 2004 Crime Victims Rights Act – which have progressively expanded the rights victims can exercise during the investigation, prosecution, and sentencing of criminal defendants. Although technically the three do not cover an FCPA violation, conspiring to violate the FCPA is covered, and a conspiracy charge is almost always one of those brought in an FCPA prosecution.[2] Thus a foreign government that is a victim of an FCPA violation can assert the full panoply of rights accorded crime victims during an FCPA criminal enforcement action.

For foreign governments, the most important right granted a crime victim is the right to compensation for losses the offense caused. Whenever a bribe-payer is found guilty of, or pleads guilty to, conspiring to violate the FCPA, under both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act a foreign government "directly harmed" by the conspiracy has a claim for damages.[3] Many FCPA actions do not end with a plea or a verdict but with a deferred prosecution agreement, and although victims' compensation laws apply only when a final judgment has been entered, a May 2015 amendment to the victims' right law covers this gap. It provides crime victims the right to timely notification "of any . . . deferred prosecution agreement" federal prosecutors offer a defendant. Courts have asserted

[2] Crime victims' laws apply only to offenses listed in title 18 of the United States Code, and the FCPA appears in title 15. But a conspiracy, including one to violate the FCPA, is a title 18 offense. Shane Frick, "'Ice' Capades: Restitution Orders and the FCPA," Richmond Journal of Global Law & Business 12(3): 433 – 452, 440 – 441, 2013.

[3] 18 U.S.C. § 3663(a)(2) (Victim and Witness Protection Act); 18 U.S.C. § 3663A(a) (Mandatory Victim Restitution Act).

the authority to approve deferred prosecution agreements,[4] and the right to advance notification of an agreement offers a claimant-government the opportunity to challenge an agreement that lacks a compensation provision.

A) Foreign Governments as FCPA Victims

Even before passage of victims' rights legislation, the Department of Justice had recognized that foreign governments suffered compensable injury when their officials were bribed. In the first FCPA enforcement action ever filed, a 1979 case arising from the bribery of the leader of a Cook Island political party, the Department required defendants to compensate the Cook Islands government as part of the plea agreement. The Department included compensation provisions in plea agreements in two other early cases as well, one involving the bribery of a Niger government official and the second a German official. Both were resolved after enactment of the 1982 Victims and Witness Protection Act, which gave courts the discretion to award compensation, but before the 1996 Mandatory Victim Restitution Act, which requires the Department to include a compensation provision in a plea agreement.

To date there are five cases where a foreign government has received compensation for an FCAP violation. Besides the three resolved before compensation was made mandatory, there is a 2009 case arising from the bribery of Haitian officials and a 2010 case from the bribery of Thai government personnel. The five are listed in table 1 along with the dates the cases were resolved and the amount of compensation. Save for the Thai case all cases were resolved through defendants' agreement to plead guilty. One consequence of a plea agreement is that few of the case's details are put on the public record; as a result, the information available on the four FCPA plea deals provides neither an explanation for why the Department conditioned the plea bargain on payment of compensation nor the rationale for the amount.

The one case where compensation was ordered as part of a verdict is *United States v. Green.*[5] Gerald and Patricia Green were convicted by a jury of bribing officials of the Thai government's official tourist agency, and at sentencing the trial judge ordered the two to pay $250,000 compensation. The court stated that "there was an identifiable victim or victims" who suffered "a pecuniary loss" as a result of the

[4] United States v. Saena Tech Corporation, Criminal No. 14-66 (D. D.C. 2015) discussed in FCPA Professor, "The Latest Judicial Opinion Regarding The DOJ's Use Of DPAs," October 26th, 2015.

[5] Court decisions and public filings in FCPA criminal cases are available on the Department of Justice's web page cited note 1. To avoid cluttering this paper with footnotes, full citations to cases are provided only for those cases and documents not available on the Department's web page nor easily retrievable by plugging the case name into a search engine or when needed for clarification.

bribery and compensation was thus warranted.[6] The Greens appealed the compensation order on procedural grounds, contending that the compensation question should have been submitted the jury, but the Ninth Circuit rejected the argument.

FCPA Cases Where a Foreign Government Received Compensation

• *United States v. Kenny International Corp*., No. Cr. 79-372 (D.D.C. 1979) (plea agreement) ($337,000 paid to the government of the Cook Islands, the amount of financial assistance provided to a political party in return for promise it would continue a government contract with defendant if it won election).
• *United States v. Napco International, Inc.,* No. Cr. 3-89-47(1) (D. Minn. 1989) (plea agreement) ($140,000 paid to U.S. Defense Department to be credited to Niger's Foreign Military Sales account as compensation for bribery scheme involving Nigerian officials).
• *United States v. F.G. Mason Engineering, Inc.*, No. B-90-29 (D. Conn. 1990) (plea agreement) ($160,000 payment plus discounts on future sales to compensate German government for bribing one of its military intelligence service officers).
• *United States v. Diaz*, No. 20346-CR-JEM (S.D. Fla. 2009) (plea agreement) (defendant ordered to pay $73, 824 to the government of Haiti, its fee for serving as intermediary in bribery scheme between government officials and U.S. firm).
• *United States v. Green*, No. CR 08-00059(B)-GW (C.D. Cal. 2010) (conviction) (DoJ sought compensation of $1.8 million, total bribes paid Thai officials; court reduced to $250,000 without explanation).

[6] Cited in United States v. Green, 722 F.3d 1146 (9th Cir. 2013) (9th Cir. 2011).

B) Foreign Government's Right to Compensation

Although the Department has never opposed treating a foreign government as a victim during an FCPA enforcement action, in one case it did oppose a claim for compensation. The claim was pressed by a corporation owned by the Government of Costa Rica. The record disclosed that officers and directors of the company, Instituto Costarricense de Electridad ("ICE"), had accepted bribes not only from defendant's Costa Rican subsidiary but from a number of other firms as well, *United States v. Alcatel–Lucent France, SA*. As the Department explained in opposing ICE's compensation petition, during the proceedings it had accorded the company "the rights typically reserved for victims and provided ICE with an opportunity to make its arguments," but because so many ICE employees had been involved in the bribery scheme, it argued that the company was not a victim but a co-conspirator. Even if ICE were a victim, it contended, compensation should not be ordered because the Mandatory Victims Restitution Act provides an exception to compensation where, as the Department argued here, determining the amount would be so complex that it would unduly delay resolution of criminal case. The trial court agreed with both arguments, holding that ICE was a co-conspirator not a victim and that in any event the computation of damages would take too long. The Eleventh Circuit upheld the trial court, ruling that the "pervasive, constant, and consistent illegal conduct" of ICE employees the trial court had identified was enough for it to conclude that ICE "actually functioned as the offenders' coconspirator."[7]

How much of a shadow the *ICE* decision casts over future compensation claims remains to be seen. So many bribes were paid for so long to so many ICE employees, and even to company directors, that in opposing its petition for compensation the Department contended that "ICE as an organization appears to have had a deeply ingrained culture of corruption."[8] Furthermore, as the Department argued, defendant Alcatel had already paid ICE $10 million in damages to resolve a criminal case in Costa Rica, and there was on-going civil litigation where ICE stood to obtain more. And finally, in *ICE* the Government of Costa Rica did not pursue compensation in its own name but in the corporation's. ICE thus presents a much different case than one where a single government official accepted a bribe one time. Determining how close to the facts of the latter and how far from the former future governments claims must fall to merit compensation will require more guidance from the Department of Justice or more litigation or more likely both.

If *ICE* shows the Department of Justice is prepared to resist compensation when it believes payment is not warranted, two recent cases show its willingness to find ways to force defendants to pay compensation when it believes it is warranted. The first involved a prosecution arising from the same bribery scheme as the 2009 *Diaz* case

[7] Instituto Costarricense de Electridad, No. 11-12708G (11th Cir. June 17, 2011).

[8] Government's Response to ICE's Petition For Victim Status and Restitution, p. 12.

listed in table 1. In that one Haitian citizen Robert Antoine had been one of several employees of Haiti's state-owned telecom company who had accepted the bribes that led to the FCPA conviction, and although a foreign public official's acceptance of a bribe is not itself an FCPA violation, if, as Antoine did, the officials deposits the bribe proceeds in an American bank account, he or she violates American anti-money laundering laws. Antoine was prosecuted for conspiring to commit money laundering; as part of his plea he agreed to pay the government of Haiti $1.8 million, the total amount of bribes he and other company employees received.[9]

A more creative effort arose from the settlement of a civil forfeiture case that accompanied an FCPA enforcement action. U.S. law permits prosecutors to file a civil suit seeking the forfeiture of money or other assets they believe to be the proceeds or instrumentalities of a crime. Suit can be filed at the time a suspect is formally charged and it progresses separately from the criminal case. The filing of a suit also allows prosecutors to seek an order freezing, or preventing, the assets from being sold or transferred pending resolution of the case. If the assets are located abroad, the Department's prosecutors will ask the government where the assets are held to obtain an order from its courts freezing the assets pending the outcome of the U.S. action.

James Giffen was indicted in 2003 for bribing officials of the government of Kazakhstan. At the same time as the indictment issued, the Department of Justice filed a civil suit seeking the forfeiture of $84 million Giffen held in a Swiss bank, money the Department alleged was going to be used to bribe Kazakh officials. The Department asked the Swiss government to freeze the funds, but before the Swiss could execute the freeze order, the funds were transferred to an official account of the Kazak government.

The FCPA case against Giffen ended in a plea agreement where Giffen surrendered any claim to the funds in question. This left the governments of the United States, Switzerland, and Kazakhstan each with a claim to the money. The three agreed to transfer the monies to the BOTA foundation, a Kazakh entity subject to international oversight, created to distribute the money to needy Kazakh children. An international NGO was appointed to administer the monies, and the $115 million, the original amount plus accrued interest, was disbursed over a five period that ended December 2014.[10]

[9] United States v. Robert Antoine, No. 09-CR-2100 (S.D. Fla. 2010).

[10] The BOTA Foundation: A Final Summative Report, February 2015, available at: https://www.irex.org/sites/default/files/BOTA%20Summative%20Report%20FINAL.pdf

C. Amount of Compensation

Court records in two of the five FCPA victim-compensation cases shown in table 1, *Kenny* and *Diaz*, show how the amount of compensation was calculated. In *Kenny*, it was the bribe paid; in *Diaz* it was the profit defendant reaped from serving as the intermediary between the bribe payer and the recipients. In a third, *Green*, the Department of Justice had asked for compensation of $1.8 million, the total bribes paid, but for reasons not explained on the public record, the court reduced it to $250,000. In the two other cases, *Napco International* and *F.G. Mason Engineering*, the court records do disclose how compensation was determined.

None of these awards comply with the provisions of the Victims and Witness Protection Act or the Mandatory Victim Restitution Act for awarding compensation. Both explicitly state that compensation is to be measured by what the victim lost rather than what the defendant gained.[11] Yet the latter is the precisely the measure used in *Diaz* and was apparently the rationale behind the award of the bribe amount in *Kenny* and the Department's request in *Greene*. But as the Fourth Circuit ruled in *United States v. Harvey* and Sixth Circuit in *United States v. Kilpatrick*, decisions interpreting the compensation provision in cases arising from the bribery of U.S. office holders, both statutes require that compensation awards be measured by defendants' gain. There may be instances, as the *Kilpatrick* court recognized, where the defendants' gain is a "reasonable estimate" of victim's loss, but the government must present evidence showing it is a good proxy for the loss and gain cannot be used simply to avoid the time and effort required to calculate the victim's actual loss.

Kilpatrick and *Harvey* offer hints of the kind of loss evidence prosecutors must present to support an award. In *Kilpatrick* defendants claimed that the bid rigging resulting from their bribery scheme had caused no loss because the Detroit Water and Sewer Department, the victim, would have had to pay a contractor to have the work done anyway. While recognizing that it would not be easy to show what the department would have paid to other contractors had the bidding not been rigged, the court's discussion of the compensation issue implies that this is the type of evidence that should be developed. In *Harvey*, where, thanks to bribery, additional work beyond that was called for in a contract with the U.S. Army Intelligence and

[11] Both statutes use the term "restitution" to mean compensating victims for their losses, but at least in civil suits that term can mean one of two things: either the disgorgement of the benefits a wrongdoer realized from his or her wrongful act or damages paid to a victim to compensate for the losses the wrongdoing caused. To avoid confusion, this paper follows the recommendation of the American Law Institute and uses "victim compensation" to describe payments to crime victims to make up for losses caused by the commission of a crime. Model Penal Code: Sentencing § 6.04A cmt. A (Preliminary Draft No. 10, September 3, 2014) cited in Courtney E. Lollar, "What is Criminal Restitution?" Iowa Law Review 100: 93- 153, 2014, n. 19.

Security Command was performed, the opinion suggests evidence of why the work was unnecessary or over-priced or both should be provided.

Federal courts determine the compensation due victims on the basis of a report prepared by the unit of the U.S. Probation and Pretrial Services System attached to the local court. The statute requires the prosecution to furnish the department with the information necessary for it to provide "a complete accounting of the [victim's] losses" although victims may submit data on their losses directly to the service.[12] Both the prosecution and the defendant are given a copy of the probation service's report, and in the event of disagreement, an evidentiary hearing is held. The burden is on the government to prove the amount of the victim's losses by a preponderance of the evidence.

II. Civil Suits for Damages

FCPA enforcement actions have spawned a variety of "follow on" actions, civil suits instituted after the Department of Justice or the Securities and Exchange Commission has begun an enforcement action. There is no bar to filing such suits, and the civil plaintiff can use the evidence gathered by the Department of Justice or SEC in its case. Suits have been filed in both state and federal courts by foreign governments, and by the competitors, business partners, and shareholders of the bribe-paying companies.

The principal challenge these plaintiffs face is showing that the payment of the bribe caused them economic harm. If they can establish that, they have considerable leeway in computing the actual amount of damages, for a wrongdoer cannot escape liability simply because its wrongdoing makes it hard for plaintiff to show the precise amount of the harm.[13] Plaintiffs must also establish a sufficient link between their claim and the United States to warrant an American court taking jurisdiction. How much of a link is not clear, but in a recent case the Second Circuit Court of Appeals held that the Mexican state-owned oil company Petroleos Mexicanos had to show more than that invoices issued as a result of bribe payments had been processed through, and payments been deposited in, a U.S. bank.[14]

[12] Procedure for Issuance and Enforcement of Order of Restitution, 18 U.S. C. §3664 (a).

[13] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

[14] Petroleos Mexicanos et al v. Conproca S.A. DE C.V.

A) Foreign Governments as Plaintiffs

At common law a merchant whose employee accepted a bribe had an action for fraud against the bribe payer.[15] The essence of fraud is deceit, and in secretly paying an employee to favor the briber's interests over her employer's, the payer both deceived the employer about the employee's loyalty and deprived it of the employee's undivided loyalty. An action by a foreign government for the bribery of its officials fits squarely within this theory and has formed the basis of four suits brought by governments or the enterprises they own. Two, those filed by a Bahrain state-owned company and the government of Trinidad and Tobago, have resulted in settlements. The other two have been dismissed before trial, the Mexican action noted above and one brought by the Government of Iraq. Iraq's claim was dismissed because, as was the case with ICE's attempt to secure compensation as a crime victim, numerous Iraqi government officials participated in the bribery scheme.

The largest recovery to date has been in the case involving Bahrain, a 2008 suit Alba, a company majority-owned by the Government of Bahrain, pressed against Alcoa Aluminum and other defendants for bribing employees. Alba alleged that its bribe-taking employees had conspired with the defendant-bribe payers to have Alba pay above-market prices for defendants' products. On one contract alone, it claimed, it was overcharged $65 million in one year for alumina, the product Alco had sold it, thanks to defendants' bribery.

To its common law fraud claim, Alba added a second claim, that the bribery and illegal acts committed to facilitate it constituted a violation the federal Racketeer Influenced and Corrupt Organizations Act. Although the FCPA does not permit private suits to enforce its provisions, the RICO statute does. Anyone "damaged in [their] business or property" by an "enterprise" engaged in a "pattern of racketeering" can sue for damages. While written to attack organized crime, the statute's definition of "pattern of racketeering" and criminal "enterprise" sweeps more than organized criminal gangs within its ambit. In *Alba,* plaintiff's allegation that defendants' violated laws prohibiting the use of the U.S. mail or travel across state lines to further the bribery scheme would, if true, be sufficient to establish a pattern of racketeering. The law does not require that the racketeering "enterprise" be formally constituted; it can be enough, as Alba alleged, that in bribing Alba employees defendants acted in concert.

Alba added a RICO claim to its common law claims for a reason; RICO allows plaintiffs to recover enhanced damages. Had the company pursued a fraud claim alone, it would have been entitled only to its actual damages and would have had to pay its own attorneys' fees. But if Alba recovered under RICO, it would be entitled to

---

[15] Dan B. Dobbs, Handbook on the Law of Remedies, St. Paul: West Publishing, 1973, pp.700 – 703.

three times its damages plus attorneys' fees. Because RICO provides for an enhanced recovery, the four civil actions for damages lodged to date by foreign government victims of FCPA violations have included a claim under RICO.

In *Alba*, the inclusion of a RCIO claim worked to plaintiff's advantage. Once defendants failed to strike it from the complaint, the case settled. As in many civil suits, defendants weighed the risk of having to pay treble damages plus attorneys' fees if they lost at trial against settling for a lesser sum; they apparently decided the risk of loss was too great and in October 2012 settled the case for $85 million. On the other hand, there are, as will be discussed in the Iraqi case below, risks plaintiff governments run when adding a RICO claim.

Alba is the rare case where the victim's lawsuit prompted a government enforcement proceeding. According to press reports, once Alba management discovered the bribery scheme, it filed suit immediately, and its suit caught the attention of the DoJ and the SEC which then opened their own investigations. Alcoa and several of its affiliates subsequently settled those cases, paying $384 million in fines and penalties and with one affiliate pleading guilty to an FCPA violation.

Florida state court was the venue the Government of Trinidad and Tobago chose to bring its 2007 action for damages for the bribery of its officials by the companies which bid on and built a new airport for the government.[16] To common law claims arising from that bribery it added a claim based on Florida's racketeering law which, like the federal statute, provides for treble damages plus attorneys' fees. It also sought damages under Florida's antitrust laws for bid rigging, alleging that the firms who bid on the project had conspired to inflate the bid prices. The case was brought in Florida state court because several of the contractors were based in Florida. The most recent press on the case (Florida trial court records are not on-line) reports settlements totaling $4.5 million have been reached with several defendants.[17]

As noted above, a suit by the Government of Iraq, based on the bribery of its officials, failed. The suit arose from corruption in the U.N. Oil-for-Food Program, a program meant to provide Iraqi citizens relief from the sanctions imposed after the invasion of Kuwait. The program allowed the government, then headed by Saddam Hussein, to sell oil on the world market to purchase food, medicine, and other humanitarian

[16] Complaint, Republic of Trinidad and Tobago ex rel. John Jeremie Attorney General v. Birk Hillman Consultants, No. 04-11813 CA 30 (11th Judicial Circuit Court, Florida, Apr. 13, 2007).

[17] Daily Business Review, "Attorneys Win Settlement of $4.5 Million in Trinidad Fraud," January 7, 2010, http://www.dailybusinessreview.com/id=1202466489331/Attorneys-win-settlement-of-45-million-in-Trinidad-fraud?slreturn=20160127123117

supplies for its citizens. After Saddam's government fell, investigations revealed that many citizens had not benefited from the program because it was riddled with corruption.

The government that succeeded Saddam's brought suit in 2008 for damages asserting RICO and common law claims against 90 individuals and companies that it alleged had had a hand in corrupting the program. These same investigations had also revealed that many officials of Saddam's government had been involved in the corruption, and at the time the government filed suit both the Fifth and Eleventh Circuit Courts of Appeal had held that *in pari delicto* ("in equal fault") was a defense to RICO. That is, where defendants can show the plaintiff's actions were as much a cause of the damage as defendants, recovery would be denied.

To avoid this result, the government sued not on its behalf but on behalf of the citizens of Iraq using a procedural device known as *parens patriae,* Latin for "parent of the nation." Thus technically the plaintiff was not the government itself but its citizens, the actual victims of the corruption in the program. In addition, the post-Saddam government tried to separate itself from Saddam's, contending that governments are agents of the citizenry, that the Saddam Hussein government had been a disloyal agent and that, as the new agent, the wrongs of the previous one should not be imputed to it. Neither argument succeeded, however. The trial court followed an earlier ruling by the First Circuit limiting *parens patriae* to Puerto Rico and the states of the United States. It also rejected Iraq's agency theory of government, holding that under U.S. law the actions of previous governments will be imputed to the current one.

On appeal Iraq abandoned its *parens patriae* argument but renewed its agency theory argument. To no avail. The current government's "attempts to escape the ramifications of [the conduct of the previous government] . . . is meritless," the Second Circuit opined in upholding the trial court. "Our law has long recognized that the legal position of a foreign state survives changes in its government."[18]

The facts alleged in plaintiff's complaint provided ample support for the *in pari delicto* defense. This was not a case of one or two rogue employees accepting bribes in violation of national law. Rather, as the trial court had concluded, "[t]he Complaint allege[d] a public goal [undermining the sanctions by corrupting Oil-for-Food], undertaken with public resources, pursued for political purposes, and using means available only to state actors." Hence, the government was as at least as much at fault as the defendants for the damages caused from the program's corruption, and hence its RICO claim must fail.

[18] The Republic of Iraq ex rel. Citizens of Republic of Iraq v. ABB AG, 768 F.3d 145, 163 (2d Cir. 2014)

B) Private Parties

Shareholders. The most common follow on civil actions are those brought by the shareholders of a company charged with violating the FCPA.[19] The suits are of two kinds, one against the company and its officers for securities fraud and the second against the officers and directors only for failing to prevent the company from paying bribes. The latter, brought in the name of the company by its shareholders, were until recently more common of the two.

In such shareholder derivative suits the shareholders allege that the bribery inflicted financial losses on the company, and its officers and directors should be held liable for failing to prevent it. Normally, the company's management brings suit on the corporation's behalf, but because management was one the one at fault for the bribery, corporate law allows the shareholders to sue on the company's behalf. While damages are paid to the corporation, the attorneys pursuing the claims are paid, and paid well, by the corporation, giving rise to a form of "entrepreneurial litigation," where plaintiffs' lawyers press a claim in the hopes of a large payoff and with little input from clients.[20] Though the chance of a lucrative fee may result in the filing of meritless cases, procedural and substantive obstacles are in place to weed such cases out before trial.

To begin with, before filing a derivative action a plaintiff must demand that the company's board itself sue to enforce the corporation's rights; if the plaintiff does not make a pre-filing demand, it must include in its complaint particular facts showing why such a demand would have been futile. In a case against Dow Chemical's officers and directors involving claims the officers had bribed officials of Kuwait's Supreme Petroleum Council, shareholders claimed board members had such financial and personal interests in the matter that they would not have been able to make an informed business judgment in response to a demand they sue the officers. Plaintiff-shareholders argued that, thanks to a web of business or personal relationships with Dow's CEO, a majority of directors were unable to act independently of his influence. In an illustration of high a hurdle shareholder plaintiffs must clear to proceed with a suit, the court ruled that without particular facts showing how and why the directors could not act independently, the case must be dismissed.[21]

[19] Amy D. Westbrook, "Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations," Ohio State Law Journal 73(5): 1217 – 1252, 2013.

[20] John C. Coffee, Jr., Entrepreneurial Litigation: Its Rise, Fall, and Future, Cambridge: Harvard University Press, 2015, pp. 1-7.

[21] In re the Dow Chemical Company Derivative Litigation, Consolidated Civil Action No. 4349-CC (Del. Ch. January 11, 2010).

Whether the plaintiff shareholder makes a pre-filing demand or not, it must overcome the presumption that the directors' decisions in overseeing the company are a reasonable exercise of their business judgment. In the Dow Chemical action, shareholder-plaintiffs had alleged that Dow's directors had ignored reports in a Kuwait newspaper that company officers had bribed members of the country's Supreme Petroleum Council and that the failure to investigate these reports, together with a previous case where Dow had settled an FCPA action, was enough to show the directors had been negligent. But allegations of bribery in a country where such claims are often hurled for political reason are not enough – even when coupled along with the argument that "because bribery may have occurred in the past . . . by different members of management, in a different country (India), and for a different transaction." The court held plaintiffs had failed to produce sufficient facts to show the directors had "consciously disregard[ed] their duty to supervise against bribery" and thus dismissed the case.

Only a few plaintiffs in FCPA-spawned actions have cleared these hurdles and in all cases where they have, the result has been an out-of-court settlement. In 2011 drug manufacturer SciClone paid derivative-plaintiffs $2.5 million in legal fees, and agreed to i) recover any incentive-based compensation from its officers if the company's earnings had to be restated after the government's FCPA enforcement action, ii) create a new position in the company called "Compliance Coordinator," iii) establish a detailed code of employee ethics, and iv) tighten up its internal controls to settle a derivate suit.[22] And in a 2009 settlement Faro Technologies' directors agreed to implement corporate governance changes and pay $400,000 in plaintiffs' attorneys' fees in settlement of a derivate suit. But most FCPA-based derivate suits have been dismissed before trial, and recent commentary notes a decline in new filings, the result surely of the general decline in shareholder derivative actions generally[23] coupled with the failure of so many earlier cases to survive a motion to dismiss.

The other remedy open to an investor in a bribe-paying company is an action for securities fraud. Under section 10(b) (5) of the Securities Exchange Act of 1934, anyone injured by reason of an "untrue statement of a material fact" or the failure "to state a material fact" which affects the price of a publicly traded security can bring suit for damages. In the days after the New York Times reported that Wal-Mart's Mexican subsidiary had bribed Mexican officials, its share price dropped eight percent,[24] and an employee pension fund that had invested in Wal-Mart quickly filed suit to recover its losses. The fund alleged that, by failing to disclose the company's involvement in a bribery scheme, Wal-Mart's stock traded at an artificially high price.

---

[22] Thomas R. Fox, Sciclone FCPA Lawsuit Settlement: New Enhanced Best Practices?

[23] Coffee, Entrepreneurial Litigation, note 19, pp. 42 -51.

[24] IStock Analyst, "Walmart FCPA Allegations: Is The Stock Reaction Overdone?" April 27, 2012, http://www.istockanalyst.com/finance/story/5805637/walmart-fcpa-allegations-is-the-stock-reaction-overdone

Similar claims were brought against the Avon Products Corporation, maker and seller of women's beauty products, after it revealed it was under investigation for bribing Chinese officials. Plaintiff-shareholders claimed the company's failure to disclose that it had obtained licenses for direct sales operations in China through bribery and its subsequent failure to report that its growing revenues in China were the result of bribery had inflated its stock price.

As with other securities fraud actions, the plaintiffs that sued Wal-Mart and Avon brought their actions as class actions, on behalf of themselves and all other shareholders who suffered from the companies' failure to disclose the bribery. Save for pension funds, shareholder rarely have a big enough stake in a company to justify bringing a case on his or her own. Filing a class action allows for the costs as well as the amount recovered through an out-of-court settlement or judgment to be distributed among class members according to the percentage of shares they own.

Class actions also provide a way for the costs of the litigation to be deferred until settlement or judgment. Plaintiffs' attorneys will agree not to seek their fees from class members but look to be paid from a settlement or judgment. Because recoveries in class actions can be quite large, the lawyers' fees can be substantial and thus, as with shareholder derivative suits, there are incentives for lawyers to press weak or meritless claims.

As with shareholder derivative actions, lawmakers concluded that too many frivolous suits were being brought and have enacted reforms making it easier at the outset of the case to cull suits with no merit. In addition to showing the company or a company officer misstated or failed to state an important ("material") fact, a plaintiff must show that i) the statement was made with an intent to deceive (*scienter*); (ii) a connection between the statement and the purchase or sale of a security; (iii)) the plaintiff relied upon the misrepresentation or omission; and (iv) it suffered an economic loss caused by that reliance. To these substantive law hurdles there are procedural ones as well. Most importantly, the Private Securities Litigation Reform Act of 1995 requires that plaintiff plead "with particularity" facts giving rise to a "strong inference" the statements were fraudulent, must identify the identity of the speaker and when the statements were made, and explain too why the statements were fraudulent.[25]

Again as with shareholder derivative actions, the challenges to maintaining a class actions securities fraud case are taking their toll. Many of the cases filed shortly after the uptake in FCPA enforcement actions are being dismissed, and commentators again predict a decline in new filings. Thus, despite filing a 164 page complaint in an attempt to meet the specificity requirements imposed by '95 reform legislation, the trial court in *Avon* found plaintiffs had failed to allege with sufficient specificity that when making statements about the company's business in China its senior executives

[25] Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

knew or had reason to suspect bribes were being paid.[26] At the same time, well-pleaded cases with solid factual bases are surviving motions to dismiss, as have plaintiffs in *Wal-Mart* have,[27] helped surely by the extensive details revealed in a New York Times series on the case and the sharp drop in the company's share price after the first story appeared.

Competitors. A firm in competition with a bribe-payer can claim damages under two different theories: one that its business was harmed as a result of the bribe, and two, that the bribery harmed the competitive process itself. The former can be brought under various state law unfair competition statutes and, if plaintiff lost an existing customer thanks to the bribe, under a common law theory of tortious interference with contractual relations. The latter, harm to the competitive process, gives rise to a private right of action to enforce the federal antitrust laws or a particular state antitrust statute. In Korea *Supply v. Co. v. Lockheed Martin Corp*., plaintiff Korea Supply had represented an American defense contractor bidding to provide radar systems to the Republic of Korea. Though its bid was lower and its equipment superior, Korea Supply and its principal lost to defendant Lockheed Martin because of alleged bribes and sexual favors Lockheed allegedly provided Korean officials. Korea Supply sued for damages under the California unfair competition law, and the state's highest court upheld the lower court's decision that a violation of the FCPA was an unfair act under the state statute.[28]

While a competitor need only show it suffered injury to recover under an unfair competition or tortious interference theory, recovery under federal and state antitrust laws requires a showing that the bribery injured competition. An example would be where a pattern of bribery allowed a firm to gain monopoly power in the market. Although a difficult showing to make,[29] the advantage is that, like federal and state racketeering laws, damages for violating the antitrust laws are trebled and attorneys' fees awarded.

The most successful competitor action against an FCPA violator to date is *NewMarket Corporation v. Innospect*. Both companies manufactured a gasoline additive, and in 2010 Innospect admitted in settling an FCPA action that it had paid the Iraqi officials responsible for approving the sale of fuel additives to flunk the field tests NewMarket's additive had to pass to be offered for sale in Iraq. NewMarket brought

---

[26] City of Brockton Ret. Sys. v. Avon Prods., Inc., No. 11 Civ. 4665 (S.D.N.Y. Sept. 29, 2014).

[27] City of Pontiac Gen. Emps.' Ret. Sys. v. Wal-Mart Stores, Inc., 12-CV-5162 (W.D. Ark. Sept. 26, 2014).

[28] Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003).

[29] Arthur H. Travers, "Commercial Bribery and the Antitrust Laws," Antitrust Bulletin 40: 779 - 82, 1995.

suit under both Virginia and federal antitrust laws alleging Innospect was attempting to monopolize the gasoline additive market in Iraq and in Indonesia, where there was also evidence it had bribed officials to keep NewMarket from selling it additive. In 2011 Innospect paid NewMarket $45 million to settle the suit.[30]

Business partners. Companies doing business with FCPA violators have also filed private suits under a variety of theories. In *Grynberg v. BP PLC*, Colorado oilman Jack Grynberg sued under RICO and common law fraud and loss of reputation theories for damages because his joint venture partners had bribed Kazakh officials. He claimed the bribes constituted a diversion of his share of the joint venture profits and "harm[ed his] hard-earned and well-justified reputation as a crusader against bribery and other corruption within the petroleum industry."[31] Argo-Tech an Ohio-based aerospace manufacturer, sued its Japanese distributor for allegedly bribing high-ranking officials in Japan's Ministry of Defense to secure contracts. Argo-Tech claimed the distributor breached the provision in the parties' distribution agreement requiring it to comply with the FCPA.[32] *Grynberg* was subsequently dismissed in favor of arbitration; *Argo-Tech* settled for an undisclosed amount.

Conclusion

There a number of remedies open to those injured when an American or a company subject to American law bribes an official of a foreign courts. But as this review demonstrates, the path is littered with obstacles. Foreign governments must show they are indeed victims and not, as was the case with the Costa Rican and Iraq litigation, that their employees were deeply involved in wrongdoing. Private parties must clear several hurdles, from establishing their cases belong in an American court to pleading with particularity how the bribe paying harmed them.

But as this review also demonstrates, these hurdles are not insurmountable, and when the bribery of a foreign official causes real economic loss, to a foreign government or to private entities, a remedy is available.

[30] Hilary Russ, "Judge OKs Innospec's $45M Deal To End Antitrust Suits," Law360, September 22, 2011, http://www.law360.com/articles/273374/judge-oks-innospec-s-45m-deal-to-end-antitrust-suits

[31] Complaint, Grynberg v. BP P.L.C., Docket No. 1:08-cv-00301 (D.D.C. Feb. 21, 2008), p. 7.

[32] Argo-Tech Corporation v. Yamada Corporation, No. 1:08-cv-00721 (N.D. Ohio March 24, 2008).