

Legal Departments Get Aggressive In Pursuing Recoveries

Tom Sager Transforms DuPont Legal Into Profit Center

BY ADELE NICHOLAS

IF YOU'RE LOOKING for a quick way to repair the legal department's image as a cost center, try depositing \$170 million into company coffers in less than a year. That's what Tom Sager, vice president and assistant general counsel of DuPont Legal at E. I. du Pont de Nemours and Co., has done in 2005.

But that money didn't just fall into his lap. The company's lawyers pursued it bit by bit as part of a plan Sager started at the end of 2003 to transform the legal department from a cost center to a legitimate contributor to the bottom line. Sager engineered this transformation by setting goals for achieving recoveries (\$100 million for 2004; \$116 million for 2005) and then systematically pursuing actions against suppliers that were engaged in price fixing, companies that infringed on DuPont's intellectual property and business partners that failed to come through on their ends of contracts.

While corporations have traditionally been wary of willingly taking on extra legal work, Sager saw doing so as a business necessity.

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Assistant General Counsel
E.I. du Pont de Nemours and Co.

LITIGATION

"We do this with the understanding that, while we're not in the business to sue people or generate claims and recoveries, we owe it to our shareholders to recover losses," he says. "When a certain amount is at stake, we have an obligation as counsel to the company to pursue claims."

More and more companies are seeing the wisdom behind this logic and following in DuPont's footsteps.

"The old way of looking at it was to do nothing and live with your damages," says Kent Gardiner, a partner at Crowell &

Moring who represents companies such as DuPont and Caterpillar in recovery actions. "Now, Fortune 500 companies are getting interested in developing strategies for bringing money back to the company."

Natural Selection

Although companies are starting to become more amenable to the idea of proactively pursuing claims, that doesn't mean they're indiscriminately chasing down dollars or seeking treble damages from everyone that's caused them a loss. The key to creating an intelligent recovery plan is selecting the right cases and going about them in a moderate manner.

"We're not about to become plaintiffs' lawyers who only go looking for quick kills



Tom Sager (left), assistant general counsel at DuPont, partners with corporate defense attorneys, such as Crowell & Moring's Kent Gardiner, to seek out opportunities for the legal department to bring money back to the company.

and large recoveries,” Sager says. “We’re trying in some instances to preserve relationships where we have disputes with key suppliers or customers. It requires balance.”

In-house lawyers are used to being forced to handle whatever complaints plaintiffs file against their clients, regardless of how weak the claims seem. But when it comes to being a plaintiff, a legal department can and should be extremely selective in the cases it chooses. The best cases to pursue are those in which the injury is significant and the proof relatively certain.

For example, DuPont currently is involved in several actions to recover overcharges from parcel tanker companies that ship its specialty chemicals. These actions follow a government investigation of antitrust activity that took place between 1998 and 2002 in the parcel tanker industry. The investigation resulted in prosecutions of several companies and their executives for price fixing and collusion. That provided DuPont immediate leverage in its efforts to recover its losses, which the company calculated to be in the tens of millions. One arbitration has already resulted in a settlement.

“If you can clearly show the suppliers that there are significant damages, they become eager to pursue a resolution,” Gardiner says. “When a government agency has already made findings that collusion occurred and we provide an analysis of our damages, most companies realize they have to do something about it.”

In addition to choosing cases that have relatively straightforward proof, GCs must engage in careful risk-reward analysis before deciding whether to pursue an action.

“There’s a continuum of factors you have to consider,” says Stacy Andreas, a partner at Lathrop & Gage in Kansas City, Mo., who represents corporations in insurance recovery actions. “You look at what your likelihood of recovery is; what the magnitude of damages is; what counterclaims you could be exposed to; and who you’re going to sue.”

That final factor is one of the reasons legal departments have been so reluctant to pursue recoveries even if the company has significant damages—oftentimes the entity that caused the loss is an important cus-

tomers, supplier or business partner. Companies are beginning to develop ways to get compensation without destroying essential relationships.

Diplomatic Means

When a company has to go after a customer or supplier, it can better maintain the underlying business relationship if it avoids an ugly and costly courtroom battle. Companies are first trying mediation or simple negotiation and leaving litigation as a last resort. If you go to the supplier armed with clear evidence that you’d win your case if you took it to court, most will be willing to sit down and work out a solution.

“Traditionally a plaintiff would seek punitives or multiples,” says Nate Eimer, founding partner of Chicago-based litigation boutique Eimer Stahl. “The trend now is saying, ‘You caused me a loss and I expect to be compensated. Let’s shake hands and move on.’”

In addition, companies are moving away from demanding monetary compensation and looking instead for creative ways for business partners to pay them back.

“The recovery actions that have been most successful are those that don’t solely pursue cash,” Gardiner says. “Negotiations can result in discounts on future sales or long-term price freezes. This provides real value to the client without undermining the relationship. Both sides feel that an appropriate balance was reached.”

An essential part of achieving this balance is selecting your counsel wisely before going forward. Instead of turning to plaintiffs’ lawyers who will immediately strike fear into their opponents’ hearts, companies are opting to use their regular defense firms with the hope that they will pursue claims in a temperate manner.

“Defense counsel are more sensitive to the need to maintain our business relationships,” Sager says. “In addition, the firms you work with on a regular basis will be more willing to invest some of their own time into helping you identify these opportunities.”

And getting your outside counsel to share some of the expense aids in the underlying purpose of any effort to seek recoveries—transforming the legal department from a cost center to a profit center.

Showing Off

However, getting businesspeople to recognize the value of implementing a strategic plan to seek recoveries can initially present a roadblock. There remains a stigma on the word “plaintiff,” and no company wants to invest money into something that might not generate any returns.

The best way to combat this resistance is to demonstrate that you can achieve success on a small scale. Keep records of any recovery your department brings in and how much it had to spend to do so. Then communicate those results to business executives on a regular basis.

In addition, executives will be more likely to support these efforts when you show them that starting a systematic recovery plan does not have to be a huge financial burden on the company. When Sager began to set goals for DuPont’s recovery plan, he tapped into the company’s network of core partner firms and put them to work looking for opportunities to bring actions and seek recoveries.

“You should have an internal team of substantive-area leaders that develops means to identify recovery opportunities, but GCs also need to reach out to firms that will help you evaluate possible claims on their nickel,” Sager says.

And when you do bring a case, get your firms to share the risk with you. Many defense firms will work on contingency or partial contingency when you’ve identified a strong claim. For the most part, firms realize that such arrangements are a necessary component of building the strong partnerships they want to form with corporate clients.

As companies become ever-more budget conscious and legal departments become more sophisticated, a general counsel can no longer sit back and just be the company’s legal shield when plaintiffs decide to sue. Judiciously using a legal sword could be the best thing a legal department could do for its image and value to the company.

“We help the business units achieve their profit objectives,” Sager says. “Any legal department at a large company that does not look for these opportunities is leaving money on the table.” ♦