

RECOVERY

LEARNING FROM EXPERIENCE



Over the past decade, many companies have increased their focus on affirmative claims and made recovery a regular part of their legal departments' activities. As these proactive approaches to recovery have evolved, legal departments are increasingly bringing

rigor to the process.

Often, recovery efforts have tended to focus on intellectual property issues—violations of licensing agreements or patent infringement, for example—on antitrust issues, where a company might participate in a price-fixing class action. Such efforts have, at times, led to recoveries of tens of millions of dollars, or even much more. In fact, large legal departments have collected billions of dollars in recent years through these efforts.

Now, legal departments are turning their attention to areas such as financial services and, especially, health care. “Many companies today are thinking about their health care spend,” says [Deborah Arbabi](#), a partner in Crowell & Moring’s [Antitrust Group](#). “Most large corporations now have self-funded health plans—and for some employers, that has made them bigger providers of health insurance than some insurers.” With health care costs rising, recovery offers an opportunity to offset that spending.

DOING IT RIGHT

As legal departments have gained experience with recovery, a number of best practices have emerged. These include:

■ Establishing a central monitoring function.

Legal departments should keep tabs on class action litigation and Department of Justice and Federal Trade Commission investigations taking place across the country. “You want to have a really broad view of what’s going on out there—not in just part of your core business, like IP, but also in the ancillary items of spend,” says Arbabi. “Maybe there’s been a price-fixing case involving office furniture you’ve purchased. You should track all that and funnel it to a single point of contact—one person who is in a position to see the big picture in order to identify and prioritize recovery opportunities.”

■ Supporting and leveraging what the business is already doing.

Often, business units will pursue recovery in tandem with

their legal departments. In-house lawyers should keep in touch with people from various functions across the company and solicit their input about recovery. What are they doing? How can the legal department help them? How should their efforts be coordinated?

“You want to pull people from different areas into regular conversations, perhaps quarterly meetings,” says Arbabi. Such communication can help ensure that recovery efforts across the company are coordinated and consistent, and pursued in a way that maximizes recovery efforts company-wide. It keeps the legal department in touch with the business, and “it gets the word out and lets people in the business recognize that there is a program in which they can take part,” she adds.

■ Having regular conversations with procurement and buyers.

Recovery claims may involve the possibility of going to court against a key supplier. “Companies often think that kind of situation makes recovery a non-starter,” says Arbabi. “But that isn’t necessarily true.” Legal departments should work closely with procurement and business buyers—the people who best understand the relationships with suppliers. Those groups can flag sensitivities, navigate around them, and help determine if recovery efforts are worth pursuing.

KEY POINTS

More systematic approaches

Legal departments are bringing rigor to recovery programs.

Best practices

Centralize the recovery function; support ongoing efforts of business teams.

Take it seriously

Assign responsibility; allocate resources.



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Those front-line business people can also help shape recovery deals that preserve the supplier relationship. “You can often avoid creating problems with the supplier while at the same time maximizing the recovery opportunities,” says Arbabi. For example, rather than seek a cash payment, a recovery deal might call for a supplier to provide discounts on additional business with the company. “There is tremendous potential for creativity in how you approach the dialogue with the supplier to create a win-win situation. And a supplier in a class action suit will often welcome this kind of conversation with an important customer,” she says.

STRUCTURING THE PROGRAM

Companies have taken a variety of approaches to building their recovery capabilities. “Some legal departments have designated one person whose sole job is recovery, and that person supports the other lawyers and business people around the company in the effort,” says Arbabi. “Others share the recovery responsibility across a number of lawyers in the legal department, making it a regular part of their work.” While the structure may vary, the key is to take a systematic approach, with the legal department providing a central hub for recovery activities.

By establishing that kind of approach, companies can bring greater efficiency to recovery processes and make the right trade-offs across recovery opportunities to achieve the greatest benefit for the company. They may also find it worthwhile to look at opportunities they have overlooked in the past. “There are certainly times where companies have thought some recovery opportunities were too small to be worthwhile,” says Arbabi. “But if you have a recovery program in place, it can give you an efficient way to handle those together as a portfolio, without really adding a lot of work. And those smaller opportunities can really add up.”

Overall, says Arbabi—whose clients have collected more than \$300 million in the past two years—the companies that have seen results from their recovery programs “recognize that this is not an extracurricular activity for the legal department, or something that the lawyers do with the last five minutes of the day. It’s an important source of revenue that will drop straight to the bottom line. So putting some resources behind it can be very worthwhile.”

RECOVERY AND THE BOTTOM LINE

Many corporations are finding growing opportunities to recover for harm they have suffered due to anticompetitive activities and other forms of malfeasance in the supply chain. These recoveries have been realized both domestically and, increasingly, internationally. A nuanced approach to these opportunities can facilitate large recoveries in ways that respect important business relationships.

As experience has shown, an effective recovery program can help a company’s legal department bring in significant dollars that have a direct impact on the bottom line. Over the past several years, Crowell & Moring has helped clients in various industries with efforts that have resulted in the recovery of:

- More than \$500 million for those harmed by price-fixing and cartel activity in the LCD industry.
- More than \$250 million for those harmed by price-fixing and cartel activity in the DRAM industry.
- \$60 million for those harmed by price-fixing and cartel activity in the polyurethane foam market.
- \$90 million for those harmed by attempts to monopolize a metals market.
- More than \$60 million for those harmed by price-fixing and cartel activity in the rubber chemicals industry.
- More than \$30 million for those harmed by a conspiracy by shipping companies to rig bids, fix prices, and allocate customers.