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Resolving your company's claims while saving millions of dollars in the process

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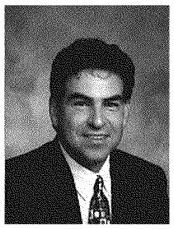

This article assumes the reader has some familiarity with the mechanics of mediation. For those who don't, the February 1996 edition of* Directorship *contains an excellent description of how the process of mediation works. With all due respect to the author of that article, he asserts that mediation should only be utilized when settlement negotiations have broken down. This author has found that mediation is a most effective means of initiating settlement negotiations, as will be demonstrated below.

I. Introduction

An unfortunate part of today's business world is dealing with claims that usually develop into lawsuits, triggering an unwelcome, significant investment of time and money. Until recently, the only way to confront claims was to hire legal counsel, litigate and wait for an unpredictable resolution that often took as long as two or three years. In the meantime, the legal bills, costs and expenses accumulated to the point of frustration.

With recent developments in the area of Alternative Dispute Resolution (ADR), it is no longer necessary to invest significant time or money to resolve claims. Several companies have implemented ADR programs as their way of dealing with claims, taking advantage of the benefits that result from a revolutionary form of ADR — pre-litigation, non-binding mediation.

Should your company consider such a program as well? Take a look at what one company has accomplished and then decide.

II. The alternative

Approximately five years ago, The Toro Company, one of the largest U.S. manufacturers of lawn and turf care products with 1995 sales of almost $1 billion and gross profits approaching $400 million, reassessed its handling of product liability claims. Until 1991, the company dealt with these claims by litigating them. However, the company noted a number of recurring themes that caused it to question the wisdom of the traditional method of claims handling.

It was obvious to the company that aggressively litigating its claims was expensive. In addition, it was impossible to predict how any given claim might be resolved when left to the discretion of a jury. History established that even though the company had prevailed in litigation on most occasions, it had not always prevailed due to reasons that had nothing to do with the merits of the case, such as sympathy for an injured person.

As if that were not enough, the company often litigated a claim for years, and then as the trial drew near, many claims were settled. In most cases, settlement was prompted by counsel, who had consistently rendered favorable evaluations with regard to out-

come, but then on the eve of trial, encouraged settlement. This scenario was the most egregious of all to the company — spending significant sums in anticipation of prevailing and then paying out sums to resolve the claims amicably.

The company had been exposed to mediation from time to time, through its occasional use in some jurisdictions. Mediation clearly offered certain advantages over traditional litigation, as it created a forum for resolving claims without leaving them in the hands of unpredictable juries. More importantly, mediation proved itself to be a superior means of conducting negotiations, as mediation gave the company a unique opportunity to speak directly to the injured claimant. This allowed the company to educate the claimant fully as to the risks of a jury trial, without any dilution of reality by the claimant's lawyer. Further, since a primary function of the mediator is to ensure that the claimant thoroughly understands the weaknesses of his/her claim, mediation created a forum for settlement negotiations unlike any other.

However, since mediation was never proposed or mandated until the litigation was nearing trial, traditional mediation did nothing to avoid the problem of significant costs, expenses and fees associated with a claim. The company thus turned its focus to ascertaining whether mediation could be utilized before litigation was even commenced.

The hurdle that had to be cleared was devising a way to evaluate a claim's liability and damages exposure adequately, without triggering the expense of litigation. In order to minimize costs while expediting the procurement of the information necessary to evaluate a claim adequately, the following system was devised:

- Immediate, aggressive accident investigation handled in-house by existing company staff;
- A voluntary exchange of relevant information relating to the claim between the company and the claimant's counsel;
- A pre-mediation inspection of the product and accident site conducted by a company engineer; and
- A pre-mediation sworn statement of the claimant, intended to ferret out accident and damages facts, while also giving the company the opportunity to evaluate the claimant's appearance and demeanor as a witness.

The system described above created a means whereby a claim can be evaluated for a fraction of what it normally cost, in a matter of weeks instead of years, and it procured all essential information necessary for the company to evaluate its claims. All that was left to do was take part in the scheduled mediation.

III. The results

The program has been a resounding success, as every problem identified by the company has been favorably resolved. Among the many benefits that have directly resulted from its use of pre-litigation mediation are:

1) Over one hundred twenty-five claims have been diverted to the program and the percentage of claims which have been settled ranges between 90 and 95 percent;

2) The number of active claims currently being handled by the company has been drastically reduced from approximately 150 to 35;

3) Claims handling expenditures have been reduced by an average $45,617 per claim, resulting in an overall cost savings of over $5,000,000; and

4) As a result of the above savings, the company's annual liability insurance premium was reduced by approximately $1,800,000 per year from the inception of the program until the company recently decided to become self-insured.

IV. The lesson learned

The most important lesson that has been learned is that claims need not be handled in the traditional litigation arena except as a last resort. Pre-litigation mediation, in conjunction with an aggressive fact-finding process that can be conducted outside the litigation context, serves to minimize the expenditure of funds from a claims handling perspective, and it works very effectively.

As a reader, you may conclude that perhaps the program discussed above is appropriate for dealing with product liability claims, but you may be wondering whether it can be applied to other types of claims. The answer to your question is a resounding yes, as evidenced by recent events.

In February of this year, The Toro Company had a contractual dispute with one of its suppliers. As a result of the supplier's conduct, the company estimated it had incurred losses of slightly over $1 million. The company engaged the supplier in preliminary discussions concerning the problem and received a token offer of $56,000 as an offer to resolve the dispute.

With potential damages exceeding $1 million, and no meaningful indication that an amicable resolution was likely, it would have been very easy for the company to file suit against the supplier to recover its projected losses. Instead, the company diverted the claim to pre-litigation mediation, and at the conclusion of the mediation, it was settled for $900,000 with minimal costs, expenses and attorney's fees, and within six weeks from the date the company suggested to the supplier that the claim be diverted to mediation.

So, should mediation be reserved only for claims that exceed $75,000 in costs and expenses, as one recent article in *Directorship* suggested? Should it be used only after settlement negotiations have broken down, as another article recommended? Are you content to stay on the traditional litigation treadmill, or is there a more effective way of dealing with claims?

As with the pre-litigation mediation program described above, a certain amount of information is needed in order to reach a decision. You now have that information in the way of a concrete example.

Decide for yourself. ■

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