COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

United States

COMPETITION LITIGATION

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in United States.

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UNITED STATES
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1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." To recover, one must not only establish an antitrust violation (see below), but also show (1) injury-in-fact (that there was an injury), (2) that the injury was caused by the conduct alleged to violate the antitrust laws (1 and 2 are often lumped together as "causation" but are distinct factual issues), (3) injury of the type the antitrust laws are intended to prevent ("antitrust injury"), and (4) antitrust standing (that the entity asserting the claim is the immediate person impacted, so that the claimed injury is not "remote"). A large range of conduct by a company acting alone or with others may be found to violate the antitrust laws and can be relied on as the basis for a competition damages claim.

Under Section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." Despite that broad language, only those restraints that "unreasonably" restrict competition violate Section 1. Violations of Section 1 require one to establish (1) a contract, combination, or conspiracy among two or more separate entities (i.e., excluding corporate affiliates) that (2) "unreasonably" restrains trade, and (3) that the conduct affects (is "in") interstate or foreign commerce.

Under Section 2 of the Sherman Act, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

Despite the fact that the antitrust statutes appear to say that violations are always criminal acts, in practice for enforcement by the Antitrust Division of the U.S. Department of Justice (Antitrust Division) the lawyers decide whether to pursue the enforcement as civil or criminal. Section 4 of the Clayton Act provides for a private right of action for those directly affected by antitrust violations to pursue civil litigation against the violators. (See Question 4 below)

Based on long-standing policy, the Antitrust Division pursues as criminal investigations only those types of Section 1 or Section 2 conduct involving multiple separate actors jointly engaged in a violation of a type that has been recognized by the courts to be have clearly anticompetitive effects without the need for detailed inquiry. These include conduct such as price fixing, bid rigging, and somewhat less frequently, allocation of customers or markets.

There are three types of violations of Section 2—(1) monopolization, (2) attempted monopolization, and (3) conspiracy to monopolize.

Proving a monopolization claim requires a showing that the defendant (1) has monopoly power (that is, "the power to control prices or exclude competition") and (2) "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Proving an attempted monopolization claim requires a showing "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."

Proving a conspiracy to monopolize claim requires a showing that the defendant (1) entered into a combination or conspiracy to monopolize, (2) took an overt act in furtherance of that combination or conspiracy, and (3) did so with a specific intent to monopolize.

Certain conduct that may violate Sections 1 and 2 of the Sherman Act may also violate other statutory provisions of U.S. antitrust law. Even so, the standards for assessing such violations and the remedies available for

violating those other statutory provisions are typically the same as they are under the corresponding antitrust provision. The relevant exceptions are for claims brought under the Robinson-Patman Act (discrimination in price by a manufacturer, for example, between favored and disfavored resellers that has an effect in the downstream market in which the favored and disfavored resellers compete), and Section 7 of the Clayton Act (mergers and acquisitions).

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

The basic elements of a competition damages claim are identified above in Question 1. Under U.S. Federal Rules of Civil Procedure (Fed. R. Civ. P.) Rule 8, the general pleading standard requires that the complaint initiating the claim "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." This requires "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the antitrust violation claimed. *Id.* at 556. (See Questions 6, 7, and 19 below regarding the filing of a claim, the jurisdictional requirements, and filing a motion to dismiss.)

3. What remedies are available to claimants in competition damages claims?

Damages (see Question 4 below) and injunctive relief are the remedies available to claimants in competition damages claims. Injunctive relief may be tailored by a court to end the antitrust violation, eliminate the benefits to the defendant of the antitrust violation, and restore competition.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Under Section 4 of the Clayton Act, a successful plaintiff in a private antitrust action "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys' fee." Trebling of damages is automatic and is executed by the court based on the amount of "single" damages determined by the jury (or by the court in a non-jury trial). Only damages flowing from the antitrust violation are recoverable. Those damages are typically calculated by comparing what the plaintiff's financial results would have been in a "but for" world (that is, one in which the antitrust violation had not occurred) with the plaintiff's actual financial results in the actual world (in which the antitrust violation did occur). Calculating damages often depends on the particular antitrust violation at issue, and invariably involves experts (see Question 13 below).

Joint and several liability is recognized. A cartel victim, for example, paying an "overcharge" (the additional amount resulting from the antitrust violation over what the price would have been without the antitrust violation) can seek to recover the entire overcharge from any one of the cartel participants regardless from of whom the victim purchased. (There is no right of contribution.)

There are limited exceptions to the automatic trebling of damages. Most notably, a participant in the joint illegal conduct that (1) is the first to report their cartel activity to the U.S. Department of Justice Antitrust Division (the Antitrust Division) before the Antitrust Division is otherwise aware of the conduct, (2) cooperates in the Antitrust Division's investigation and with private plaintiffs, if any, and (3) meets other requirements under the Antitrust Division's Leniency Program, detrebling of damages is available under the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA). (ACPERA limits damages to single instead of treble damages caused by one's own conduct rather than joint and several liability (see Question 16 below).)

The Antitrust Division's Leniency Program also allows those involved in antitrust crimes to self-report and avoid criminal convictions, fines, and imprisonment. The first conspirator to confess participation in an antitrust crime, fully cooperate with the Antitrust Division, and meet all other required conditions receives leniency. Later-reporting cartel participants may receive consideration in sentencing recommendations by the Antitrust Division, depending on all the facts of their conduct, reporting, and cooperation.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

The relevant limitations period for a competition damages claim is four years. That period begins when the cause of action accrues, which is typically when the injury from the antitrust violation arises. Each

subsequent overt act in furtherance of an antitrust conspiracy, and/or each subsequent injury arising from a continuing antitrust violation, creates a new cause of action, thus restarting the limitations period.

The four-year limitations period may be suspended or "tolled" by several factors, such as government enforcement investigations or other actions. In addition, equitable principles such as fraudulent concealment, duress, and equitable estoppel also may toll the limitations period. In the class action context, the timely filing of a class action tolls the limitations period for all persons encompassed by the class through the pendency of the class certification decision. If class certification is denied, the tolling ends, and the limitation period once again begins to run. Any class member may file an individual claim upon denial of class certification, so long as it files within the restarted limitation period.

6. Which local courts and/or tribunals deal with competition damages claims?

Competition damages claims arising under U.S. federal antitrust law may be commenced in any U.S. federal district court. (See Question 7 below as well.) Those same courts may also exercise supplemental jurisdiction to hear claims arising under U.S. state antitrust law if those claims are sufficiently related to the federal claims as to qualify. In addition to U.S. federal antitrust law, all 50 states and the District of Columbia have antitrust laws that are generally similar to federal antitrust law, but may vary in some specifics. Claims arising solely under state antitrust laws can be brought in the courts of the relevant state.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

U.S. federal district courts have exclusive (subject matter) jurisdiction over a competition damages claim arising under U.S. antitrust laws (for example, Sherman Act and Clayton Act claims). The U.S. district court must also have personal jurisdiction over the defendant(s) to hear the claim, and the defendants can be sued by the claimant in any district court where they are found, have an agent, or transact business. This generally provides the Antitrust Division or a private plaintiff with a fairly large range of choice about the particular U.S. district court in which to bring the claim.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

The law that applies to a competition damages claim is summarized above generally (see Question 1). The applicable standard of proof for a civil competition damages claim brought under the U.S. federal antitrust laws is the "preponderance of the evidence" standard, which requires a showing that it is more likely than not that a violation occurred. For criminal antitrust charges filed by the Antitrust Division (or the Office of a U.S. Attorney), the standard of proof is "beyond a reasonable doubt," the same standard that is applicable to all U.S. federal criminal charges. In terms of calculating the amount of damages in a civil case, a claimant need not show the amount with precision. (See Question 17 below.)

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

Under Section 5 of the Clayton Act, final judgments or consent decrees entered against a defendant in U.S. federal governmental criminal or civil proceedings may be used in related private actions as "prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties" in the U.S. federal government proceeding. If the judgement or consent decree is entered before testimony has been taken, that judgment or decree does not establish a prima facie case, or collateral estoppel. Collateral estoppel is not available with respect to any "finding made by the Federal Trade Commission." Decisions of foreign competition authorities are not binding on U.S. courts.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

Private damages actions often proceed while a related government enforcement action is pending. It is often the related public enforcement action that spawns the private damages actions. In some cases, government enforcers may and do seek a stay of such private damages actions while the government enforcement action is pending, in order to protect the government investigation.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

U.S. Fed. R. Civ. P. Rule 42 provides for consolidation and class action proceedings of competition damages claims. Separately-filed competition damages claims by different parties against the same defendant in the same court—for example, that involve a common question of law or fact—may be consolidated into a single proceeding by the court.

For cases filed in different courts that share common questions of law or fact, there is a process for consolidating all such cases by transferring them to a single court in which one of the cases was filed, allowing for coordinated or consolidated pretrial proceedings. A motion to transfer such cases to a single court must be filed with the U.S. Judicial Panel on Multidistrict Litigation, known informally as the MDL Panel, in order to initiate the transfer and consolidation. A copy of the motion must be filed in each district court where the motion affects a pending action.

Under U.S. Fed. R. Civ. P. Rule 23, a party may bring a competition damages action in a representative capacity on behalf of a class of others damaged by the same alleged violation. There are a number of requirements that must be satisfied in order to proceed on a class action basis. Most notably, Rule 23(b)(3) permits a class to be certified only where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and where "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Class certification analysis is highly case specific. However, where common proof is available to establish both the alleged antitrust violation (for example, proof of an agreement to fix prices) and the injury is common to all alleged class members, certification is more likely even if there is individual variation in the *amount* of damages among class members (as distinguished from the *method* by which damages are determined).

Competition damages claims are assignable, and the assignee stands in the shoes of the assignor for all purposes, including determination of "standing" to pursue the claim, even where the assignee would not have standing absent the assignment.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

Yes. There are number of defenses that are unique to competition damages cases, but some otherwise-apparent defenses are barred as a matter of policy. For example, the "pass-on" defense—where the defendant argues the plaintiff has not been injured because the plaintiff "passed on" all or part of the overcharge to subsequent purchasers down the distribution chain—is typically barred. The defense can only be shown in the rare instance where the defendant proves that (1) the buyer "raised his price in response to, and in the amount of, the overcharge," (2) "his margin of profit and total sales had not thereafter declined." and (3) he "could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." *Hanover Shoe, Inc. v. United Machinery Corp.*, 392 U.S. 481, 493. The case-law barriers to proving the pass-on defense are "normally . . . insurmountable" (*id.*), but adequate proof may exist "for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract." *Id.* at 494.

Similar to the bar against the pass-on defense, the "indirect purchaser" doctrine (also known as the *Illinois Brick* doctrine, based on the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977)), bars an indirect purchaser from bringing a claim in U.S. federal court for damages for overcharges passed down through the distribution chain. Defendants frequently invoke the *Illinois Brick* doctrine in response to a claim, thus bringing about dismissal from the federal litigation of the indirect claims. However, indirect purchaser plaintiffs may have standing to sue for damages under state antitrust laws, and some such claims may be pursued in the same case pursuing the federal claims under the federal courts' "pendent jurisdiction."

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Yes. Expert evidence is not only permitted in competition litigation, but as a practical matter, is essential. Counsel for each party to the litigation typically engages its own economic expert(s) on multiple issues as noted below. Counsel's communications with an expert are protected from discovery, as is the expert's draft written report. Experts are required to produce a written report that

contains, among other things, a complete statement of all opinions the witness will express and the basis and reasons for them. Notably, case law provides that the party retaining the expert may not control the expert, and the expert is not the party's advocate. In practice, of course, each party's expert provides evidence favorable to the hiring party, and many cases include, or even come down to, a "battle of experts."

Among the areas in which economic expert testimony is critical are defining relevant product and geographic markets, examining the competitive effects of the challenged conduct, and calculating damages. In addition to economic experts, the parties may also engage numerous other types of experts to provide testimony, including accountants, industry experts, marketing experts, and statisticians.

Under U.S. Federal Rule of Evidence (Fed. R. Evid.) 702, expert testimony must be reliable and relevant. The purpose of expert testimony is to "assist the trier of fact" to understand the evidence, or to determine a fact at issue. For this reason, experts normally are not permitted to give an opinion on the "ultimate issue," which is the province of the "trier of fact" to determine. If asked, the U.S. federal district court will determine whether the proposed expert testimony is both reliable and relevant; if it is not, it will be excluded.

A court may appoint an expert either on a party's request or on its own initiative to serve the court as a "neutral" expert. The court may appoint any expert on whom the parties agree, or any of its own choosing, but only if the appointee consents. It is rare for a court to appoint its own experts in antitrust matters.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

In a private civil case, either party can demand a jury trial. Criminal antitrust cases are tried to a jury unless the defendant "knowingly and voluntarily" waives that right. In jury trials, the judge determines and instructs the jury on the law to be applied, but the jury determines the facts based on the evidence presented during the trial. The judge also determines the admissibility of the evidence presented when admissibility is challenged by a party. The jury must follow the judge's instructions on the law, but it alone determines the facts. In non-jury (bench) trials, the judge determines the law and the facts. Evidence is typically presented both orally and in documentary form. U.S. Fed. R. Evid. Rule 601 governs the mode and witness examination. Cross-examination is permitted, but technically is limited to the subject matter of the direct examination and matters affecting the witness's credibility, although the trial court has a fair amount of discretion in controlling the scope of cross-examination.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

The time to trial varies based on the complexity of the violation alleged, whether the claim is brought on a class basis, and how crowded the docket is in the court where the claim is brought. Claims in so-called rocket docket courts proceed to trial much faster than others.

The U.S. federal court system has three levels of courts: (1) district (trial) courts, (2) circuit courts (the first level of appeal, which is an appeal as of right), and (3) the Supreme Court (the final level of appeal, to which a request for appeal is determined by the Court upon competing "writs of certiorari"). A U.S. federal competition damages claim is initiated in a U.S. federal district court. In most cases, non-final orders of a district court cannot be appealed unless permission is granted by the district court making the order. Final orders are appealable to the circuit court having jurisdiction over the district court making the order. Circuit court orders are appealable to the Supreme Court, but the Supreme Court hears only those appeals it chooses to hear (although it rules on some without a hearing).

16. Do leniency recipients receive any benefit in the damages litigation context?

Yes. As described in response to Question 4 above, ACPERA is designed to incentivize cartel members to self-report to the Antitrust Division in order to gain the benefits of its "leniency" program. Under that program, the first to self-report cartel-like conduct not previously known to the Antitrust Division and meet the other requirements of that program receives certain additional benefits under ACPERA. Most notably, ACPERA limits damages against a leniency participant to single damages, and exempts the participant from joint and several liability. To qualify for ACPERA's benefits, a "leniency candidate" also must provide civil plaintiffs with "timely" and "satisfactory" cooperation in any follow-on litigation; neither term is defined in ACPERA. The ACPERA cooperation provisions require leniency participants to (1) provide civil plaintiffs with a "full account" of known facts concerning the cartel, (2) "furnish[] all documents or other items … potentially

relevant to the civil action," and (3) use "best efforts to secure and facilitate" cooperation from individuals encompassed by the leniency agreement.

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

To be recoverable, damages must be "antitrust damages," meaning damages flowing from the antitrust violation. Therefore, to be recoverable damages must flow from a reduction in competition (that is, an anticompetitive effect). (See the response to Question 1 as well.) As a result, a plaintiff must disaggregate losses caused by the antitrust violation from those flowing from lawful competition, mismanagement, and any other factors. A failure to mitigate one's damages may preclude recovery.

Umbrella damages—overcharges paid to non-conspiring suppliers as a result of the innocent suppliers selling at the inflated umbrella price—are recoverable from defendant co-conspirators in some U.S. federal district courts but not in others, depending on the case law of the relevant U.S. federal circuit court. The theory for allowing such umbrella damages is that the defendants' conspiracy raised market prices and injured all purchasers regardless of whether they purchased from a co-conspirator supplier or from a non-conspirator, "innocent" supplier.

Even though courts recognize the difficulty of establishing the amount of damages with precision, at the other end of the spectrum, an award cannot be based on speculation and guesswork. Within these boundaries, there are a number of well-recognized economic/econometric methodologies for calculating damages. Among those methodologies are approaches known as (1) "before and after," (2) "yardstick," and (3) "market share." Under the "before and after" approach, the profits earned or prices paid during the period of the violation are compared with the profits earned or prices paid either before the violation is deemed to have started or after the violation is deemed to have ended. The "yardstick" approach compares profits earned or prices paid in the market in which the unlawful conduct occurred with those earned or paid by firms or in markets not affected by the violation. And finally, the "market share" approach estimates the market share the violator would have had absent the antitrust violation, and that market share is used to determine the amount of damages. These three approaches are just a few of the various methodologies accepted by courts.

Prejudgment interest is typically not available. However, damage calculations sometimes include an element that is functionally equivalent to prejudgment interest. Post-judgment interest is mandatory and applies to the entire award "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."

18. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

No. A defendant cannot seek contribution or indemnity from other defendants. As noted above (see Question 4), joint and several liability is the rule. Despite the joint and several liability rule, defendants are permitted to enter into a judgment-sharing agreement allocating potential damages among themselves. Any settlement amounts paid by a co-defendant must be deducted from the trebled damages award, but the amount deducted is the actual amount paid, rather than a deduction, for example, of the settling co-defendant's "proportional share" of the total joint and several liability.

19. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

A competition damages claim can always be disposed of without a full trial by a settlement between the parties. A settlement may be negotiated by the parties directly or with the assistance of a mediator selected by the parties or appointed by the court. In class actions, the court must approve the settlement, in order to ensure it serves the interests of all class members. (See Question 20 as well.) Short of a settlement, there are a number of procedural mechanisms available to dispose of a claim without a full trial.

Under Fed. R. Civ. P. Rule 12(b), the defendant may move for dismissal at the pleading stage based on a number of infirmities (for example, process, venue or jurisdictional problems, to name a few). The most common basis argued is under Rule 12(b)(6), a "failure to state a claim upon which relief can be granted" based on reading the complaint in the light most favorable to the plaintiff(s). (See Question 2 above.) Based on the violation alleged, there may be numerous avenues for dismissal, the discussion of which is beyond the scope of this response.

Under Fed. R. Civ. P. Rule 56, either party may file a motion for summary judgment, which must be granted where "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." A motion for summary judgment is typically filed after discovery has taken place, and often both plaintiffs and defendants file cross-motions for summary judgment. While these motions are filed routinely, they are granted infrequently as to the entire case, but are granted more frequently with respect to particular issues in the case.

20. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Under Fed. R. Civ. P. Rule 23, a certified class, or a class proposed to be certified for purposes of settlement, may settle with the defendant(s) with the approval of the court after a hearing and only on finding by the court that the proposed settlement is fair, reasonable, and adequate on a number of factors to all class members, particularly to the "absent" class members, meaning all class members other than the named class representatives. Such settlements cannot bind members of the class that opt out of (voluntarily exclude themselves from) the settlement, or parties outside the scope of the definition of the settlement class or outside the court's jurisdiction (on the grounds that they were never in the class).

21. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

The parties to the litigation typically negotiate a "protective order" to protect confidential or proprietary information disclosed during the court process. Upon court approval, the negotiated protective order governs the exchange and filing with the court of such information and typically also will protect such information produced by third parties to the litigation. Generally, several different levels of protection are provided in such orders, so that some information is available to all individuals in and representing the opposing party, some only to selected individuals (typically by position) in the opposing party, and some only to "outside counsel" for the opposing party. Such orders typically also allow for either party to challenge by motion to the court the designation of information as "confidential" and subject to such treatment.

The U.S. Federal Rules of Civil Procedure govern the pre-trial discovery process in all federal litigation. As a general rule, parties may obtain discovery regarding any "non-privileged" matter that is "relevant" to any party's claim or defense and proportional to the needs of the case. Information within the scope of discovery need not be admissible in evidence in order to be discoverable. "Privileged" information is generally not discoverable. Examples of "privileged" information include attorney-client communications containing or relating to a request for or the provision of legal advice, including work performed for the attorney by non-attorney employees or retained advisors such as paralegals, economists, accountants, and financial advisors (the "attorney client" privilege); and materials prepared by or for an attorney in the course of the litigation (the so-called "attorney work product" privilege).

The investigative files of competition agencies are rarely (if ever) discoverable. By contrast, documents produced to those agencies by a party are discoverable if they are relevant. Third parties also may be subject to discovery demands, but within rules designed to minimize the burden on those parties.

Materials related to a defendant's leniency application or participation, and materials relating to settlement, may be discoverable if relevant, but are often subject to a privilege.

22. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Yes. A successful plaintiff is entitled to recover its "reasonable" attorneys' fees and costs. Recovery of attorneys' fees is mandatory when treble damages are awarded. There are numerous methods by which reasonable attorneys' fees can be calculated. The most common is the "lodestar" method, under which the number of "reasonable" hours spent on the matter is multiplied by a "reasonable" hourly rate, which may be the attorneys' actual billing rate or a "reasonable" market rate. In class action matters where the recovery involves a common fund settlement, the typical award of

attorneys' fees is calculated as a percentage of the fund. Costs are also recoverable. Recoverable costs include filing fees paid to bring the action and transcripts, for example. Fees paid to a party's expert witness are not recoverable. In class actions, the court must approve any award of fees and costs.

23. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Yes. Third parties are permitted to fund competition litigation. There are no restrictions on third-party funding of competition litigation, and third party funders cannot be made liable for the other party's costs. Lawyers are permitted to act on a contingency or conditional fee basis, but experts are not and must be paid by a method unrelated to the outcome of the matter.

24. What, in your opinion, are the main obstacles to litigating competition damages claims?

The main obstacles to litigating to verdict are the time it takes to litigate such matters (typically several years), the expense involved, and the potential damages faced by defendants. The expense and potential damages associated with competition damages claims brought as class actions are significant, and create powerful incentives to settle even marginal claims.

25. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

If passed and signed into law, proposed legislation changing the standard by which transactions are judged would profoundly affect competition litigation over mergers and acquisitions for years to come. The proposed legislation would lower the showing needed to challenge a transaction as well as make certain proposed transactions presumptively anticompetitive.

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