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Toro Co.'s ADR Strategy Saves Money and Wins Honors

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MANAGEMENT PROFILE

"OUR AVERAGE COST to settle a claim has been lowered by about $45,000," says J. Lawrence McIntyre, vice president, secretary and general counsel of The Toro Company. Add that to the millions the company has saved in insurance premiums, and you can see why Minneapolis-based Toro considers the pre-litigation mediation program it instituted in 1990 a major success.

The Center for Public Resources' Institute for Dispute Resolution agrees with that assessment. Toro was co-recipient of the Institute's 1995 Significant Achievement Award "For Excellence in Alternative Dispute Resolution."

Toro is a leading manufacturer of gas- and electric-powered lawn mowers, leaf blowers, trimmers and snow blowers for the consumer market. It also sells larger machines to institutions and municipalities. "Most of our equipment is designed to cut, and it does, so the potential for products liability claims is high," says McIntyre. "We have approximately 25 open cases at any one time. This is down from 150 open cases four years ago."

The mediation program's author is Assistant General Counsel James J. Seifert. "It dates back to May 1990, when I was hired," says Seifert. "I actually developed the methodology with my former employer, American Hoist & Derrick, which had a much more serious products liability problem than we have here. When I interviewed for this job I said I would approach it with the ADR concept in mind, and I was hired on that basis."

SWIFT AND HUMANE

When Toro learns that a suit has been or soon will be filed, a company representative who is not a lawyer meets with the claimant or the claimant's attorney to establish the facts surrounding the claim. The representatives are usually paralegals or product-integrity staff who have authority to settle a claim on the spot if it seems appropriate. They receive some training from Seifert, and ongoing education through seminars and reading.

"What we really want from them is a commitment to finding the truth of the case," says Seifert. "Using a non-lawyer in that capacity is the key to the whole process. It eliminates the kind of posturing for ego and advantage that takes place between lawyers, and makes for an honest, fact-based conversation."

The dynamics of the situation during this first face-to-face meeting are all positive from Toro's perspective, according to McIntyre. "What we try to do is humanize the procedure," he says. "We go to great lengths to design safe products; most of these claims result from misuse, in our opinion. Nevertheless, claimants will usually say the accident resulted from a design flaw or a failure to warn. Very often people are angry. They've had some sort of trauma–they've lost a finger, for example. What they want to do is vent some emotion with the knowledge that someone from Toro is listening sympathetically. Frankly, we're able to settle many claims without monetary compensation–by giving them a new product, for example–once they've been able to speak their minds."

If the claim isn't settled on the spot, the case is referred to the law firm of Cobb Cole & Bell in Daytona Beach, Fla., specifically to attorney Miguel A. Olivella Jr. He contacts the claimant's lawyer and tries to arrange a mediation.

"I used to handle that step myself," says Seifert, "but I was gone too often, so we decided to hire someone. I had dealt with Miguel on some litigation, and he was the only private practitioner we talked to who had the right orientation. He is fair, he's balanced, and his income expectations aren't driven by big fees for litigation. We have a fixed-fee arrangement with him."

The mediations are non-binding, and claimants are often persuaded by the fact that they aren't giving up their right to litigate, but are being presented with an opportunity for early settlement.

Time is of the essence once mediation is agreed upon. Sworn statements are taken as a basis for the mediation, a joint agreement is made on who will mediate, then the session is held. A concerted effort is made to accomplish those steps in one or two days. The mediation agreement provides for confidentiality, and limits the scope and duration of discovery. The claimant is required to furnish any records that bear upon the claim. Toro provides an operator's manual for the product in question, plus other materials deemed relevant.

"We're very pleased with how it's worked out," says McIntyre. "Part of the savings comes from the speed at which we're able to reach settlements, and because it happens so fast there aren't as many expenses involved."

THE LAST 10 PERCENT

Toro has a four-person legal department. R. Lawrence Buckley and Donald S. Trevarthen, the remaining two attorneys, are patent specialists. Seifert administers products liability claims along with his mediation program duties.

"Jim and I share responsibilities for all matters that don't come under the products liability or intellectual property headings," says McIntyre. These include regulatory matters, compliance with federal Consumer Product Safety Commission regulations, keeping abreast of Environmental Protection

Agency regulations that affect Toro products, and contract and financing matters.

Patent litigation takes up much of the department's time. "We actively pursue patents for products our engineers come up with," says McIntyre, "and we actively review our competitors products to make sure we're not being infringed. If we feel we are, we don't hesitate to sue. A good outcome for us would be damages plus an agreement with the other party to change its design. Sometimes we cross license or license for a royalty, but in general our industry is pretty active in obtaining patents and using them exclusively. It gives you a leg up for awhile."

The ADR mindset permeates Toro's legal affairs. "It's a company philosophy," says McIntyre. "It is hard to actualize in patent matters, though. A quirk of patent law makes it difficult to mediate until a suit has been filed." For example, if a competitor claims Toro has violated on of its patents, that gives Toro an opportunity to do some forum shopping. The violation claim gives the company standing to go to U.S. District Court in Minneapolis, presumably a friendly venue, and obtain a declaratory judgment that it has not violated the patent. The next step is an infringement suit. Only then can mediation come into play.

"That's a few steps down the road," McIntyre says. "Still, we encourage it at that point, and often we're successful." He defines success as a cross-licensing agreement plus negotiated damages.

Because of the size of his department, McIntyre sends much of his work out. "We tend to favor regional firms," he says. Chief among them are two Minneapolis-based firms: Doherty, Rumble & Butler for corporate work; and Merchant, Gould, Smith, Edell, Welter & Schmidt for patent work. Globally based Baker & McKenzie handles the company's international work

Seifert is surprised that ADR programs like Toro's aren't in wider use. "I think most of it comes from a corporate mind set that says, 'We couldn't possibly have done anything wrong.' It won't work if you aren't willing to give a little."

Tales of ADR attempts that generate more paper than ordinary litigation, then end up in trial anyway amaze him. "Things tend to get bogged down at the discovery phase," he says, "and most of the time, effort and paper is expended during the last 10 percent of discovery. What we do is forgo that last 10 percent. I'd say the results speak for themselves."