THERIUM.

CHAPTER 1

Learning from history

The legal departments of the world's corporations exist out of necessity. The legal department has been viewed—incorrectly—as a cost center, not a profit center. But legal departments regularly bypass potentially valuable litigation claims because the risks required to monetize litigation assets are viewed as too steep. That was already the case in a good economy, and the issue becomes even more acute as we descend further into the current economic downturn. Corporations are losing value each day, leading to tighter budgets and greater pressure on all departments. At the same time, they must find revenue wherever they can.

Corporate legal departments do, however, have the potential to become proactive drivers of revenue if they can successfully monetize their litigation claims. And in this economy, they must do so. We have developed this progressive eBook (beginning with chapter 1 below) to tell the story of affirmative claims and educate in-house counsel formalizing a program for initiating plaintiff-side litigation.

We'll release one or two chapters each month to avoid inundating you with an overload of information all at once. Register to receive each chapter in your inbox as it is published by submitting the form on this page. And once the final chapter is released, we will send you the full book to keep as a reference.

INTRODUCTION

A meeting at the exclusive Greenwich Country Club in the summer of 1998 inspired a series of legal actions that would resound through the court system for years to come. Most of those proceedings were as tradition-bound as the club itself, including at least one petition for review to the Supreme Court (submitted in the customary form of a 6 ¼ -by-9 ¼ inch booklet, saddle-stitched, and typeset in a time-honored Century font).[1] One legal dispute, however, featured something entirely new: a corporate law department determined to collect money it was owed.

To those outside the club of the legal profession, it may sound unremarkable that a company would pursue money to which it was entitled and use the full apparatus of the justice system to recover it. But lawyers—especially in-house lawyers—know that historically, recovering such funds has not been a priority of corporate legal departments.

It was certainly not a priority during that summer of 1998 when a group of executives from a shipping firm gathered at the Greenwich Country Club. There, on the grounds of the fourth country club ever established in the United States, senior management learned that the company had entered into a secret agreement with a competitor to divide their customer base, rig bids, and eliminate competitors.[2]

The conspiring companies were the world's two largest operators of parcel tankers, specialized ships designed to transport chemicals and other liquid cargo.[3] Ultimately, their conspiracy to control the market unraveled in a federal investigation that produced a guilty plea from one, an amnesty agreement with the other,[4] and a great wealth of litigation.

The ensuing legal proceedings took many forms, most of them unsurprising. In one conspirator's 2006 annual report, it took 10 pages to inventory the various actions. They included an antitrust claim by a former competitor, a securities class action

by aggrieved investors, and an employment lawsuit from a former in-house counsel.[5] There was also an antitrust class action by its former customers. But buried on page 116 of the report was a brief description of the outlier. The report notes that several of its parcel tanker customers had decided to opt-out of the class action and, instead, "have come forward and presented formal arbitration demands."[6]

One of those customers was E.I. du Point de Nemours and Co. Two years earlier, in 2004, DuPont's legal department had begun in earnest an initiative to maximize its recoveries and contribute to the company's bottom line. "When a certain amount is at stake," DuPont's then-assistant general counsel Tom Sager told The Corporate Legal Times, "we have an obligation as counsel to the company to pursue claims."[7]

This was new thinking at the time—and to some extent remains so today.

For DuPont, the collusion in the parcel tanker industry presented a prototypical case in which its new philosophy called for it to act. The company had a lot at stake, and its case was easy to prove. DuPont, which ships a great volume of chemicals, pegged its losses in the tens of millions of dollars. Meanwhile, the evidence developed in the federal antitrust investigation had all but put a bow on DuPont's own case. DuPont, therefore, made it a point to maximize its recoveries, including through arbitration.[8]

It got results. In 2004, DuPont's law department recovered $100 million for the company.[9] Within a decade, it had recovered more than $2.6 billion.[10] Merely stating that figure is enough to establish the obvious major benefit of a program like DuPont's, now commonly known as "affirmative recovery programs." They have many additional advantages for the corporate law departments and lawyers who create them. Among them is the satisfaction of achieving the oft-stated but rarely realized goal of making a legal department a profit center rather than a cost center—and realizing the respect that comes with that status. Even so, DuPont and a relatively small number of like-minded companies still stand out as the exception rather than the rule.

Which raises an obvious question: why aren't more companies following their lead?

That's a question we will address in this book, which will argue that the time has come for most if not all law departments to establish their own affirmative recovery programs. It will also offer guidance on how to create one. The chapters to follow will include:

Chapter 2 Structuring an affirmative recovery program
Designing the team structure for a program, including core legal department team members, business leaders, law firms, and litigation funders.

Chapter 3 Identifying claims
Building relationships with business unit leaders, helping them understand what potential claims might look like, and incentivizing them to uncover opportunities.

Chapter 4 Selecting claims: Finding value & avoiding risk
Finding value and Avoiding Risk: Determining which claims to bring, including strategic considerations that go beyond monetary value. Among other factors, we will discuss how firms should weigh the dollar value of a claim against its certainty of recovery.

We will also assess risks that have kept firms from bringing affirmative claims in the past—reputational risk, the risk of counterclaims, and the risk of unintended business consequences—and thinking about them in selecting affirmative cases to bring.

Chapter 5 Financing litigation
Using litigation funding to mitigate the financial risk of bringing affirmative claims, as well as the option (and drawbacks) of contingency fee arrangements.

Chapter 6 Managing outside counsel
Selecting and supervising outside counsel in identifying and bringing affirmative claims.

Chapter 7 Making settlement decisions
Evaluating settlement decisions as a plaintiff.

Chapter 8 Achieving and maintaining buy-in
Handling the reluctance of legal department team members, business unit leaders, and senior executives. We will suggest approaches for winning internal support and describe how that support can be maintained with reporting that keeps the program accountable—and keeps decision makers aware of its success.

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[1] https://www.scotusblog.com/2006/07/move-to-block-antitrust-prosecution/; SCOTUS Rule 33 (https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf)

[2] https://www.courtlistener.com/opinion/2289395/in-re-parcel-tanker-shipping-services-antitrust/

[3] https://www.wsj.com/articles/SB10648482765826900

[4] https://www.wsj.com/articles/SB10648482765826900

[5] https://www.sec.gov/Archives/edgar/data/831980/000110465907046533/a07-16170_1ex99d1.htm

[6] https://www.sec.gov/Archives/edgar/data/831980/000110465907046533/a07-16170_1ex99d1.htm

[7] https://www.crowell.com/documents/DOCASSOCFKTYPE_NEWS_343.pdf

[8] https://www.crowell.com/documents/DOCASSOCFKTYPE_NEWS_343.pdf

[9] https://www.crowell.com/documents/DOCASSOCFKTYPE_NEWS_343.pdf

[10] https://profilemagazine.com/2013/dupont/

LEARNING FROM HISTORY

In recent years, corporate legal departments have taken tentative steps toward adopting a more aggressive mindset. Three-quarters of the Fortune 500 have filed lawsuits as plaintiffs in what could be called "affirmative recovery" matters.[11] But a much smaller portion of the Fortune 500 have actually created their own, structured affirmative recovery programs. And the fact remains that for legal departments of all sizes, to create such a program is to color outside the lines that have long constrained the activity of in-house lawyers.

The institutional forces that have kept legal departments from aggressively asserting legal claims are complex and intertwined. But the most basic is complacency. Simply put, conventional wisdom has long held that it's not the general counsel's job to go make money for the company. Lawyers were thought to be above such crude considerations. Instead, in the traditional corporate mindset, lawyers served the important, singular function of defending the company from legal risk. Imbued with the mystique conveyed by their law degrees, they enjoyed wide latitude to fulfill that function however they saw fit. Budgets could be defended on the simple grounds that "legal needs it," and few had the temerity to question the legal department's judgment about its choice of outside resources. You've probably heard some variation of the adage that "No GC ever got fired for hiring Cravath."

This all worked out pretty well for the lawyers. Broadly speaking, the defensive orientation of in-house legal departments made a comfortable fit with the risk-averse nature of its lawyers. Cultural forces have also inclined in-house lawyers against acting as plaintiffs. For one thing, at least some lawyers accustomed to representing defendants indulged their tribal instincts and gave plaintiffs' lawyers a bad name. They may have been reluctant to take on the role they've denigrated. Perhaps more importantly, in the clubby world

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of the bar, in-house counsel were not eager to oppose, as a plaintiff, fellow in-house departments and outside defense firms with which they closely identified.

Despite the structural forces keeping legal departments from bringing lawsuits, they have gradually begun to adopt a plaintiff's mentality. We can trace the origins of the movement as far back as the 1980s, when—in a theme that will repeat itself—a financial crisis led a company to turn to its legal department for revenue. The company was Texas Instruments, which was staring down a bankruptcy in the mid-1980s. The method that its legal department used to generate revenue was not litigation, but the licensing of its patent portfolio. By the turn of the century, TI's patent licensing program was bringing in $800 million a year, and the company had left its dire condition behind.[12] Likewise, an intensive initiative at IBM took patent-licensing revenue from $30 million in 1990 to nearly $1 billion by 2000.[13] These and similar efforts revealed that legal departments could do more than protect companies from risk. They could become strategic actors generating meaningful revenue.

In the mid-2000s, financial crisis again forced an evolution of the legal department. Even before the Great Recession, Tom Sager and his team at DuPont undertook their pioneering effort to turn the company's legal department into a revenue producer. But the economic crisis that soon followed highlighted the value of their project in a way no one could expect.

With the onset of the Great Recession, the mystique of the legal department began to fall away. Companies came under great pressure to reduce costs, and legal departments were no longer immune. The field of "legal operations," devoted to imposing discipline on the spending of corporate legal departments, was born. Google hired its first director of legal operations in 2008. In 2010, an association of legal operations professionals was founded, and by 2017 its Las Vegas convention was attracting nearly 1000 attendees.[14]

The wide latitude that corporate legal departments once enjoyed narrowed considerably in the years following the Great Recession. Their budgets needed defending, and previously untouchable decisions–like their choice of outside counsel—came under scrutiny. In short, corporate legal departments began to be judged on business terms.

In that context, DuPont's approach looked attractive. That legal department measured its success on business terms. In the three years preceding 2008, DuPont secured $500 million through its affirmative recovery program. No one could ignore such results—and after the economic crisis hit, no one did. In the ensuing years, more companies created their own affirmative recovery programs. Their results demonstrated that such programs can enjoy success at companies of various sizes, across various sectors. Companies like Ford, Michelin, and Tyco International have created highly successful programs. Going far beyond the protection of intellectual property, they have pursued insurance claims, antitrust actions, and breach of contract disputes. In at least one quarter, Ford generated enough revenue through its affirmative recovery program to fund its entire legal department.[15] Smaller companies, like CNH Industrial, have also benefitted greatly from their programs. After recovering $400,000 through its program in 2010,[16] CNH had increased that number to $30 million by 2017.[17]

Today, the timing is right for another leap in the adoption of affirmative recovery programs. The structural impediments to bringing affirmative claims have largely eroded. As we'll explore in future chapters, the riddle of funding affirmative cases has been addressed by the availability of litigation funding. And the thirst for revenue from corporate legal departments has not been this palpable since the Great Recession.

Of course, to satisfy that thirst—and achieve results like those above—legal departments must first build their affirmative recovery programs.

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[11] https://www.acc.com/education-events/2019/affirmative-recovery-legal-departments-can-no-longer-afford-be-only-cost-1#

[12] https://hbr.org/2000/01/discovering-new-value-in-intellectual-property

[13] https://hbr.org/2000/01/discovering-new-value-in-intellectual-property

[14] https://www.ft.com/content/61294270-4567-11e7-8d27-59b4dd6296b8

[15] https://www.reedsmith.com/en/perspectives/2013/09/recoveries-can-turn-legal-departments-into-profit

[16] http://www.accdigitaldocket.com/accdocket/march_2018/MobilePagedArticle.action?articleId=1339575#articleId1339575

[17] https://modern-counsel.com/2017/cnh-industrial/