PERSPECTIVE

Toro's Mediation Program Challenges Wisdom of Traditional Litigation Model

These days, trial lawyers are all too familiar with the situation in which a corporate defendant takes an aggressive posture early on after a claim is threatened or actually filed and thereafter wages a war of attrition until either the plaintiff gives up and settles on terms favorable to the company or the company itself goes bankrupt. But this approach has created problems, including the alienation of suffering claimants as well as crippling hourly legal bills. Recently, The Toro Company, a major manufacturer most recognized for its lawn care products, implemented an intervention and mediation program in an attempt to reach out to aggrieved claimants and reduce its costs of litigation. In the following article, attorneys who conceived the program and those who have led clients through it discuss its effectiveness. Early indications are that it provides numerous benefits that may lead to a reversal of the traditional litigation model as we now know it.

By J. Stratton Shartel

The increased use and popularity of alternative dispute resolution is vividly illustrated by a 1994 study conducted by the Center for Public Resources (CPR), which develops uses of private alternatives to the high costs of litigation. Last year, CPR resolved business disputes involving $1.5 billion in controversy. Savings estimated by 109 companies totalled $74.7 million in direct legal costs. Average company savings were $695,000 for all cases and $366,000 for general commercial cases. Of the cases completed during the year, 88.2 percent were successfully resolved by non-binding ADR processes: 49 percent by mediation and 39.2 percent by direct party negotiations required as the first stage of certain mediation programs.

In the past five years, the Toro Company of Bloomington, Minn., has revolutionized the traditional practice of litigation by corporate defendants through the use of a direct negotiation/mediation program. On January 26, 1995, CPR's Institute for Dispute Resolution bestowed its Significant Practical Achievement Award to Toro for implementation of its program. *Inside Litigation* interviewed the major players in the Toro program as well as some plaintiffs' attorneys who've led their clients through it to find out how it works. The process represents a dramatic 180-degree turnabout from the standard practice by corporate defendants of waging full scale litigation war when confronted with a claim or threat of a claim.

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Toro's success comes at a time when the cost and delay of traditional litigation is receiving much attention. Despite evidence that ADR can produce significant savings in time and money, there is still substantial resistance to it. This is in part a result of the fact that the ADR movement represents a threat to litigators because it means lost business. Every company that implements ADR is one less company resorting to full blown litigation led by outside counsel usually paid on an hourly basis. Other litigators object philosophically on the grounds that ADR takes away a party's right to "its day in court." Although resistance remains, companies are beginning to see the benefit to the bottom line.

A 'Litigate Everything' Attitude

The Toro Company manufactures a variety of turf care and lawn maintenance products, both under its name and the names of subsidiaries. Toro is self-insured for liability purposes up to certain limits, beyond which it is insured via traditional insurance coverage. Many of the company's products are designed and made to cut grass, including walk behind mowers, riding mowers, lawn tractors, and golf course mowers. Toro also manufactures snow throwers, wood chippers, tub grinders, weed trimmers, leaf blowers, and other devices. Some of the products are for consumer use and others are for professional use.

For many years, Toro handled all lawsuits filed against it by immediately referring them to its outside counsel to be aggressively defended. The model, says Toro assistant general counsel James Seifert, could be summed up as "litigate everything." "The strategy was to use every legal weapon you can to defend the case," Seifert says. However, it became apparent that the resultant high discovery costs, investigative expenses, expert witness fees, travel expenses, and most of all, attorneys' fees, were becoming

In composing this article, the author relied upon interviews with in-house corporate lawyers, outside defense counsel, and plaintiffs' lawyers, as well as an article entitled, "Description of the Toro Company's Pre-Litigation Alternative Dispute Resolution Program," written by Toro officials.

a significant drain on the company. Even when cases settled, they would often not do so until just before trial, resulting in substantial costs up to that point. And Toro representatives say that if cases did proceed to trial, it was impossible to predict how juries would respond to the cases.

Drew Byers, Toro's corporate product integrity manager, agrees that the costs were bleeding the company. "We were spending $60,000 to $70,000 right up to the courthouse steps," Byers says, "and then settling these cases for $15,000. Or, Byers says Toro would proceed to trial and, in 82 percent of the cases, obtain a defense verdict, but at a cost of $60,000 to $100,000." Byers says the decision seemed like a "no brainer." "We said why not take that $15,000 and maybe a little more and quit making these defense lawyers rich?" he explains. Byers realized that Toro might also benefit from an attitude change. "Up until the Summer of 1990, if someone called us up and said, "I've been injured," our effective response was, "You're stupid, go away, don't bother us," Byers says. "We realized that if we put a more human face on things, we'd make more friends and cut down on our lawsuits."

An Innovative Solution

In May 1990, Seifert joined Toro as assistant general counsel. Seifert had previously worked at American Hoist & Derrick Co., a construction company based in St. Paul, Minn., where he had experimented with an early investigation program to respond to legal claims. Seifert says he decided to change the model, from one that defined every claim or rumored claim as a legal problem requiring a legal response, including finding defenses and conducting elaborate discovery, to one which defined Toro's product liability cases as a human problem first and a legal problem only as a last resort. "Regardless of whose fault it is," Seifert says, "somebody's life has been changed forever. Part of our responsibility is to listen to the person whose life has been changed. Then, you really understand what's going on in the person's life."

Seifert translated this new corporate philosophy into the first step in a new Toro program for responding to potential legal claims against the company. The company began a policy that when it first receives word that a lawsuit is imminent or has already been filed, it immediately dispatches a non-lawyer company representative to communicate with either the claimant or the claimant's attorney for the purpose of scheduling a meeting to discuss the facts of the case. Seifert says that it's not necessarily the same person every time, but it is someone who "knows the product and the company inside and out" and who is a "good listener." These meetings are held at the plaintiff's domicile usually within days from the time the company first learns of the claim.

Seifert describes the meetings as an opportunity to "freely exchange information." The Toro representative asks questions such as whether the claimant has medical insurance, whether he or she is out of work, and whether the claimant has been unable to pay bills because he or she can't work as the result of injuries suffered in the accident. "Often, those issues are more important than getting the most before a jury or settling on the courthouse steps, because the bills continue to pile up" Seifert says. He explains that the Toro representative sent out to meet with the claimant has the authority even to pay bills of the claimant "without any strings attached." This includes deductibles, which the company may "take care of and not ask any questions."

James Seifert

At this meeting, the representative and the claimant also explore the nature of the claim and how the accident occurred. Usually, Toro also sends a company engineer with the representative to inspect and photograph the product involved in the accident. The engineer also attempts, if possible, to survey the scene of the accident to determine whether it played a role in the plaintiff's injuries. Finally, the Toro team may attempt to contact the dealer who sold and or services the product where appropriate to gather additional information about how the accident occurred. The early overture phase can yield practical benefits for Toro. "Sometimes, all the claimants want to do is tell their story," says Byers. "Sometimes, they admit that they did something stupid, and the case can be settled quickly." Byers adds that the early meeting also "makes it a little bit harder for them to go to their lawyer if someone has been drinking coffee in their living room."

After the facts of the claim are explored and information is exchanged, Seifert says that he works with Byers to assemble all the information and evaluate it. He says the two try to determine where liability might fit. "If we think there is potential liability on Toro's part," he says, "we either offer a reasonable settlement or non-binding mediation." Byers

says that if the case is serious, for example, a child with catastrophic injuries, the company might decide to take more time to consider whether the dispute is appropriate for mediation. "The seriousness of the injury is a pretty telling factor," he says.

The 'Mediation Advocate'

A company summary of its ADR program states that before 1990, Toro was familiar with non-binding mediation, which it occasionally used in jurisdictions that required it. The company recognized that mediation offered numerous advantages over traditional litigation, including removal of decisionmaking from unpredictable juries and vesting greater control over settlement decisions in Toro's hands. But in spite of these advantages, traditional use of mediation had its limitations. Company officials concede that mediation was generally not used until the litigation was about to go to trial, and thus it did not resolve the problem of the significant pretrial costs and expenses.

'It's sometimes difficult for traditional defense counsel to take off the bulldog hat and put on the amicable hat,' says Toro mediation advocate Mike Olivella.

One of the first tasks was for Toro to find a lawyer it could retain who would attempt to persuade claimants to agree to mediate disputes and act as the company's counsel in the actual mediation proceeding. Toro preferred someone who was comfortable with and experienced in the mediation process. Seifert says that it also needed to be someone who would place Toro's interests ahead of his or her own interest in billable hours. Seifert and Byers decided to compensate its lawyer on a flat fee basis per case, rather than based on how many actual hours were expended working on the case.

Seifert says Toro had some difficulty finding a lawyer who fit the criteria. Then, in 1990, Toro was impressed by the work of one Miguel Olivella, an attorney with Cobb, Cole & Bell in Melbourne, Fla., who represented Toro in a products liability case. Shortly thereafter, Toro and Olivella entered into a retainer agreement under which Toro agreed to pay Olivella a flat fee on a yearly basis, rather than by the hour. In return, Olivella agreed to serve as Toro's (or any of its subsidiaries') National Mediation Advocate. His job was to act as the company's legal representative and attempt to persuade claimants to use mediation to resolve their claims against the company. If the parties elected to mediate, Olivella also would help choose a mediator and a site for the proceeding to take place.

Olivella sees his position as unique. He does not know of another lawyer in the country who has a similar practice. He also says that litigators are often shocked when they hear what he devotes his practice to. "Most lawyers aren't aware that companies are looking for alternatives to litigation," he says. "Many defense lawyers are operating under the impression that defendants want to spend money in litigation as opposed to looking for alternatives." Olivella admits that he is not always appreciated by other defense lawyers. "Mediation is not something that most defense counsel are real warm and fuzzy about," he says. "Most insurance defense lawyers are very guarded [about it]. The more companies that divert their claims into this type of program, those are claims that are not going through the traditional litigation process. It's really more for corporate counsel than insurance defense counsel." Olivella explains. "Corporate counsel is realizing that their local defense counsel is probably not experienced to represent them in mediation. It's sometimes difficult for traditional defense counsel to take off the bulldog hat and put on the amicable hat."

Once the claimant and Toro agree that mediation is the best means of resolving the dispute, Olivella usually faxes a mediation agreement to the plaintiff's attorney for review. The agreement describes the parameters for the proposed mediation. It certifies that the parties have agreed to voluntarily enter into non-binding mediation, which is scheduled to take place at a mutually agreeable time and date. The agreement also provides for some exchange of information between the parties. One provision gives Toro the ability to take the sworn statement of the claimant before a court reporter, which is limited to one and one-half hours. A second provision requires the plaintiff's attorney to provide Toro with all of the claimant's medical records, wage loss and loss of earning capacity documentation, and any other information which the claimant's counsel believes would be relevant to the claim.

In exchange for receiving this information, Toro typically agrees to provide the claimant's attorney with a copy of the operator's manual for the product involved in the accident. It also usually agrees to provide drawings of any component parts relevant to the claim. If the plaintiff requests it, Toro will also make available for a sworn statement at the plaintiff's domicile a company representative who is knowledgeable about the product at issue and who can answer questions involving the product's design, manufacture, warnings, and claims history. Statements by the plaintiff as well as the Toro representative are considered privileged and confidential. If the claim is not resolved through mediation, both sides agree to return all copies of statements to one another, and no statements can be used in subsequent litigation. The mediation agreement also calls upon the parties to select a mutually acceptable mediator.

Positive Reviews

Toro reports that the mediation program has yielded numerous benefits. First, the company states that almost 90 claims have been sent to the pre-litigation intervention program to date and the percentage of claims which have been mediated and settled exceeds 95 percent. Second, Toro claims that the number of active claims it currently handles has been substantially reduced. Third, Toro reports that at the end of the first year of the program, its direct expenditure of sums for the purpose of resolving claims had been reduced by an average $45,617 per claim. The company attributes this reduction to lower litigation related costs as well as a reduction in the actual settlement amounts. It reports that this amounts to an annual reduction of defense and settlement costs of approximately $900,000. Finally, the company states that because of these reduced defense and settlement costs, the company's annual liability insurance premium was reduced by approximately $1.8 million.

Plaintiffs' lawyers who have guided their clients through the process also give it mostly positive reviews. "I went into it being distrustful of mediation," says Susan Mahood of Barry & Mahood in Pittsburgh, who represented a plaintiff in a Toro mediation in 1993. "But I came out of it impressed." Mahood says that one thing that impressed her was that her mediator had tried and mediated a lot of cases and could "speak to both sides." Anne Kerrigan, a solo practitioner from Lynn, Mass., who handled one mediation on behalf of a plaintiff, says that her mediator was "fairly high-powered" in that he "exerted a lot of pressure at various points and talked quickly." But Kerrigan admits that this was more a function of the mediator's style than an adverse characteristic of the process.

Another benefit that plaintiffs' lawyers interviewed agreed upon was that Toro's mediations get the claimants more involved than they would be in a typical trial. "In this mediation," says Mahood, "it's a much more interactive process than in a trial, where the plaintiff has to sit there until it is time for him or her to testify before people who he or she has never met." Mahood says that it is extremely helpful for claimants to hear a third party say things like "You have a good lawyer here and Toro has a good lawyer. We're going to try to answer both sides' questions." Kerrigan agrees. "Instead of having to answer questions on the stand at a trial, the plaintiff was able to talk openly," she says. "His wife could interject with something he had forgotten, for example."

Mahood and Kerrigan both agree that their mediations helped narrow the issues in their cases and saved them a substantial amount of money. "The mediations get the people who want money and the people who have money sitting across from one another," says Mahood. "From the plaintiffs' perspective, it eliminates the middle man." "They also reduce costs," she says. "They take you fro the end of discovery to a stage similar to the final pretri conference."

Attorneys said that to a great degree, whether a case appropriate for the program will depend on the circur stances of the case itself, such as the seriousness of tl injuries, the personality of the plaintiff, and the produ involved in the accident. Kerrigan says that her client the case she handled was a likeable person who didr rattle easily. This helped, she says, because the mediatic "showed him to good advantage." However, Kerrigan sa that if a claimant is the temperamental type, it wouldr work as well. She says this is because there is a lot of bac and forth in the mediation. "The mediator would meet wi all of us at once," she says. "then, he would meet with tl two defense attorneys. While he did this, the claimant ha to sit and wait. This was trying."

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Claims involving more serious injuries may not mal good candidates for mediation. Byers says that Toro more inclined to think twice about mediating a case th involves serious injuries. "With the more serious cases he says, "we may want to think about [whether we want mediate]. If we're dealing with a child with catastroph injuries, for example, we might want to do something diffe ent." Mahood says this applies to the claimant as well. " you have a really nice juicy case with a sympathy factor, yc could be doing a disservice to your client [by mediating]."

At least one litigator warned other plaintiffs' lawye about risks in Toro's process. "Although Toro tries come off as though alternative dispute resolution is a good for everybody and the wave of the nineties, they a not nice guys," says one solo practitioner. "They send an army of investigators. They'll leave you with four cen on the dollar." This attorney says he tells everybody wh calls him to inquire about the program to "Watch out f those guys. They are real snakes in the grass."

But others say that if a plaintiffs' lawyer goes in pr pared and open-eyed, the claimant won't be taken adva tage of. Mahood says that in her mediation, Toro repr sentatives attempted to insist that they take a sworn stat ment from the claimant and that no information develope in the mediation could be used in traditional litigation the mediation process failed. Mahood rejected both cond tions. "Everything is negotiable," she says. "It's still a adversarial process. You have to get ready for it. But yc can cut some pretty expensive corners."