



How Affirmative Recovery Can Turn Legal Into a Profit Center

Law Department Management



How would your company view your legal department if it had generated more than US\$2.6 billion for the company over 10 years? That's the amount DuPont reported that it had recovered between 2004 and 2013 in its widely touted Legal Recoveries Program.

If US\$2.6 billion seems unattainable, how about US\$4.5 million annually? Still too daunting? How about US\$400,000 in one year? That's the amount first recovered by CNH Industrial America's legal department in 2010, the first year of our Affirmative Recovery program. Since then, the program has grown to recover an average of US\$4.5 million per year and is recognized by senior management as being part of the department's performance objectives.

Defending your clients' interests in litigation, advising on compliance issues, guiding transactions, and resolving business disputes can be all consuming for an individual corporate lawyer, or even a large corporate legal department. By focusing solely on defensive or reactive measures, however, you may be doing your clients a disservice when it comes to opportunities for affirmative recoveries. An in-house legal department can add to the company's bottom line without hiring additional staff or, in most cases, incurring additional legal fees.

Affirmative recoveries can include anything from submitting class action settlement claims to filing unclaimed property notices — recoveries that require minimal time and can add new value to your legal department. Asserting intellectual property claims and breach of contract claims may involve more effort and resources, but the end result could be significant in terms of adding savings and/or value to the company's bottom line. Other examples of affirmative recoveries include subrogation, insurance recoveries, contractual indemnity, avoiding supply-chain disruptions, and getting reimbursed for breach of warranty.

Since the inception of its Affirmative Recovery program, companies like CNH have recovered millions of dollars each year. So while you and your colleagues may be entrenched in the defense side of litigation and negotiating commercial transactions, don't become passive or dismissive when it comes to pursuing affirmative recoveries. Here are considerations that your legal department should not overlook.

Recovery types

Your first priority is making sure you understand the various departments within your organization (which should be second nature). That way, you can identify potential class action claims and affirmative recovery clients. While there are a variety of ways to identify potential clients and types of recoveries within your organization, offering to train specific groups or departments is often the best way to start a dialogue. Asking your client about issues or problems they have had with third-party vendors or about ongoing disputes can also serve as an excellent launching point. Opening a question-and-answer session at the conclusion of the training will often result in one or more potential affirmative recovery matters coming to light.

Educating your clients that they may have recourse or an opportunity to recover some or all of the money they paid to a vendor or supplier should be your second goal. Communicating the various options and letting them weigh in on the approach is also important.

Help your internal client understand that recovering money for the company need not, and often does not, involve filing a lawsuit. Rather, let your client know that a well-drafted letter by an in-house counsel could be more effective in recovering money than a lawsuit while still maintaining commercial relationships, public relations, and confidentiality.

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Some affirmative recoveries are relatively simple. CNH has recovered money from class action settlements involving credit card exchange rates and steel antitrust claims. Those recoveries involved nothing more than collecting the (usually) minimal information required to file a claim and submit it to the class action settlement administrator.

Likewise, our legal department has recovered thousands of dollars simply by monitoring unclaimed property lists of various states and submitting claims. These efforts take minimal time, no additional staff, and do not require outside counsel. Ours is an all-team approach with legal assistants, paralegals, and lawyers all involved to identify and pursue possible recoveries.

Other recoveries involve additional efforts. These include subrogation in workers' compensation claims or seeking reimbursement from suppliers if their part was the basis for a recall type customer campaign or excessive warranty claims. Your company's warranty, supplier/procurement, and tax departments are a good source of possible recoveries.

Some states, for example, refund the sales tax charged on energy bills if the energy was used in manufacturing. If your tax department isn't already claiming the refund, legal can assist in identifying the right procedure for doing so. Other possibilities are repayment agreements that your company may have with employees who received tuition or relocation assistance but left the company during the payback period.

In these types of recoveries, business relationships and strategies may come into play. For example, your procurement department may be negotiating a new contract with a supplier and does not want to demand warranty reimbursement until the new contract is signed. The tuition-owing employee may be a high risk for an employment claim if you seek repayment. Obviously, these considerations must be weighed.

Finally, higher-reward recoveries may be more complex and require outside counsel. For example, many companies face personal injury lawsuits arising from alleged asbestos exposure from decades ago. While current insurance policies often expressly disclaim asbestos coverage, historic policies did not have that exclusion. Today's insurance companies could still be responsible to defend or indemnify a company's present-day asbestos-related lawsuit.

Locating legacy policies and identifying current carriers may take some effort, but the results can be well worth it if your company is still defending and resolving asbestos claims. Further, many law firms have expertise in handling exactly this sort of background examination of policies and, if necessary, bringing a coverage lawsuit. Most are willing to do the work on a contingent-fee basis as well.

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— *Emily Lawrence and Diane Rohrman*

Similarly, your company's intellectual property may be more valuable than you think. Although a patent infringement lawsuit can be complicated and costly, your business clients may be agreeable to granting the alleged infringer a license instead — something that may be accomplished with a few letters from in-house counsel and the time it takes to draft an agreement.

There are probably affirmative recovery prospects throughout your company. You and your business clients may decide to pass on some of them but it is important to identify the possibilities so you can make that determination.

Keeping score

So now that you've recovered thousands (or even millions) of dollars, how do you ensure the legal department is recognized for its contribution to the bottom line? Recoveries and savings resulting from the legal department's intervention, guidance, and advice should be tracked on an annual basis and shared with upper management. CNH's legal department reports its annual recoveries to senior management.

The "scorekeeping" doesn't necessarily need to be limited to "revenue" as defined by your finance department and generally accepted accounting principles. Rather, your scorekeeping should also demonstrate your contribution to avoiding costs and saving the company money.

Say your company has a supplier that threatened to stop shipping to your company unless you pay a price increase. You make a few calls, write a few letters, and persuade the supplier that a stop-ship would breach its contract with your company. You can "score" the amount of the price increase that your efforts prevented. Make sure to document the end result and follow-up with your clients if necessary so they better understand when your legal advice or efforts were the motivating or precipitating factor of the recovery or savings.

Fees and costs

Using in-house counsel to negotiate affirmative recoveries is the most cost-effective approach. It can often lead to a compromised settlement in a relatively short period of time without incurring attorneys' fees. Sending an attorney letter marked "Notice of Breach" or "Notice of Claim" in the subject line can sometimes be enough to bring the parties to the table to discuss a reasonable resolution, especially where the opposing party has been taking a no-pay position, continuing to breach an agreement, or denying responsibility.

We note that you don't have to (metaphorically) pound the table or threaten to file a lawsuit within a fixed period of time to get results. Indeed, such over-the-top demands are more likely to result in silence or a "go pound sand" letter than a check. Sometimes the other person or company has simply made a mistake such as sending a notice of price increases to all customers, not realizing that it had a specific supply agreement with fixed prices with your company. Alerting them to the fact, and that the noticed increase would breach your contract, may be enough to avoid the increase.

Educate yourself if you are not familiar with basic contract principles, the uniform commercial code, warranty principles, and remedies. A well-drafted letter citing basic contract law principles as well as applicable case law will get the opposing party's attention. This approach alleviates the fees and costs of hiring an outside law firm, and also increases the recovery amount for your clients. Having the general knowledge and background, and being able to promptly answer your clients' questions, will give them more confidence about pursuing a recovery.

For more complex matters that cannot be resolved following in-house intervention, a contingency fee agreement is typically the best way to control attorneys' fees. For matters where money damages are not being sought (e.g., a stop shipment) and that have a more urgent business need, negotiating a flat fee upfront may be the best approach.

Why dedicate resources to affirmative recovery efforts?

Simply put: You can't afford not to pursue affirmative recovery efforts. Today's legal departments are expected to be proactive and add to their company's success. If you want to be viewed as both a legal and business partner of your internal clients and better demonstrate the legal department's value to the company, one of the best ways is to show the amount of money your efforts bring to the table even as you reduce legal fees or spend paid by the company.

When you decide to pursue an affirmative recovery matter, keep your clients updated on the progress and status. Make sure they understand the process, risks, costs (expert fees, contingency fee agreements, appellate fees, etc.), and chances of success upfront. Finally, as you begin to pursue recoveries and experience your first successes, track the recovery amounts to show — in hard dollars — the added value of your department to the overall organization.

More information on types of affirmative recoveries

Unclaimed funds

By law, states must give notice of unclaimed funds before they are forfeited to the state. Some states publish lists in the newspaper each quarter, while most maintain searchable websites. Such funds can include utility deposits, abandoned bank accounts, or tax refunds. Particularly if your company has multiple sites or has acquired and sold different properties over the years, there may be funds in states where you no longer have active operations. CNH has recovered amounts ranging from US\$177 to nearly US\$170,000.

Class action settlements

If your company paid for certain prescription drugs, incurred foreign currency exchange fees on credit cards or bought steel or wire harnesses, it could have participated in recent class action settlements simply by completing a brief claim form. CNH recovered nearly US\$140,000 in those settlements.

Reimbursement for corrective actions

If your company has incurred costs to address warranty claims by your customers or has undertaken a product improvement or recall-type program, and you can demonstrate to your supplier that it was due to a problem with their product, you can seek reimbursement from the supplier. CNH has recovered over US\$1 million in reimbursements.

Subrogation

If your company incurred workers compensation costs because of a third party (e.g., a delivery truck backed into your employee on your loading dock), you can seek payment from the third party. Often, your injured employee retains counsel to bring suit on his or her own against the third party, and your company can recover on the workers comp lien. CNH has recovered nearly US\$60,000 recently.

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