September 13. 1993

Business Insurance®

Reporting Weekly For Corporate Risk, Employee Benefit and Financial Executives / $2.50 a copy

ADR savings depend on nature of dispute

By JOANNE WOJCIK

Because time is money, risk managers and insurers increasingly are urging their attorneys to use alternative dispute resolution to avoid protracted litigation that leads to higher legal fees.

However, some ADR approaches work better than others and hold down costs.

For example, non-binding-court ordered arbitration, which has been required in California to resolve personal injury claims for less than $50,000, and has not resolve the cases any quicker nor has it reduced the legal costs involved, a recent study found.

By contrast, binding arbitration and mediation are capable of producing significant savings by reducing the time it takes to resolve disputes, ADR experts say.

"Because of the early resolution" ADR can provide, "no doubt but there's a profound cost savings," said Eric R. Galton, a partner with Wright & Greenhill in Austin, Texas, who has published a book on mediation.

"The use of an institutionalized mediation program can cut legal costs by one-third," he estimated.

While the size of settlements reached through ADR and those that go to trial often "are no less or more than they would be three years down the road, the real savings for the company is in legal fees", observed Joseph P. Decaminada, executive vp and general counsel for Atlantic Mutual Insurance Co. in New York, and then chairman of the nonprofit American Arbitration Assn.

"ADR– and in particular mediation–can be a valuable cost and time-saving strategy for resolving disputes and differences between parties are not too great and both parties are willing to cooperate," said Eileen Scudder, a Deloitte & Touche partner in Chicago who co-offered a study on the growing popularity of ADR among Fortune 1,000 companies.

However, "in complex cases and certainly in cases when the ADR process is forced upon the parties, ADR may only had one more step to the already long and costly process of litigation," she pointed out.

Bud London, the partner with New York-based London Fisher, agreed.

"If you can do it in a couple of days and there's not a lot of discovery, you can save a lot of money. But I haven't seen great efficiencies in big cases," Mr. London said. "If you've got a seven-figure case, you're looking at a protracted proceeding with hearings, discovery, etc.. You might as well just have a judge," he said.

Because ADR is a relatively new legal concept, it is still evolving. Growing experience with ADR tools is helping to identify the less successful forms of dispute resolution.

For example, a new study of claims contested by the California State Automobile Assn. found that the current system of judicial arbitration often results in awards that are higher than a jury would likely given.

The insurer obtained a more favorable result in 73% of the cases that went to trial after he either the plaintiff or the insurer rejected an arbitration award, according to the study of 148 CSAA cases from 1991. The study was published in the August 1993 issue of "For the Defense," a Law Journal.

Among the criticisms leveled by study author's Michael J. Brady of Ropers, Majeski, Kohn, Bently, Wagner & Kane in Redwood City, Calif. and Peter R. Cubanske, assistant manager of claims for that CSAA's Inter-Insurance Bureau:

•Too many high-valued cases are sent to arbitration.

•The quality of arbitration judges is inconsistent.

•Too few lawyers take the arch ration proceeding seriously.

In contrast, the recent Deloitte & Touche study of 246 corporate attorneys for Fortune 1,000 companies, found that 67% of ADR users reduced their legal costs while only 3% saw an increase.

About half of the ADR users said their savings were in the range of 10% to 50% of the expected litigation costs according to the Deloitte & Touche survey.

In addition, an in-house study by Design Professionals Insurance Corp. of Monterey, Calif., found that legal expenses and the signs of losses associated with disputed claims have dropped as its use of ADR has increased.

DPIC projects its average legal expense will drop to $17,391 per claim in 1993, compared with $22,038 per claim in 1991. Similarly, the insurer's average loss per closed claim is declining to a projected $103,005 in 1993, down from $116,020 in 1991.

During the same period, DPIC's use of ADR has increased to as much as 20% of its open claims files this year, from a low of 10% in 1991. On average, the insurers use of ADR was 12.0% of open claims in 1991, 21.5% in 1992 and 25% in the first five months of 1993 (see chart).

When assessing the value of ADR it's important to consider what method is employed, points out Marjorie Crowder Briggs, a partner with Porter, Wright, Morris & Arthur in Columbus, Ohio.

For example, in non-binding court-ordered arbitration, "there are probably a lot of

ADR Potential

plaintiff's lawyers who don't take it seriously because they would get more money if they presented their case to a sympathetic Jury," she said.

So, unhappy participants often seek a trial de novo - or a new trial with a rehearing of all the issues which can prolong litigation.□

In contrast, 95% of bodily injury cases and 85% of commercial litigation can be satisfactorily resolved through mediation, a process in which both parties iron out an agreement with a mediator serving as a referee, according to San Francisco attorney Nelson C. Barry III. an ADR specialist who often serves as a mediator.

Since 95% of civil litigation settles before trial, there is no reason not to elect ADR for these cases, he said.□

Many ADR advocates feel that much of the criticism of the system comes from lawyers who feel early dispute resolution threatens their livelihoods.

"The interest of defense attorneys is to maximize the time they have to spend on a case to increase the billable hours," said Jeff Krivis, a partner with Krivis, Passovoy & Spile in Encino, Calif.

Defense lawyers also "want to present as much evidence as possible that ADR doesn't work so they can convince (insurers) to take a case to trial," he added.

"Many lawyers are trained litigators and hired to argue," agrees DPIC Chief Executive Officer and President Peter Hawes. "It's kind of like making the pitbull to become kinder and gentler."

So while the lawyers recommend ADR to their insurer clients, insurers have begun telling their lawyers to use ADR since loss-adjustment expenses are increasing at a faster rate than claims payments, said Atlantic Mutual's Mr. Decaminada.

And while many die-hard lawyers cling to traditional litigation methods, a growing number of innovative defense lawyers, realizing the threat dispute resolution closes, and turned it into an advantage by touting their ADR expertise as a marketing tool.

Even the American Bar Assn. has created a new dispute resolution section: and ADR is now being taught at virtually all law schools in the country.

"ADR is the wave of the future," said John K. Trotter, a retired judge who works as a mediator for the statewide Judicial Arbitration and Mediation Service in California.

"What I have been predicting for some time is now happening," said Mr. Galton, the Austin attorney and mediation expert. while in "lawyers who do trial work are integrating ADR into their practice."

For example, he said, many firms are starting to assign two lawyers to one file: one with expertise in ADR, the other a litigation specialist. Only if the ADR expert fails to achieve early resolution does the litigation specialist take over.

Other firms, like Krivis, Passovoy & Spile, had established departments of specially trained dispute resolution attorneys whose compensation depends upon their ability to achieve early resolution to the use of various alternative dispute resolution procedures.

"We had a check-and-balance system with the (insurers) that puts the control back in the claims department and makes lawyers accountable for their work product." Mr. Krivis explained. "Since over 95% of all cases are resolved without trial, our focus is on training our attorneys in mediation, arbitration and specialized negotiation skills. This reduces transaction costs for the (insurer) and increases our ability to close cases."

The ADR department is an offshoot of the firm's participation in a nationwide dispute resolution system for real estate errors & omissions claims developed by the Homeowners Group Inc. in Hollywood, Fla. Homeowner's Group is the risk management services arm of POMG Insurance Co. Ltd., a Caymans-domiciled captive for real estate agents.

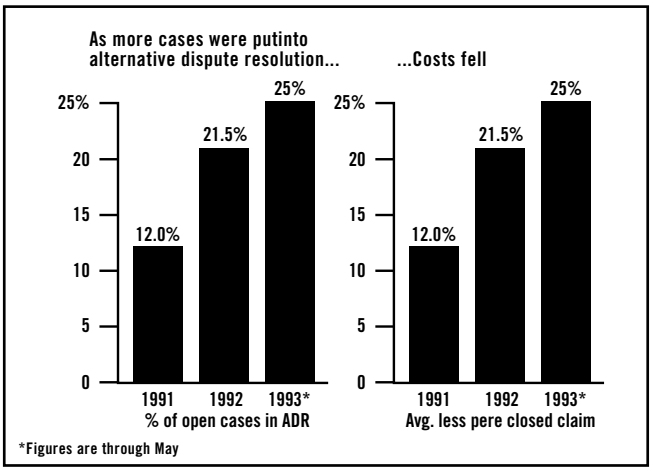
Under the Homeowner's Group Risk Management Assistant, both buyer and seller agree to the use of dispute resolution when they sign the real estate sales contract, explained Michael McDonald, vp of risk management for the organization. When a dispute arises, the real estate professionals can access the network of ADR specialist lawyers via toll-free phone number.

Mr. McDonald estimates that the use of ADR in resolving real estate transfer disputes has reduced legal costs about 15% to 20% since the system was implemented in March 1992.

"We know risk management is a solution to resolving disputes early on," and ADR is simply an offshoot of risk management, Mr. McDonald said.

According to the Deloitte & Touche survey, companies increasingly are including ADR provisions in contracts with suppliers, customers, labor organizations and joint venture partners.

Architectural and engineering firms traditionally have provided for ADR used in their contracts, according to DPIC's Mr. Hawes.



And the American Arbitration Assn. is helping insurers resolve claims from Hurricane Andrew in Florida and from the summer floods in the Midwest, according to Allison Weintraub, director of mediation in the AAA's San Francisco office.

But even ardent ADR supporters acknowledge that the process must be refined to become a realistic alternative to traditional litigation.

"Sometimes binding arbitration can be costly," involving expensive discovery similar to that required to prepare for trial, said Miss Briggs of Porter, Wright.

"Reinsurance arbitrations have in the last decade grown dramatically in scope and now resembles something more akin to litigation," observed Jonathan Bank, a partner with Buchalter, Nemer, Fields & Younger in Los Angeles. This is because "the clients have become more litigious, the lawyers haven't discouraged them and many arbitrators are going along with it-in this case, it takes three to tango."

"The trend is clearly to reduce costs and if ADR holds out the promise of doing that," it will have to be refined, Mr. Bank added.

"I believe the role of lawyers is to become 'process architects' " said Mr. Galton of Wright & Greenhill. "Their job will be to match the tool to the dispute," and ADR increases the number of tools available, he said.

"Corporate clients concerned with cost-containment are delighted when firms have resources to resolve disputes early," Mr. Galton added.

"I think ADR is the trend of the future," agreed Mr. Decaminana of Atlantic Mutual. While there still will be cases that need to go to trial, such as those that will make new law, the vast majority can be resolved amicably outside the courtroom, he believes. Even the Supreme Court discriminates when deciding which cases to consider.

"Can you imagine what the courts would be like it every case went to trial?" Mr. Decaminada mused.