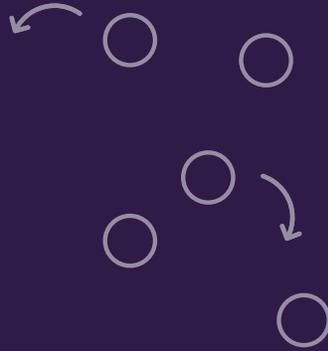


**THERIUM.**



**CHAPTER 3**

*Identifying claims*

**A GOOD OFFENSE:**

*The Therium Guide to Creating an Affirmative Recovery Program*

Once a company and its legal department have structured their affirmative recovery program using the principles outlined in Chapter 2, it must turn to building a system for identifying the claims it will pursue. Naturally, this system will rely heavily on insights from employees within company business units. Thanks to their day-to-day interactions with customers, vendors, and other third parties, those employees are ideally positioned to function as the company's eyes and ears for potential claims, assuming: a) they know that an affirmative recovery program exists at their company; and b) they understand what constitutes a potential claim.

So, in building an effective system for identifying potential affirmative recovery claims, education and relationship building must be front and center. A corporate legal department should build relationships with employees in its company's business units, help them understand what potential claims look like, and incentivize them to report them when they see them.

### **Building relationships with and educating business unit employees**

Affirmative recovery programs represent a shift in both the strategic and tactical roles of corporate legal departments. Traditionally, a corporate legal department focuses on protecting the company from legal liability. As a result, in-house lawyers may have a tendency to approach legal issues from a risk-averse, defense-first mindset. This mindset may chill the relationship between a company's legal department and its business units. After all, there is a degree of natural dissonance between the groups tasked with driving revenue and those assigned to mitigate risk.

But an affirmative recovery program requires a legal department to play offense. And the effective implementation of such a program depends on the company's understanding

of the universe of claims available to it. The employees within a company's business units are in the best position to initially flag potential claims.

So how can in-house lawyers encourage their colleagues in business units to bring potential claims to their attention? By proactively building relationships with those colleagues through a process focused on education and establishing trust.

On the education side, corporate legal departments must sell the idea of an affirmative recovery program to business unit employees. They should convey the ins and outs of the program, what's in it for the company, and how the business units can play a vital role in identifying potential recovery opportunities that drive revenue.

Initially, education should take the form of written and visual content, live and on-demand training, and an initial messaging campaign focused on getting buy-in. Once this first round of education has taken place, in-house lawyers must maintain open lines of communication with their colleagues. That ongoing communication should not only reinforce the initial education, but offer updates on affirmative recoveries secured, demonstrating the payoff of an affirmative recovery program.

A more intimate one-on-one education component also is likely necessary for business unit leaders where legal departments believe there may be significant opportunities for affirmative recovery claims. Typically, business units that handle warranties, interact with suppliers and/or distributors, and navigate tax issues would fall under this umbrella, as would departments that manage or deploy intellectual property assets such as patents and trade secrets. In these business units, buy-in from management is critical to the success of an affirmative recovery program.

The relationship-building initiative should rely heavily on education, but not solely on it. Legal departments also must build trust with business unit leaders and employees who may consider that the company's pursuit of an affirmative recovery claim against a current customer, vendor, or supplier could damage an important relationship. This is a particularly delicate issue where certain employees, such as sales staff, derive a substantial portion of their annual compensation from the company's ongoing relationship with a third party.

Legal departments can build this trust by hearing and directly addressing colleagues' concerns about pursuing affirmative recovery claims against third parties. Where appropriate, in-house lawyers can explain that the company values the relationship and will work hand-in-hand with the business unit to explore potential resolutions that would work to the overall benefit of that unit as well as the larger company. This trust-building campaign can be seamlessly woven into the overall education effort.

The importance of a legal department establishing trust with business units cannot be overstated. If employees do not trust that the legal department will prioritize their relationships with third parties as much as they do, they are unlikely to ever bring potential affirmative recovery claims to the attention of the lawyers. To this end, business units may need assurances from legal that if they identify a potential claim, both departments will collaboratively engage in a cost-benefit analysis to determine the best overall outcome for the business as a whole. Importantly, the affirmative litigation program must be a part of driving the company's business forward – not the other way around. If bringing a particular claim would jeopardize a valuable client relationship, the larger affirmative recovery program may be better served by tabling that specific litigation until a later date (statutes of limitations permitting) or foregoing that claim altogether.

## **Helping business unit employees understand potential claims**

When building a system for identifying potential affirmative recovery claims, the education legal departments provide cannot stop at what an affirmative recovery program is and why the company is initiating one. It must also help business unit employees understand what potential claims look like.

This second round of education will vary from one business unit to the next, as potential claims vary widely across an organization. In-house lawyers must explain the situations in which potential recovery opportunities arise, such as in the context of insurance claims, commercial contracts, and intellectual property usage. It will also be helpful for employees to see actual examples of claims and recoveries, such as reimbursement for breaches of warranty, contractual indemnity, subrogation, and credits or refunds.

In addition, in-house lawyers should invite issue-spotting exercises by asking business units about problems they have had or are having with third parties. When in-house lawyers help work through those problems in real time, the employees are likely to gain an appreciation for how conflicts that arise in the normal course of business could lead to affirmative recovery claims.

While a company's general counsel will ultimately decide which affirmative recovery opportunities to pursue, business units should be educated on what generally constitutes a strong claim: a significant injury coupled with relatively strong proof of wrongdoing and sufficient damages to warrant the claim's inclusion in the program. This is not for the purpose of discouraging employees from identifying and notifying in-house lawyers about weaker potential claims. Rather, when employees have an idea of what strong claims look like and proactively provide supporting information to a corporate legal department, the department will be able to more quickly determine whether a claim is worth pursuing.

## **Incentivizing business unit employees to uncover affirmative recovery opportunities**

After employees are educated about a company's affirmative recovery program, their role in it, and how to spot potential claims, some will readily participate. Others might need a slight nudge. This is where incentives come into play. In the context of affirmative recovery programs, incentives may take the form of financial rewards or recognition from the company.

With financial incentives, corporate legal departments can draw a clear, albeit indirect, line between affirmative recoveries and the compensation some employees receive. In many cases, the failure of a client to pay their bills has a direct impact on an employee's ability to meet internal targets that are tied to their compensation. By structuring an affirmative recovery program in a way that allows business units to treat recovered amounts as revenue, such employees will be incentivized to be on the lookout for recovery opportunities.

These financial incentives must be carefully balanced, however, to avoid creating a competitive and adversarial culture in which employees are encouraged to aggressively dig for potential claims that are not colorable. Remember, while driving revenue and recovering money that rightfully is owed to the company are important objectives, an affirmative recovery program should never compromise company values.

For employees whose compensation is not tied to their business units' performance, the incentives for participating in an affirmative recovery program likely will rest on recognition. Such recognition could include being featured in internal publications like newsletters or case studies, participating in ongoing education efforts regarding the company's affirmative recovery program, or simply receiving a commendation

from an executive. For many, being recognized by company leadership for a job well done, and perhaps being acknowledged in corporate training materials, is incentive enough to participate actively in an affirmative recovery program.

How corporate legal departments carry out the relationship building, education, and incentive programs we have discussed in this chapter will necessarily vary depending on the lines of business a company is in, its size, its corporate culture, and other factors. But these three programs are vital to empowering and mobilizing business unit employees to be the eyes and ears of a corporate legal department in identifying potential affirmative recovery opportunities to pursue.

Next month, we tackle the criteria that companies can use to assess whether an affirmative recovery claim is worth bringing.