



What States Should Know About the Civil Tort of Bribery

Who can be sued? A civil claim for bribery can usually be made against the bribe-payer and the bribe-recipient.

When does it apply? The tort of bribery is founded on the legal relationship of principal (the state) and agent (the official). A similar relationship exists between a company and its directors. The “bribe” is a benefit given by a legal entity or individual to a public official to obtain a favourable decision from the state, for example the award of a contract. A claim for bribery will not be available when there is no agency relationship. That may be the case for junior officials, but alternative claims will usually be available.

What needs to be proved? The state must prove:

- **The public official receives a benefit.** This can be a benefit actually provided, or a promise of a future benefit. It can come in all shapes and sizes, provided it is meaningful. Examples include cash, property, shares, expensive gifts, loans, school fees, loan or credit card repayments, or anything else of real value. The benefit can be given, and received, directly or indirectly (for example from an agent of the payer to the official's spouse), or could be made to a third party at the official's directions.
- **Decision making process.** The official must have had a role in the decision benefitting the provider of the benefit. The role need not be decisive.
- **Conflict of interest.** The benefit must create a real risk of a conflict of interest. The conflict of interest is not limited to the specific transaction for which the bribe was paid. It stains future transactions between the state and third party.
- **Briber's knowledge of official's role.** The state must show that the entity or individual providing the benefit to its official either knew that the recipient was an official of the state, or was wilfully blind to the possibility.
- **Secrecy.** The benefit must have been concealed from the state. It is the failure to disclose the payment and obtain informed consent that is the “vice”. Full disclosure to the state is a defence to a claim for bribery.

What does not need to be proved? The state does not need to prove that the motive for the payment was corrupt or dishonest, or even to prove that the bribe actually influenced the official. This is irrebuttably presumed.

What can be recovered? The state has a choice. It is always entitled to recover the amount of the bribe, plus interest. Alternatively, it can recover compensation for the financial losses it has suffered. The latter approach might be taken, for example, where a contractor pays a bribe to win a contract which it then performs poorly, causing loss or requiring significant cost to put the problems right. The election can be made at any time before judgment is finally given, and is (of course) usually determined by what would lead to the largest recovery. It is possible that a state may also be entitled, in the alternative, to recover the profits made by a bribe-payer or recipient.

Who owns the bribe? The state “owns” the bribe (it has a “proprietary claim”). This has a number of benefits. For example, the state also “owns” any assets acquired using the bribe, including any increase in value due to market rises. If the official is insolvent, the defendant can recover the bribe ahead of the claims of other creditors.

What about the agency contract? Sometimes, the bribed agent has been appointed by the state under a contract. The state is usually entitled to terminate the agent's contract without notice for bribery, and the agent forgoes any entitlement to past or future remuneration.

Can the state escape a contract procured by the bribery?

A successful claim for bribery will allow the state either to rescind or terminate its contract with the bribe-payer. The difference can be very significant. Rescission means that the contract will be treated as if it never existed, and the Court will seek to restore the parties to that position. This means the state may have to return the value of any benefits it has received under the contract to date (except the value of the bribe), which may not be welcome. Termination may be a contractual alternative to rescission, avoiding the need to account whilst also allowing a contractual claim for compensation. Whatever the choice, rights must be exercised relatively quickly or the state's ability to escape the contract may be lost. That would mean the contract must be performed, although a claim to recover losses could still be pursued.

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