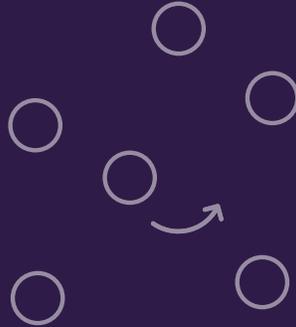


**THERIUM.**



**CHAPTER 2**

*Structuring an Affirmative  
Recovery Program*

**A GOOD OFFENSE:**

*The Therium Guide to Creating an Affirmative Recovery Program*

**A**ffirmative recovery programs are a relatively recent phenomenon, and it's easy to understand why. As we discussed in our first chapter, corporate legal departments historically have not been incentivized to pursue affirmative legal claims; instead, institutional barriers have actively dissuaded them from acting as plaintiffs. Those historical forces are changing, however, and for those ready to expand the role of their legal department in a meaningful way, this chapter offers broad outlines on how they can structure a successful affirmative recovery program.

For better or worse, there is no one-size-fits-all approach to structuring an affirmative recovery program. There are, however, several general principles that apply broadly across organizations. First, the goal of establishing a program is to make the initiative systematic within the company—as opposed to an ad hoc effort—and improve its performance over time. Second, while the legal department is the focus of the program, creating one does not require hiring additional personnel. In fact, much of the effort that goes into it can and should be performed by outside partners. The ability to create and leverage relationships, therefore, is critical to the success of almost all affirmative recovery programs.

Any company creating an affirmative recovery program should keep these points in mind. They can also consult the following list of imperatives for any successful program and use it as a guide in structuring their own.

### **Set goals and measure progress towards them**

DuPont could have played a passive role in the parcel tanker antitrust litigation by remaining in the class action; instead, it pursued a greater recovery through an opt-out arbitration. That decision was not happenstance. It was made, in part, to achieve a goal that the legal department had set for itself. In 2005, the second full year of its affirmative recovery program, DuPont set a goal to recover \$116 million. By November of that year, through actions like the arbitration, it had recovered \$170 million.<sup>1</sup>

The legal department's progress towards its goals should be carefully tracked throughout the year. And it's worth noting here that companies should track more than just their cash recoveries. Some successful recovery efforts will result in highly valuable but less immediately tangible benefits like long-term price freezes, discounts on future sales, and other avoided costs. All of those benefits should be captured and documented. These records will later prove vital in achieving buy-in for the program throughout the company.

### Develop a strategy

Not all goals need to be as ambitious as DuPont's. In setting their recovery targets, companies would be wise to begin by considering their lowest-hanging fruit—tax rebates that routinely go uncollected, for instance—and make those a priority for the first year. Having a clear strategy in place will help companies establish appropriate recovery goals while making a smooth program rollout a greater possibility.

### Assemble the in-house team

Responsibility for the affirmative recovery program can be centralized or diffused within any given legal department, but some middle ground often works best. In those cases, a single individual will head the effort, but several others within the legal department will contribute to it. While the strategic direction can be established at the top, for instance, in most situations it will be helpful to have multiple members of the department involved in training business departments to recognize potential claims. Multiple team members should also be involved in asserting claims—which, importantly, does not necessarily mean filing lawsuits. As always, litigation should be viewed as a last resort. Affirmative recovery programs can generate sizeable sums by firmly yet diplomatically asserting their rights with business partners. As the Association of Corporate Counsel has noted: “Sending a letter marked ‘Notice of Breach’ or ‘Notice of Claim’ can sometimes be enough to bring parties to the table to discuss a resolution.”<sup>2</sup>

### Find reliable partners

It's almost impossible to conceive of a modern legal department operating a successful affirmative recovery program without relying extensively on outside partners. At each major step in the process of bringing an action—identifying the claim, funding it, and asserting the claim—a legal department depends on external support. We will discuss those functions in greater detail throughout this book, but it is vital that legal departments establish solid relationships with the following:

**Internal allies:** To identify claims, the legal department will need the assistance of on-the-ground personnel who can inform them about potential claims against vendors and other third parties. A good way to start the dialogue is to conduct training sessions that help businesspeople identify the information they should be passing along to the legal department.

**Funding partners:** The advent of litigation funding has removed the budgetary barriers to bringing significant legal actions, which might otherwise prevent companies from asserting even very meritorious claims. With that barrier removed, legal departments should have a relationship in place with a litigation funder to reduce the friction in asserting new affirmative claims. Not every affirmative claim will require the use of outside capital, but it is essential to have these relationships in place in advance for those that will.

**Outside counsel:** These partners are necessary for prosecuting lawsuits. For in-house lawyers worried that they don't have a strong connection to a plaintiff's lawyer, DuPont again offers a model. It turned to its defense counsel, on the theory that when asserting claims against its business partners, it did not necessarily want “plaintiffs’ lawyers who will immediately strike fear into their opponents’ hearts.” Their defense counsel, by contrast, would be “more sensitive to the need to maintain our business relationships.”<sup>3</sup>

### **Establish protocols for selecting cases**

It does not make sense to bring an affirmative claim if it will have costs that exceed the potential reward. Even a strong claim, for instance, may not be worth pursuing if it is certain to demand significant time from the CEO or other senior executives. To avoid such unintended consequences, legal departments should establish a formal process for greenlighting claims. As part of that process, they should develop a checklist that ensures they will consider the drag on management time, potential negative effects on business partnerships, and other potential downsides of asserting a lawsuit.

### **Communicate results**

To quote John D. Rockefeller, “Next to doing the right thing, the most important thing is to let people know you are doing the right thing.” Affirmative recovery programs benefit companies through the dollars they add to their bottom line. They also benefit the general counsel and the legal department as a whole, increasing their esteem in the c-suite and earning them recognition for the strategic value they offer. These benefits, of course, cannot be fully realized unless the CEO, board, and other senior leadership are aware of any success an affirmative recovery program is generating. The metrics that are tracked on the program’s performance, therefore, should be communicated to those leaders regularly.

These are general guideposts, leaving plenty of room for legal departments to tailor the specifics to their own businesses, company cultures, and the legal talent on their in-house teams. For those that have made the progressive decision to create an affirmative recovery program, however, the principles in this chapter provide a universal roadmap to success.

Please read-on next month, as we move from structuring affirmative recovery programs to identifying the most appropriate claims.

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<sup>1</sup> [https://www.crowell.com/documents/DOCASSOCFKTYPE\\_NEWS\\_343.pdf](https://www.crowell.com/documents/DOCASSOCFKTYPE_NEWS_343.pdf)

<sup>2</sup> [http://www.accdigitaldocket.com/accdocket/march\\_2018/MobilePagedArticle.action?articleId=1339575#articleId1339575](http://www.accdigitaldocket.com/accdocket/march_2018/MobilePagedArticle.action?articleId=1339575#articleId1339575)

<sup>3</sup> [https://www.crowell.com/documents/DOCASSOCFKTYPE\\_NEWS\\_343.pdf](https://www.crowell.com/documents/DOCASSOCFKTYPE_NEWS_343.pdf)