

# DIAMOND McCARTHY<sub>LLP</sub>

## Affirmative Recovery Fundamentals for In-House Counsel

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Dallas

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Houston

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Los Angeles

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New York

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San Francisco

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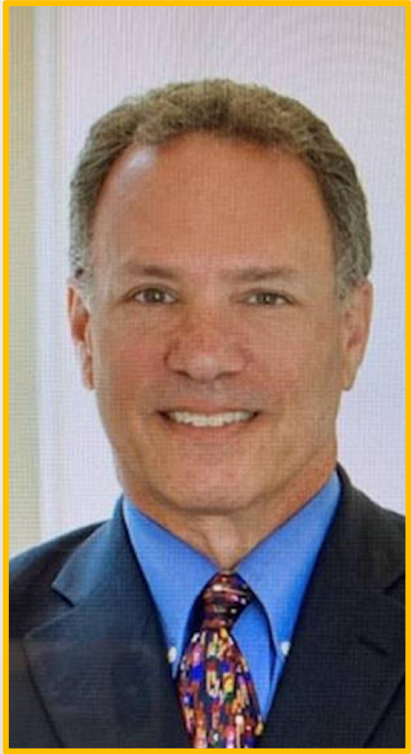
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March 18, 2022

# Meet Our Affirmative Recoveries Experts



## Cary A. Levitt

- DuPont Legal: Corporate business, intellectual property and commercial legal matters.
- General Counsel of a publicly traded company and a start-up.
- COO of a global intellectual property services company.
- Chief IP Counsel of a multi-national industrial company, Chief Compliance Officer.



## David H. Burt

- DuPont Legal 20 years: Recoveries Core Team, 10 years; Transnational Arbitration & Commercial Litigation; Corporate ADR Leader.
- Executive Consultant for Programs and Policy, International Institute for Conflict Prevention and Resolution, NYC.
- Experienced trial lawyer and commercial arbitrator.

# Contents

## Create a systematic revenue recovery program and turn Legal into a profit center

1. Key principles to develop an Affirmative Recoveries solution
2. DuPont's "Pursuing Recoveries" program
3. Overcoming reluctance about Affirmative Recoveries
4. Specific examples to boost the bottom line
5. Diamond McCarthy's innovative Corporate Asset Affirmative Recovery "CAAR" program



# First, a few comments

- **Scaled and shaped to your particular company**
  - Can grow from a small nucleus
  - Can initiate with full project architecture
- **Any CAAR Program evolves through its entire life**
  - Rome was not built in a day
- **Essentials:**
  - Must be programmatic
  - Must be Top-Driven
  - Requires some passion
- **Pan-corporate opportunity for every employee**



# In-House Counsel as Value Creators

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# Evolving Role of In-House Counsel

## Past:

- Historically, corporate Legal Departments manage risk
- Legal = “Department of No”

## Current:

- Legal Department assists to manage risk, contributing to value extraction
- Legal strategically evaluates business opportunities and reasonable risk

## Future:

- Legal Department, with a robust Corporate Recoveries program, affirmatively helps pursue claims
- Legal evolves into a profit center
- Legal becomes a valued business partner that manages risk, and pursues Recoveries
- In-house lawyers take more active roles in a company’s success
- Legal = “Department of Enablement”

Eliminate  
Risk

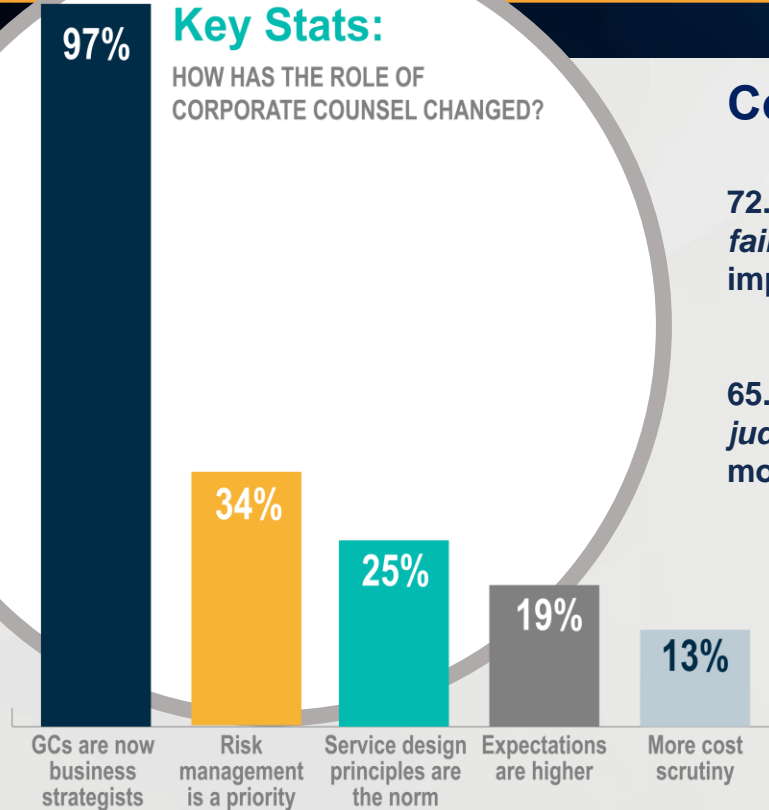
Contribute  
to Value  
Extraction

Legal  
becomes a  
“PROFIT CENTER”

# Unrealized Opportunities

## Key Stats:

HOW HAS THE ROLE OF CORPORATE COUNSEL CHANGED?



FTI Consulting and Relativity (2020). *The General Counsel Report: Corporate Legal Departments in 2020*.

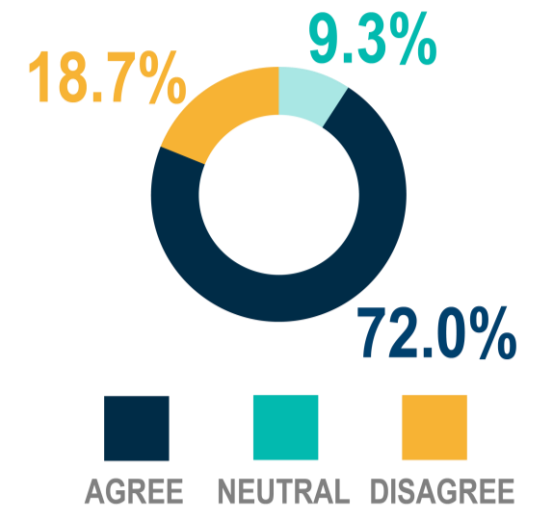
## Companies Leave Millions on the Table...

72.0% of in-house lawyers report that their companies have *failed to pursue meritorious claims* for fear of adversely impacting the bottom line.

65.0% report that their companies have *unenforced judgments or uncollected awards* valued at \$20 million or more.

Burford Capital (2021). *2021 Legal Asset Report: A Survey of Finance Professionals*.  
<https://www.burfordcapital.com>

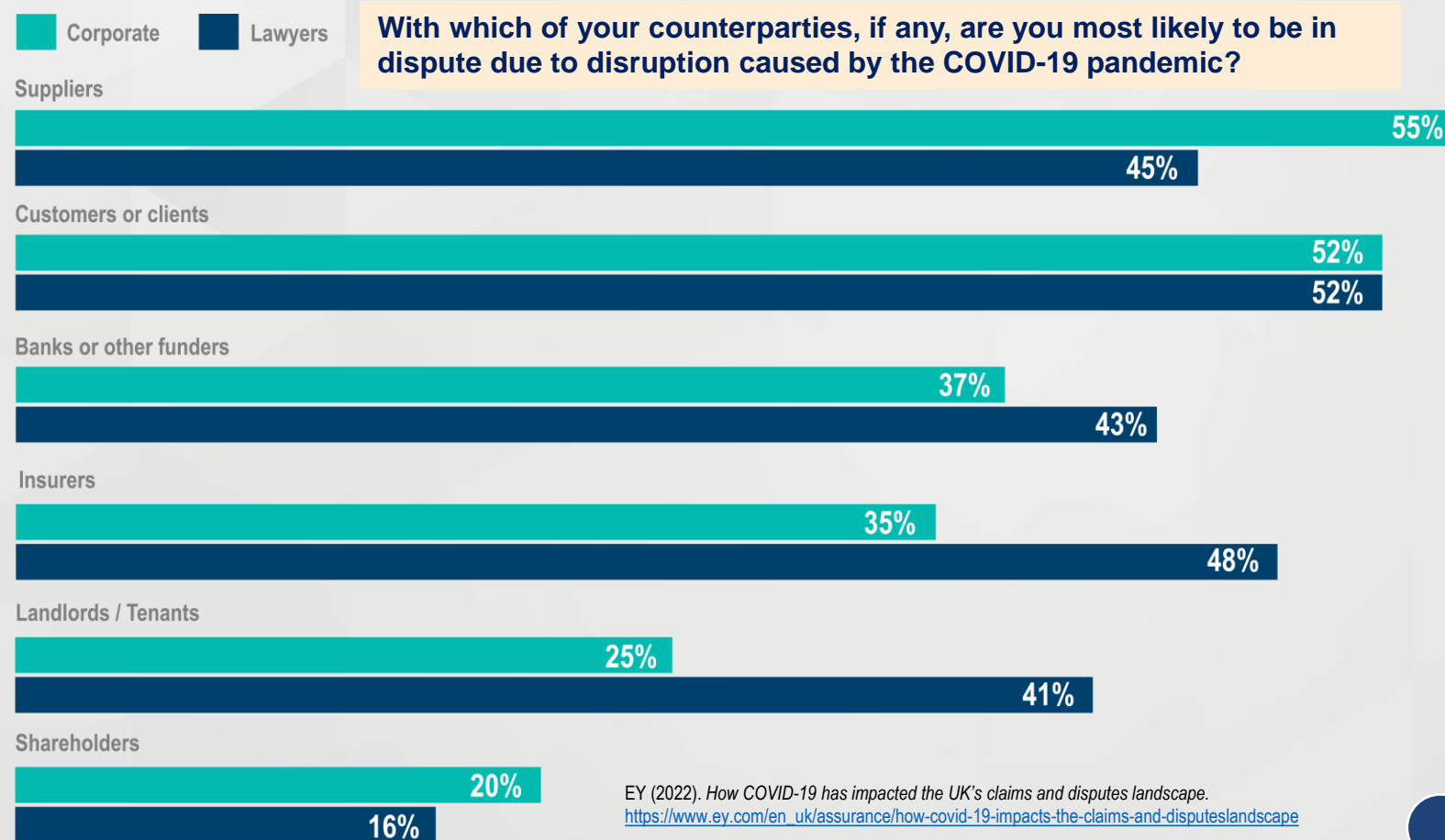
Our company has chosen to forego claims due to the impact of associated legal expenses on the bottom line.



In-house responses only



# Commercial Relations Disruption – Covid19 pandemic



EY (2022). How COVID-19 has impacted the UK's claims and disputes landscape.  
[https://www.ey.com/en\\_uk/assurance/how-covid-19-impacts-the-claims-and-disputeslandscape](https://www.ey.com/en_uk/assurance/how-covid-19-impacts-the-claims-and-disputeslandscape)





# Relationship: Risk Mitigation and Revenue Generation

## Revenue Generators/ Business Strategist:

- 82% of GCs are involved in the revenue-generating idea process
- 97% of those have seats on the board and involved
- 73% of those without board seats also are involved

## Top Responsibilities

RISK IDENTIFICATION AND ASSESSMENT

67%

CORPORATE COMPLIANCE AND SECURITY

53%

RECORD RETENTION AND MANAGEMENT

44%

CRISIS MANAGEMENT

42%

OUTSIDE COUNSEL MANAGEMENT

33%

COST / CONTROLLING LEGAL SPENDING

32%



# Key Principles – Affirmative Recoveries Programs

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# Elevator Pitch: Affirmative Recovery Program

A business method by which corporate Legal Departments can enable their company to stop leaking funds that should be revenue, while respecting business relationships.

*...respecting business relationships*

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# What is a Corporate Asset Affirmative Recovery “CAAR” Program?

- CAAR is above all a business discipline managed by Legal Department personnel
- Systematic process – Legal collaborates with Business Units to manage conflict with third parties and extract value
- Latent recoveries located throughout any business are inefficiencies waiting to be monetized
- Goal of CAAR is to identify recover those funds to protect the business financially, year after year



# Key Principles – Corporate Asset Affirmative Recoveries Solution

- **Corporate Assets** include valuable contracts with trading partners and intellectual property
- Underperforming assets leave revenue on the table that should be **Recovered**
- CAAR is a disciplined technique to identify, evaluate and pursue worthy Recovery opportunities *and* support business objectives
- Recoveries are pursued using a spectrum of dispute resolution methods with risk-shared litigation as an effective tool of last resort
- **Affirmatively** pursuing first-quality performance
  - Produces revenue
  - Grows company's reputation for demanding specified performance
  - Showcases Legal Department and Outside Counsel contributions!
- Low-cost, high reward.



# Key Pillars – of a CAAR Program

- Establish Recoveries Core Team
- Educate the Company and Seek Buy-In
- Identify Claims – Where to look and what to look for
- Standardize Early Case Assessment (“ECA”) Process
- Set Goals; Track, Measure and Report Success
- Collaborate with Business Units, Focused on Their Goals
- Employ Least Disruptive but Efficient Means to Pursue Recoveries – such as ADR
- Collaborate with Outside Counsel where needed



# Some Examples of Recovery Streams

- Antitrust
- Anti-Dumping Enforcement in International Trade
- Bankruptcy and Collections
- Benefits, Pension, Labor and Employment
- Class Action Opt-Outs
- Commercial Contract
- Customs, Tariffs, Duties and Government Claims
- Joint Ventures: Performance related warranties, governance
- Environmental
- Illegal Business Practices
- Insurance
- IP, Patents, Trademarks, Trade Secrets
- Mergers & Acquisitions
  - Post closing conditions relating to representations
- Product Liability
- Tax – Local, State and Federal
- Torts - Commercial



# Half-Time Questions?

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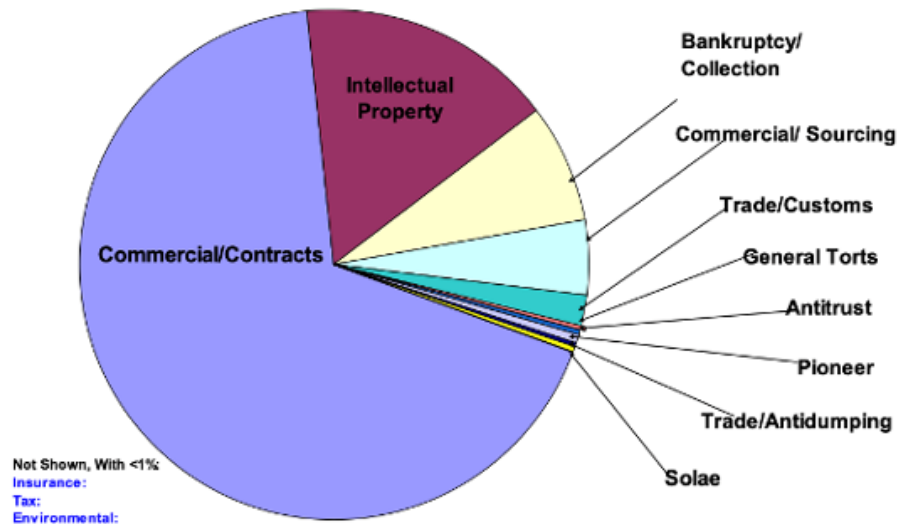
# DuPont's “Pursuing Recoveries” program

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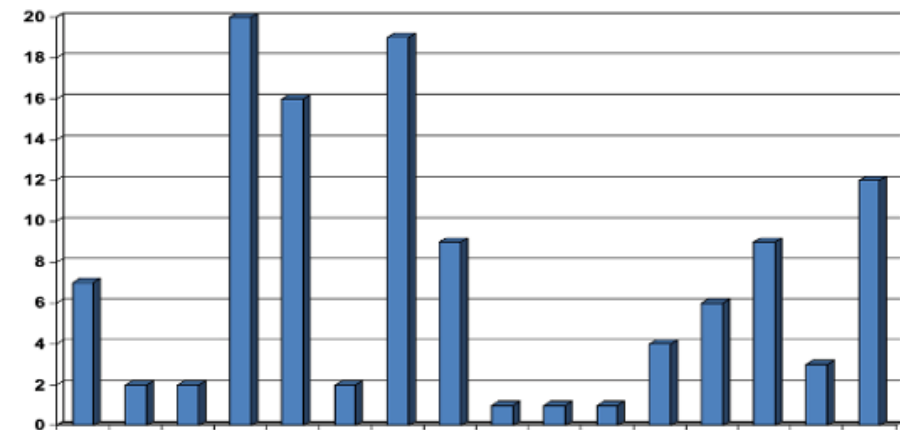
# DuPont's “Pursuing Recoveries” Program

2009 Recoveries Data Published by DuPont, ALM Conference, October 2010

2009 Recoveries by Stream



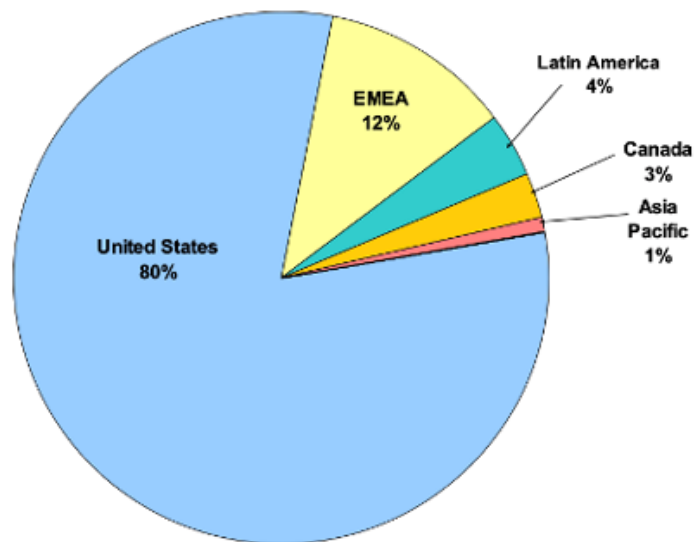
2009 Recoveries by Platform  
(total matters)



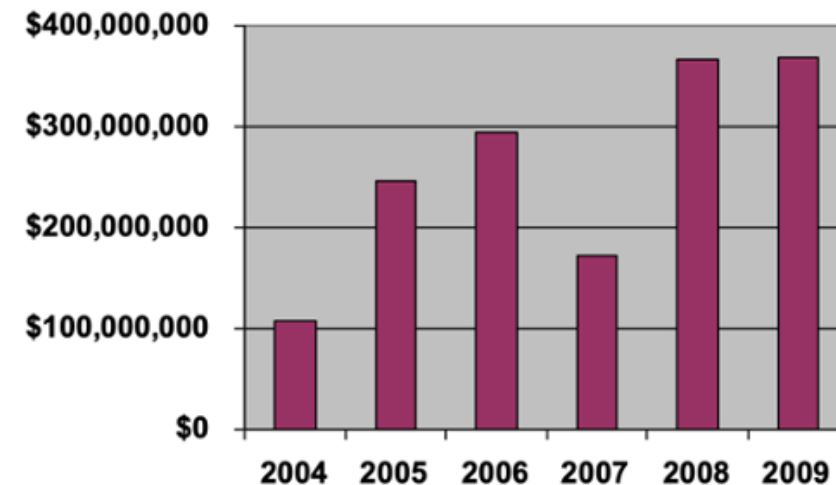
# DuPont's “Pursuing Recoveries” Program

2009 Recoveries Data Published by DuPont, ALM Conference, October 2010

2009 Recoveries by Region



2004-2009  
Cumulative Recoveries = \$1.557 Billion



# How? Program Implementation



# Some Misconceptions

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# Debunking Misconceptions

- **Is not serial litigation**
  - Trading relationships with customers etc. are respected
- **Does not require significant resources or cash**
  - Is a relatively “light lift”
- **There is value lurking unseen**
  - Has been implemented successfully by major U.S. corporations
- **Not limited to collections**
- **Not limited to Litigation Finance**



# Case Studies

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# Case Studies

- **\$10.00 electrical component knocks down plant – “Eight digit” recovery**
- **Distribution contract – Price increase after sales hurdle – Third party auditor reveals underpayment**
- **Insurance coverage for hurricane damage**
- **IP Monetization programs**



# Diamond McCarthy's Corporate Asset Affirmative Recoveries (CAAR) Program

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# Why Now-

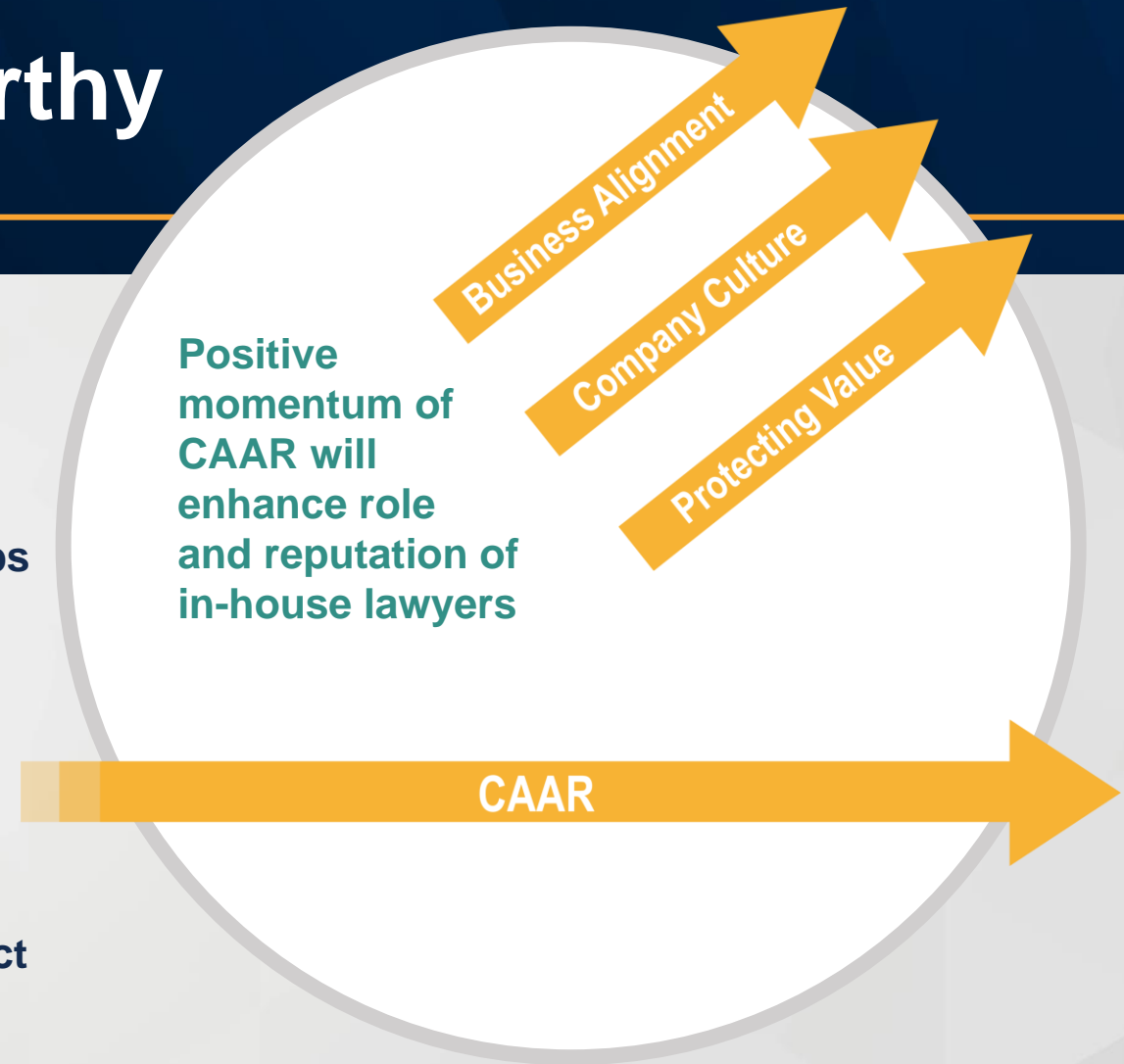
## The Role of Diamond McCarthy

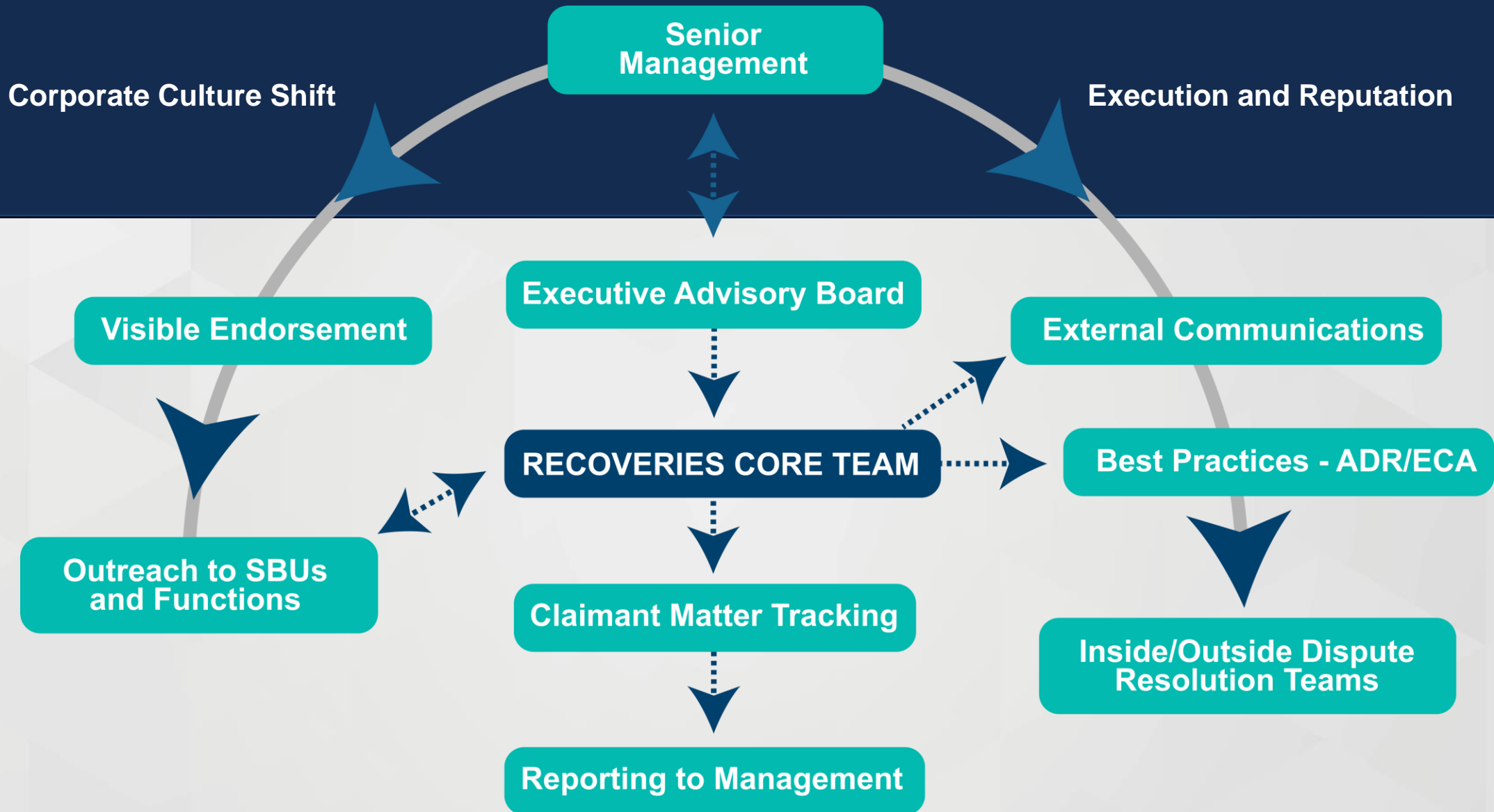
- The Covid19 pandemic has introduced economic and market uncertainty
- Imperative to allocate cash wisely
- Legal Departments must continue to innovate, even become revenue centers
- The trend will increase
- CAAR can be deployed quickly, using existing resources economically.



# The Role of Diamond McCarthy

- Advisory, dispute resolution, and trial capabilities
- Align in-house lawyers with business objectives
- Legal Department, in partnership with outside counsel, helps assure value due
- Outside counsel works seamlessly with Legal to resolve internal clients' problems and reclaim value
- Establish company's reputation to demand first grade performance
- Re-orient the Legal Department to be more vigilant to protect value that is due, and not leave money lying on the table





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