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The Use of "Principled Negotiation" in Resolving Environmental Disputes

William A. Ruskin†

I. Introduction

Environmental litigation threatens to choke America's court system in the 1990s.[1] People living near manufacturing plants increasingly seek judicial solutions to environmental issues.[2] Fear and suspicion hinder constructive dialogue and problem solving by manufacturers and their communities. An overburdened court system cannot respond quickly or creatively enough to stop the disintegration of communities burdened with environmental concerns and the deterioration of corporate-community relationships.

Environmental issues, more than other legal corporate concerns, tend to have a ripple effect, often causing multiple repercussions with far-reaching influence on company business. An accidental release of contaminants into the air or groundwater may result in adverse public relations, worker safety disputes, boycott of company products in the market place, reconsideration of discharge permit requirements and the potential for tension between the company and its community. In the

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aftermath of such highly publicized incidents as the Bhopal India explosion,[3] the Exxon Valdez oil spill,[4] the Times Beach, Missouri dioxin scare,[5] and the toxic dump at Love Canal,[6] environmental issues have become prime-time items in the media.[7] How a company responds to media attention has an important effect on how the community, including elected officials, health authorities, regulatory agencies and prospective jurors, responds to the issues presented. Accordingly, a company must plan in advance how it will respond to an environmental crisis and what steps it will take to minimize the fallout from such a crisis.

"Principled negotiation" can be used effectively to resolve environmental disputes. This Article discusses why homeowner suits can present "no-win" situations for industry;[8] second, what principled negotiation is;[9] and third, how two companies, E.I. du Pont de Nemours & Company

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3. *See* Frank J. Prial, *Experts Say Slum Alongside Factories Inevitable*, N.Y. TIMES, Dec. 10, 1984, at A8, col. 1; *see also India Sues Union Carbide in Toxic Gas Disaster*, CHI. TRIB., Sept. 6, 1986, News at 5.

4. *See Exxon Apologizes to Nation for Oil Spill*, CHI. TRIB., Apr. 4, 1989, News at 10; *see also* Bill McAllister, *Millions of Gallons of Oil Spill Into Alaskan Sound*, WASH. POST, Mar. 25, 1989, at A1; Maura Dolan & Ronald B. Taylor, *Alaska Oil Spill May be Largest in U.S. Waters*, L.A. TIMES, Mar. 25, 1989, at pt. 1, 1, col. 4; Matthew L. Wald, *Exxon Estimating $1.28 Billion Cost for Spill Cleanup*, N.Y. TIMES, July 25, 1989, at A1, col. 3.

5. *See generally Learning From Times Beach, The Christian Science Monitor*, Feb. 24, 1983, at 24; *Dioxin Settlement Okd*, L.A. TIMES, Nov. 19, 1986, at pt. 1, 2, col. 1; *Jury Selection Begins in Times Beach Suit*, CHI. TRIB., Nov. 11, 1987, News at 3; Tom Raber, *Barren Lands: Where Dreams Died From Poisoning*, USA TODAY, Apr. 20, 1990, at 208E.

6. *See generally Who Pays for Poison?*, WASH. POST, Apr. 12, 1979, at A20.

7. *See, e.g.*, Donn Esmonde, *For These Neighbors of Pfohl Dump, Escape is the Only Dream Left*, THE BUFFALO NEWS, June 13, 1993, Lifestyles; Denise Lavoie, *Environment: Woman Who Fled Love Canal in the 1970s Discovers Her Connecticut Residence is Sitting Near a Toxic Dump*, L.A. TIMES, at A11, col. 1; Stevenson Swanson & Robert Becker, *10-gallon Spill Leads to 8-hour Cleanup: Accident Raises Fears Over Safety*, Jan. 24, 1992, News at 1; *Environmental Timeline*, WASH. TIMES, Apr. 20, 1990, at H3; Jeffrey L. Rabin, *City Launches Drive to End Use of Hydrofluoric Acid at Oil Refinery*, L.A. TIMES, Apr. 13, 1989, at pt. 9, 15, col. 1; *Saving The Earth's Environment: 'Planet in Trouble' and U.S. Aid*, L.A. TIMES, Mar. 4, 1989, at pt. 2, 9, col. 4; *EPA Probes Gas Leaks at Amoco Plant*, CHI. TRIB., Oct. 26, 1988, Chicagoland at 1; *Activists Raise Alert on Toxins*, CHI. TRIB., Dec. 22, 1986, News at 1; Albert Scardino, *A Tragedy in South Georgia*, N.Y. TIMES, July 20, 1986, § 3, at 1, col 2; Susan Chira, *State Officials and Environmentalists Assess the Problems of Toxic Waste*, N.Y. TIMES, June 18, 1983, § 1, at 26, col. 1.

8. *See infra* part II.

9. *See infra* part III.

(Du Pont) and Eastman Kodak Company (Kodak), effectively utilized principled negotiation and implemented Value Protection Programs in their respective communities.[10] An examination of the negotiation methods applied by Du Pont and Kodak may assist other companies in working toward an early and mutually acceptable resolution of residents' grievances. Although the expectation that a successful negotiation with disgruntled residents will deter all litigation is perhaps naive, any resulting litigation is likely to be more manageable and not as threatening to the company.

II. A "No-Win" Situation

Toxic tort claimants are often those people who live closest to the controversial industrial facility or waste site. These residents typically sue to recover for personal injury,[11] fear of cancer,[12] birth defects,[13]

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10. *See infra* part IV.

11. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982); *see also* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1203 (6th Cir. 1988) (stating, "[i]n seeking damages for actual physical injuries, a plaintiff must prove to a reasonable medical certainty that his or her injuries were caused by a defendant's acts or omissions"). *But see* Maddy v. Vulcan Materials Co., 737 F. Supp. 1528 (D. Kan. 1990) (holding plaintiff's presentation of her doctor's testimony that she suffered respiratory ailments was insufficient to withstand summary judgment when the doctor testified he was not an expert on toxic fumes).

12. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986); Wisniewski v. Johns-Manville Corp., 759 F.2d 271 (3d Cir. 1985); *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563 (D. Hawaii 1990); Friedman v. F.E. Myers Co., 706 F. Supp. 376 (E.D. Pa. 1989); Pollock v. Johns-Manville Sales Corp., 686 F. Supp. 489 (D.N.J. 1988); Stites v. Sundstrand Heat Transfer, Inc., 660 F. Supp. 1516 (W.D. Mich. 1987); McAdams v. Eli Lilly & Co., 638 F. Supp. 1173 (N.D. Ill. 1986); *In re* Moorenovich, 634 F. Supp. 634 (D. Me. 1986); Jones v. United Railroads of San Francisco, 54 Cal. App. 744, 202 P. 919 (1921); Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984); Payton v. Abbot Lab., 386 Mass. 540, 437 N.E.2d 171 (1982); State by Woyke v. Tonka Corp., 420 N.W.2d 624 (Minn. Ct. App. 1988); Mauro v. Raymark Indus., 116 N.J. 126, 561 A.2d 257 (1989); Winik v. Jewish Hosp., 31 N.Y.2d 936, 293 N.E.2d 95, 340 N.Y.S.2d 927 (1972); *see also* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1205-06 (6th Cir. 1988) (applying Tennessee law); Hagerty v. L&L Marine Servs., Inc., 788 F.2d 315 (5th Cir. 1986); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986); Eagle-Picher Indus. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985).

13. *See, e.g.*, Bubash v. Philadelphia Elec. Co., 717 F. Supp. 297 (M.D. Pa. 1989).

trespass,[14] nuisance,[15] and property damage.[16] The degree of hostility and mistrust felt by community residents toward the company certainly influences their decision whether to participate in mass tort litigation against the company. How successfully the company deals with the media, community groups, and regulatory authorities during a crisis, however, may well have an impact on the number of residents who become plaintiffs in these lawsuits and, ultimately, on the outcome.

In a typical toxic tort suit, property damage claimants usually outnumber personal injury claimants, although the two groups are by no means mutually exclusive. With troubling frequency, plaintiff attorneys are pleading personal injury complaints on behalf of residents who have no discernible injury and bear only a remote or fleeting connection to the site.[17] This variety of personal injury suit, however, may be success-

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14. *See, e.g.*, Renken v. Harvey Aluminum, 226 F. Supp. 169 (D.C. Or. 1963); Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979); Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960); Bradley v. American Smelting & Refining Co., 104 Wash. 2d 677, 709 P.2d 782 (1985). *See generally* Frona M. Powell, *Trespass, Nuisance, and the Evolution of Common Law in Modern Pollution Cases*, 21 REAL EST. L.J. 182 (1992) (discussing the expansion of trespass, nuisance, and other common law remedies to aid in providing relief in environmental cases).

15. *See, e.g.*, Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 717-21 (D. Kan. 1991); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986); Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1267-68 (N.D. W. Va. 1982) (predicting West Virginia law); Stockdale v. Agrico Chem. Co., 340 F. Supp. 244 (N.D. Iowa 1972) (applying Iowa law); Cook Indus. v. Carlson, 334 F. Supp. 809 (N.D. Miss. 1971) (applying Mississippi law); *see also* Jeffrey L. Rabin, *Torrance Asks Court to Declare Refinery a 'Public Nuisance'*, L.A. TIMES, Apr. 8, 1989, at pt. 2, 1, col. 4. *See generally* Beth I. French, *A Private Nuisance Approach to Hazardous Waste Disposal Sites*, 7 OHIO N.U. L. REV. 86 (1980) (discussing the problems and benefits of bringing a nuisance claim); David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief From Environmental Harm*, ECOLOGY L.Q., Nov. 1989, at 883 (discussing the use and validity of public nuisance claims in cases involving environmental torts); Powell, *supra* note 14; Michael C. Skotnicki, Note, *Private Actions for Damages Resulting From an Environmental Public Nuisance: Overcoming the Barrier to Standing Posed by the "Special Inquiry" Rule*, 16 AM. J. TRIAL ADVOC. 591 (1992) (discussing the use of common law public nuisance to remedy environmental harm and the requisites to prove standing).

16. Villari v. Terminix Int'l, Inc., 677 F. Supp. 330 (E.D. Pa. 1987); Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303 (W.D. Tenn. 1986), *aff'd in part and rev'd in part*, 855 F.2d 1188 (6th Cir. 1988); Ayers v. Township of Jackson, 493 A.2d 1314 (N.J. Super. Ct. App. Div.), *cert. granted*, 508 A.2d 191 (N.J. 1985), *aff'd in part and rev'd in part*, 525 A.2d 287 (N.J. 1987); Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944).

17. Harper v. Illinois Cent. Gulf R.R., 808 F.2d 1139 (5th Cir. 1987); Bennett v. Mallincrodt, Inc., 698 S.W.2d 854 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986).

fully defended because these claimants rarely substantiate their cases with toxicological proof of exposure, dose, duration, and proximate cause.

As a rule, a company's damages exposure in an environmental property damage claim is less than in a personal injury suit. The sheer volume of property damage claims, however, can pose a much greater financial threat to the company. Moreover, the plaintiffs' burden of proof in a diminution-of-property-value claim is more easily met than in a toxic-tort personal injury claim.[18] During settlement negotiations, the prospect of a jury assessing the damages in several hundred or several thousand pending claims may be sufficient to compel a company to ante up millions of dollars before trial.

The magnitude of environmental cases against a company often results in a windfall to claimants who may not have provable claims. In mass tort cases, the plaintiffs' attorney determines how much money each settling plaintiff receives. The defendant rarely learns how much money went to an individual plaintiff. More to the point, the defendant never learns what the claimant might have accepted in a more traditional, individually-negotiated settlement of his claim. In the typical mass tort litigation negotiation, the adversaries often lose sight of objective settlement criteria and fail to focus on the interests of both the residents and the company. As a result, settlements drain the corporate coffers but, ironically, fail to provide an adequate remedy to the plaintiffs. As will be discussed later, a primary function of principled negotiation is to constantly maintain the focus of negotiations on the interests of the parties.[19] Principled negotiation will likely produce a more satisfying and equitable result to both sides.

A corporation's failure to promptly and effectively negotiate during an environmental crisis may result in potentially severe and far-reaching adverse consequences. Such consequences may include: (1) litigation costs, including attorneys' fees, settlement/judgment costs, and punitive damages; (2) adverse agency actions—for example, community activists

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18. *See generally* Milhollin, *supra* note 1 (discussing the exceptional burden on plaintiff's in order to recover and suggesting the creation of a liability fund to insure an adequate remedy to private individuals); Mark D. Seltzer, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform*, 10 B.C. ENVTL. AFF. L. REV. 797 (1982) (suggesting the burden on plaintiff's to meet their prima facie case should be lightened).

19. *See infra* part III.

may seek revocation of a waste water or air permit or a hearing to discuss whether to reduce permitted discharges from the facility; (3) either civil fines and penalties levied pursuant to local ordinance or state/federal statutes or both; (4) criminal sanctions;[20] (5) adverse publicity, such as a boycott of the company's products;[21] (6) labor issues arising from plant workers questioning whether their health may be impaired due to workplace exposures;[22] and (7) relocation of the facility, and the costs attendant to a relocation, including closure costs.

The threat of litigation, however, may not be the chief concern of senior management. In confronting an environmental crisis the consideration of potential legal liabilities is only one issue among many. The very integrity of the company's name may be at stake, and its value cannot be assessed in legal terms. Therefore, a trial lawyer's analysis of the situation, including his assessment of the company's liability exposure in a mass tort jury trial, may fail to consider other potentially adverse consequences to the company. More often than not, typical mass tort negotiation tactics fail to consider the big picture. Tragically, in marshalling their assets and strategizing how to win the battle against the residents, many companies have sown the seeds of their defeat.

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20. *See, e.g.*, 7 U.S.C. § 1361(b) (1988) (imposing criminal penalties on anyone who violates the environmental pesticide act); 33 U.S.C. § 1319(c) (1988 & Supp. III 1991) (imposing criminal penalties on anyone who violates regulations on discharging pollutants into navigable waters); 33 U.S.C. § 1415(b) (1988) (imposing criminal penalties on anyone who violates regulations on ocean dumping); 33 U.S.C. § 1908 (1988 & Supp. III 1991) (imposing criminal penalties on anyone who violates the MARPOL Protocol); 42 U.S.C. § 6928(d) (1988) (imposing criminal penalties on anyone who violates regulations regarding solid waste disposal); 42 U.S.C. § 6992d(b) (1988) (imposing criminal penalties on anyone who violates regulations regarding medical waste disposal); 42 U.S.C. § 8432 (1988) (imposing criminal penalties on anyone who violates regulations regarding powerplant and industrial fuel use); 49 U.S.C. app. § 1679a(c) (1988) (imposing criminal penalties on anyone who violates regulations regarding natural gas pipeline safety); 49 U.S.C. app. § 2007(c) (1988) (imposing criminal penalties on anyone who violates regulations regarding hazardous liquid pipeline safety).

21. *See, e.g.*, *Alleged Victims of Fungicide Call for Boycott of Du Pont*, L.A. TIMES, Dec. 5, 1992, at D3, col. 1; Joel Makower, *National Boycott News Just Says No*, THE HOUSTON CHRONICLE, Mar. 14, 1993, at 10 (highlighting the current issue of the National Boycott News, which is a publication providing information on over 100 national boycotts underway).

22. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (applying Mississippi law), *cert. denied*, 478 U.S. 1022 (1986); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984).

Principled negotiation techniques may enable a company to avoid some of these consequences.

The company should take whatever steps it can to avoid the filing of a mass tort law suit. Unfortunately, many companies appear to take little or no constructive action to discourage or defuse these suits. If anything, the rhetoric on both sides becomes more strident and positions become further polarized as both the company and the residents prepare for the inevitable battle in court. The filing of a mass tort suit will most likely even further polarize the positions of the respective combatants. Moreover, after the commencement of suit, the company may no longer have the same access to the community that it might have previously enjoyed through community outreach programs and citizens advisory committees. At the insistence of either the claimants' attorneys, the company's attorneys, or both, communications may be reduced to posturing correspondence between attorneys or to newspaper interviews.

Negotiations between a corporation and community members are almost always more fruitful if conducted early, before community frustration over corporate inactivity or stonewalling reaches the boiling point. Although this approach may result in up-front costs to the company, early participation in negotiations with community residents can ultimately result in a substantial savings to the company. Possible savings become evident when one considers the bad publicity attendant to litigation, the millions of dollars paid in defense costs, the wasteful distraction of executive attention, the ever present risk of punitive damages, and the hefty contingency fee that most plaintiffs' attorneys work into their settlement proposals.

III. Principled Negotiation

The Harvard University Negotiation Project (Project) works on negotiation problems and develops innovative methods for mediating conflict. The Project's seminal work introduced the general public to the concept of principled negotiation as a method for dispute resolution.[23] In its simplest terms, the principled negotiation method requires that

23. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN xviii (Bruce Patton ed., 2d ed. 1991).

conflicts be resolved on the basis of impartial standards or principles. Principled negotiation encourages parties in conflict to seek mutual gain rather than haggle over arbitrarily fixed positions from which they will grudgingly retreat, inch by inch, as the conflict moves through progressively destructive phases.[24]

During times of environmental uncertainty, a company's actions must be guided by adherence to corporate principles rather than to staked-out positions. Positions often appear confrontational and inflexible. Adopting fixed positions tends to escalate, rather than resolve, conflict. Because the negotiation process focuses on the interests of both sides and on creative options which address mutual interests, principled negotiation can be a valuable tool in reaching an acceptable resolution in a heated environmental debate between a company and adjacent homeowners.

Typically, in managing environmental disputes with residents, a company utilizes positional techniques rather than principled negotiation techniques. A company spokesman may state, for example, "We will pay each homeowner $5000 and not a penny more." Unquestionably, this position antagonizes people who feel that the company should be prepared to pay a great deal more. Moreover, if the company is later forced to increase its offer, the corporation would appear to have lost the battle and would then lose face. Conversely, if the homeowners adopted and then stuck to the position that the company had to buy all of their homes, negotiations would be long and difficult. Reaching negotiated agreements which satisfy the interests of all parties to a dispute is, therefore, difficult when either party adopts a non-negotiable position.

The practice of principled negotiation has some basic concepts. First, never bargain over positions. Positional negotiation can produce agreements that are unwise and that create ill will, which can endanger an ongoing relationship. Negotiations should focus on the interests of the parties, not their positions, as those interests define the problem. Parties should discuss their interests before they even attempt to reach a resolution. Second, separate the people who conduct the negotiation from the underlying problem. The process should not be permitted to become dominated by emotions and personalities. A working relationship should be built between adversaries which encourages attacking a common

24. *Id.* at xviii-xix.

problem, not the parties to the dispute. Third, creative options should be invented for resolving the dispute by encouraging brainstorming. Options that provide for mutual gain should also be examined. Finally, objective criteria (fair standards and procedures) should be developed, and those criteria should be used as an agreed upon basis for the negotiation. Negotiations based on principle allow for any number of creative resolutions to a dispute. As will be discussed, corporations can successfully employ these techniques in attempting to resolve environmental disputes.[25]

Principled negotiation envisions a negotiation framework where room (and often times necessity) for the use of incentives to compensate a potentially injured party exists. The successful use of principled negotiation may therefore result in the use of "creative compensation" techniques. If a community is concerned about health and safety issues, a number of questions can be addressed jointly by the company and the community in the negotiation process. Such questions include: How can the community get reliable, credible assessments about perceived safety and health hazards? Even after the source of the immediate environmental concern has been addressed, what guarantees can be provided to the community to ensure that the plant's future operation will minimize the likelihood of a subsequent accident? What steps can the company and the community take jointly to increase the overall community safety and health? What guarantees can the company provide the community against declining property values for property adjacent to the plant?

If the community and the company can engage in the creative brainstorming process envisioned by principled negotiation, any number of compensation programs and packages may present themselves. For example, if the town has an unusually large number of elderly people at a higher health risk because of inadequate ambulance facilities, the company may propose to subsidize a mobile coronary-care unit so that emergency patients would not have to travel long distances to an adequate emergency care center.[26] Establishing such a unit may not address the immediate health concerns of contaminants in the groundwater beneath

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25. *See infra* part IV.

26. Howard Raiffa, *Creative Compensation: Maybe 'In My Backyard'*, 1 NEGOTIATION J. 197, 203 (1985).

the community; if, however, the bottom line issue under discussion concerns increasing the safety and health of the community as a whole, this kind of proposal may well be included in a package of benefits negotiated between the company and the community.

IV. Value Protection Program

In 1988, Kodak was confronted with environmental problems at its Rochester headquarters.[27] Kodak revealed that chemical releases at its facility had contaminated the groundwater in the bedrock under its property fence line. Immediately adjacent to the fence line was a densely populated suburban middle-class neighborhood typical of middle-class communities throughout the country—spacious yards, leafy trees, neat sidewalks, and streets where children rode bicycles. For the most part, the neighborhood homeowners' principal asset was their home. The community then discovered that their industrial neighbor, Kodak, may have contaminated the soil and the groundwater beneath their homes. Had the homeowners' fears not been promptly and effectively addressed, the residents would have quickly sued Kodak alleging, among other things, an increased risk of disease and a fear of disease.[28]

Accordingly, Kodak's first priority was to open and maintain channels of communication with the public. In the ensuing meetings with residents, community groups, health officers and local politicians, Kodak identified two primary issues that the community demanded to be addressed: their health and the value of their property. Environmental testing conducted by Kodak revealed that the contamination posed no health threat, although early media reports suggested the contrary. Until all health tests were completed, residents naturally remained apprehensive.

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27. For general information regarding the events that occurred in Rochester, see *Rochester Testing for Tainted Ground Water Near Tanks at Kodak*, N.Y. TIMES, Apr. 10, 1988, § 1, at pt. 1, 35, col. 1., and Robert Hanley, *Eastman Kodak Admits Violations of Anti-Pollution Laws*, N.Y. TIMES, Apr. 6, 1990, at D4, col. 1.

28. One of the most important things that a company can do in this situation is to educate the community. Community residents desperately seek reassurance concerning potential health and safety issues as well as property value issues. If the company can become the source for reliable, accurate information, the residents will be grateful for the information, and the company can enhance its own credibility and standing.

Ultimately, Kodak was able to allay the community's health concerns. Although anxiety over health issues seemed more a perception than a reality,[29] even the perception of a health problem can influence property sales.[30] Accordingly, Kodak realized that homeowner economic concerns would be primary and that they had to be addressed immediately. Kodak understood that by addressing these concerns and acting as a responsible corporate citizen, it could build a relationship of trust with the community.

Against this background Kodak developed its Value Protection Program. The Value Protection Program was a framework carefully designed to compensate homeowners affected by the contamination. Pursuant to Kodak's plan, approximately 750 homeowners became eligible for benefits; eligibility was determined by the location of their property. Properties closest to the plant were more affected than those further away, and therefore, those homeowners were placed in the first "tier" and received the most benefits.

This program alleviated community tensions and demonstrated Kodak's commitment to local homeowners. Kodak recognized that its neighbors' homes were their most significant investments and that their greatest fear was the loss of these investments. By creating and implementing the Value Protection Program, Kodak reduced fears, established a framework for compensating homeowners, and enhanced long-term neighborhood stability.

A. The Elements of Kodak's Value Protection Program

Kodak promised to compensate those homeowners who sold their homes by paying them the difference between the property's sale price and its fair market value prior to the discovery of possible contamination. The company then offered to reimburse the closing costs and the moving expenses of residents who left the community. Kodak also made money available to residents, either in the form of a low interest loan or an outright grant, to improve real estate values. To make purchasing a home in the affected community as attractive as possible, Kodak also

29. No potable drinking water wells were anywhere near the contaminated area.

30. These perceptions are often shaped by media attention.

agreed to discount the local mortgage rate for new buyers. And to encourage residents to remain in the community, the company offered to refinance their home mortgages with low interest mortgages.

Shortly after announcing the plan, Kodak established a Neighborhood Information Center, a centrally located facility which administered the Value Protection Program. The Center provided general real estate counseling and assistance and handled neighborhood concerns and complaints. The Value Protection Program was designed to maximize the involvement of the community and to provide the information necessary to make informed decisions about benefits.

Kodak's efforts toward resolving its dispute with Rochester homeowners provide a textbook example of principled negotiation. Even though Kodak had not yet decided upon a specific course of action, it understood the importance of articulating the principles that would guide it in its efforts to resolve its potential conflict with homeowners.

Kodak assured the people of Rochester in 1988 that the Company was committed to preserving the stability of the surrounding community. Without any committed course of action or a single financial expenditure, Kodak transmitted an important message to its neighbors. Equally important was Kodak's ability to develop the components of the Value Protection Program by adhering to its corporate principles—the preservation of a stable community and the protection of property values. As community residents also sought to preserve the stability of the community and protect property values, the use of principled negotiation encouraged both sides to focus on the problem, to avoid bargaining over positions, and to invent creative options that would provide for mutual gain.

The Value Protection Program that emerged from the negotiations between Kodak and the community addressed a broad range of Kodak corporate interests, including:

(1) the protection of property values in affected neighborhoods;
(2) the enhancement of long term neighborhood stability;
(3) the demonstration of corporate commitment to the community;
(4) the generation of favorable press and the improvement of public relations;
(5) the diffusion of community tensions;

(6) the allocation on benefits to homeowners without plaintiff-bar interference;
(7) the opportunity for homeowners to weigh alternatives calmly; and
(8) the reduction of the likelihood of litigation.

The Value Protection Program sought to accomplish these goals by establishing a program of creative compensation which would protect current and future residents from economic loss.

A successful Value Protection Program may include some or all of the elements in Kodak's program; the program, however, may also include other elements. In fact, depending upon the circumstances, the use of principled negotiation may result in an entirely different dispute resolution. What a creative compensation company offers should be based on face-to-face negotiations with affected community members.

Kodak's creative response to this challenge offers American business an innovative blueprint for using principled negotiation to forge community bonds and to address community concerns in an atmosphere of trust and common purpose. Since Kodak's successful implementation of the program, other major corporations have initiated similar programs.[31]

B. Du Pont's Value Protection Program

Under dramatically different circumstances, Du Pont implemented a Value Protection Program after engaging in principled negotiation with the community neighboring its Pompton Lakes Works Facility.[32] The Pompton Lakes Works Facility in Pompton Lakes, New Jersey had been a manufacturing site for over ninety years. The Acid Brook runs through the length of facility property, leaves the site property at its southern boundary, and winds its way through a lovely residential community[33] until it reaches Pompton Lake about a mile away. While

31. Reichhold Chemicals, Inc. and Du Pont initiated similar programs in Mississippi in 1989 and in New Jersey and North Carolina in 1991, respectively.

32. For general information regarding the events that occurred in Pompton Lakes, see Lyn Mautner, *Du Pont and Residents Try to Resolve Contamination Issue*, N.Y. TIMES, Jan. 13, 1991, 12NJ, at 2, col. 1.

33. The residential community to the south of the facility is situated on a flood plain.

in operation, facility maintenance activities resulted in the contamination of Acid Brook with high levels of lead and mercury. As a result of flooding over the years, runoff from Acid Brook carried contaminants to the yards of nearby homeowners.

In September 1988, Du Pont signed a voluntary Administrative Consent Order with the State of New Jersey to remediate the site and affected portions of the community within the flood plain. Du Pont conducted soil sampling in 1989 at three locations along the Acid Brook below the facility. As a result of that sampling program, Du Pont told both the DEP and area residents that soil in the flood plain was contaminated with excess levels of metals.

Over one hundred homes with market values between $125,000 and $180,000 were in the contaminated area. Pursuant to the Order, Du Pont was required to remove elevated levels of lead and mercury from homeowners' yards.[34] If Du Pont had not handled the situation promptly and correctly, the situation could have become a nightmare for both Du Pont and the community.

Early on, Du Pont made a commitment to the community to dedicate the company's resources to remedy the problem and to move quickly and openly in achieving that remedy. Like Kodak, Du Pont emphasized its concern for any potential health threat and gathered information as quickly as possible regarding any such threat. As part of this information gathering process, Du Pont tested fish in the Acid Brook and vegetables in neighborhood gardens. Du Pont did not, however, conduct this information gathering campaign in a vacuum, but enlisted the assistance of local health officers and environmental coordinators in Pompton Lakes and in adjoining towns.[35] The results of the tests enabled Du Pont to announce, in conjunction with local public health officials and retained outside experts, that garden vegetables and fish did not create a pathway of exposure that might cause a health problem.

Also effective was Du Pont's program of going door-to-door and dealing with community members individually. The results of soil and

34. In order to comply with the Order, Du Pont had to move heavy earth moving equipment and backhoes into the community.

35. The enlistment of health officers and experts added necessary credibility to the tests.

vegetable sampling, and an analysis explaining the significance of these results, were discussed with each affected family.

As a result of its discussions with community members, Du Pont developed a Value Protection Program. Du Pont offered what it termed "Level I" benefits to 135 homeowners. Level I beneficiaries were those homeowners whose property contamination necessitated removal and remediation activities. Du Pont estimated that the removal and remediation effort on any homeowner's property would take about six weeks to complete. Homeowners were given the opportunity to remain in their homes during the six-week period or to move into a fully furnished home provided by Du Pont. The steps in the remediation process included: building a fence around a block of six adjacent homes, bringing in heavy equipment to perform the soil removal, confirming that all contaminated soil had been removed, replacing the soil with clean fill, and bringing in a landscaper to put down sod and trees pursuant to a homeowner-approved landscape plan.

The landscaping program, in conjunction with the property restoration benefit offered in the Value Protection Program, upgraded the appearance of the neighborhood. Although remediation has not been completed in all of the affected property, new homeowners are buying homes within affected portions of the community. Recent purchases are evidence that the integrity of the community and property values have been maintained.

In conjunction with the remediation and restoration program, the Pompton Lakes Works Value Protection Program offers the following Level I benefits:

(1) Property value protection from April 30, 1990 through April 30, 1993
(2) Guaranty of the appreciation rate of property from April 30, 1990 through April 30, 1992
(3) Low interest mortgage financing on first or second mortgages, or refinancing of existing mortgages at rates approximately 3% below existing market rates
(4) A home improvement restoration benefit for each affected property until April 30, 1993 with Du Pont paying 75% of approved costs up to a $4500 benefit limit

In addition, Du Pont offered benefits to those homeowners who decided to leave the neighborhood, including:

(1) a guaranty of property value from April 30, 1990 through the closing date (at least through April 30, 1993);
(2) a guaranty of the appreciation rate of property from April 30, 1990 through April 30, 1993;
(3) payment of an additional incentive commission to the selling broker equal to 1.5% of the sale price at the time of closing;
(4) an interim interest-free bridge loan up to the value of the owner's equity in the affected neighborhood property to purchase new property so that the owner can avoid incurring expenses on two homes;
(5) duplication of the existing mortgage arrangement on the new property based upon the homeowner's old property mortgage arrangement as of April 30, 1990; and
(6) relocation expenses, including moving costs, closing costs on the new property (including three points or the cash equivalent), legal fees connected with obtaining the new property and a cash allowance of $1000 for miscellaneous expenses.

Level II benefits were offered to an additional forty-nine homeowners who lived adjacent to Level I beneficiaries. Level II benefits were offered to compensate for the noise of bulldozers starting at 7:00 a.m., the increase of traffic in the neighborhood, and the presence of strangers. Although Level II homeowners were not eligible for the property value guaranty, they were eligible for the home improvement grant.

Crucial elements to the development of Du Pont's Value Protection Program were the company's Community Outreach Program,[36] and the Citizens Advisory Committee through which Du Pont communicated with the community and monitored community concerns. After news of the soil contamination was made public, the Citizens Advisory Committee advised Du Pont of its concerns and of its needs. The Value Protection Program was not offered to the community as a prepackaged or "canned" solution. Rather, the Value Protection Program was integrated into other outreach programs, and into the overall program, to

36. The Community Outreach Program had been established several years previously.

remediate and to restore community property. The Program was a creative response to an ongoing dialogue between the company and the community. The interworkings of the Program demonstrated that a Value Protection Program cannot be introduced to a community in isolation. The Program can only be effective as one component of an overall corporate response to an environmental situation.[37]

Much like the corporate labor negotiator who only begins to pay attention to workers' concerns immediately before negotiation on a new collective bargaining agreement, companies that launch their public relations efforts only after a crisis will have a difficult time projecting corporate concern. One of the keys to ensuring open channels of communication and understanding in the mist of an environmental crisis is to have firmly established those channels of communication long before the problems arise. Du Pont's Community Outreach Program ensured lines of communication. A company that attempts to reach out to the community only after a crisis has occurred runs the risk of appearing insincere.

V. Avoiding Class Action Litigation

How can a Value Protection Program help a company to avoid a threatened class action suit? In establishing a Value Protection Program, the company essentially defines its own class. Even before a plaintiff's attorney can offer ideas on a proposed class, the company has established tiers or zones of affected homeowners. Once the company has engaged in principled negotiation with the community and has produced a realistic plan, an attorney will be hard pressed to subsequently establish new zones of homeowners for inclusion in a planned class action suit.

The requirements for class certification are set forth in Rule 23 of the Federal Rules of Civil Procedure.[38] Rule 23(a) requires "numero-

37. Shortly after the Pompton Lakes Works Value Protection Program was successfully introduced, Du Pont announced, in late 1991 a similar program for homeowners living near a Du Pont facility located in North Carolina. The adoption of these programs at two Du Pont facilities suggests a corporate commitment to the use of principled negotiation in addressing homeowner concerns. As a leading chemical manufacturer, Du Pont's commitment may establish trends ultimately followed by other companies.

38. *See* FED. R. CIV. P. 23(a). Rule 23(a) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that

sity"[39]—the class must be so numerous that joinder of all members is impracticable.[40] Assuming that a significant percentage of affected homeowners participate in the Value Protection Program, a company could argue that the number of potential class action members has been dramatically reduced, thus failing the numerosity requirement. In *Hunter v. Union Carbide Corp.*,[41] Union Carbide settled 9000 claims out of a potential class of 17,000 people who were evacuated following an explosion at a Union Carbide facility in Louisiana. In denying class certification, the court reasoned that the parties were not too numerous to make individual lawsuits impossible.[42] The court noted that 9000 individual claims had been settled within a year of the explosion.[43] The court, therefore, held that to assume that the remaining claims could similarly be settled without resort to a class action was not unreasonable.[44] In *General Telephone Co. v. Equal Employment Opportunity Commission*,[45] the United States Supreme Court held that "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations."[46]

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joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the Class.

FED. R. CIV. P. 23(a). *See generally* General Tel. Co. v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 162-63, 94 S. Ct. 2140, 2145, 40 L. Ed. 2d 732, 739-44 (1974); Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975); Cook County College Teachers Union, Local 1600 v. Byrd, 456 F.2d 882, 885 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972); Walters v. Thompson, 615 F. Supp. 330, 333 (N.D. Ill. 1985).

39. FED. R. CIV. P. 23(a)(1); *see also* Harris v. Palm Springs Alpine Estate, Inc., 329 F.2d 909 (9th Cir. 1964).

40. FED. R. CIV. P. 23(a); *see* Biechele v. Norfolk & W. Ry. Co., 309 F. Supp. 354 (N.D. Ohio 1969); CHARLES A. WRIGHT ET AL., 7A FEDERAL PRACTICE AND PROCEDURE § 1762 (2d ed. 1986).

41. 468 So. 2d 28 (La. Ct. App. 1985).

42. *Hunter*, 468 So. 2d at 30.

43. *Id.* at 29.

44. *Id.* at 29-30.

45. 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980).

46. *General Tel. Co.*, 446 U.S. at 330.

In addition to the requisites of Rule 23(a), Rule 23(b)(3) requires that the plaintiffs meet the "superiority" test before a class action may be certified.[47] A class action must be "superior to other available methods for fair and efficient adjudication of the controversy."[48]

Even if all the requirements for class action are met, the plaintiffs have the burden of demonstrating that a class action is the best and fairest method for resolving claims.[49] In determining whether it is best, the court will consider such factors as: (1) the difficulty of managing the case, (2) the amount of court time the class action will require, (3) the risk of jury prejudice and confusion, and (4) the prejudice to the possibility of pretrial settlement.[50]

Once a Value Protection Program has been implemented, a company can argue that a class action is no longer necessary because claims are being fairly and efficiently resolved without judicial intervention. The plan is a valuable and attractive alternative because it satisfied Rule 23's concerns of fairness and efficiency. In terms of efficiency, the implementation of the Value Protection Program conserves judicial time

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47. FED. R. CIV. P. 23(b)(3); *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974); Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); Wilcox v. Commerce Bank, 474 F.2d 336, 345 (10th Cir. 1973); Caruso v. Celsius Insulation Resources, Inc., 101 F.R.D. 530, 537 (M.D. Pa. 1984); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 83 (M.D. Pa.), *appeal dismissed*, 505 F.2d 729 (3d Cir. 1974); Yandle v. PPG Indus., 65 F.R.D. 566, 569 (E.D. Tex. 1974); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970).

48. *See* Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); Mertens v. Abbott Lab., 99 F.R.D. 38, 42 (D.N.H. 1983).

49. *In re* Diamond Shamrock Chem. Co., 725 F.2d 858, 861 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); Bogosian v. Gulf Oil Co., 561 F.2d 434, 448 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); Mertens v. Abbott Lab., 99 F.R.D. 38, 42 (D.N.H. 1983); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 83 (M.D. Pa.), *appeal dismissed*, 505 F.2d 729 (3d Cir. 1974); Yandle v. PPG Indus., 65 F.R.D. 566, 569 (E.D. Tex. 1974).

50. *See* Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986) (en banc); Abrams v. Interco, Inc., 719 F.2d 23 (2d Cir. 1983); *In re* Tetracycline Cases, 107 F.R.D. 719, 735 (W.D. Mo. 1988); *In re* Asbestos School Litig., 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part and rev'd in part*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986); Caruso v. Celcius Insulation Resources, Inc., 101 F.R.D. 530, 537 (M.D. Pa. 1984); Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 233 (D.S.C. 1979); Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974), *modified*, 523 F.2d 611 (3d Cir. 1975), *rev'd on other grounds sub nom.* Beal v. Doe, 432 U.S. 438 (1977).

and resources. The only class that would stand to gain by class certification would be the plaintiff bar.

VI. Conclusion

By implementing Value Protection Programs as a result of principled negotiation, Kodak and Du Pont were able to take constructive actions at a fraction of the potential cost arising from prolonged litigation, adverse regulatory action, business loss due to managerial distraction and a tarnished public image.

When seeking common ground in stressful times, corporations and private citizens should look to principled negotiation to reestablish their communities on principles of sound business, strong employment and secure property rights. Otherwise, the only redress for diminished property values will be legal action. The history of mass litigation sadly confirms that court action often does not properly compensate plaintiffs and may disproportionately punish corporate defendants. Principled negotiation offers an alternative to litigation and a fresh approach for resolving a growing problem.