OSBORN

Alternate Dispute Resolution and Asbestos

From National Insulation and Abatement Contractors' Outlook Magazine, April 1990

John E. Osborn

The 1980's have seen the passage of a massive volume of new asbestos-related legislation and regulations and the development of common law doctrines that create new areas or broaden existing areas of legal responsibility relating to asbestos. As a result, for the 1990s, the federal and state courts are in for an onslaught of new cases, many of which – in volume of documents, complexity of legal and factual issues, number of witnesses, and number of parties involved – will resemble antitrust, construction contract, and other large and protracted commercial litigation that already confound the courts.

Regulatory agencies charged with responsibility in connection with asbestos face a tangle of dilemmas and a shortfall in resources in keeping up with promulgation of new regulations and in setting and meeting enforcement priorities. Private parties purchasing or managing property face the growing burden of mastering the applications of volumes of environmental regulations at federal, state, and local levels.

Clearly, alternatives to the time-consuming and costly conventional means of dispute resolution may be welcome in this heavily-regulated industry. Following is a discussion of the benefits of alternative options for dispute resolution.

The Courts

1. Many asbestos-related matters may be the subject of litigation:

2. Government enforcement – a full array of criminal and civil penalties are in place for violation of laws and regulations relating to asbestos;

3. Challenges by private parties to government regulations or to their interpretation or application;

4. Personal injury lawsuits – which have abounded since the correlation between exposure to asbestos and illness was established;

5. Property damage lawsuits – developed against asbestos manufacturers, installers, and under insurance policies as parties seek to recoup massive costs they have incurred in asbestos abatement; and

6. Breach of contract litigation – developed regarding the obligations of parties who have contracted for the performance of an abatement job.

The Regulatory Agencies

The traditional process through which government rules and regulations are made is formal, cumbersome, and time-consuming. With significant legislative activity relating to asbestos, those agencies charge with development of rules and regulations are unable to keep up.

Conventional Resolution

In the rapidly evolving area of asbestos regulation and litigation, conventional means of dispute resolution are simply not effective. In particular, delay in pursuing and resolving enforcement cases undermines government regulators in the following respects: failure to achieve compliance while the litigation is pending; failure to reach a prompt resolution, which diminishes the deterrent effect on other parties and the government regulator's credibility (swift, proportionate, and strong punishment are seen to bring the most results); and impairment of the government's ability to prosecute the action as the evidence and witnesses become stale.

Of course, when litigation drags on, the cost of the process, through extensive legal fees, disbursements, and substantial (and costly) time involvement of executive personnel is monumental.

Negotiated Rulemaking

The traditional rulemaking method used by the U.S. EPA was the "notice and comment" approach prescribed by the Administrative Procedures Act. The participants typically include individuals representing interests within the regulated community, environmental enforcement officials, states, and other affected stakeholders.

The EPA has infused great enthusiasm into the pursuit of Negotiated Rulemaking as a method to streamline and speed up the process. The EPA indicates that it has approximately 250 regulations under development through the normal notice-and-comment process at any given time. Ninety-five percent of the rules are statutorily mandated. For a major rule, the average period between initiation of rulemaking activity and promulgation of the final rule is nearly three years. But this does not even define the whole problem, as approximately 80 percent of EPA's final rules are challenged in court, with the court challenges requiring an average of two years to be resolved and frequently resulting in further rulemaking which could take another two years.

Negotiated Rulemaking includes: involvement of essential interests with their incentives and motivations to be taken into account when choosing the regulatory approach; relevant data from all sources to be available to the agency in making decisions; "real-world" considerations to be taken into account in deciding in what manner and how stringently to regulate; the participation of the regulated community in drafting the actual language of the rule, thereby assuring it will be familiar and comprehensible to those subject it it; and minimization of the likelihood of legal challenge.

Although experience with Negotiated Rulemaking is limited by its newness, we can make a few generalizations from its use up to this point: developing proposed rules through negotiation has made rulemaking easier and less costly; the substantive standard achieved by Negotiated Rulemaking has tended to be more pragmatic (and can be assumed to bring about better environmental results) than those the EPA might be expected to develop through traditional rulemaking; litigation has diminished; and the negotiations have facilitated exchanges of information and understanding of disputed issues. It would appear that working relationships will develop during negotiations that will help some of the participants work together more constructively in other situations.

New Approaches

The EPA urges the support of use of alternate dispute resolution (ADR). The agency claims that the caseloads of Department of Justice attorneys and the EPA technical and legal staff are large and diverse, leading to an inability to resolve disputes in a timely and knowledgeable manner. Also, those administering the enforcement program may be lacking in experience, as there is a high turnover in government representatives and technically complex remedies are usually involved. In addition, hierarchical management makes it nearly as difficult to deal with the EPA's own internal system of management as it is to negotiate with defense counsel.

ADR has been used to great success in commercial and contractual disputes. It is clear that with the heavy dockets of the courts, commercial litigation will take many years to reach trial although 90 to 95 percent of all lawsuits are settled prior to trial. The aim, then, must be to develop ways to replicate, at an earlier stage, the same type of dynamics which are present on the courthouse steps.

Proponents argue that ADR has many advantages. It accelerates the dispute resolution process, which allows parties to focus on their interests rather than on the strategy of the case, and provides "a day in court," allowing for advocacy and emotional outlets. It assures the involvement of executives early in the process and avoids the need to educate a judge or jury. ADR can better protect confidentiality; it avoids the acrimony which often accompanies litigation and allows a business relationship between the parties to continue.

When Do You Use ADR?

In a situation where parties enter a contract with each other, such as one between an owner and a contractor for asbestos abatement, it is appropriate to specify, in the contract itself, the procedure under which any disputes between the contracting parties are to be resolved. Even though some parties feel that there could not possibly be a problem and are unwilling to give attention to the inclusion of an ADR procedure in their agreement, others, who have seen the economy created through use of ADR, are now including ADR at the outset.

Certainly it is never too late to utilize ADR at any point, especially in cases that have been at an impasse after a number of years of traditional litigation. Impasses can arise from personality conflicts between counsel, poor communications between parties, inflexible negotiating postures, or difficult public policy or political issues presented. The parties can rest assured that the court will encourage their use of ADR; in fact, the

courts have increasingly suggested resorting to ADR, especially in connection with technically complex issues which the court is ill-suited to address.

Parties to most litigation relating to asbestos do not have the opportunity to prescribe ADR from the beginning because the relationships among the parties are not contractual, e.g., government enforcement, property damage, and personal injury litigation.

The Right Process

In contractual relationships, the method of dispute resolution can be a point of negotiation along with the other terms of the agreement. Approaches to certain recurring problems can be fashioned (e.g., scope of work disputes, evaluation of undisclosed conditions claims, interpretation and application of government regulations).

There appears to be no one process that can be expected to be effective for every dispute. There are a number which have been utilized:

Meditation: facilities negotiations by neutral party who has no power to make binding decisions, but who may facilitate settlement by scheduling and structuring negotiations and acting as a catalyst between the parties, focusing the discussions, facilitating communications, and serving as an assessor and not a judge of the positions of the parties.

- Arbitration: employs a neutral party to hear all or a portion of the factual, legal, or policy issues in a case and make binding decisions. Arbitration is generally less formal than court proceedings, as discovery is severely limited and the rules of evidence are not strictly followed.

- Fact-Finding: uses a neutral third party with industry expertise to narrow factual issues. The process can be either binding or non-binding, and the parties, if they so choose, can treat the decision on the issues of fact as admissible in subsequent proceeding.

- Mini-Trial: permits parties to present their cases (or portions of their cases) to principals who have authority to settle the dispute. Following the presentation, the principals who have authority to settle the dispute. Following the presentation, the principals continue negotiations with the aid of the third party who has acted as the mini-trial judge. (See sidebar, Implementing ADR: The Mini-Trial Agreement).

- Settlement Judge: involves the participation of judges of the court hearing the case who are not involved in any aspects of the litigation. The settlement judge hears the positions of the parties and offers suggestions as to reasonable compromises in light of his evaluation of likely outcomes.

- Summary Jury Trial: involves an abbreviated trial before a jury assembled by the parties to get a sense of the amount likely to be awarded after a full trial. The decisions of the "Summary Jury" are advisory.

Use of ADR

How is ADR used in two prevalent types of cases, the asbestos personal injury and property damage suits?

In reference to asbestos personal injury suits, the Asbestos Claims Facility (ACF) has used ADR in a number of contexts. The ACF has been involved in helping resolve disputes involving procedures and insurers. Under the procedure, the plaintiffs can submit their claims directly to the ACF for possible settlement. Once a settlement offer is made and the plaintiff rejects it, a variety of ADR procedures can be undertaken. A more formal ADR procedure has been implemented for cases involving serious injury, total disability, and death. Punitive damages have been excluded from this process.

To this time, there is some doubt as to the effectiveness of the use of ADR in asbestos property damage suits. The asbestos property damage claim itself is still in a state of development, and therefore many defendants are not inclined to settle those claims, yet. Once there have been other cases ruling that plaintiffs are entitled to recover for property damage, it is likely that ADR will be used more on this type of claim.

The Manville Trust provides for mediation and arbitration procedures for both personal injury and property damage cases.

No matter what type of lawsuit is at hand, if it includes the analysis of voluminous technical evidence, exploration of ADR can't hurt. The alternative is that you may have to wait years for a resolution (and perhaps the same result) if you don't, and you will expend tens and perhaps hundreds of thousands of dollars in attorney fees and court costs, and your own time. With this equation, ADR becomes an attractive option.

Implementing ADR: The Mini-Trial Agreement

The mini-trial is, in effect, a structured mediation procedure. The principal features are as follows:

1. The parties designate a neutral advisor, usually a person of eminence or one highly knowledgeable in the subject matter of the dispute.

2. Principals of each party, with full settlement authority, attend the proceedings.

3. Limited discovery is afforded both parties.

4. Evidence is submitted to the neutral advisor in advance of the hearings.

5. Each party is given a fixed, short period of time to make its presentation. There are no rules governing what evidence can be presented. No objections to evidence are permitted. No cross-examination is allowed, although the neutral advisor may ask questions.

6. The neutral advisor makes a written recommendation which the parties use as a basis for settlement negotiations.

7. If the case cannot be settled, the neutral advisor's recommendation is not disclosed in subsequent litigation or arbitration.

8. Sanctions are provided against the nonprevailing party if the ultimate result of arbitration or litigation is close to the neutral advisor's recommendations.