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Suing Bribing Competitors: The Next Tool in the International Anti-Corruption Arsenal?



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Compass Points to the Future

Compass Group, the world's largest catering firm, was investigated for allegedly bribing United Nations officials in order to secure contracts for the provision of food rations to peacekeeping forces. Spurred on by these investigations, two rival companies brought private lawsuits against Compass Group and others in the United States. The plaintiffs, who claim to have lost business because of the corrupt bids, settled their claims against Compass Group for a reported \$74 million, and continue to litigate against some of the other defendants.

Increased Focus on Anti-Corruption Will Lead to More Private Suits

More such private lawsuits by companies against bribing competitors are inevitable. Prosecutors worldwide are increasingly holding companies criminally liable for their involvement in public corruption, including corruption by foreign subsidiaries or even low-level employees working far from the home office. Investigating and prosecuting those paying bribes to win public contracts has risen on the international agenda. The United Nations Convention Against Corruption, now ratified by over 100 countries, has given this movement particular impetus. Leading the way, the U.S. Department of Justice and the Securities and Exchange Commission have ramped up their enforcement of the Foreign Corrupt Practices Act (FCPA).

For companies involved in foreign corruption, the fines and costs associated with such government investigations have become substantial. But companies that have won government contracts because they bribed foreign officials now must contend with a further risk – private lawsuits brought

by their competitors. Companies that have lost government contracts because they refused to pay a bribe to a foreign official could bring a private lawsuit against the corrupt company that was awarded the contract.

Enhanced scrutiny of publicly awarded contracts around the world, together with meaningful efforts to investigate and prosecute both bribers and corrupt public officials, means that evidence of bribery and other corrupt practices by companies will increasingly be unearthed. That could give companies losing bids to bribing competitors sufficient material to bring proceedings to recover profits that otherwise would have been earned and costs that were wasted in bidding.

Private Suits in the United States

The United States' principal statute dealing with international corruption, the FCPA, does not contain a private right of action. A losing bidder cannot therefore bring a private lawsuit based directly on an FCPA violation. Plaintiff lawyers, however, have been able to rely on other causes of action to bring suit against both US and foreign companies in US courts, based even on bribes that occurred outside the United States. For example, suits have been brought against US competitors, against foreign nationals in the United States who arranged bribes, and even against foreign companies that have ties to the United States.

Plaintiffs have based their claims on several different causes of action – many of which carry the added power of multiple damage awards. Plaintiffs have brought claims under both federal antitrust laws, such as the Sherman Act, and under state

antitrust laws, arguing that the bribery and corruption is of sufficient scope to constitute a restraint of trade. They have similarly brought claims under the federal anti-price discrimination statute, the Robinson-Patnam Act. Often plaintiffs bring a claim under the federal Racketeer Influenced and Corrupt Organizations Act, arguing that the defendant's bribes constitute such predicate acts as wire fraud, money laundering, bid rigging, and commercial bribery. Finally, plaintiffs also rely on state common law causes of action such as intentional interference with contract and business relations, unfair competition, and unjust enrichment.

Private Suits in England

In England, a competitor losing a bid to a bribing competitor should be able to recover damages for conspiracy, breach of competition laws or – in formal tender processes – for breach of an implied agreement between bidders that each would tender on an honest basis. Countries based on the English common law system are likely to offer similar remedies.

Conspiracy may be the favoured route for such claims. A conspiracy requires injury to the claimant as a result of an unlawful act or acts where two or more people have combined to cause the injury, for example here, the payer and receiver of a bribe. A claimant may choose to sue one or more of the conspirators.

To succeed, a claimant must prove the conspirators intended to injure it. This could be problematic as it might be argued that the defendant's intention in paying a bribe was to enrich itself, not injure its competitor. However, in leading conspiracy cases, Judges have stated that it is not a defense to show that a defendant's primary purpose was to further or protect its own interests; in the case of a conspiracy to defraud by misappropriation of assets it would be absurd to argue that the conspirators did not intend to injure the claimant, and even that it may be enough to show that it was reasonably foreseeable that the claimant would suffer loss as a result of the unlawful conspiracy. It can be argued with force that these principles should be applied in cases arising from bribery.

Breach of contract claims are also possible. Where an invitation to tender for a contract prescribes a "clear, orderly and

familiar" bidding procedure, it is likely that there is an implied contract between the invitee and each person delivering a conforming tender that the tender will be considered honestly, impartially and on its merit. That implied contract would be breached by a bribe, and it therefore should follow that the bribing competitor will be liable for wrongfully procuring the breach of contract by the invitee. It is possible that there is also an implied contract between tenderers participating in a formal process that each would tender on a honest basis. Payment of a bribe would, if that were right, be an actionable breach of contract.

Bribes paid to secure a contract could also be a breach of English or European Community competition law. E.C. law prohibits agreements that affect trade between E.C. member states and prevent, restrict or distort competition, or constitute abuse of a dominant position within the common market, and English domestic legislation has similar provisions. Those suffering losses for breaches of competition law may be able to bring a claim for breach of statutory duty. Typically this would follow a finding by the applicable public authority that there had been a breach of competition law. However, it may be possible to bring claims in the absence of such a finding.

Potential Difficulties

Success in international bribery cases will very much depend on the facts. Proving bribes is not straight-forward. However, a claimant may face difficulties even where the evidence is strong.

Many significant bribery cases will be international, with relevant acts occurring in various jurisdictions. This could create technical complexities, both in terms of the correct law to apply when determining liability, and the identity of the correct jurisdiction to determine a claim.

Moreover, the US courts in particular could be reluctant to issue decisions that question the propriety of actions taken by foreign governments. Defendants may well try to seek refuge in these complexities, but may struggle to find judicial sympathy in the face of strong evidence of bribery.

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been properly awarded. That involves establishing that the claimant would have won the contract in a fair fight, and that the contract would have been profitable. These could be difficult questions, particularly if there were several bidders for a contract. In England, the damages could be framed as the loss of a chance to win the contract and earn the profits. Here, a claimant successfully establishing liability would need to demonstrate a real prospect that it would

have won the contract (i.e. something more than fanciful), and the court would calculate damages on likely profits reduced to reflect its assessment of the likelihood that the contract would have been awarded to the claimant.

Notwithstanding these hurdles, these types of private lawsuits are bound to increase in the United States, England and elsewhere.

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A Uniquely Positioned Law Firm

The recently announced merger of the US law firm Edwards Angell Palmer & Dodge with Kendall Freeman of London combines two firms with impressive experience and capabilities in assisting corporations and individuals confronting corruption issues in a wide array of contexts. The new firm is uniquely positioned to guide clients through almost any corruption-related issue, whether it be implementing effective training and compliance programs, vetting prospective business partners, conducting challenging multinational internal investigations, or responding to government inquiries or enforcement actions.

Edwards Angell Palmer & Dodge has extensive experience representing a broad range of companies and individuals dealing with the U.S. Department of Justice and the Securities and Exchange Commission, including conducting challenging multinational FCPA internal investigations while avoiding unnecessary and costly practices. In merging with Kendall Freeman, Edwards Angell Palmer & Dodge now features the capabilities of one of Europe's most prominent and experienced law firms in the area of foreign corruption.

It is a testament to Kendall Freeman's experience and capabilities that the firm is the first non-US law firm to have been appointed by a US corporation with the consent of the U.S. Department of Justice to supervise a corporate FCPA compliance program across Europe.

The combination of Edwards Angell Palmer & Dodge and Kendall Freeman creates a law firm with the depth of experience and the geographic diversity to offer unparalleled service to clients facing any FCPA or corruption-related situation.

For further information on FCPA and how it may affect you, contact any of the members of our FCPA Practice:

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