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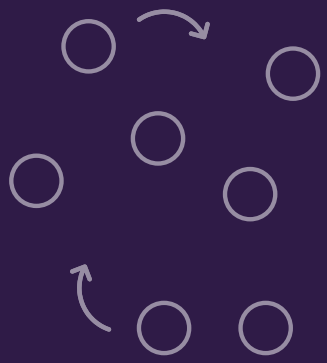

CHAPTER 4

Selecting Claims: Finding Value

After creating a system for identifying the universe of affirmative claims that it *could* pursue, a company must then determine which of those claims are actually *worth pursuing*. Because at bottom, of course, affirmative claims are only worth pursuing if they provide value to the company.

But value lies in the eye of the beholder. Different companies, in different industries, facing different external pressures, will see the "value" of affirmative claims differently. That said, we can at least identify several broad types of value that companies can derive from legal claims. Some are more obvious than others, beginning with the benefit that will rightfully occupy the most attention inside the general counsel's office: the potential to recover dollars. Beyond pure monetary considerations, though, affirmative claims can and do bring strategic benefits. All forms of value that a claim can bring should be considered in the cost-benefit calculus determining which claims a company will assert.

We will address the important topic of costs—which also goes beyond monetary considerations—in the next chapter. For now, here are several factors to consider in assessing the value of a claim and, as a result, the priority it should receive. We begin with the overriding consideration of the potential reward, a necessary—and in some cases, sufficient—motivation to bring suit, before analyzing some additional sources of value.

The Overriding Factor

The claim will provide a meaningful monetary return on investment

Ultimately, the business case behind any affirmative claim comes down to dollars and cents. For many companies, deciding whether to pursue an affirmative claim is as simple as determining whether there is a high probability that they will see a significant return on their investment. Whether that

is the case relies on three factors: (i) the strength of a claim's merits, (ii) the expected amount of damages, and (iii) the time and effort required by the company and its employees to prosecute the claim. Conceptually at least, this can be expressed as an equation in which D represents damages, W represents win percentage, and C represents litigation cost: ($D x W%) - $C = $Expected Value.

The vagaries of litigation, of course, make any one of those figures impossible to determine with mathematical precision. But some factors can give legal departments enhanced confidence in their estimates. The chances of success for a legal claim tick upward—or at least solidify—when similar causes of action have been tested successfully by other plaintiffs. Generally, corporations don't have a great appetite to press highly innovative legal theories as plaintiffs. There are just too many unknowns to contend with.

Claims that piggyback off a civil or criminal proceeding, therefore, will be more attractive, especially where they have survived a motion to dismiss. One potential sweet spot for affirmative recovery programs are class action opt-out cases – suits of the kind we described in chapter one. When you get to the point in class action litigation where a class is certified, the claims have been vetted to some extent. That gives in-house counsel a bit of security in the merit of the case—and opting out of the class allows them to pursue their own litigation strategy.

Of course, just because a claim looks like a winner does not necessarily mean a company should charge ahead. There is a cost to bringing any legal action, which we will discuss in greater detail in chapter five.

At a minimum, however, companies must consider the obvious, direct costs of litigation, including the cost of outside counsel, if necessary, and the opportunity costs of devoting employee time and company resources to the litigation—which takes away from time they might otherwise spend of helping with the company's day-to-day operations.

The final input in determining the ROI of an affirmative recovery claim, and thus whether there is value in bringing it, is the expected amount of damages. Even claims that are not layups and would require a significant investment could be valuable if the potential damages are large enough. Would a company invest $500,000 in resources on a claim that has a 60-70% chance of success, where damages are in the low tens of millions of dollars? Most likely, yes.

The ROI of an affirmative recovery claim should be the first factor a legal department looks at when deciding if there is value to the company in bringing such a claim. But determining the ROI is a multi-step process requiring a careful calculation of factors, like opportunity costs, that may be difficult to quantify.

Secondary Factors

That threshold assessment of value, as we wrote in the formula above, depends largely on two factors: the potential damages and the strength of the case on the merits. Ideally, both factors will be in ample supply. But one is a necessity and the other a luxury. Every affirmative claim brought to court must be a meritorious one. Legal departments that don't litigate by that principle could find themselves answering ethics questions (and long before that will lose the backing of litigation funders, which have no interest in funding losing claims).

But even when damages are relatively small—or where a company is prioritizing among multiple cases with large damages—secondary forms of value can and should be considered.

The public relations effect

Some claims can be resolved confidentiality outside of court, and thus, outside public view. But when a resolution outside of court is not possible and litigation becomes the only way for the parties to resolve their

differences, there is a good chance that reporters could learn of the lawsuit through a public docket, leading to publicity around the dispute. In some cases—probably most—publicity around litigation is at best a distraction and at worst a serious nuisance for corporate entities. More on that next chapter. But in other cases, publicity can be a positive.

There are at least two paradigmatic situations in which companies might welcome the publicity that comes with a lawsuit. First, the lawsuit may allow the company bringing it to boost its standing with key stakeholders. Take an insurer that sues physicians who violated the law in over-prescribing opioid medications. For a large insurer, such a lawsuit is unlikely to recover meaningful damages. But it might show employees, customers, shareholders, vendors, government regulators, and the public that it is doing its part to combat the opioid epidemic.

Second, a publicized legal action—or series of actions—can act as a deterrent. Once entities that do business with a company pursuing an affirmative recovery claim learn that such a lawsuit has been filed, they are going to want to make sure their own dealings with the company are on the up and up. They will not want to be on the receiving end of that company's next action. This deterrent effect was a motivating factor behind some of the earliest affirmative recovery programs.

These are benign examples of ways that companies derive value from publicity around their cases. Veteran litigators reading this, however, will recognize that the powerful tool of PR can also be wielded as something of a dark art. In the tech industry, for example, competitors of dominant companies have quietly supported class action litigation highlighting the alleged failures of dominant companies on topics, like customer privacy, sure to get media attention. Likewise, rivals that compete for government contracts could obtain a tactical benefit when seeking a government contract if a competitor has had negative publicity attach to it because a lawsuit that has been filed.

We note this not to approve of such tactics—in fact, to the contrary. Instead, litigation finance firms are far more attracted to meritorious cases in which publicity enhances the reputation of the company bringing it and is a secondary consideration to substantial potential damages. Funding considerations aside, most responsible corporate legal departments will feel the same way.

The claim will solidify the company's position in the marketplace

A company may also derive "secondary" value from an affirmative recovery claim when the claim provides it with an opportunity to solidify its position in the marketplace. To draw on the technology example above, a company that positions itself as a protector of its users' privacy may choose to bring a claim against a partner or vendor enforcing those protections. For such plaintiffs, an affirmative recovery claim can be valuable in reminding stakeholders of their principles and reinforcing their branding—all while enforcing their legal rights.

The claim will change business practices within an industry

Some affirmative recovery claims may be valuable to a company because they provide it an opportunity to change industry business practices in their favor. An antitrust claim against competitors engaged in anticompetitive behavior, for example, could help lower market prices (and allow the plaintiff to compete on a level playing field) if the claim allows competition to flourish. An affirmative claim could also, for instance, bring an end to intellectual property infringement within an industry that went unpunished for too long.

Though the successful resolution of these affirmative recovery claims may not immediately add millions of dollars to the treasuries of the companies pursuing them, they could unlock immense value—and eliminate significant inefficiencies—going forward.

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Without a doubt, companies that pursue affirmative recovery claims do so because they believe asserting these claims will bring tangible value to their companies. But as we have explored in this chapter, "value" has a multitude of meanings.

Next month, we look at the risks that frequently force companies to think twice before bringing affirmative recovery claims.