The Profitable Legal Department
How legal departments can prosper by generating revenue for their company
2010 Research Report

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FORBES INSTITUTE
EUROPEAN GC
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Foreword

LexisNexis Martindale-Hubbell’s research reports for general counsel typically range from managing budgets to measuring risk and better integrating the in-house legal department with the priorities of their companies. These reports have helped general counsel function better in their jobs and benchmarked their departments in an unequalled way.

This report takes a different approach because it focuses on one highly-defined topic: how legal departments can cease to be viewed purely as a cost centre in the company and, instead, can proactively generate (or recover) revenue for the business to the point where it may even become a profit centre.

This vision is not set in the distant future. To paraphrase William Gibson, the science-fiction author, that era is already here – it’s just not evenly distributed. At the vanguard of this step-change is the global in-house legal team of the giant industrial and chemical conglomerate, DuPont. Their track record and insight from their successful recovery program forms the basis of this new report.

The financial crisis of 2008 and 2009 has placed in-house legal departments under cost pressures and the DuPont legal team shows how to mitigate this by using legal support for vigilance and not just compliance.

This report acts as a ‘how to’ guide for general counsel worldwide who wrestle with the question: “How can my legal department demonstrate value to our company?” And not just ‘soft’ value, such as preventative measures that ensure your company complies with the law, but ‘hard’ value that is measured as a return on investment that affects the company’s bottom line in a positive way.

“The Profitable Legal Department” provides the most in-depth and up-to-date information available on leading legal departments who were willing to go public with their revenue-generating ideas and activities. Though it may leave some readers wanting more, it should act as enough of a primer for any general counsel or head of legal department to initiate a recovery program in their company.

In their own ways, the ideas discussed in this report promise to be as revolutionary for general counsel as the advent of the personal computer in the 1980’s, or the internet in the 1990’s. Welcome to the new world of the in-house lawyer.
Acknowledgements

We would like thank those senior in-house counsel who gave their time to participate in this special report. Without their input we would not have been able to produce such a comprehensive guide. In particular we would like to thank Thomas Sager, David Shelton, and James Shomper at DuPont, for allowing us to get a rare and in-depth view of their visionary recovery program. We would also like to thank Hannah Lim, Dennis Lynch and Judith A. Reinsdorf at Tyco, and Malcolm Wood at Standard Life, for allowing us to publish their stories which we hope will inspire others to follow their lead.

We would also like to extend our thanks to Patrick Wilkins of the European GC and Jeffrey Forbes of the Forbes Institute, who are the co-authors and publishers of this special report. Without their strong understanding of the issues facing the legal market and recognition of this important shift in ideology, this project would have never gotten off the ground.

To create a dialogue of legal spend issues facing in-house counsel, we have set up a discussion forum in the “Legal Spend Management” Group in martindale.com Connected, our online professional networking site for the global legal community (www.martindale.com/connected). We would like to acknowledge Patrick’s help in building a discussion as well as thank the in-house counsel and private practice lawyers in our “Legal Spend Management Group” that have contributed to the conversation. To find out more, go to page 34 in this report.

Derek Benton, Director International Operations
LexisNexis Martindale-Hubbell
Introduction

The objective of a recovery program is emphatically not to generate litigation, nor to turn the legal department into a profit centre, although the latter might be a consequence of a successful program.

The profitable legal department appears to be an contradictory concept because in-house legal departments have always been cost centres. But this new approach is real and has been largely pioneered by Thomas Sager, Senior Vice-President and General Counsel for DuPont. As a visionary for the in-house legal profession, Mr. Sager’s idea of convergence nearly two decades ago saved corporations millions of dollar in external legal fees. Now, his latest crusade is for in-house legal departments to generate revenue because he thinks they should behave more like stakeholders and recover lost value as a result of vigilance. For Mr. Sager, a legal department that does not consider revenue generation is not acting in the best interests of the company and its shareholders. It is a duty, he states bluntly, for in-house legal teams to recuperate any monies due to the corporation, outside normal duties such as dealing with labour law matters, contracts, or regulation and compliance.

Those that do not support the idea believe it is not the duty of the legal department to generate revenue, as this would be a conflict of interest, which may endanger independence of thought and deed.

Those that support the idea see it much differently, because they know that Chief Executive Officers (CEOs) and Chief Financial Officers (CFOs) have long looked at the ever-rising costs of the legal department, and wondered: Why should it be immune to economic measures? Much of the blame is directed at law firms and the billable hour; though this is changing. But some general counsel (GC) admit they are also complicit for not pushing back on legal fees.

Mr. Sager’s vision of the profitable legal department takes the evolution of the in-house legal function one giant step further. Once mindsets and culture are changed in corporations, the legal landscape can be re-written, so that in-house lawyers gradually change management’s perception that they are only an overhead. By being proactive and more aggressive on what are, after all, only standard business arrangements with partners of a corporation, lawyers are simply doing their jobs the way they were meant to. At least that is the way many CEOs and CFOs see it, once they realise that the company’s legal costs can be reduced, perhaps even counter-balanced, by redeploying resources to recover lost value.

We know that some in-house counsel have a strong reaction to the word profit. This is especially true if it is used in connection with their legal department. For some, profit + legal department = a conflict of interest. For others, profit = budget which may mean accountability. For example, some general counsel have said, the idea of trying to make in-house lawyers generate revenue and taking up senior management time by chasing litigation, is the very last thing a company would want to do. ‘Our whole training is about avoiding litigation where we can. Also, just allocating litigation recovery to the legal budget is playing with numbers. That doesn’t add real value. How can you make independent judgments on merits (as required by the code of conduct) if you are incentivized to litigate? The whole concept is a direct conflict of interest,’ they say.

We agree, but they are missing the point: there is no conflict. Critics like these insist that a recovery program creates a potential conflict of interest by placing the in-house lawyer in a
position of aggressively pursuing claims at the expense of their primary role as a legal advisor to the company: that the lawyer’s independent judgment to assess potential claims may be compromised by the goal to turn the legal department into a profit centre, and that the in-house lawyer may be inclined to pursue questionable claims.

It would be fair criticism, if the underlying assumptions were correct, but those criticisms are misplaced. The objective of a recovery program is emphatically not to generate litigation, nor to turn the legal department into a profit centre, although the latter might be a consequence of a successful program. Indeed, most companies, including those with a formal recovery program, would prefer to avoid litigation due to its burdensome time, expense and resource demands and will use litigation only as a last resort.

A formal recovery program does nothing to change that dynamic. On the contrary, the intent of a recoveries program is simply to ensure that the legal department identifies and pursues those legitimate claims that otherwise might be missed for various reasons.

For example there might be:

1. A lack of resources to pursue them.
2. A lack of knowledge about the right to make a claim for a particular situation.
3. Other internal priorities that result in not pursuing rightful claims.

Stated otherwise, the objective is not to generate claims nor to assert questionable ones, but rather to assert those claims for damages that already exist and that have merit. If the legal department is not assisting the company in asserting rightful claims, when loss or damages have occurred due to the culpable conduct of another, it is doing itself and the company a disservice.

Whether corporate legal departments like it or not, companies assert claims formally and informally every day, even without a recovery program. It is an unfortunate fact of business life that things sometimes go wrong: services are not delivered on time, products are shipped in a defective condition, company property is negligently damaged by another party, warranties are breached, etc.

In many such cases, compensation is appropriately due to the affected party and a recovery program simply formalises this process by:

1. Identifying pre-existing and legitimate claims.
2. Asserting legitimate claims to recover damages rightfully due.
3. Tracking and analysing recoveries to identify improvements or adjustments in business practices to mitigate future losses.

Ultimately, a recovery program minimises the need, to assert future claims. Whether this is done formally or informally, the results add quantifiable value to the company’s bottom line.
The Profitable Legal Department: 2010 Research Report

Executive summary

The new legal mindset

As the title of this report implies, the use of the word profitable, is a play on words. As an adjective, it suggests that a legal department may be profitable, in the sense that it generates more revenue than cost. As a synonym, it suggests that the profitable legal department is valuable, and adding true monetary value is what this report hopes to encourage. But it will require a shift in thinking for some in-house lawyers; to become more commercially-minded. The legal landscape is vastly different from that which existed prior to the onset of the global banking crisis in late 2008. Since then, huge cutbacks in legal spending by corporations have been at the forefront of economic drives led by general counsel. Yet they must go further to improve efficiency, and this means that in 2010, they are still under considerable pressure from CEOs and CFOs to do more with less. This situation is likely to exist for the foreseeable future as the global economy coasts out of recession.

The concept

The concept of the profitable legal department is to add more value to the company by generating additional revenue. If the legal department is creative, it can find ways to do that, as demonstrated in the Standard Life case study on page 21. But in most companies, all the legal department needs to do is get more involved in the business process lifecycle – specifically the monitoring and optimisation phase. That is essentially what the DuPont legal team has done with their recovery program, which was led by Thomas Sager, its chief legal officer and arguably one of the world’s most innovative and visionary in-house lawyers. He has shown that legal departments can cover their own internal costs and even make a profit for the company. He calls it evolution. It involves legal departments proactively monitoring their transactions, agreements, patents and other contracts, to discover or detect wrongdoings. It is not litigation, but making sure that standard business-to-business agreements have been honoured. When done properly, a financial reward is claimed, usually without resorting to expensive litigation.

Recovery objectives

The main objective of a recovery program is to proactively identify and assert claims where the company has been harmed. This benefits the company and shareholders by providing income that would not normally be available. But this will only happen when the culture of the company, from the CEO downwards, believe that wrongdoings should be proactively pursued. Once that spirit is instilled, the managers meet regularly with the legal department, and report all potential areas of concern. Those areas that look promising will be taken up by the lawyers, with or without managerial support, depending on sensitivities to relationships with the defending party. Sometimes a case will be uncovered by, or outsourced to, one of the company’s external law firms to help recover the claim.
**How it works**

Ideally, in-house teams form a committee, headed up by a litigator, to lead the recovery program. An audit of plaintiff and defendant gains or losses in the past few years is then carried out. This can be done by an outside auditor, or in-house with the help of the finance department. Meetings with department heads and other senior management should be set up to see what matters have been settled in the past without actions by either side. Once a historical chart has been produced the committee can then look to the future.

Many mishaps, unfulfilled warranties, plant breakdowns, power outages, etc. tend to be brushed under the carpet for fear of upsetting relationships with customers, agents, business partners and others. Yet if pursued they could be worth huge amounts of money. In the six years since DuPont started their recovery program more than U.S.$1.5 billion has been recovered by the corporation.

**What law firms can do**

There is nothing to stop any law firm offering to help its clients start a successful recovery program (see “Lessons for law firms” on page 27). Often, once a deal has been done, transaction papers are filed away and forgotten. Under a recovery program, these should be re-examined. Partners may hear or read something that affects one of their clients, and could lead to a recovery. For instance, power breakdowns where clients have factories are never without cause. Even minor stoppages can lead to successful actions against utility companies or equipment suppliers who have a duty to provide a continuous supply. This is one way law firms can demonstrate to their corporate clients that they can add value and sustain a relationship in-between transactions. Pursuit of compensation for any errors or infringements that are discovered will more than likely involve the firm that identified it in the first place.

**Conclusions**

Any company, regardless of size, can launch a recovery program. If the in-house legal team is small, help can be sought from external law firms. In large companies, resources for chasing recoveries can be found by sharing compliance and regulatory duties. It makes a legal team productive in financial terms and is a clear way to demonstrate value to the company. Few CEOs or CFOs will disagree with the concept of taking a proactive stance instead of always being defensive or reactive. Attack is a good form of defence and lawyers should, when possible, be adversarial. That is the nature of their job. It may mean embedding a culture change within their own department and within the business, but a good and successful recovery program will always pay dividends.
What is a legal recovery program?

What is a legal recovery?

DuPont defines legal recovery as any recoupment in the form of cash (royalty payments, settlements, and adjustments), products, services, or other quantifiable rights obtained for a company or its affiliates, through the intervention by legal professionals beyond a normal business transaction. In other words, the fundamental feature of a legal recovery is some sort of positive and quantifiable benefit gained for the company, as a result of proactive legal intervention.

According to this definition, a legal recovery does not occur when the legal department (or external law firm) provides legal counsel in the normal course of business, such as helping the company to achieve a profitable contract or transaction, cost savings, a more favourable settlement or resolution of a dispute.

Where do legal recoveries originate?

Legal recoveries can originate in any company or industry that a company does business with because recovery opportunities are always present and change from year to year. For example, DuPont has found that recovery cases in 2009 surfaced the most in commercial/contracts as well as intellectual property and bankruptcy/collection (see chart below: DuPont 2009 recoveries by cases).
What is the purpose of a legal recovery program?

The main purpose of a legal recovery program is to proactively assert a company’s rights by recovering lost value which can positively contribute to profitability. Over time this can lead to a significant amount. For example, between 2004 and 2008, DuPont generated more than U.S.$1 billion in total recoveries. The long-term effect of a recovery program is to encourage the company to operate more efficiently and realise the value it is owed from contracts and other business agreements that it has already negotiated.

Are legal recoveries only possible in certain jurisdictions?

No. Legal recoveries are possible in any jurisdiction in the world where business agreements exist, provided of course, the relevant legal counsel (internal or external) is willing to proactively pursue this. For example, DuPont’s legal recovery program is global, with key contributions being made by members of its legal department in every region in which it operates. In 2008, approximately 30% (by dollar amount) of their total recoveries came from outside the U.S. In 2009 this fell to 20% but increased to nearly half in terms of total number of recoveries for the year.

Is a legal recovery program litigation-driven?

No. This would defeat the purpose of such a program because litigation can be very costly and time consuming. Although in some cases, recoveries do result from litigation, the goal is not to identify and pursue any and all claims as a plaintiff’s litigant. Instead, the objective is to instil confidence in asserting the company’s legal rights where the facts justify it. Litigation then is seen as a last resort.

For example, the majority of DuPont’s recoveries between 2004 and 2008 were accomplished without the need for litigation, outside counsel or other external costs. Instead, many recoveries were resolved through amicable negotiations, or in some cases through mediation or arbitration.
From the start a successful recovery program must recognise the importance of the company’s existing customer and supplier relationships. This is accomplished by the in-house legal team sitting down with the relevant internal stakeholders and devising a strategy that allows the company to assert its lawful rights in an appropriate way, whilst preserving strategic business relationships.

While the objective of a recovery program is not to make the legal department into a plaintiff’s law firm, DuPont has learned that it is wise to think like one, as most of their recoveries are handled in-house and resolved without the need for litigation.

**How difficult is it to implement a legal recovery program?**

This depends on each individual company. However, the greatest challenge might come from changing the culture of the company or the mindset of “business-as-usual”. In many companies there is a natural reluctance to assert their legal rights, because it is feared that it might upset relationships that have been fostered over many years. The challenge for management, as well as the in-house legal team, is to move from a passive culture of conflict-avoidance to a proactive culture that asserts its legal rights. Especially in these tough economic times, who would argue with any approach, which only encourages what is rightfully due? This is only good business practice.

**What is in it for the legal department?**

The in-house legal department in most companies has long been regarded as a cost item – or even a black hole for some – in the corporate budget. So a recovery program as outlined in this report, and proven by companies like DuPont, can actually turn an in-house legal function into a profit centre.

In future this may become one of the most compelling ways that a legal department can demonstrate to management the value it can bring to the company. Then imagine being looked up to instead of down on. Imagine the respect from the board, maybe even a promotion. Imagine being able to submit a budget for technology and training that is approved.

These are all add-ons that formulating and delivering a successful, and profitable, legal department can bring over time. Thomas Sager at DuPont is more than just a local hero: he’s almost become a living legend within corporate counsel circles in the United States. Malcolm Wood, the general counsel for Standard Life (see case study on page 21) walks as tall within his company as a Corinthian pillar. He hasn’t been decorated with laurel leaves yet, but he and his team are nonetheless seen as ‘stars’ within the organization. It’s difficult to see how Mr. Wood would be refused any reasonable investment requests for his department.

It’s also one more important step towards closing the gap between the formerly ‘downtrodden’ in-house lawyer, and the (sometimes seen as over-confident) profit-generating law firm partner. Entrepreneurialism is perhaps the word, and there is no better way to convert the sceptical CEO than by contributing to the lifeblood of the business.
Case Study: DuPont creates a new profitable reality

In 2004 the DuPont legal team created their Global Recoveries Initiative which had four key objectives:

1. Assert the legal rights of DuPont through the intervention of its legal resources.
2. Recoup cash or other quantifiable rights owed to DuPont.
3. Educate and inform DuPont businesses about potential recoveries.
4. Develop resources to facilitate future recoveries.

While all companies assert their legal rights and make affirmative recoveries, what distinguishes the DuPont recovery program is:

- It is a formal, structured program.
- It is a collaborative effort among legal, finance, sourcing and business groups.
- It drives cultural change over time in order to protect DuPont’s intellectual property and company assets to the benefit of company shareholders and each business.
- It is global in reach.
- It goes beyond simply counting affirmative recoveries.
- It can more accurately track and analyse recoveries and spot early trends.
- It has impressive support from the company’s top management.

As a testament to the success of DuPont’s Legal Recoveries Initiative, in 2008 the program received Inside Counsel Magazine’s IC10 Award, which each year recognises the top ten most innovative corporate law department programs in the United States.

DuPont’s recovery program continues to evolve with several projects underway, including one that seeks to identify potential recoveries and resource needs at DuPont plant sites. Active efforts also are underway to further drive the recoveries mindset into all of the individual businesses at DuPont, where many recovery opportunities originate and can be identified.

DuPont recoveries contribute significantly to the bottom line.

- Between 2004 and 2009 the program resulted in gross recoveries totalling $1.5 billion.
- Each year since its inception the program documented legal recoveries exceeding $100 million.
- Every region is contributing significant recoveries. In 2008, for example, approximately 30% of the recoveries came from outside the U.S.
- Costs associated with recoveries have been relatively modest in relation to total recoveries since most are handled in-house and without the need for litigation.
- A settlement with the U.S. Government dating back to World Wars I and II contributed four cents per share to DuPont’s 2008 second-quarter earnings.
Examples of types of recoveries at DuPont

The types of recoveries made by DuPont, and other corporations now following them, are many and varied. They cover most areas of law used within business, with the possible exception of labour law, and have ranged from as little as $30,000 dollars in value, to tens of millions. They cover most industrialized countries in the world ranging from the Americas through Europe, Middle East, and Africa, to the Russian Federation and Australasia, including China, Japan and Taiwan. Perhaps reflecting the global nature of DuPont and other large corporations and conglomerates, there appears to be endless opportunity when it comes to asserting business rights. Indeed, it has been DuPont’s experience that their recovery program spreads geographically year on year.

What seems to be a common element, however, is that most successful recoveries involve a confidentiality agreement drawn up between the parties. This is regardless of the amount paid, and is generally a pre-condition of a satisfactory settlement, once the rights have been asserted. This is not surprising considering that they are often resolving private business disputes. Consequently this makes it very difficult to disclose more details in this report, so that other GC can learn directly from their peers’ experience, or ask them for guidance and opinion. For instance, in some of the examples which follow, just to name the country where it took place would mean the company could be identified, because in industrial circles, suppliers, agents and others dealing with DuPont are all known to each other. Indeed in every sector this is true and any GC, having drawn up compromise agreements, or who is now considering a structured recovery initiative, would empathise totally that mutual confidentiality is the touchstone of the best pre-trial settlements.

Although Thomas Sager initiated the recovery program, the head of the Recoveries Committee today is James D. Shomper, Corporate Counsel, based in Wilmington, Delaware. He says: “On an annual basis the number of recoveries we count year-on-year is approximately 60, through to a record year in 2009 when we made nearly 170. It was also the biggest in dollar terms because of two particularly large settlements. The trend also indicates that the more you look into a big business the more potential recoveries can be made. Once senior management become aware, and realise the benefits, the more willing they are to try to identify other problems and mishaps within their business units. We are very proud of the non-legal management in the company who willingly support the initiative because this is a vital part of the success.”

Several examples in the commercial law and other sectors illustrate how management, and not necessarily the legal department, can identify possible recoveries.

- The failure of a customer to take a product in previously agreed quantities.
- A product sold that did not meet specifications leading DuPont to pursue the contract manufacturer who used non-specific raw materials.
- A customer’s failure to honour, take, or pay the provisions of the contract.
- Failure to purchase a product despite the acceptance of DuPont incentives.
- A contractor padding hours by having records reflect more workers than actually performed the work.
- Inflated customer forecasts resulting in unnecessary capital expenditure by DuPont, meaning the capital expenditure could be recouped.
- A distributor’s refusal to pay DuPont.
- Questionable royalty payments by the licensee of patents.

Broadening the search for ‘wrongdoings’ DuPont looked at sourcing and found that audits revealed an engineering contractor paying a head tax to the State and cross-charging DuPont. Upon investigation it was found that, pursuant to the contract, this tax was not required to be paid by the contractor. Subsequently the contractor filed a petition with the state to recover the tax and this was paid back to DuPont. Without a keen auditor’s eye this would probably have been long-forgotten and resulted in a loss of revenue for DuPont.

Additional examples are given in the table below:

<table>
<thead>
<tr>
<th>Joint Venture Agreements</th>
<th>Invoked audit provisions in joint venture agreements, or regular audits finding significant royalty underpayments and cost allocations.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over-Billing</td>
<td>Over-billing by suppliers of utility companies. In one case a gas company supplier simply changed the meter reading date without informing DuPont. Money was successfully recovered that had been over-billed.</td>
</tr>
<tr>
<td>Power Cuts</td>
<td>Power cuts had historically cost DuPont millions of dollars because the company assumed that such outages ‘simply happened’ from time-to-time and that the loss should be absorbed. Upon investigation into the utility sector DuPont lawyers discovered that outages can more often than not be prevented. Sometimes the power company or an equipment supplier is at fault or negligent. In the past decade DuPont has recovered millions of dollars this way.</td>
</tr>
<tr>
<td>Licence Agreements</td>
<td>Audits of certain license agreements have generated millions of dollars simply because a few staff detected that sales were not being reported accurately, or the same level of royalty payments were being made despite increased sales. In another case a previous licensed-based royalty obligation being paid on projected, rather than actual sales, was re-negotiated, gaining a substantial year-on-year recovery.</td>
</tr>
<tr>
<td>IP and Technology</td>
<td>In the IP and technology fields, recoveries have been successfully made for being overcharged for translation of documents or other expert fees, overpaid patent expenses from co-owners or other obligated partners such as in filing, prosecution and maintenance duties, and licensing fees or revenue for the use of ‘know how’. Equally DuPont has recovered patent and trademark licensing payments and royalties by examining running royalty or lump sum agreements.</td>
</tr>
<tr>
<td>Currency Fluctuations</td>
<td>In the international financial arena numerous customers in Brazil owed substantial debt due to currency fluctuations. DuPont’s remedy was to have attorneys set up a process where the debt was collected on an ongoing basis without disrupting the business.</td>
</tr>
</tbody>
</table>
In several other manufacturing situations DuPont has recovered amounts from $10,000 upwards, with many extending into the low millions. Here are some other examples:

| **Factory Fire and Penalty for Delay** | In a factory in Taiwan, a fire broke out (due to boiler oil overheating) while the production line was under construction and testing by the contractor. Since the production line was still under construction and not yet turned over to DuPont, it was the contractor’s responsibility to restore and rebuild. However, the scope of the damage was larger than the production line itself. After lengthy negotiations the contractor agreed to pay for the internal DuPont costs involved, while DuPont deducted this from the amount they owed the contractor. In addition DuPont imposed a 10% contractual penalty for delays. |
| **Clean Up Costs** | Charging the U.S. government a share of the cleanup costs at 15 DuPont sites that were commandeered for production during World Wars I and II, which raised a staggering $51m. This war plant’s recovery alone was settled for an amount that contributed four cents per share to DuPont’s 2008 second-quarter earnings. |
| **Breach of Supply Contract** | A supplier announcing its intent to void raw materials supply contracts based on force majeure and hardship. DuPont filed a declaratory judgment in Delaware Federal Court to recover damages for breach of contracts to supply raw materials needed to make their product. The case was settled before the hearing with an agreement to supply raw materials for the duration of the contract. |
| **Quality Control** | A conveyor belt manufacturer installed an adhesive to the underside of the belt to help reduce noise. Unfortunately, this adhesive contained silicone, which interfered with the quality of the product that DuPont was moving along the belt. The problem was identified by the head of quality control and a financial penalty was paid by the manufacturer of the belt. |
| **Burst Pipe** | A burst pipe in a DuPont building flooded the company’s offices making them partially unusable for several months. DuPont successfully charged the tenant responsible for the damages over and above what was paid by insurance. |

**Examples of more routine claims**

- A contractor who failed to meet construction milestones and deliverables.
- A supplier who delivered the product in railcars and excessively charged by weight.
- A claim against a site tenant for failure to pay for steam delivered by DuPont.
- Repair costs of a vessel purchased as part of an acquisition by DuPont.
- A claim against a freight carrier for lost cargo.
- A vendor who failed to deliver goods.
- A claim against a sub-supplier for delivery of goods with respect to title.
- Damages following a truck accident.
- Repair costs of a vessel purchased as part of an acquisition.
- A supplier who delivered steam overcharged due to a defective meter and subsequent calculations.
- A supplier’s failure to deliver raw materials.
- Delivery of defective goods.
Many GC will immediately think that all of these examples are suggestive of the ‘litigious’ nature of U.S. attorneys and happen only on U.S. soil. They would be quite wrong. Between 30-35% of all DuPont’s recoveries take place in EMEA and include all the countries of the European Union. Moreover in 2009, four out of five DuPont recoveries were resolved without litigation and most often without need for outside counsel.

In EMEA, DuPont attorneys on average generate between 30 and 40 different cases at an average of $1m a case. They further claim that the cost of recovering such amounts is below 5% giving a 95% return on investment - an attractive incentive to start a recovery program.

DuPont Cumulative Recoveries (2004-2009)

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount Recovered</th>
<th>Cost of Recoveries</th>
<th>No. of Recoveries</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>$108,000,000</td>
<td>N/A</td>
<td>62</td>
</tr>
<tr>
<td>2005</td>
<td>$247,835,946</td>
<td>$12,126,992</td>
<td>67</td>
</tr>
<tr>
<td>2006</td>
<td>$295,467,709</td>
<td>$24,598,453</td>
<td>63</td>
</tr>
<tr>
<td>2007</td>
<td>$172,277,323</td>
<td>$1,828,562</td>
<td>125</td>
</tr>
<tr>
<td>2008</td>
<td>$366,223,538</td>
<td>$26,404,678</td>
<td>115</td>
</tr>
<tr>
<td>2009</td>
<td>$368,150,294</td>
<td>$2,203,529</td>
<td>169</td>
</tr>
</tbody>
</table>

Interview with Thomas Sager, Senior Vice President and General Counsel for DuPont

In March 2010, Thomas L. Sager, the Senior Vice President and General Counsel for DuPont Legal, gave an exclusive interview about this topic to European GC. It is reproduced here with permission.

**How did you first get the idea that you could change from a cost centre to a profit centre?**

We had a few recoveries going on, but it was very much an ad-hoc procedure, so we asked our auditors to do a study of our experiences over the years in this area. The results showed that we had been relatively successful in this area. But more importantly, it signalled to me that if we had a more disciplined approach we would be more successful. This meant spending more time evaluating potential claims and measuring better our chances of succeeding.

To do this we needed to change the culture in the company, not just in the legal department, but everywhere, from a very conservative and somewhat benign outlook to being more...
aggressive and proactive when things go wrong. Everyone had to be taught that we owed it to the shareholders of DuPont to recognise the opportunities out there for recoveries.

We then set about leveraging our external law firms to help us evaluate various cases so that we could take the decision to run with it or let it drop. But I must emphasise it is not about litigation. It’s about enforcing our rights in IP, contracts – in general really – and whether they are being contravened or not. Basically we have to assess legitimacy in chasing this with a customer, client, agent or any other party by making sure everything is well documented and the proactive case is up to the highest professional standards.

Do you believe that other legal departments around the world could do the same thing and generate revenue for their company instead of just costs?

Absolutely, and that is regardless of the size of the company. Any general counsel who looks into his company’s income streams would probably find, under examination, that it cries out for this sort of process. It’s about establishing a process that is proactive and disciplined, perhaps using paralegals on the investigative dynamics that are needed.

In other words, legal departments are handling day-to-day matters, but not looking out for where they could add financial value for the company?

Yes exactly. I doubt if there is a single corporation anywhere that couldn’t recover something from another corporation somewhere. I understand that Europeans are not litigious by nature, but if that is so, you have to ask the question of the legal team: are they really doing the job for their corporations that they should be? Our job as lawyers within the company is to be vigilant. And if we are not it means we are not protecting the corporation and its shareholders properly. I understand it sounds revolutionary in nature, but other corporations are following us. We’ve already had such questions from two I can name, Ford Motor Company* and Tyco, who have had lawyers in to see us and discuss how they can do the same with their legal departments.

Could you give a sample of the modus operandi, bearing in mind of course, that all corporations are different?

Well, most corporations will have a considerable chunk of their business that involves IP and are probably active in emerging markets. It’s almost certain that an investigation will prove that it is being infringed or ignored. In Russia, or Ukraine, this is common. Even in countries where the full rule of law is in place there may be violations that can be fairly easily detected. It is quite possible that the person directly responsible has simply taken the view that it is not worth pursuing, whereas if the legal team has a proper reporting system, these violations will come to light.

Another area often overlooked is mergers and acquisitions. Post closure, on a regular basis over anything up to five years, the in-house lawyers should be reviewing the reps and warranties to see if they were perhaps not entirely accurate. This is an opportunity to go back to the party and tell them they were not exactly true and discuss reconciliation. In a different area, several times we have sought compensation from utility companies, when power outages have prevented our operations from functioning correctly. If you extrapolate on that you can look anywhere in the entire business to see where services have not been delivered as promised in the contracts. The likelihood is there will be room to be compensated for this.

*Ford Motor declined to contribute to this report at this time.
Curiously, heads of legal departments may find that their relationships with the other parties are actually strengthened through this approach. You have brought a violation to their attention and this allows them to impose better practices on the people they control.

**You must be the only legal department in the world that was thinking this way a few years ago as you developed your recovery program?**

I can’t say we were the only department, but I personally felt that unless we were bringing value to the company, we would be doing it a disservice. That was the motivation. In addition, it was a way of heightening awareness amongst our Board of Directors that we need to be good stewards of our corporate assets. This permeated down to the senior management and helped them focus their profit objectives year-on-year. They assigned task forces within their departments so that the opportunities could be identified. And with a big business like DuPont trading all over the world there were many.

**Is it fair to say that you are absolutely convinced just about every company anywhere is in the same situation?**

That is so true. Corporations are very complex and it’s certain there are many things going on that shouldn’t be going on if people take the time to look. You have to remember that two or more parties invest in good and professional relationships as they do business together, and if the rules are followed and digressions are challenged, this in the end is beneficial to all.

In a special follow-up interview for this report in June 2010, Thomas Sager went on to say: “So far we have generated nearly $1.6 billion in recoveries which have been validated by the financial experts in DuPont. In order to generate these recoveries we have probably spent about $65 million (outside of the costs of the legal department itself) which is a tiny fraction of the total amount recovered. So it is not about the U.S. litigation system, which is available to us if need be. The point is that the recoveries are done through normal commercial negotiations and this process costs a lot less.

If you think this program is just about suing someone you miss the point entirely. Litigation is really costly and our business, never mind anyone else’s, would not be able to support it. We have only spent significant money pursuing a company when the claim was in the tens of millions of dollars. Our experience is that the vast majority of claims we pursue are from the tens of thousands to the single digit millions. The largest we have ever done was for $92 million in Texas. Another was for $51 million and involved the U.S. government dating back to World Wars I and II (see examples of types of recoveries at DuPont on page 13).”
Case Study: Tyco reverses trend and now collects

Tyco is a highly-diversified corporation involved in electronic manufacturing, safety devices and related products. With over 100,000 employees worldwide, the 100-plus attorneys in the global legal department, are still in the experimental stages with Tyco’s recovery program. They are launching a pilot program that will focus on streamlining processes in targeted areas in 2011. The program will have a North American focus for the time being. “We will, of course, continue our IP enforcement activities globally, but we’re streamlining our efforts in bankruptcy, class actions and unclaimed property,” says Hannah Lim, senior litigation counsel for Tyco. Ms Lim explains: “We’ve always pursued recoupment when it made sense. The most significant difference for us has been the paradigm shift in our mindset. As most companies spend their in-house resources on defending the company’s interests and assets, finding time to look at affirmative opportunities has never been a high priority. In 2009, we started to track and record our recovery dollars and discovered that just by increasing our awareness and maintaining close communication with our businesses, the opportunities for recoupment have arisen. We’ve also implemented new processes for receipt and response to class action notices to capture dollars that were traditionally left on the table, and now hit Tyco’s bottom line. Tracking and recording our recoveries have also helped us identify key areas that will yield the highest potential for the company.”

“As a result of the economic downturn, many companies are looking at cost cutting measures. There’s a growing contingent of companies, Tyco included, that are collaborating with their legal departments to create revenue by using litigation or the threat of litigation to pursue a loss. We are trying to reduce our overall cost by bringing in revenue. A few years ago, the company was more reluctant to go after a competitor for stealing customer lists or infringing our IP, and therefore able to undercut us on price. We’re happy to report that we’ve reversed the trend and have increased the number of affirmative suits by over 40% in the commercial/contract dispute area, and now have an 8 to 1 ratio of affirmative over defensive IP matters that are in active litigation. Active litigation includes filed cases. Many settle early; given the cost to actually go to trial.”

She adds: “We’re very excited about this recovery program and have the full support of our senior management, including our General Counsel, Judith Reinsdorf, and Chief Litigation Counsel, Dennis Lynch. In addition to the U.S., we’ve also pursued recoveries in Australia, Germany, France and South Africa. Although the program is currently focused on North America, we intend to globalize our efforts over the next four years. Since we’re still developing our recovery program, most of the investigative and evaluation work is currently being done in-house. We believe that as the program becomes fully operational, we will be increasing our reliance on outside law firms.”
Recoveries Plaintiff and Defendant: 2000-2010

How Tyco Gained the Upper Hand: Shift from Defendant to Plaintiff

* Figures for 2010 = January 1 – April 30 only

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Case Study: Standard Life engineers
£100m bonus

In 2009, at a time when companies worldwide were strapped for cash in the most serious
downturn in generations, Standard Life plc preserved £101 million of cash in the company.
This was due to the ingenuity of its chief counsel and company secretary, Malcolm Wood,
who heads the legal team for the giant British-based insurer and asset manager.*

The remarkable nine-figure ‘bonus’ at Standard Life was done by having shareholders agree
to forego a cash dividend and increase their shareholding.

Mr. Wood explained: “Most listed companies have schemes which allow their shareholders to
take more shares instead of taking a cash dividend. If you are a shareholder the company pays
a dividend twice a year, but the shareholder can instead just buy more shares. So the
shareholding accumulates.

“There are basically two ways of doing that. When we became a quoted company in 2006 we
set up what is known as a DRIP scheme (Dividend Re-Investment Plan). This is how it works:
if shareholders sign up for it, the company takes the aggregate amount of money it would pay
out in dividends and goes off into the market and buys shares from shareholders who want to
sell. It then allocates them to those choosing shares as opposed to cash.

“The disadvantage is, if you have a big take-up, the company has substantial amounts of cash
going into the market twice a year to buy shares. The market sees the company coming, so the
stock price tends to go up, and the number of shares that the shareholders receive reduces.

“It’s not much of a problem for companies where they don’t have much of a take-up. Typically
companies will have 6-7% of shareholders who subscribe to this. We’ve had up to 30% of our
shareholders signing up to the DRIP scheme. It’s a great expression of confidence in the
company. But it did mean we had a large amount of money going into the market. And we were
concerned that it was not producing the best results for the shareholders, who also had to pay
0.5% stamp duty on their purchases. But it’s neutral for the company since it still pays cash to
sellers in the market.

“So in 2009 we thought about this and discovered that we’d be better off all round having a
Scrip scheme issuing new shares. The number of shares you get is done by reference to the
market price several weeks before the dividend is paid. That means it’s clear how many shares
you are going to get, but more importantly, it doesn’t affect the market price.

“The advantage is there is no influence on the market, there is no stamp duty, and most
importantly the cash is retained by the company. In 2009 that produced about £100m of cash
for Standard Life because it didn’t have to be paid to buy more shares, as in previous years.

“The clever thing is that we had 500,000 shareholders signed up for the old DRIP scheme and
we were sure that a Scrip scheme would be better for them. If we had written to each one
individually to ask them to sign up to the new scheme many would have thrown it away unread.
Instead we put a resolution to our Annual General Meeting, changed the Articles of Association
of the company, and if passed it had the effect of automatically transferring from the DRIP to
the Scrip – and we made it equally easy for them to opt out if they wanted to.

“The resolution was passed by a huge majority: only about 300 people opted out. But the prize
from the company’s point of view was that we preserved £101m of cash.”

* First published in European GC, Spring 2010.
How to set up a legal recovery program

It needs to be stressed that a legal recovery program is not a litigation program or a one-off event. Instead, it is an evolutionary process and part of a long-term strategy, in which the legal department plays a key central role in setting up and managing such a program. The three major components of a legal recovery program are: Collaboration, Structure and Strategy.

Collaboration

Collaboration is the key to the success of a legal recovery program. If you do not have good working relationships and open communication between business units where the wrongdoings occur, the management and leadership of the company, and the legal department, then any legal recovery program will be plagued by mistrust and a lack of actionable information.

Structure

The structure of a recovery program would ideally include a core team (as outlined in Step 2) and a responsible manager, perhaps covering a specific geographic region, who progresses the recovery program in his/her respective region. A corporation’s primary law firm and other external advisors can be involved where appropriate.

Strategy – Six Steps

1. The audit (informal or formal)
2. Formal program to aggressively assert legal rights
3. Culture shift – from conflict avoidance to assertion of rights
4. Develop resources to facilitate recoveries
5. Standardize process for recurring opportunities
6. Communicate your successes

1: The audit (informal or formal)

Informal audit: An audit will give you a sense of the scale of potential recoveries in your company and is the first place to start. If your legal department’s budget is tight or you need approval from management to bring in outside auditors, then you may want to take an informal approach first. This entails working internally with your company’s finance department to look for easy or lucrative claims where you can have quick wins. You would then have a sound case, and an ally in your finance department, if you wanted to conduct a formal audit later with outside advisors (see the Tyco case study on page 19 for an example of an informal audit).

Formal audit: A formal approach, like DuPont took, requires engaging an external audit firm to evaluate the history of litigation issues in your company over the previous 5-10 years. This produces a balance sheet showing what was recovered from disputes with other companies, and what was paid out when you lost. Against this, costs such as court and legal fees would need to be calculated, so that a ‘profit’ or a ‘loss’ can be defined on a yearly basis. DuPont estimates that a formal audit like this would cost anywhere from $10,000 to $200,000.
depending upon the size of the company (see the DuPont case study on page 12 for an example of a formal audit).

When DuPont initially performed such an audit, they found – as most companies will find – that they were paying out more than they were getting in from commercial disputes. Nonetheless an audit will indicate how big the issue is, or potentially is, because it should also include problems that have been previously ‘written off’ as unrecoverable. It is also important during the audit process to give assurances that you will not undermine relationships that the business heads have with customers, suppliers, contractors and the like. The audit should also help evaluate the culture within the company, whether it is soft, conservative and risk averse, or whether it can at times be aggressive. This requires interviewing the business managers at length, going over the past few years, to discover what has been brushed aside and not pursued. If the culture of your company is not aggressive and constantly working in the interest of shareholders, then a management decision needs to be taken to change that.

2: Formal program to aggressively assert legal rights

Before deciding to pursue your first claim you should review everything and correctly assess the amount. DuPont’s advice at this stage is to reassure the senior manager involved that the legal department will handle the case alone if there are fears of losing customers, upsetting suppliers and contractors, and losing business as a result.

This stage is not about saber-rattling, but about constructing the claim in a purely professional way with the appropriate research, to the extent that it is viable and can be advanced through amicable means. It is very much a psychological exercise. For example, when DuPont began their program, the legal department often got comments that the service level (of suppliers) was going to suffer. But this did not happen. Obviously, as professionals, you owe it to your company to pursue such claims in a very correct manner. If so, then relationships do not suffer. On the contrary, as DuPont has found, people understand that business is business and standards have to be maintained.

3: Culture shift – from conflict avoidance to assertion of rights

It may not be easy for management to get all the business managers to be more aggressive and constantly work in the interests of the shareholders of the company. But again, DuPont’s experience showed that very often, after a lot of soul-searching, they realised it was friendliness that was driving the business relationships. And even though there was a potential case to pursue, managers did not want to because of this. They thought it would ultimately undermine their relationships if they got into a business-to-business dispute with a friendly business partner. That is why each interview needs to be conducted with complete confidentiality and an agreement, that if the manager does not want to be named to the third party, they would not be.

According to Mr. Shomper: “Driving such change is a key objective of a recovery program but one, unfortunately, that can only be measured in relative and somewhat subjective terms. It is truly a journey and may never be fully attained but still worth striving for. As we see it, driving cultural change - from conflict avoidance to proactive assertion of rights - requires as a minimum starting point two things: Leadership from the top - it must be driven from the top
down. That is why Thomas Sager as DuPont’s General Counsel is actively engaged in the program and why he has received support from corporate management. The second minimum requirement is Communication - the message must be clear and constant. Through various internal communications and presentations, we continually reinforce the goals of the recovery program and its importance.

It has been a challenge, of course. When DuPont first rolled out the recovery program with business clients, many misperceived it as a litigation program, or they were fearful that it would disrupt established customer/vendor relationships. Part of the challenge has been to dispel those impressions. DuPont has been running its recovery program for over five years now and we admittedly still have a long way to go before achieving the optimum cultural change. We know we can learn from others and are hoping to do so.”

Mr. Sager adds: “If your company uses every success to illustrate the potential impact on the bottom line, the cultural shift will occur. Selecting the appropriate business champions, or cheerleaders, furthers that shift. It takes time, strong communication, and discipline. There’s nothing easy about it, but that is the challenge.”

In general, a three-stage approach to cultural change should be driven by the legal department as it is in their interest to demonstrate how they can add financial value for their company:

1. The GC or head of the legal department to bring the recovery program to the company’s management and sell the concept.
2. The GC/head of the legal department to drive the program throughout the company, but with a free hand or consent from the company’s top management.
3. As top management usually has other priorities, the GC/head of legal department should be prepared to personally drive the project forward to deliver some positive results. Based upon results, management will, over time give increased moral and/or material support to such a program. Then, once there is momentum, all the GC/head of legal has to do is keep developing it. The eventual goal is greater efficiency and awareness regarding vigilance in the company.

4: Develop resources to facilitate recoveries

To effectively pursue recoveries, a cross-disciplined team of in-house professionals should be assembled that comprises experts in various practice areas. These can be led by commercial lawyers who have the ears of the leaders of the different areas of the business. For example, DuPont has two committees and these are populated by litigators, bankruptcy, real estate and anti-trust specialists, who are all up-to-speed on what is going on in their field. Finally, the team requires a finance expert. DuPont has finance experts who work with the legal team and the respective businesses within the company to evaluate the claim or the recovery in question. For any resources you don’t have, you can leverage off your primary law firms or other external advisors. This means smaller companies need to mix and match in order to create a team. In larger companies, an official committee of lawyers can be set up to oversee the entire recovery program, and take ongoing decisions.
The recovery team is responsible for reaching a decision about whether or not you pursue or drop a claim. Savvy legal departments might want to follow DuPont’s example of leveraging their external law firms to do some of this preliminary work gratis. Indeed, many of DuPont’s law firms offer to do this before they are instructed. It is a good way to train their younger attorneys and also, if they are successful in identifying and formulating a claim, the firm will get a piece of the action. DuPont gives that commitment to the firm and then works out the fee arrangements with them. It might seem like sweat equity for some law firms, but it’s the best training associates and junior partners can get. This teaches them how to write watertight contracts and roll up a bad contract into a claim.

5: Standardize process for recurring opportunities

DuPont’s standardized in-place systems and procedures both track and analyse recoveries. This starts with their Recoveries Core Team, essentially a steering team with overall responsibility for management of the program. In addition to their Core Team they have:

- Regional legal recovery leaders (one lawyer in each region who has primary responsibility for organizing and promoting recoveries in that region, e.g. David Shelton based in Geneva who is responsible for EMEA).
- Recovery stream owners (i.e. subject matter experts in the various legal specialities that they track such as IP, commercial, antitrust, international trade, tax, environmental, etc.).
- Recovery ‘champions’ in each business unit who are the “eyes and ears” for recoveries in their respective business and are the interface with the core team. These are nominated on a regular basis during the year.
- Primary law firms and services providers to whom they turn if outside resources are needed on a particular recovery opportunity.

Every proposed recovery must meet five criteria:

1. There must be a recoupment.
2. It must be quantifiable.
3. It must result in a net benefit to DuPont or an affiliate.
4. The legal department must make a substantial contribution to the recovery.
5. It must be outside the normal course of business.

Once verified, recoveries are documented and tracked in a way that allows reports to be generated easily, with the breakdown of recoveries by calendar year, or quarter, by type, by region, and by the respective DuPont businesses.

The over-riding principle of DuPont’s recovery program is psychology: business partners and suppliers targeted for recoveries have to be made to feel that the matter is not resolved, formal litigation or legal proceedings will follow.

This requires lawyers with exceptional negotiation and persuasion skills, because they have to give the impression of being prepared to pursue the matter beyond the initial negotiations. That’s the stick.
The carrot is to remind the other party that the financial amount the recovery represents may only be a fraction of the amount it would cost if it went to litigation. It is also helpful to remind the other side that the claims seeks to recover what they were obligated to deliver, but didn’t.

The golden rule is to be forever vigilant and disciplined in order that your company gets the maximum return on its assets and contracts.

6. **Communicate your successes**

GC need to understand that the cornerstone of a recovery program is NOT litigation. The focus is legitimate claims where both parties have contractual obligations to deliver, or certain representations to honour. Recoveries reflect the spirit of the original contract or agreement and are based upon well documented and researched claims which parties should be addressing in any event.

Think simply of a more disciplined approach, using the keen eyes of experts who identify and review the claims and communicate this to all those involved.

For instance, DuPont schedules regular internal and external communications about its recoveries:

- Periodic reports summarizing recoveries with analysis as to the source of recoveries and progress against objectives.
- Core team meetings to establish objectives and to assess progress.
- Internal webinars with all interested parties within the company.
- A specially-written chapter in the DuPont Legal Model book.
- Recognition awards for exceptional contributions to the recovery program.
- Quarterly meetings of regional legal leaders.
- Recovery tools and resources, with examples, on DuPont Legal department’s intranet.
- External articles in legal media and external recognition such as the IC10 Award.
- Videos about recoveries on the company intranet and for use in business team meetings which generally describes the program.
- Presentations to external audiences, to other attorneys in DuPont Legal, and to business clients such as the purchasing group. This serves to advance the culture shift from conflict avoidance, to assertion of legitimate legal rights. Within these meetings the legal department will provide examples of recoveries and helpful resources.

As a result of these initiatives, DuPont has achieved a complete ‘buy in’ by senior management and department heads. They see proactive recoveries as valuable for the company. This improves teamwork and demonstrates that DuPont is not a pushover. Other companies embarking upon a formal recovery program should encounter similar feedback from management.
Key points from DuPont’s recovery program

1. A recoveries program needs to be driven from the top.
2. It’s an evolutionary, not a revolutionary, process.
3. A recovery program shows corporate management that the legal department adds value.
4. Untapped recovery opportunities do exist.
5. A formalised, structured program can provide clear benefits to the company.
6. It requires active management and repetition to succeed.

Lessons for law firms

At first glance, law firm partners will stand back in admiration at the work of Thomas Sager, in turning DuPont’s 185-attorney global legal department into a healthy profit centre for his company. Look deeper, however, and there are important lessons suppliers of legal advice can learn from understanding, and then shadowing what Mr. Sager is doing.

In effect, he has been able to reverse the standard cost centre model for in-house legal departments by becoming more proactive and vigilant. Instead of simply sitting back and waiting for work to come into their department, he, his attorneys, AND the law firms that work for DuPont, are forever on the look-out for any breach that may lead to a financial recovery.

The fact is, any law firm could do the same with its clients, and in these lean times perhaps they should. Partners should simply refer to the section in this report outlining potential areas for recoveries, and then review the contracts they have drafted for their clients. Soon enough they will find examples that they can take to the client, discuss the potential for a settlement with the offender, and, if viable, earn a new assignment.

This is work that simply wouldn’t exist without a degree of proactivity by the law firm. In addition, it demonstrates to the client that the supplier of legal advice really does care and also goes some way to curing the ills of a deep and global recession.

Sceptical partners will say that their firms don’t want to become ambulance-chasers. Their mission is to be transactional – not litigious. In reality, it is not. Few of Mr. Sager’s recoveries for DuPont have gone to court. They are usually settled long before, through skilful negotiations on the basis that there was a wrong committed by the other party, and that damages are due.

All it amounts to is a re-distribution of the wealth of corporations. They know they should pay for violations, slack performance, non-fulfilled warranties, whatever – but they certainly won’t unless they are invited to do so. The moral being that rather than sitting around bemoaning the dearth of transactional work, a little proactive research within the existing client base could bring in new business.

In the January 2008 issue of ACC Docket, Mr. Sager wrote: ‘Dickstein Shapiro LLP is a DuPont law firm that has really bought into the plaintiff-side work, particularly around
antitrust. They have designed a process to identify suspect competitive pricing by DuPont’s suppliers. Once they have identified a potential matter, they bring it to DuPont’s attention and earn the privilege of pursuing the matter on our behalf. In exchange - and in addition to keeping the lion’s share of the recovery - DuPont gets the benefit of deterring further predatory or collusive pricing. “Dickstein Shapiro is always monitoring the market place in search of price fixing and other similar transgressions against DuPont. While our main objective is always recoveries, we also like to think we are making DuPont’s suppliers and competitors think twice before engaging in this type of activity,” said R. Bruce Holcomb, partner at Dickstein Shapiro.

Outside the U.S., the London-based international firm Eversheds, is leading the way in this initiative. The firm’s front running position has come about mainly because of its long-term involvement with DuPont. Dating back to the 1990s, Eversheds was there when the Delaware-based DuPont pioneered today’s global phenomenon of 'convergence', where large numbers of external law firms were whittled down to a few dozen with fixed-term engagements.

Eversheds has now set up a specialised consultancy for in-house legal departments, of which developing recovery programs forms a major part. Led by senior international partner, Paul Smith, the consultancy typically starts by examining a client’s contracts, ranging from tax documentation to Intellectual Property rights, to M&A files. “When clients do big acquisitions or disposals of companies,” says Mr. Smith, “corporate lawyers spend inordinate amounts of time negotiating indemnities, warranties and other risks like IP or environmental issues that can affect the value. What usually happens is that when the deal is done, the documents are put in a big file and put on the shelf. Often, no-one will bother to monitor over the years whether everything recorded was based on fact or speculation.”

“What we do with clients is go through all this documentation and see what benefits have been extracted – or not – over the period dating from the beginning of the contracts to see, for instance, if there have been breaches in warranties or indemnities,” Mr. Smith explains.

In Eversheds’ view, many agreements made between companies involve disjointed sets of lawyers, and though some companies do have contract checking departments, whether there are any hard and fast mechanisms within most organizations to follow through year in year out, is arguable. As proactive legal departments chasing potential recoveries become more common, this facility will be built into relationships with outside law firms, and they will equally profit from it.

Mr. Smith, however, believes the discipline should really start with the in-house teams. Instead of just stowing away documents in filing cabinets, an internal procedure to re-examine on a systematic basis would need to be implemented. The rationale being that this would be time well spent since it may lead to revenue generation for the company that had never been foreseen. Just one moderate recovery would pay to engage extra internal lawyers as Thomas Sager at DuPont has done.

Nonetheless Mr. Smith is at pains to point out that structural re-organization of this ilk will require considerable mindset change by non-U.S. in-house legal teams. He believes chasing recoveries, and litigation saber-rattling is very much an American concept, where threatening to sue one another, is part of the fauna and flora of the U.S. legal landscape.
Obviously it exists in Europe and elsewhere but the disparity gap has plenty to grow before the rest of the world catches up and law firms agree to work on a no-win-no-fee basis, or other more creative arrangements with clients. It is common for instance, in the U.S., for law firm associates to work on recovery-seeking documents as part of their training. The client would only be liable to pay a fee once a recovery is commenced. This might be a hard concept for European law firms to swallow as the billable hour, though declining, is far from moribund yet.

“In the U.S. law firms are very much into contingency fees,” says Mr. Smith. “So what tends to happen is that the firms spot the opportunities, go to the GC and propose that if successful, they will derive 40% of the award with the remainder going to the client. This is not the way we work in Europe.” The rules vary in Europe across jurisdictions for contingency fees.

“The stakes are also much higher in the U.S.,” says Mr. Smith, “with jury trials and substantial damages awards. So we would not pitch these sorts of opportunities. But clearly if there is an ongoing relationship between the firm and client there will – and should – be mechanisms put in place to ensure this type of co-operation, as opposed to the normal ad-hoc arrangements, where considerable time can pass between the parties with no contact.”

Regardless of how law firms tackle this area of opportunity to generate unforeseen revenue, the potential to recover business-to-business damages for wrongdoings remains high, because large corporations have complex structures – and invariably deep pockets.

“The sums out there to collect are theoretically enormous,” Mr. Smith estimates. “Up until now it has not been a priority for legal departments to recover them. In big corporations in-house lawyers are used to being defensive and nothing else. Indeed, this was the way it was at DuPont and Tyco at one time. They were rich companies with seemingly unlimited resources and often had to defend claims against them. Now they have reversed that trend at DuPont, and started to do so at Tyco.

“Now we are continuing this trend outside the U.S. by identifying and pursuing insurance and other companies in a way that we have never done before,” says Mr. Smith. Eversheds nonetheless, remains sensitive to the climate of litigation aversion due to sometimes massive discovery outlays.

The fact is, however, the current aversion to costly trials is unlikely to change just because of recoveries, thinks Mr. Smith. “Nine out of ten cases – the historical average – will still be resolved before going to trial,” he says. “The systems in Europe and most other places are designed to bring settlements before they have to be heard in court. So actively helping clients with recoveries is not going to change that.”
Indeed, not pursuing recoveries could prove foolhardy for corporations. Claims in IP areas alone could amount to billions of dollars, according to Eversheds’ research. The caveat must remain though, insists Mr. Smith, that there is no silver bullet approach. “For many GC outside the U.S. their mindset is a million miles away from running a legal department in such an aggressive, proactive, fashion. So we must not give the wrong message and believe that it can be transformed overnight.”

“A far better way is to simply go in with no preconceptions and sit down, go through the books, and see what there is. Have a look and see what problems could be turned into a means of generating revenue. The biggest problem with legal departments from the view of the CEO or the CFO is that it is just a cost centre. That is why they are always asking GC to demonstrate the value the department provides. What does the corporation get from this?

“What’s different now is that the GC can say they have done a review and identified ways the legal department can generate revenue for the company. That would go some way towards covering their overhead and the conversation in an instant becomes wholly different,” says Mr. Smith.

Indeed outside law firms have helped manoeuvre DuPont to the strong position it now maintains. As Mr. Sager confirms in the same ACC Docket article: ‘Our company is known as one that will stand up for its rights. Whoever is on the other side of the table - business partners working on a contract, government agencies, plaintiffs’ firms - understands that they may be in for a fight. With the word out that we are more aggressive, it results in better contracts, better compliance, and less trouble at the end. In fact, this was one of the objectives of the DuPont Law Firm Network in the first place. Anyone opposing DuPont would know they are dealing with a strong network of firms. These firms were chosen for their ability to be resourceful, creative, and aggressive, as well as for their willingness to collaborate.’

Scott L. Winkelman, partner and co-chair of the Torts Group at DuPont law firm Crowell & Moring, says, “DuPont has invested in a strategy that demonstrates it’s not going to roll over, and the legal community has taken notice. It’s an example of a savvy legal department positioning its company to be more profitable and less vulnerable to frivolous lawsuits over the long run.”

Frequently Asked Questions

1. What do you mean by “profitable” legal department? We are a support function in the company, not a business.
   The word profitable, in the English language, has several meanings. As an adjective, it suggests that a legal department may be profitable, in the sense that it generates more revenue than cost. But as a synonym, it suggests that the profitable legal department is valuable, and adding true monetary value is what this report hopes to encourage.

2. Are you suggesting our legal department should charge fees like law firms to generate revenue and make a profit?
   No. This report shows how legal departments can generate “additional” or “unexpected” revenue for their company, by using their existing skills or resources, and not by charging fees to internal or external clients like law firms. The main method of generating additional revenue, as shown in this report, is for legal departments to develop a proactive recovery
program to recoup value for their company. This is illustrated in the DuPont and Tyco case studies on pages 12 and 19. Another example of generating unexpected revenue for the company, is to be creative or innovative, as is shown in the Standard Life case study on page 21.

3. What do you mean by a “legal recovery” program?
The fundamental feature of a legal recovery is some sort of positive and quantifiable benefit gained for the company, as a result of legal pro-activity or intervention. According to this definition, a legal recovery does not occur when the legal department (or external law firm) provides legal counsel in the normal course of business, such as helping the company to achieve a profit, cost savings, or a more favourable settlement resolution of a dispute. For a full explanation see “What is a legal recovery program?” on page 9.

4. Isn’t a legal recovery just a fancy name for litigation?
No. The main purpose of a legal recovery program is to recover lost value for the company without resorting to expensive litigation. Success is achieved more through skillful preparation and negotiation than saber-rattling. However, there may be times when litigation or arbitration may be necessary. But this is seen only as a last resort and not the ‘modus operandi’. See “How to set up a legal recovery program” on page 22.

5. Won’t my business and supplier relationships suffer from this?
No. If a recovery program is approached and handled in a professional manner, it will be seen by all parties involved as just good business practice. When DuPont first started their program in 2004 they faced similar internal scepticism. But these fears proved to be unfounded as people understood that business is business and standards have to be maintained. Refer to the step ‘Formal program to aggressively assert legal rights’ in the chapter “How to set up a legal recovery program” on page 22.

6. How much does it cost to implement a legal recovery program?
There is no set cost to implementing a legal recovery program, because it mainly utilises existing internal resources, and every company’s costs and needs will be different. For example, DuPont attorneys in EMEA generate between 30 and 40 different cases annually at an average of U.S.$1million a case. They further claim that the cost of recovering such amounts is below 5% giving them a 95% return on investment. See “How to set up a legal recovery program” on page 22 and the DuPont case study on page 12.

7. What do you mean by the term “convergence”?
Convergence refers to a system that large legal departments have used to reduce the number of external law firms they work with. This system created the law firm panel trend and it was largely pioneered by the DuPont legal team in the early 1990s. This has helped many legal departments save millions of dollars on legal fees as well as increase the speed, quality and efficiency of their relationships with external law firms.

8. Should all companies consider setting up a formal recovery program?
Some companies feel satisfied that they already pursue legitimate claims through existing programs and policies. However, until they investigate, they will not know the actual extent of potential claims. So as this report shows, a formal recovery program, probably has greater value for companies with diversified operations and products. Equally, a smaller company with a single product line, probably can achieve similar results without a formal recovery program. Nonetheless, all company legal officers, should find much inspiration within these pages.
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- Brazilian Study on the Relationship between Legal Departments and Law Firms – 2010 Research Study
- How In-House Counsel in Russia are Managing their Legal Departments – 2009 Research Study
- How In-House Counsel in Central & Eastern Europe Select and Retain their External Counsel – 2008 Research Study

Forthcoming Reports

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