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Fixed Fee Makes Champions Of Partnership

By **David Forster**
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DENVER — Five years ago, when Whirlpool informed attorneys at Wheeler Trigg O'Donnell that it wanted to move toward a flat-fee payment structure for the class action cases the firm handled, it wasn't a total surprise.

Since the mid-1990s, the appliance manufacturer had been pushing to reduce its legal costs and make them more predictable, in part by weaning law firms off of the open-checkbook billable-hour model.

The company began in 1995 by reducing the number of firms handling its product liability defense from 200 to just three, which Whirlpool called its national product council. Each of these firms was assigned a product category: laundry products, products with compressors and heat-generating products.

The firms were offered incentives for bringing a case to a close for less than the average cost, including bonuses for early resolution. Over the next decade, Whirlpool tracked how much these cases were costing and used this data to transition the firms to fixed-rate fees for the work they handled.

But class actions are not like most product liability cases, said Mike Williams, a partner at Wheeler Trigg. Once a class is certified, the expenses, especially for discovery, can explode in ways that make it hard to nail down averages for purposes of a flat fee.

"That's the problem with class actions," he said. "You just don't know where the case is going to go."

So Williams was a little apprehensive when Whirlpool first broached the idea.

Whirlpool had retained Wheeler Trigg as part of the second major phase of its cost-containment strategy. It added four more firms to its national product council, one each to serve as national counsel for class actions, business litigation, asbestos litigation and litigation in Canada.

And now the company wanted Wheeler Trigg to come up with a plan to move its class action work to a fixed-rate payment structure.

"The only thing that we're used to talking about is hourly fees," Williams said. Fixed rates flip that model on its head.

Williams said he started poring through



Mike Williams helped to develop a fixed rate for litigation services for Whirlpool. | LAW WEEK PHOTO MATTHEW MEIER

bookkeeping records to find out what the firm had been spending on its class action cases. What he found was that the costs for a typical case were fairly predictable up to the point of class certification.

So what Whirlpool and Wheeler Trigg ended up with was a hybrid model under which the law firm is paid a flat fee for the class action cases it handles up to the class certification and then is paid by the hour.

This model impressed the Association of Corporate Counsel enough that its judges recently named Whirlpool and Wheeler Trigg among its Value Champions for 2012. The association launched its Value Challenge in 2008 to encourage companies and law firms to explore alternatives that lower legal costs and make them more predictable, and improve outcomes.

The arrangement with Whirlpool has accomplished this and also resulted in a closer working relationship between Wheeler Trigg and the company, Williams said. Because the law firm oversees all of

Whirlpool's class actions, the attorneys who handle these cases are becoming experts across all of the company's product lines.

Wheeler Trigg attorneys also collaborate with attorneys at the three firms heading up each of Whirlpool's product lines, sometimes bringing them in on cases, Williams said. This is the "virtual law firm" model that Whirlpool's leaders envisioned when they started this process in the '90s — that some of the best and brightest attorneys at firms around the country would effectively operate as one giant firm, sharing their expertise.

The switch to fixed-rate fees also is intended to give law firms some skin in the game, creating an incentive for attorneys to keep legal costs under control. One result of this is that Wheeler Trigg attorneys are becoming much more involved in helping Whirlpool proactively manage its risk, Williams said, even to the point of weighing in on the decisions about product design and

literature.

Under the billable-hour model, Williams said, the people at Whirlpool were reluctant to take his calls because they knew that every minute on the phone was going to cost them. Now, he said, they're not only answering, but picking up the phone themselves and calling him and other attorneys at the firm for advice.

The new model is still evolving, with safeguards built in to ensure the fees are fair to both sides. For example, Wheeler Trigg started out with a one-size-fits-all fee for Whirlpool's class actions, Williams said, but has since migrated to a scalable-fee structure to better reflect the complexity of different cases.

Williams said he can now envision a time not too far off when his firm will handle class actions right through the trial on a fixed-rate basis, something that seemed almost unfathomable just a few years ago. •

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