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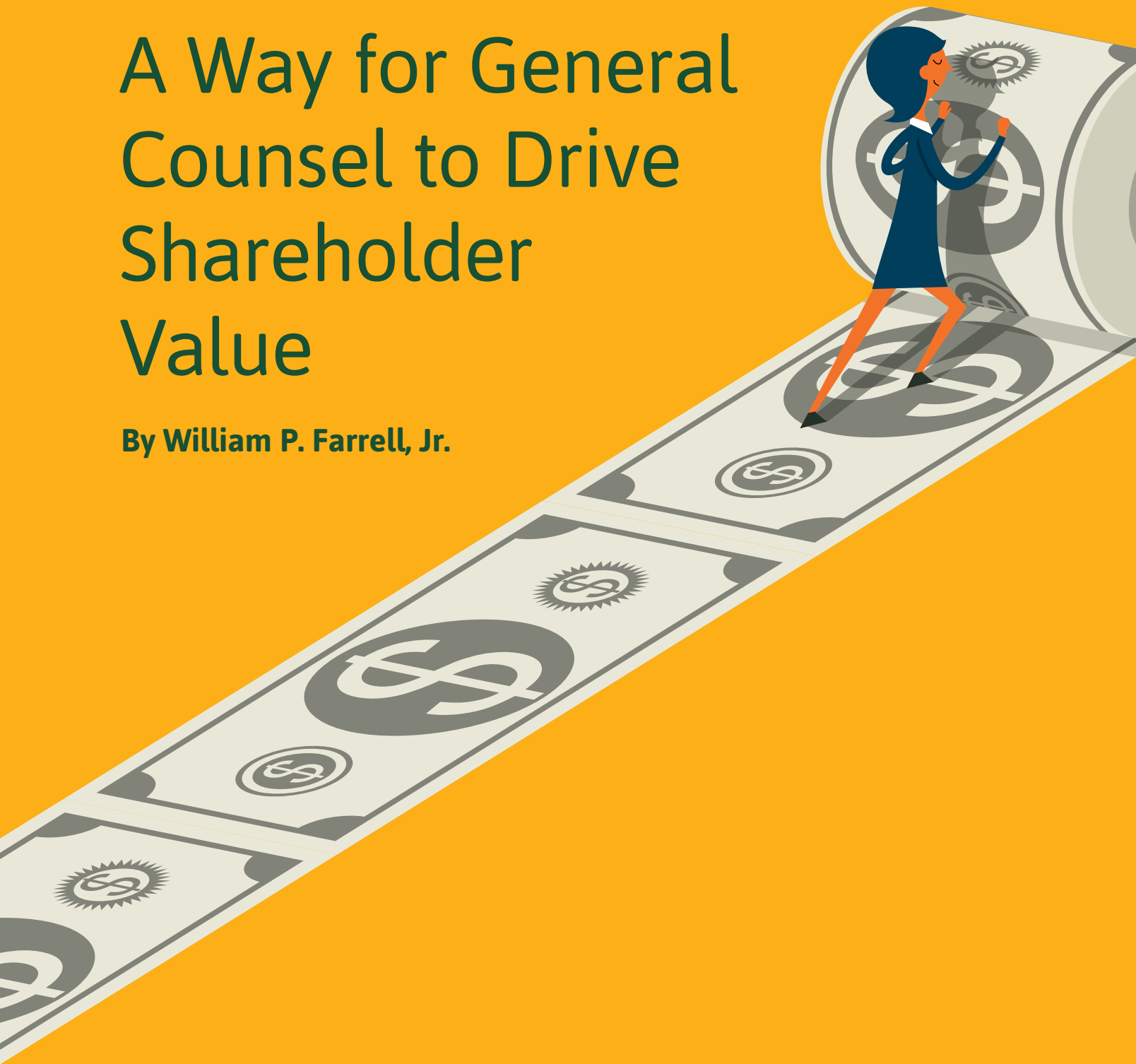
How Litigation Finance
Changes the Equation

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A Way for General Counsel to Drive Shareholder Value

By William P. Farrell, Jr.



Corporate law departments have historically been viewed, even by the in-house attorneys who lead them, as unavoidable cost centers.

In-house counsel are essential to mitigating risk, protecting assets and dealing with legal, transactional and compliance issues that a business encounters. They are charged with working within often-decreasing budgets. But the thinking goes that those services inevitably create a drag on the bottom line, so the decision to pursue even the strongest legal claim of substantial value is difficult. It requires the company to advance cash, often in the seven-figure range, with no guarantee of a favorable result and with the expectation of a short-term drag on profit.

However, that perception is changing fast. Progressive general counsel have adopted the view that, as part of the corporate leadership team, their goal is the same as that of the CEO or CMO: to drive shareholder value.

This is not simply a new way of managing the law department but also a new understanding of the value of legal matters. Among innovative general counsel, legal claims have become corporate assets that, like physical or financial assets, must be cultivated and protected and can be financed and monetized.

The most prominent example of this transformation is perhaps DuPont's legal division.

As Sager's notion that a legal department should generate revenue for the enterprise has taken hold, especially among large corporations, forward-thinking general counsel have also embraced tools that help them aggressively pursue claims without imposing a strain on the balance sheet.

While DuPont's model for enforcing its legal rights proved effective for a large-cap organization with vast resources, the realities of our legal system make it difficult for many companies to implement that model. Going after all those recoveries requires hiring outside attorneys and paying them to work on the cases. Those expenses come directly out of cash, so the P&L impact is immediate and ongoing, while the proceeds typically aren't received for years — if at all.

Take, for example, a company with \$500 million in revenue that in a good year generates \$50 million in profit. The general counsel believes a supplier owes the company as much as \$100 million after it broke a contract. But in order to collect it, she'll have to engage outside counsel, which will cost as much as \$10 million. She knows neither her CEO nor her board will be willing to incur that much cost on a lawsuit they might not win.

Confronted with this scenario in the past, the general counsel had few good choices. Choosing to ignore a breach of contract that harmed the company is akin to abandoning a valuable cor-

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In 2004 the chemicals conglomerate launched its Global Recoveries Initiative, outlining a company-wide plan to identify meritorious legal claims and aggressively assert DuPont's rights where it had been harmed. In the next five years, the initiative netted \$1.5 billion in recoveries.

"Our job as lawyers within the company is to be vigilant," Thomas Sager, DuPont's then-general counsel, said in 2010. "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."

porate asset. Settling for less expensive lawyers who are not the first choice, and who may be less qualified, introduces a different risk to the company.

The problem gets even thornier if the potential defendant is a mega-cap corporation; some of those companies are notorious for using their seemingly infinite resources to overwhelm plaintiffs, leading them to walk away or accept meager settlements. (This is not to suggest that large public companies are not using litigation finance. They are, often as a tool to manage quarterly earnings and protect their balance sheets and P&Ls.)

Litigation finance has given general counsel another option, allowing them to pursue strong legal claims without asking their organizations to absorb the entire cost and risk of litigation. By transferring the risk of a lawsuit to a financier that agrees to pay the costs of the lawsuit in exchange for a portion of any proceeds, general counsel can engage the lawyers of their choice and let them litigate without onerous billing

to the bottom line. At the very least, they will be expected to run self-sustaining departments. Recoveries from enforcement of an organization's legal rights through pursuit of valid legal claims will become the law department's source of revenue.

In this scenario, legal claims come to be viewed as assets that, like other corporate assets, must be managed to deliver value to the organization.

Through litigation finance, legal claims essentially become unbound from the associated expenses.



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constraints. They can choose which claims to pursue based on merit, and those claims will be decided on the strength of the claims — not on the parties' financial wherewithal.

The process is relatively simple. When a general counsel concludes that her organization has been harmed by a breach of contract, IP theft or any business tort, she contacts a litigation finance firm. A team of experienced litigators, finance and business executives evaluate the claim and decide whether it is likely to prevail. If they decide it is, the litigation finance firm advances the company funds to cover legal fees and other costs associated with the litigation.

The general counsel is able to pursue the recovery on her own terms, with little risk to her organization. She can hire the lawyers of her choice and turn them loose without having to worry about the persistent cost pressures that often characterize commercial litigation.

If the company achieves a favorable outcome, the financier receives a portion of the proceeds agreed upon up front. If the case is unsuccessful, the company owes the financier nothing; the financier absorbs the loss.

If the number of firms using litigation finance continues growing at the pace of recent years, more than half of commercial litigators will be using it in the next two years. Soon, more and more general counsel will be expected to demonstrate that they are contributing directly

The cost of pursuing those claims is no longer an obstacle to monetizing the assets, but a factor in determining the asset's value, both to the organization and to the litigation-finance provider.

Through litigation finance, legal claims essentially become unbound from the associated expenses. General counsel who fail to pursue a strong case of patent infringement are not avoiding risk; they are forfeiting an opportunity to increase revenue. Litigation finance is even helping make legal recourse a sensible option for entities like universities and bankrupt companies, that may have struggled to come up with capital in the past. Universities can both protect their sprawling patent portfolios and generate additional funding for research and innovation. Companies in bankruptcy can generate additional cash for creditors without having to dip into finite assets.

We are experiencing a change in commercial litigation. Truths that were once universal in business — deep pockets win lawsuits and in-house law departments are a necessary cost center — are becoming antiquated. Forward-thinking general counsel are relying upon the legal system to protect corporate assets and recover funds to which their organizations are legally entitled. Litigation finance helps provide access to the justice system. It provides innovative general counsel a new tool for remaking their law departments as valuable contributors to the bottom line. ■