THE WHAT AND WHY OF CLAIMS RESOLUTION FACILITIES

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INTRODUCTION

"Claims resolution facility" is a generic term used to describe a wide range of entities that process and resolve claims made against a potential funding source. In the context of a natural disaster, for example, there might be facilities to process claims based upon insurance policies, federal or state statutory or administrative rights, international relief efforts, contractual obligations, or any

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other basis for receiving economic or noneconomic benefits. These facilities are generally characterized by a large number of claims that are in need of rapid and efficient resolution. In certain instances, however, the positive connotations of the term have been expropriated to describe a facility that desires to appear quick and efficient while acting slowly and expensively. In the context of alternatives to the litigation system, claims resolution facilities function to enable the disaggregation of liability from damages in the determination of legal entitlements either individually or collectively, in settlement or as a precursor to litigation. The facilities operate under the assumption that there is at least some liability, and their role is to focus on any residual damage issues not resolved through litigation or settlement.

These facilities vary considerably in form, from “qualified settlement funds” recognized by the federal tax code to ad hoc efforts to resolve disputes prior to any invocation of the legal system. In the context of a man-made disaster, for example, there might be facilities either by defendants or their insurance carriers to settle claims prior to the intervention of attorneys, to evaluate and/or settle claims individually or in groups after the retention of counsel either before or after the initiation of litigation, to determine individual or collective damages, or to allocate damages among claimants.

Part I attempts to identify the critical variables that are integral to the claims resolution facilities that have become alternatives to traditional litigation. These variables include all the essential elements, with particular attention to the criteria and methodology used by claims resolution facilities to evaluate, process, and pay claims. In Part II, there is an analysis of the strategy for designing a claims resolution facility that takes advantage of the multiplicity of options in order to accommodate the particular needs associated with a given claims resolution facility. Parts III and IV consider the assets and defects of claims resolution facilities, including rationales for their recent popularity. Finally, Part V assesses the future by focusing on common failure modes for claims resolution facilities and then proposes possible substantive standards and procedural rules that may increase the legitimacy of claims resolution facilities.

I. CLAIMS RESOLUTION FACILITY VARIABLES

The variety of options available for creating a claims resolution facility are daunting. One of the theoretical assets of such a facility is the ability to tailor it to the unique needs of each case. The following discussion attempts to isolate nine different elements found in any claims resolution facility. The next Part attempts to describe how a designer of claims resolution facilities would approach such a polycentric problem to create the most appropriate facility.
A. Function

There are generally two potential roles played by claims resolution facilities: (1) determining both the total amount of damages and the allocation to each applicable individual,\(^1\) or (2) performing only the allocation function.\(^2\) The September 11th Victim Compensation Fund illustrates the first variety.\(^3\) It established a process for the payment of claims but did not specify either overall or individual amounts. Total damages were determined from the bottom up by aggregating all the individual damages. Likewise, the MDL-926 silicone

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1. See, e.g., September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 237, 237-41 (codified at 49 U.S.C. § 40101 (Supp. I 2001)). Claims resolution facilities generally are not associated with the initial determination of liability. The threshold determination of whether there should be payment at all is left to entities like legislatures, administrative agencies, courts, or one or more parties themselves. In certain instances, the liability decision is made in the abstract and the claims resolution facility has the task of determining which parties qualify for compensation, what the amount of each individual party’s compensation should be, and the total amount of compensation to be paid. The statute passed by the U.S. Congress on September 22, 2001 is an example of the legislature deciding that the U.S. Treasury would pay for certain damages to persons injured on September 11, 2001, and that those damages would be determined individually and in toto by a special master using the process contained in the statute. Id. § 404; see also September 11th Victim Compensation Fund of 2001, 28 C.F.R. §§ 104.1-6 (2003).

2. More frequently the threshold determination is made both on liability and the total amount of compensation to be paid. The role of the claims resolution facility is to allocate and distribute those monies in accordance with the provisions of that determination. Sometimes the threshold decisions include detailed provisions as to how the claims resolution facility is to operate, and in other instances great discretion is given to a third party. The A.H. Robins bankruptcy case is an apt example of the latter option. $2.3 billion was placed in a trust to be distributed by five trustees who were provided in the plan of reorganization with a series of general rules for the allocation and distribution of the funds and were empowered with wide discretion in the implementation of those rules. See Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, In re A.H. Robins Co., 88 B.R. 742 (Bankr. E.D. Va. Mar. 28, 1988) (No. 85-01307-R) [hereinafter A.H. Robins Disclosure Statement]; see also In re A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989); In re A.H. Robins Co., 788 F.2d 994 (4th Cir. 1986); Kenneth R. Feinberg, The Dalkon Shield Claimants Trust, LAW & CONTEMP. PROBS., Autumn 1990, at 79, 103-04; Georgene M. Vairo, The Dalkon Shield Claimants Trust and the Rhetoric of Mass Tort Claims Resolution, 31 Loy. L.A. L. Rev. 79, 129 (1997). See generally S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS AND BANKRUPTCY REORGANIZATIONS 187-238 (2000) [hereinafter GIBSON, CASE STUDIES] (summarizing the In re A.H. Robins Co. litigation); S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (forthcoming 2005) [hereinafter GIBSON, JUDICIAL MANAGEMENT] (establishing best judicial management practices); RICHARD B. SOBEL, BENDING THE LAWS (1991); Georgene M. Vairo, The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?, 61 FORDHAM L. REV. 617 (1992).

gel breast implant settlement\textsuperscript{4} and the United Nations Compensation Commission\textsuperscript{5} described a process for resolving claims and directed that the total amount of damages would be the sum of the subsequently determined individual amounts.

The second variety of claims resolution facility has, \textit{ab initio}, a defined fund and then allocates that fund to individual claimants. The stock analysts' cases,\textsuperscript{6} the Alabama DDT litigation,\textsuperscript{7} and the A.H. Robins bankruptcy\textsuperscript{8}

4. Under the MDL-926 silicone gel breast implant settlement, the three principal defendants made a unilateral offer to settle all cases that met certain criteria for predetermined amounts of money. The MDL-926 claims resolution facility had the task of determining which claimants qualified for compensation and the precise amount each claimant would receive. It would be only at the conclusion of the claims process that the total cost would be determined. \textit{See} Settlement Facility and Fund Distribution Agreement between Dow Corning Corporation and the Claimants' Advisory Committee at 2-3, In re Dow Corning Corp., 244 B.R. 705 (Bankr. E.D. Mich. Feb. 4, 1999) (No. 95-20512) [hereinafter Breast Implant Settlement Agreement], http://www.tortcomm.org/downloads/SETTLEMENT_FACILITY_AGMT.pdf (last visited Mar. 7, 2005); \textit{see also} In re Silicone Gel Breast Implant Prods. Liab. Litig., 174 F. Supp. 2d 1242 (N.D. Ala. 2001), aff'd in part and rev'd in part, United States v. Baxter Int'l, Inc., 345 F.3d 866 (11th Cir. 2004).


7. Approximately thirteen thousand individual plaintiffs entered into a class action settlement under Fed. R. Civ. P. 23(b)(3) with a single defendant to resolve litigation regarding exposure to DDT. The total settlement amount was $15 million, and the plan of distribution was designed by a special master; both were approved by a U.S. district court. \textit{See Report of Administrator at 1-2, In re Redstone Arsenal DDT Litig.,} No. CV-86-C-53313-NE, N.D. Ala. Nov. 17, 1986. The claims resolution facility was operated by an administrator under court supervision. \textit{See generally} Francis E. McGovern, \textit{The Alabama
illustrate this variety. Each of these claims resolution facilities had a predetermined amount of money to distribute, and the task was to allocate that money among the various claimants in accordance with the guidelines provided in the settlement that created the facility.

B. Metaphor

Because the term “claims resolution facility” contains such a variety of applications, one of the first issues in establishing legitimacy is to determine the metaphor or paradigm that best incorporates the characteristics of the facility. A disaster relief facility has a different narrative from a war reparations or tort facility.9 The applicable goals, standards, and yardsticks vary depending upon the role the facility plays in the context of the surrounding social and political fabric.

By definition, the claims resolution facility is an alternative to the standard litigation model. The standard model contemplates a judge or jury determination of liability and damages. The tort paradigm, for example, is of one or more defendants being held liable to an individual for the precise amount of damages they caused in order to create a perfect alignment of both deterrence and compensation policies.10 In tort cases involving large numbers of plaintiffs, this model is generally a fiction; those cases are typically settled in the form of individual damages, collective damages, or a collective process.11
The role of damage determination resides either with the negotiators or with a third-party processor, not with a judge or jury. Yet the metaphor remains the same—the party that caused the damage must internalize those costs by compensating the injured party for the precise amount of the damages sustained.

A contract metaphor is somewhat different. It contemplates that the parties determine and allocate damages in accordance with a predetermined formula that has been accepted by the parties through arms-length negotiation. If the damages are in dispute, a court is available to interpret the contract to decide the nature and amount of damages, if necessary.

The welfare paradigm is that of a social safety net to insure that no fundamental needs are unmet. There is no implication of wrongdoing or malfeasance. The war reparations metaphor has a host of connotations, including retribution and compensation.

The concept of a metaphor or paradigm becomes critical for the public perception of the claims resolution facility. The more accountable the party causing the harm, the more likely that the treatment of damages will be viewed as necessarily individual. The more fate is perceived to be the source of the damage, the more acceptable standardized or collective damages become.

C. Authority and Funding

Another set of variables incorporated in any claims resolution facility relates to the source of its authority and the source of its funding. Facilities can be the product of a statute, administrative regulation, international
mandate,\textsuperscript{15} class action,\textsuperscript{16} bankruptcy,\textsuperscript{17} group settlement,\textsuperscript{18} or unilateral offer.\textsuperscript{19} Funding can be from a government, multiple defendants, or a single defendant. Both the source of authority and the source of funding will affect the applicable paradigm as well as the choice of organization, methodology, and payment mechanisms.

Typically, the more governmental the authority, the more legitimate the facility. The more ad hoc the source, the more burden on the facility to legitimate itself by its own design. The more public the source, the greater the acceptance of limited funding. Conversely, the more private the source of funding, the less tolerance for financial shortfalls and the greater demand for "full" compensation. On another axis, the more governmental the decisionmaking process for allocating damages, the greater the acceptability of standardized payments. The more private the decisionmaking process, the more demand for a decentralized payment process.

D. Size and Similarity

The size and similarity of claims are critical variables in analyzing any claims resolution facility. The standard model of a one-on-one trial or


17. See, e.g., In re Nat'l Gypsum, 219 F.3d 478 (5th Cir. 2000); In re Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996); In re Johns-Manville Corp., Nos. 82-8-11656 to 82-B-11676, 2004 WL 1876046 (Bankr. S.D.N.Y. Aug. 17, 2004); In re Western Asbestos Co., 313 B.R. 456 (Bankr. N.D. Cal. 2004); In re Celotex Corp., 204 B.R. 586 (Bankr. M.D. Fla. 1996); In re UNR Indus., Inc., 72 B.R. 796 (Bankr. N.D. Ill. 1987); Breast Implant Settlement Agreement, supra note 4; In re A.H. Robins citations supra note 2; see also STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT (2002); GIBSON, CASE STUDIES, supra note 2.


settlement is the generally accepted mode of dispute resolution. The existence of large numbers of claims affects both the desire for a facility and its precise characteristics. If there are fewer than one hundred claims, the standard model works well. If there are over a thousand plaintiffs, the allure of aggregation and rough justice becomes compelling. This is particularly true when the individual claimants share similar characteristics. Thus, there will be much greater tolerance for fine-tuned inequities in damage determination if there is a corresponding efficiency in claims processing. The law of large numbers becomes particularly compelling.

E. Organization

The organization of claims resolution facilities is founded in an inquisitorial model of decisionmaking, not an adversarial one. The emphasis is on truth-seeking and participation rather than political restraint functions. Notice to claimants is typically guaranteed, low access costs are favored, and control of the process by the facility, rather than by counsel, predominates. The organization is more reminiscent of the inquisitorial model of the courts of equity rather than the adversarial mode of the common law courts. There is still a presentation of evidence, an opportunity to argue, and a reasoned decision constrained by law and fact. There may even be some of the privacy associated with equity courts, but the counsel-driven process of formal discovery and argumentation is lacking.

In its simplest form, counsel representing multiple claimants can serve as their own "facility" to allocate damages, either by negotiating for each client separately or by settling all the cases in a single amount and allocating those funds to each individual client. If any attorney feels that there might be a conflict of interest in determining damages among clients, there is the option of hiring a third party, either with or without court sanction, to perform the allocation. On the other side of the litigation coin, defendants or their insurance carriers can be a "facility." Claims adjusters have great expertise in processing and evaluating claims.

The type of claims resolution facility considered here contemplates a third party designated to determine damage amounts. This third party would typically be sanctioned by a court and be subject to judicial review. In its simplest form, there could be a single special master appointed to allocate damages or to design a process for allocating damages. Other potential


21. See Stringfellow Referee's Decision, supra note 18, at 6-14. The September 11th Victim Compensation Fund provided for a single special master to flesh out the intricacies of the statute, implement regulations, and then determine individual damages. See September
organizational approaches could include trustees, administrators, judges, commissioners, mediators, consultants, lawyers, and a variety of staff personnel. The typical large claims resolution facility would have a governing entity of trustee or trustee-like appointees, a claims administrator, a lawyer for the facility, financial and statistical consultants, and a staff of twenty-five to two hundred.\textsuperscript{22} Other potential parties could be independent judges, mediators, and, on occasion, attorneys to represent the facility in litigation before courts or juries.\textsuperscript{23}

Other models for a claims resolution facility include a single administrator responsible for all the facility’s activities, sometimes with ad hoc assistance from consultants or part-time employees.\textsuperscript{24} There may be teams of commissioners assigned to resolve certain numbers or types of cases.\textsuperscript{25} They may be supported by a staff of attorneys and experts to assist in their decisionmaking.

One of the most neglected aspects of choosing an organizational design is its longitudinal form. If the claims resolution facility is to allocate a certain sum to claimants over any extended period of time, there will be a disproportionate ratio of administrative cost to damage payments as the facility winds down.

\textsuperscript{22} Virtually all the asbestos claims resolution facilities have this format. In Celotex there were five trustees, a claims administrator, facility counsel, a statistical consultant, and several financial advisors or money managers. The total number of employees on the facility payroll was approximately ninety. See Annex B: Second Amended and Restated Asbestos Personal Injury Claims Resolution Procedures, In re Celotex Corp., Nos. 90-10016-8B1, 90-10017-8B1 (Bankr. M.D. Fla. June 15, 1999) [hereinafter Celotex Settlement Facility Annex B], available at http://www.celotextrust.com/files/Claims\%20Resolutions.pdf; Annual Report, Summary of Claims Disposed, Financial Statement, and Account of the Trustees of the Asbestos Settlement Trust for the Period January 1, 2001 to December 31, 2001 at 4-8, In re Celotex Corp., 204 B.R. 586 (Bankr. M.D. Fla. 1996) (Nos. 90-10016-8B1, 90-10017-8B1); see also In re A.H. Robins Co., 86 F.3d 364, 367-68 (4th Cir. 1996) (discussing the administration of the Dalkon Shield Claimants Trust).

\textsuperscript{23} See Breast Implant Settlement Agreement, supra note 4, at 10-11. The Dalkon Shield Claimants Trust utilized mediation, arbitration, and even jury trials to resolve cases that could not be negotiated. As a result, the facility had negotiators and lawyers who represented it in the various proceedings. See A.H. Robins Disclosure Statement, supra note 2, at 6; GIBSON, CASE STUDIES, supra note 2.

\textsuperscript{24} In MDL-926, a claims administrator was appointed contemporaneously with the settlement. See Breast Implant Settlement Agreement, supra note 4, at 1. In the Alabama DDT litigation, the administrator was appointed after the settlement. See Report of Administrator at 1-2, In re Redstone Arsenal DDT Litig., No. CV-86-C-53313-NE (N.D. Ala. Nov. 17, 1986).

\textsuperscript{25} See supra note 5.
Thus, what may be an efficient organization in the early stages of the life of a facility may not be economical as it ages.

F. Eligibility Criteria

The threshold issue for any claims resolution facility is to determine the universe of claims that are to be compensated. The mere existence of potential funding will generate applications that present a difficult trade-off between errors and transaction costs. It is not uncommon for the pool of claimants to exceed the true positives by several multiples.26 If the eligibility criteria are fuzzy or expensive to apply, there can be a seriously flawed outcome of either paying ineligible claimants and diluting a fixed pool of money or inflating an indeterminate amount of total damages. From another perspective, the trade-off is between expending disproportionate amounts on transaction costs or accepting high error rates.

The varieties of eligibility criteria demand tailored treatment. Eligibility for a case involving a medical device is far more defined than eligibility based upon inhalation of a toxic substance. Even with the medical device, there can be substantial identification problems.

There are, however, certain standard options available to establish eligibility. The first option includes a statement from the claimant, a third party, or an expert to verify eligibility.27 Additionally there may be a need for documentary evidence, often contemporaneous with the questioned events.28 If

26. In the A.H. Robins bankruptcy, it was anticipated that 40,000 to 60,000 claims would be made. The total number exceeded 300,000, but only approximately 100,000 received any payment. See Feinberg, supra note 2, at 106-11. In the original MDL-926 class action settlement, it was anticipated that the $4.3 billion fund would be sufficient to pay all the claims. When the individual payments were anticipated to be reduced by ninety-five percent to accommodate all the eligible claimants, the defendants decided not to settle in that manner. Gibson, Case Studies, supra note 2, at 218-20. The eventual number of successful claimants was a fraction of those who originally made claims. See Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659, 680-88 (1989); Christopher S. Burnside et al., Mold Spores: Bad Science or Bad Dream?, Nat’l J., Feb. 18, 2002, at B13 (discussing the first major success in breast implant litigation—Stern v. Dow Corning).

27. In the asbestos claims resolution facilities, there is often an “exposure” requirement that can be satisfied by a statement that the claimant was exposed to the asbestos product manufactured or sold by the debtor. See Breast Implant Settlement Agreement, supra note 4, at 19 (providing for an affidavit as proof of “exposure”).

eligibility criteria are difficult to meet, there may be surrogate criteria that are readily available and verifiable that would be a suitable substitute. Some facilities have the liberal use of presumptions in combination with surrogates to establish eligibility. Another technique is to provide a choice to the individual claimants to select a payment option that has more relaxed criteria with a correspondingly lower payment.

Information has value in the evaluation of claims. Some facilities require more proof for more money; the elimination of false positives becomes more important as the damage awards increase. Whatever the eligibility criteria, most claims resolution facilities will memorialize the procedure for evaluation in great detail and provide levels of quality control to ensure a consistent application of those criteria across all cases. The memorialization can be in the form of training sessions, manuals, retesting, reeducation, or any combination of all of these techniques.

29. For instance, the September 11th Victim Compensation Fund used standard tables for income and mortality. September 11th Victim Compensation Fund of 2001, 28 C.F.R. §§ 104.41-.47 (2004). Because there are independent records of the role of certain asbestos products for specific uses by specific purchasers, some of the asbestos claims resolution facilities require only that a claimant provide a Social Security printout that confirms employment in an occupation during a particular time frame.

30. The September 11th claims resolution facility used a number of standard indices regarding mortality and income. These standards created presumptions or eliminated the need for specific proof. See 28 C.F.R. §§ 104.41-.47; sources cited supra note 3.

31. One of the more innovative approaches to processing claims has been to provide claimants with process options. So, for example, claimants in the Dalkon Shield Claimants Trust could choose among the following:

- Option 1: A single flat payment that was lower in amount but required minimal evidence.
- Option 2: A workers’ compensation type approach that required more proof and the claimant would receive more money based upon a limited factor grid.
- Option 3: An individualized review that required tort-like evidence with payment based upon an algorithm that mimicked tort factors and tort settlement values.
- Option 4: A full-fledged resort to the tort system with negotiation, mediation, arbitration or trial as well as tort defenses and litigation methodology.

See A.H. Robins Disclosure Statement, supra note 2, at CRF-1 to CRF-4. Most of the asbestos claims resolution facilities have adopted a modified options approach. They generally provide for a discounted cash payment for lower amounts of proof and compensation; an individualized review process requiring more evidence for more money; and negotiation, mediation, arbitration, or trial for those unsatisfied with other options. See Marianna S. Smith, Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust, LAW & CONTEMP. PROBS., Autumn 1990, at 27, 32-33; supra note 26.

32. The Dow Corning claims resolution facility requirements mimic the MDL-926 procedures, down to the facility’s training methods, manuals, and quality control techniques. See Dow Corning Settlement Facility Annex A, supra note 28, at A-10; Breast Implant Settlement Agreement, supra note 4, at 9.
G. Damage Methodology

There are at least ten methods for accessing damages, varying from giving the same amount of payment to everyone to having a fully litigated trial before a jury of peers. As suggested above, the same facility may have several of these methodologies available depending upon the degree of certainty required before making a payment.

Identical flat awards are well known in war reparations, disaster relief, and payment options that require little proof.33 Once eligibility is established, the damages are identical. More popular in claims resolution facilities is a grid for payments composed of a small number of variables, usually three to five.34 Once eligible, a claimant is placed on a grid depending upon the evidence on the limited number of axes and awarded the designated amount.

In the event that payment is more fine-tuned, a larger number of variables—typically more than five but less than twenty—can be considered and applied by the use of an algorithm or formula.35 Sometimes data is collected from cases resolved in the litigation system and regression analysis reveals that the normal outcomes can be explained by the interaction of a small number of variables that can be weighted in an algorithm that then approximates the historic calculation of damages.36

As is the case with eligibility criteria, the damage-valuation methodology may also use surrogate variables to substitute for expensive or not readily obtainable factors.37 That is, standardized data that cuts across all claimants, rather than more individualized information, may be acceptable for damage calculation. If the numbers of cases are small, either because of a limited

36. Option 3 of the Dalkon Shield Claimants’ Trust utilized such an approach. See A.H. Robins Disclosure Statement, supra note 2, at CRF-2 to CRF-4; see also Western Asbestos Distribution Procedures, supra note 35, at 6-16 (using a similar approach).
universe or because of self-limitation, the claims facility might look at all conceivable variables to make a damages determination.

Often there is a combination of methodologies, with certain variables subject to much greater scrutiny than other variables.\textsuperscript{38} Like the eligibility criteria, the nature and level of proof required may vary, but the standards for application are usually quite rigid. There are great efforts to insure consistency within the accepted guidelines.

Outside of the facility itself, there is the potential for additional input in assessing damages.\textsuperscript{39} It is not uncommon for the facility to evaluate a claim and, if the value is not accepted, to engage in a negotiation with the claimant. Other external interventions include mediation, arbitration, or even litigation. There are generally, however, serious disincentives to the use of such expensive and individualized claims evaluation processes.

H. Compensation

The form of compensation provided by claims resolution facilities is limited only by the imagination of its creators. The norm is money: cash, note, stock, or other financial instrument. There are instances, however, where the payment has been in-kind: medical operations, health care facilities, property repair, or other services.\textsuperscript{40} There are instances where compensation has been deferred, as in an insurance policy or fund available for future harms.\textsuperscript{41} Remedial compensation of removing a hazard or a defect in a product is

\textsuperscript{38} Oftentimes, the damages algorithm will include weighting for the quality of the evidence or for certain factors over other factors. See Feinberg, supra note 2, at 94-97.


\textsuperscript{40} See In re Redstone Arsenal DDT Litig., No. CV-86-C-5313-NE, slip op. at 3-7 (N.D. Ala. Nov. 21, 1988). The medical surveillance aspect of the fen-phen settlement is another good example. See In re Diet Drugs Prods. Liab. Litig., Nos. 1203, 99-20953, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (order approving class action settlement). Many defendants would prefer to have more control over services provided to claimants because they believe they would then have better opportunities for controlling costs and obtaining volume discounts. Most plaintiffs are skeptical that they will receive full value if the defendant has any control over the facility process.

\textsuperscript{41} Both the MDL-926 and Dow Corning facilities have provisions that claimants who suffer certain future harms can return to the facility for additional compensation. See Dow Corning Settlement Facility Annex A, supra note 28, at A-13; Breast Implant Litigation Notice, supra note 28, at 5. Virtually all of the asbestos claims resolution facilities have provisions under which future malignancies are to be compensated for when they occur. See, e.g., Celotex Settlement Facility Annex B, supra note 22, at 7.
common.\textsuperscript{42} Less usual is the provision of counseling or psychological assistance.\textsuperscript{43} Sometimes this occurs with an outreach, legal assistance, or informational program to explain the procedures for making claims to a facility and to assist in helping claimants in deciding how to proceed. One by-product of this type of outreach is to provide psychic compensation for claimants. A related benefit may consist of ideological compensation for those who have achieved results that are nonmonetary in nature.\textsuperscript{44} An example of this type of compensation would be the reformation of a mode of conduct that was deemed ideologically incorrect.

I. Implementation

One of the least discussed but most important variables in claims resolution facilities relates to the method of implementation and operation. Some facilities begin in smoke-filled rooms in the dark of night, and others are the product of consensus-building by all constituents.\textsuperscript{45} Some facilities are subject to judicial hearings before, during, and after operations.\textsuperscript{46} Other facilities are subject to court approval of their processes, but not their application.\textsuperscript{47} When the facility

\begin{itemize}
  \item The Dalkon Shield, silicone gel breast implants, and fen-phen were all removed from the marketplace. The polyethylene pipe that was defective was replaced. See \textit{In re Diet Drugs Prods. Liab. Litig.}, 2000 WL 1222042, at *2; \textit{In re A.H. Robins Co.}, 88 B.R. 742, 743 (Bankr. E.D. Va. 1988).
  \item The Holocaust funds probably illustrate this point most directly. See \textit{In re Holocaust Victim Assets Litig.}, 105 F. Supp. 2d 139 (E.D.N.Y. 2000). The monetary compensation would generally be viewed as inadequate, but the recognition of responsibility was deemed to be even more important. MICHAEL J. BAZYLER, \textit{HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS} 307-34 (2003).
  \item For examples of consensus-building facilities, see Ortiz v. Fiberboard Corp., 527 U.S. 815, 824-25 (1999); \textit{Amchem Products, Inc. v. Windsor}, 521 U.S. 591, 599-601 (1997); and \textit{Stringfellow Referee's Decision, supra} note 18, at 6-14. Most class action settlements are negotiated by class counsel, not class members. The U.S. Supreme Court's opinions in \textit{Ortiz} and \textit{Amchem} illustrate this point. The bankruptcy courts never initiate a majority, two-thirds, or three-quarters positive vote. Some counsel actively involve their clients in the discussions concerning the claims process. In \textit{Stringfellow}, there were independent special masters who dealt directly with the plaintiffs and developed consensus approaches that were adopted by the courts. See \textit{id}.
  \item See, e.g., \textit{In re Redstone Arsenal DDT Litig.}, No. CV-86-C-5313-NE, slip op. at 3-7 (N.D. Ala. Nov. 21, 1988). All the bankruptcy claims resolution facilities fall into this category. See, e.g., Breast Implant Litigation Notice, \textit{supra} note 28, at 13. See \textit{generally} GIBSON, \textit{JUDICIAL MANAGEMENT, supra} note 2.
  \item The \textit{Stringfellow} claims resolution facilities are an example.
\end{itemize}
is part of a larger agreement, it may be a quite small aspect of a much larger review.

Once operational, some facilities are completely transparent, others are transparent only to each individual beneficiary, and still others are inscrutable to the lay observer. Many of the bankruptcy trusts have built-in advisory bodies composed of claimants or their counsel, usually paid out of the fund.48 After claims are decided, some of the facilities have an internal or external review process or even a full-fledged right of appeal to a specially appointed third party or judge.49 A few facilities have built-in economic incentives to deter claim filing, the pursuit of appeals, or the use of additional alternatives to facility valuation.

Then there are the personalities. Some of the facilities have been blessed with individuals who have assured their facilities’ success almost in spite of the way these variables have been assembled. In other instances, the personalities have been counterproductive, particularly if there are tensions in the respective sources of authority or lines of responsibility.

II. A STRATEGY FOR DESIGNING CLAIMS RESOLUTION FACILITIES

One of the major assets of claims resolution facilities is the flexibility in design: the ability to tailor the key variables to the particular needs of a given case. In developing a design strategy, there is a series of steps that are usually taken: (1) understanding all the relevant factors that drive the success of the accepted norm that is to be changed in the new design; (2) making assumptions about uncertainties that emanate from the accepted norm; (3) identifying and disaggregating the variables that will be the focus of the new design; (4) identifying the actors and their preferences in reacting to the design; (5) selecting short- and long-term goals to be achieved; (6) devising a plan and an endgame; (7) anticipating resistance; and (8) revising the plan and adding continuous feedback loops.

As indicated above, there are generally certain accepted norms that exist for any compensation process. By definition, a claims resolution facility will be altering that norm. It is particularly important for a strategic designer to recognize the critical elements that drive the acceptability of the normal base case so that inadvertent changes will not create problems. Why is the base case accepted? Are there myths or fictions that need to be sustained or replaced? Should the changes be maximalist or minimalist?

In essence, the strategy is a search for legitimacy. How can the new model receive sufficient support so that its form does not undermine its function?

48. These committees are known as "claimants' advisory committees" or "technical advisory committees." See Breast Implant Settlement Agreement, supra note 4, at 14.
49. Both the MDL-926 and Dow Corning claims resolution facilities have an appeals judge. See id. at 11.
Typically, there are a number of external and internal sources of legitimacy that can be used: legislative, administrative, or other governmental authority; judicial approval; consent by those affected; consensus acceptance; and even myth. If an already legitimate governmental entity creates a claims resolution facility pursuant to its normal processes, it is likely that the entity will be viewed as legitimate. There are instances, however, where the governmental entity may be viewed as overstepping its jurisdiction, and its role can become quite counterproductive.

As suggested earlier, judicial approval is the most common type of legitimacy utilized in the design of claims resolution facilities. There is a threshold dilemma, however. Generally, the design and implementation processes are severed; that is, the design of a claims resolution facility and its processes for evaluation and payment of claims are subject to court review before the claims are actually processed. Once the court approves the design, the facility examines the individual claims and makes awards. Beneficiaries, therefore, are put in the position of judging the design of a proposed facility in the abstract before they know the actual application of that design to their individual claims. The court review is ex ante; the award is ex post.\(^{50}\)

How can a beneficiary evaluate the design before knowing its effects? There are several approaches to this problem. The most common is to force parties to make a judgment in the abstract and then bind them to the ensuing outcomes.\(^{51}\) A second method involves presenting sample outcomes at the time of the generic review process so that beneficiaries can compare their circumstances to the samples and approximate what results there might be for

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\(^{50}\) The DDT claims resolution facility is an example. See supra note 7; see also Gibson, Judicial Management, supra note 2, at 187-215.

\(^{51}\) In Stringfellow, the court approved the plan of distribution before its application, and plaintiffs were bound by the plan once it was approved. The plan contemplated a "points" system where each plaintiff was assigned points for how long they had lived in the areas, how close they lived to the site, what their mode of exposure was, their age, their diseases, if any, and whether they had been a representative plaintiff. Once all the plaintiffs had completed and verified claim forms that provided the answers to these questions, points were assigned to each plaintiff. The total number of points for all plaintiffs was then divided into the amount of the settlement. Once the value of each point was mathematically determined, each plaintiff's total points were multiplied by the value of a point, and the result was the amount of compensation to be received. No plaintiff could know the value of his or her award until all claims were processed. See Plaintiff's Motion to Approve the Plan of Distribution of Settlement Funds as Fair and Reasonable to the Adult and Minor Plaintiffs, Including Findings of Fact and Conclusions of Law at 5-6, Newman v. Stringfellow, Nos. 165994MF and 167122, 167173, 167291, 167327, 167467, 167691, 168088, 168349, 168591, 168939, 169223, 169610, 169999 (Cal. Super. Ct. May 9, 1995); see also Gibson, Judicial Management, supra note 2, at 188-94; Francis E. McGovern, Foreword, Law & Contemp. Probs., Autumn 1990, at 1, 2; McGovern, supra note 7, at 75-76. See generally John Rawls, A Theory of Justice 136-42 (1971) (providing the theoretical underpinning for this idea with its Rawlsian "veil of ignorance").
them. A third solution is to hold the approval process in abeyance until all the awards have been completed and beneficiaries are notified. Finally, there has been ex ante judicial approval of the design with an ex post right to opt out of the claims resolution facility and seek redress using other dispute resolution mechanisms. Sometimes that opt-out right is without restrictions, while at other times there are limitations in evidence, damages, or payment.

Another vehicle for achieving legitimacy is the consent of the beneficiaries or their representatives. At one extreme there is the problem-solving dispute resolution approach wherein the critical decisionmakers are engaged to approve a design by a majority vote. At the other extreme is the consensus-building mode with all the beneficiaries engaged in the design process in an attempt to achieve true consent. Even though there may be a few outliers who oppose a design unless it meets their specific needs, this type of search for legitimacy tends to isolate objectors from the mainstream.

A fourth technique to achieve legitimacy is to seek a consensus for general approval. This consensus can derive from a generally accepted yardstick to define the award of damages, from standards of substantive due process, or from rules of procedural due process. Existing payment approaches such as successful previous settlements, governmental programs, programs anointed by respected experts, and programs that carry the authority of respected “gray hairs” have all been utilized. If there is public acceptance of the source of the

52. The September 11th Victims Compensation Fund’s claims process used this approach. It took hypothetical examples and gave advance guidance before the claims were processed. See 28 C.F.R. § 104.34 (2004).

53. The MDL-926 settlement provided for a letter to each plaintiff who had filed a qualifying claim form letting them know how much money they would receive if they decided to participate. See Dow Corning Settlement Facility Annex A, supra note 28, at A-2 to A-3.


56. See, e.g., Stringfellow Referee’s Decision, supra note 18, at 1-2.

57. The Dow Corning settlement facility was based upon the MDL-926 facility. All the asbestos bankruptcy claims resolution facilities have followed their predecessors. The September 11th Victim Compensation Fund used a number of governmental programs as guidelines.


yardstick or the yardstick has achieved its own legitimacy, it can be incorporated to enhance the stature of the new design.

There can be a consensus approval based upon outcomes where there is general acceptance of the fairness of damage awards, acceptance based upon notions of corrective, distributional, or other similar norms. More likely, however, is acceptance based upon the process, based on values such as participation, dignity, equality, autonomy, accuracy, efficiency, and satisfaction. The argument is that if the process is fair, then the outcomes must be just.

Another critical aspect for achieving legitimacy is defining the problem or audience that will make the dispositive determination of success or failure. Is the goal to please the world or a single country? Political leaders or the entire populace? Opinion leaders or the affected beneficiaries? Objectors or acceptors? Who, indeed, are the players in the “legitimacy game,” and what type of resistance will be created? It is not uncommon to focus on the approval of a larger group in order to isolate and demonize opponents. Sometimes there are overt efforts to sway public opinion, and in other instances there is a desire to maintain a low profile. The critical issue is to identify the relevant public and to establish short- and long-term goals for achieving acceptance.

The legitimization process is intimately connected with the terminology used in the design and in the framing of the issues to be posed. If the goal is “full” compensation for every claimant, there is still the issue of what “full” means. If there are insufficient funds for full compensation, the issue can be changed from “full” compensation to “equitable” compensation, a more achievable standard; “safety net” terminology might be more acceptable than “compensation” frames of reference. The concept here is the psychological one of a “reference point.” If it is possible in the design of a claims resolution facility to establish an achievable reference point, then there are increased chances that the facility will be deemed successful.

Finally, there is the implementation phase, with the attendant conflict between predictability and flexibility and between transparency and confidentiality. It is critical that there be horizontal equity in the determination and distribution of damages. Similarly situated claimants must be treated alike or the facility will lose credibility. On the other hand, there must be sufficient flexibility to adapt to changed circumstances. Generally this tension is released by having extreme flexibility before the facility design is approved and rigidity afterwards. Sometimes the facility will use transparency to ensure that the equivalency requirement is met; at other times the claims processing is a giant black box. This variation reflects the reality that transparency and a full sharing of claims information, while tending to increase legitimacy, also increases the

THE UNITED NATIONS COMPENSATION COMMISSION, supra note 5, at 119, 135-44. To legitimate the decisions, the commissioners in the UNCC were all highly respected jurists, arbitrators, or governmental officials. Id.
chances of strategic machinations by the parties, leading to less horizontal equity, and defeats confidentiality and privacy concerns of the beneficiaries. Often a middle ground can be achieved with the use of internal quality control and external quality control audits.

III. ASSETS

The traditional strengths of claims resolution facilities relate to their ability to adapt to meet the particular needs of virtually any situation, their efficiency in time and transaction costs, and their ability to ensure horizontal equity. There is flexibility in designing a facility—each of the variables previously considered can be dealt with so as to accommodate desired goals. In contrast, the traditional litigation system has one set of rules to fit all circumstances. Even though the Manual for Complex Litigation (Fourth) (MCL) suggests tailoring different procedures to different cases, the range of tailoring is limited. Notwithstanding the exhortation for judicial management, the interjection of flexibility into the legal process has not always been a happy experience; it creates its own instability and delay. Lawyers will take advantage of every opportunity to seek a tactical or strategic edge; the more independent decisions a judge must make regarding case management, the more opportunity for adversarial wrangling. One of the critical mantras of the judicial management credo exacerbates this situation: judges express strong preference for attorney, rather than judicial, resolution of issues. As a result, the desire for flexibility in procedural devices oftentimes leads to stalemate, delay, and expense. One can make a strong argument that the original MCL’s focus on predictability could generate better outcomes than the current regime’s experiment with flexibility.

The speed and expense figures for claims resolution facilities are quite impressive, particularly in comparison to the standard litigation model. The more the claims resolution facility paradigm looks like a substitute for welfare compensation, the more likely that it will operate quickly at lower cost using simple criteria that are readily provable and reviewable (given a typical tolerance of false positives). The more the facility operates under the tort paradigm, the more complex and individualized its eligibility criteria and evaluation methodology will be, and the less tolerance it will have for errors. Notwithstanding the additional time and expense inherent in such a model, it still will be significantly quicker and less costly than the litigation approach.

61. Peterson, supra note 20, at 127-31; McGovern, supra note 60, at chart 24.
62. McGovern, supra note 60, at 1-3.
The aggregation of cases brings the need for horizontal equity that is readily attainable through the facility's standardized claims evaluation process. This is a particular asset when claims are mature and visible. In contrast, the litigation system produces erratic damage outcomes for similarly situated cases that receive rather critical review even when various comparisons are obvious.

Less obvious assets include the velocity of resolutions, varieties of behavioral and noneconomic compensation, and the offer of finality and closure. The endless queue of plaintiffs awaiting resolution of their cases presents a compelling case for an alternative process. Defendants can arguably pay net present value prices for nominal dollar damages—even sometimes with a bulk transaction and risk discount. Claimants receive a lower amount than optimal litigation values but without the attendant risk and transaction costs. Most importantly, they typically receive a much higher marginal value by getting their payments now.

The ability of claims resolution facilities to operate in a more claimant-friendly environment and to provide a wider range of compensation constitute additional advantages over litigation. Research on litigant satisfaction suggests that there is a major behavioral component that is often ignored in the litigation context.63 If the designer of the claims resolution facility deems it appropriate, it is possible to include a variety of substitutes for cash that might have a greater value at the same cost, if the beneficiaries have strong preferences in that regard.

The allure of finality is probably the greatest attraction found today for claims resolution facilities. If a dispute or litigation endures for a long period of time, there can be substantial cost imposed on claimants, defendants, and even an entire nation. The psychic damage of uncertainty is well known. The shadow effect of uncertain liability on stock prices has been well documented. Adverse impacts and even paralysis on political will and well-being can likewise result from a festering dispute that generates controversy. One of the major strengths of a claims resolution facility is to allow for the bifurcation of liability from damages in order to eliminate the source of these types of dislocations. A claims resolution facility enables the parties to resolve liability, and even the total amount of damages, without waiting for the time-consuming, individualized damage-evaluation process. Once people know they will be receiving money, and the marketplace knows the amount of the damages, or at least the nature of the process to assess damages, society no longer needs to focus on a festering dispute, and the ancillary harm generated by the controversy can be eliminated.

Except for the option of individual trials, all of the currently available litigation procedures for an endgame in disputes involving large numbers of claims contemplate a claims resolution facility. Rule 23(b)(1)(B), Rule

63. See McGovern, supra note 7, at 76-77.
23(b)(3), state class actions, bankruptcy, multidistrict litigation, and mass settlements all reach closure with a claims resolution facility.

IV. DEFECTS

As is often the case, the good news is also the bad news. Velocity, finality, and efficiency are illuminating examples. Many defendants and their insurance carriers price their products based upon certain assumptions about the incidence of claims and the velocity at which they will be processed and paid. These assumptions envision that future income from sales or investments will be available on a timely basis to pay legitimate claims. When the payment schedule is accelerated, there can be severe cash-flow problems. Thus, the presence of a vehicle that increases velocity can be a major problem unless there is a sufficient discount provided for the time value of money, risk of litigation, and bulk settlement. There may not be sufficient funding even if payment is stretched over a significant period of time, thereby defeating one of the fundamental rationales for a claims resolution facility in the first place.

A more important problem is the finality dynamic. There is a serious time-consistency problem created by claims resolution facilities; in certain circumstances their mere existence may mandate their use. The issue is not dissimilar to the typical defendant’s aversion toward any aggregation technique, particularly class actions. On the one hand, a class action for trial is bad because it can intensify the risk of substantial indemnity losses. On the other hand, a class action for settlement may be positive if a defendant desires to resolve all the affected cases at once.

In the context of claims resolution facilities, the ability to sever liability from damages creates a distinct incentive for judicial managers. If their goal is to resolve large numbers of cases quickly, liability may constitute a common issue that can relatively readily be adjudicated at one time for all potential plaintiffs. If liability is resolved in favor of a defendant, the case is over. If liability is resolved in favor of the plaintiffs, there will be enormous pressure from the court for the defendant to settle. No court would relish trying similar cases over and over simply to determine damages. If a court decides to use bellwether cases rather than a severed-issue trial, the outcome would be quite similar.

Plaintiffs’ lawyers, recognizing the desire of courts to resolve all cases at once, relish the opportunity to increase the risk and size of any potential loss for a defendant or defendants. Their strategy is to push as many chips into the pot as possible so that a defendant is faced with a “bet your company” scenario. At the same time, they have become quite adept at manipulating the media to increase external pressures on defendants to settle.
The management of a company facing this type of scenario will confront almost overwhelming pressures. The capital markets typically react unfavorably, thereby reducing the stock price and making the cost of money more expensive. The company may become vulnerable to a takeover, management may face a rebellious board of directors, and stock-based compensation will be eroded. Depending upon the insurance situation, litigation costs may become oppressive and insurance indemnity dollars halted pending years of litigation. The economic opportunity costs for a prosperous company may become higher as business options diminish along with cash flow. What to do? Resolve liability and damages and defer the allocation of damages to individual plaintiffs through a claims resolution facility. Or settle liability with a claims resolution facility, processing all claims that meet the eligibility and valuation criteria. Even the tax code helps, allowing the defendant company to deduct the amount of any funds contributed to a qualified settlement fund.

Thus, the dynamic of the mass processing of claims can become inevitable. This is when the time-consistency problem enters. A defendant who desires to fight each claim or even groups of claims has the difficulty of convincing judges and plaintiffs’ lawyers that they will, in fact, not settle. The existence of a claims resolution facility as a single-shot solution encourages closure and finality. As long as there is the option of the claims resolution facility endgame, plaintiffs’ lawyers and sometimes judges will continue to increase the pressure

64. Probably the most extreme examples are American Home Products and the fen-phen litigation. Most of the bankruptcy cases would have had the same pressures. See Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1369-80 (2003); see also Big Trouble for Merck, ECONOMIST, Nov. 6, 2004, at 61; Roger Parllof, How Bad Will the Lawsuits Get?, FORTUNE, Nov. 1, 2004, at 96; John Simons & David Stipp, Will Merck Survive Vioxx?, FORTUNE, Nov. 1, 2004, at 90; David Whitford, AHP’s Awful Losing Streak, FORTUNE, Nov. 22, 1999, at 52.

65. The concept of the time-consistency problem is that governments may make suboptimal decisions because their decisions cannot be enforced over time. For example, a government decision not to subsidize a flood plain area may change once the area has become populated due to the corresponding political pressure. This phenomenon in the context of litigation suggests that a defendant’s decision to litigate rather than settle with a claims resolution facility can be undermined by the economic pressure that other actors can bring to bear. Plaintiffs’ counsel may recognize this tendency and the inevitable “safe haven” of a claims resolution facility and attempt to raise the economic ante of litigation beyond the point of tolerance. Although a long-term “stay the litigation course” strategy would be preferable, the short-term pressure can lead to a suboptimal result. See generally ALLAN DRAZEN, POLITICAL ECONOMY IN MACROECONOMICS 99-216 (2000); Finn E. Kydland & Edward C. Prescott, Rules Rather than Discretion: The Inconsistency of Optimal Plans, 85 J. POL. ECON. 473, 473-92 (1977); Royal Swedish Acad. of Sci., Finn Kydland & Edward Prescott’s Contribution to Dynamic Macroeconomics: The Time Consistency of Economic Policy and the Driving Forces Behind Business Cycles, in ADVANCED INFORMATION ON THE BANK OF SWEDEN PRIZE IN ECONOMIC SCIENCES IN MEMORY OF ALFRED NOBEL 4-10 (2004), available at http://nobelprize.org/economics/laureates/2004/ecoadv.pdf.
to settle. Fighting becomes extremely costly, oftentimes far more costly than settling. The claims resolution facility provides certain closure immediately.

The efficiency rationale for claims resolution facilities presumably extols a much quicker and less expensive dispute resolution process than the public courts could provide, while doing so with private resources rather than public funding. To the extent, however, that private facilities expropriate public functions, there may be a corresponding erosion of the role of public courts in our civic enterprise. The values associated with state enforcement of conduct via transparent decisionmaking constitute the flip side of the legitimacy argument.

There are three additional defects worthy of consideration: elasticity, error rates, and cognitive dissonance. The concept of demand elasticity has

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66. The concept of elasticity in mass torts is closely akin to the economic concept of demand elasticity. If supply is high and cost is low, an increase in demand means it is elastic. In litigation terms, if the supply is the number of cases processed by the system and cost is the transaction cost of that processing, then an elastic mass tort would have an increase in filings, whereas an inelastic mass tort would not. Aircraft crash cases are, for example, inelastic; asbestos cases are highly elastic. Since only 10-20% of all actionable torts result in litigation, there is a universe that remains unfiled. If there is a claims resolution facility that processes claims quickly and at low costs, one can anticipate a much higher filing rate than one would otherwise expect in the tort system. These larger numbers of claims can create a major dilution of benefits, particularly if they are accompanied by large numbers of false positives that cannot be eliminated. See McGovern, supra note 11, at 1827-34.

67. See Florence & Gurney, supra note 33, at 189-96. Time, quality, and cost are three main possible priorities for claims resolution facilities; emphasis on any two will make it hard to truly emphasize the third. If the speed and expense of processing claims are the priorities, as is the case almost by definition for claims resolution facilities, then quality will suffer. Error rates will be higher. The concept of rough justice contemplates larger numbers of false positives, thereby exacerbating the dilution-of-damages effect promoted by claims resolution facilities.

One interesting approach to this problem occurred in the Global Research Analyst Settlement. See supra note 6. That settlement allowed for plaintiffs to bring arbitrations or other legal actions to enforce their claims. The distribution plan recognized this phenomenon and focused on ensuring that only true positives were paid, because false negatives could pursue other remedies. Recognizing that there will be higher error rates than with a more deliberate and expensive process, most claims resolution facilities err on the side of paying the highest possible number of positives, thereby increasing the number of positives that are false. The distribution of the Global Research Analyst Settlement focused on not paying false positives, even at the risk of not paying true positives.

One of the most prominent examples of the use of error rates in legal decisionmaking is in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), where the “known or potential error rate” is one of the four factors considered in deciding on the admissibility of scientific evidence. Id. at 594; see also Ayres, supra note 10; Florence & Gurney, supra note 33.

68. The fundamental problem here is the well-known psychological phenomenon of reference points. If the reference point is 100, there will be disappointment if one gets 10. If the reference point is 1, 10 will look terrific. The same applies to claims resolution facilities. If the reference point for liability is based upon tort and its concept of full individual compensation, the specter of a welfare-like low and uniform payment will not be attractive. Since there is usually discontinuity between the liability and damages determination and the
raction in any mass claims scenario. If there is a large universe of potential claimants, the existence of a fast and inexpensive process for obtaining money will, in and of itself, create greater numbers of claimants than would otherwise occur when the transaction costs are high and the trial process slow. With the larger number of claimants and the expedited processing, the number of errors will increase. More false positives will be paid than would receive compensation in the litigation process. Even the use of surrogates or limited numbers of variables will alter the base-case compensation of litigation. Certain claimants will be advantaged or disadvantaged by the altered evidence and standards of proof.

A more subtle, but arguably equally important, problem with claims resolution facilities can arise out of bifurcation of liability and damages. If the rationale for liability is severed from the rationale of the allocation of the damages generated by the liability rationale, there can be serious cognitive dissonance not present when liability and damages are united in the litigation system. The use of one metric to define total damages and a different metric to define individual damages runs the risk of creating a conflict in the perception of legitimacy. A decoupling approach is similar to the separation of “general” causation from “individual” or “specific” causation in a mass tort. The decoupling changes the overall decisionmaking dynamic by distinguishing between risk and damage, ex ante and ex post, and the group and the individual. “No harm, no foul” no longer applies. If severe, this cognitive dissonance can undermine the public acceptance and legitimacy of the claims resolution facility. There are instances where the dispute over how the money is allocated creates more havoc than the initial liability dispute.

From a more basic perspective, the comparison of claims resolution facilities and litigation is in many senses unfair. Litigation starts with no agreement; the claims resolution facility is created when there is at least partial agreement. The level of controversy should be lower; the goals should be more definable and achievable.

allocation and distribution determination, there is substantial opportunity for cognitive mischief. What, for example, was the September 11th Victim Compensation Fund? A welfare safety-net program? A tort replacement? An airline bailout? For the claimants, it seemed to substitute for tort compensation—and anything less than that was unsatisfactory. For the American public, it often seemed like a hybrid insurance/welfare-safety-net/war-reparations model. Depending upon the frame of reference, the viewers’ attitudes could be radically different. Prospect theory contemplates that “individuals evaluate outcomes as changes from a reference point.” JONATHAN BARON, THINKING AND DECIDING 255 (3d ed. 2000); see also LAWRENCE W. BARSALOU, COGNITIVE PSYCHOLOGY 209-12 (1992) (describing referent models); DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES AND FRAMES (2000) (providing a more complete discussion of the concept of reference in a variety of contexts).
V. THE FUTURE

Claims resolution facilities have evolved from bottom-up reform in the litigation system to meet demands for more efficient payment of damages. Their foundation is in an inquisitorial model of dispute resolution rather than our more adversarial approach. Over the last twenty years, their path of development has been along the tradition of charisma to routine. As they have become more routinized and mature, it has become increasingly possible to find a similar path that most of them take, from negotiation of the damage model, to design of the claims resolution facility, to implementation. Each of these three stages in the life of a claims resolution facility is subject to pitfalls and dangers. It may now be possible to establish a series of defined rules that the claims resolution facility must meet in order to attain even greater acceptance in our legal system.

There are two non-mutually exclusive approaches that may have value in guarding against the most likely failure modes faced by claims resolution facilities: required standards of judicial approval and required rules of procedure for the process of creating claims resolution facilities. First, it might be helpful to look at the potential failure modes.

A. Failure Modes

There are at least nine intermingling failure modes that have emerged from our experience with claims resolution facilities. The most obvious is the failure of the negotiation process to insure horizontal and vertical equity in the payment of claims. Counsel representing a group of claimants may also represent specific individual claimants, and it is not unusual to find during the negotiation of the damage model that equality of treatment may fall below generally accepted standards. Certain types of claims may be favored or the relative value of different claims may be skewed by the individual interests of the negotiators or by other forms of agency failure.

If equity is viewed longitudinally, there may be a similar uneven payment of claims over time. Typically, future claimants are in a disadvantaged position in negotiations today. The tension between predictability and flexibility may lead to differential treatment of similarly situated claimants as the implementation occurs.

As time passes, the goal of finality may be attained from the litigation perspective but be elusive in terms of the plan of distribution itself. It is not uncommon to find a continuing role in the claims resolution facility for the parties who negotiated the original damages. As they negotiate over the implementation of the claims resolution facility, their negotiation may lead to changes that will effectively discriminate among recipients of payments before and after the negotiations.
Bargaining power among the parties tends to shift before and after the creation of a claims resolution facility. If there is a continuing relationship among the original negotiators, they may find that their relative bargaining positions have changed, and subsequent negotiations may create results that are inconsistent with the original plan of distribution. If there is a residual interest or a contingent obligation to pay embedded in the funding arrangement, relative-bargaining-power shifts can have a dramatic effect on the stability of the facility.

Closely related to the issue of continuing negotiations among parties is the shift in process back to a more adversarial model rather than an inquisitorial one. The mixed metaphor that can result will inevitably lead to dysfunction.

Another of the well-recognized failure modes arises from the inherent uncertainty associated with a defined contribution combined with a defined-benefit plan of distribution. Notwithstanding measures to allow for potential prediction errors, any reduction in compensation from the expectations of the parties can be detrimental to the functioning of the claims resolution facility.

In managing the balance of inquisitorial and adversarial processes between the facility and the claimants, there can be problems with a claimant exit strategy from the claims resolution process in the event of disagreement over the value of claims. Back end opt-outs can put pressure on a facility to raise individual compensation beyond existing resources or to secure additional funding beyond what was originally viewed as a final amount.

Most claims resolution facilities are touted as being operated by “neutral” figures not beholden to any constituent groups. Yet the quest for neutrality can become a quest for malleability and inexperience. Running a claims resolution facility is not compatible with on-the-job training. Even competent individuals may find their lack of experience, knowledge of the underlying circumstances, and amiability inconsistent with the needs of the facility.

As suggested above, the threat of false positives and even fraud is another potential failure mode. Given the need for relatively inexpensive scrutiny of individual claims, unscrupulous claimants may be able to game the system, with adverse results.

B. Standards for Approval

Most claims resolution facilities that arise out of the litigation process eventually seek some type of judicial imprimatur. Amchem,\(^69\) Ortiz,\(^70\) and In re

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\(^69\) 521 U.S. 591 (1997) (refusing to certify a global class for the settlement of current and future asbestos-related claims).

\(^70\) 527 U.S. 815 (1999) (holding that certification of a class in an asbestos case under a limited fund theory required showings that the fund was limited by more than the agreement of the parties and that conflicting interests of class members had been taken into account).
Combustion Engineering, Inc.\textsuperscript{71} have taught us that the judicial approval of potential claims resolution facilities is not automatic. The following list of minimal goals could be helpful in providing guidance to courts.

_Horizontal equity_. Equivalency of treatment seems to be a common goal. Defining classes within which there should be equivalency is more problematic, but both the bankruptcy statute and class action decisions can give guidance here.

_Longitudinal equity_. Equivalency extends over time as well, particularly if there are bargaining incentives to make changes in the existing understanding. Continuing the role of parties may be worthwhile—but not keeping them as decisionmakers.

_Finality_. There should be an appropriate mix of predictability and flexibility, erring on the side of fixed terms.

_Empirical confidence_. A court should have confidence that the projections of claimants and payments are sufficiently certain to allow predictability.

_Independence, neutrality, and experience_. These qualities are necessary for the operation of a claims resolution facility. There is potential for mischief with respect to any of the three characteristics. Sometimes “neutrals” are selected as unbiased because of their poverty of understanding about the litigation. Others are selected as personal favors with strings attached. A combination of the two can generate a hat trick of foibles.

_Error rates_. There should be a defined acceptable error rate and mechanisms for constant vigilance against fraud.

_Judicial supervision_. Courts should maintain, and the operators of the facility should desire, continuing judicial supervision. Transparency in reporting and accountability in outcomes are critical checks to ensure the ongoing legitimacy of a facility.

\subsection*{C. Process Rules for Creation}

Another approach to regularize the institution of claims resolution facilities is to develop rules of procedure for the process by which damages and plans of distribution are negotiated. Normally, there would be great resistance to any constraints on bargaining, but history suggests that the parties by themselves may not be able to define the outer boundaries of what is legally and ethically acceptable given their own particular interests. Amchem, Ortiz, and Combustion Engineering are judicial opinions that provide such boundaries, but each case can be seen as unique, and more ex ante guidance may be worthwhile to enhance the “due” in the “process.” Rules would also deal more directly with the ex post problem found by judges who do not participate in the details of the creation of an entire package but are being asked to rule on the legality of the

\footnote{\textsuperscript{71} 391 F.3d 190 (3d Cir. 2004) (rejecting a prepackaged bankruptcy).}
entire package in a binary fashion. Earlier judicial involvement could ameliorate the situation and, at the same time, give more confidence to the parties that their decisions will not be reversed on any appeal.

There are four elements to any negotiation of damages and plan of distribution: parties, issues, information, and procedure. Each of these elements can be addressed in formal rules of civil procedure and are amenable to treatment as rules of negotiation procedure.72

*Judicial supervision.* Negotiations regarding the global resolution of a complex case that contemplates a claims resolution facility should be conducted under the auspices of a judge independent of the judge who is assigned the case in chief.

*Judicial ancillaries.* The judge should have the option of appointing ancillaries in accordance with rules of evidence and procedure. Experts in epidemiology, statistical modeling, mediation, and other arenas may be of assistance to the court.

*Parties.* All affected parties—including future claimants, trustees of a fund, and operators of a facility—should be involved in the negotiations. The most notable problems in the creation process arise from the absence of representation of interests that are then insufficiently recognized. The judge should ensure that all relevant interests are at the table.

*Issues.* The issues regarding a global resolution are often quite different from the issues in traditional litigation. A global resolution tends to focus on aggregate matters rather than the individual case issues. In addition, there are independent issues inherent in a plan of distribution that do not exist in the traditional adversarial system.

*Information.* Just as litigation raises different issues than do global resolutions, the type of information that parties seeking a global resolution may need is typically different from the individualistic, case-by-case approach of common law adjudication. Often there is even opposition to the collection of global data to be used in individual trials; a focus on the entire case can be maintained in the context of settlement without adversely impacting the litigation of individual cases.

*Procedure.* The procedure by which the parties engage in the negotiation dance should be made known to the judicial supervisor. Although negotiations could suffer if they were conducted only in public, they could benefit from judicial oversight.

There has been extensive recent criticism of the judiciary for insisting on the “perfect” to the detriment of the “good” in the resolution of complex litigation. Judges who insist on principle over pragmatism have been accused of promoting an idyllic world of legal fictions that drive parties into a far darker

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world of reality. The balance between the "correct" and the "doable" is often
delicate. The rules discussed above would provide ex ante guidance for a
process that principle-oriented judges could find acceptable and, hopefully,
would lead to results that would meet with a similar sense of approval.

CONCLUSION

Claims resolution facilities have been used in a variety of paradigmatic
contexts: war reparations, disaster relief, social welfare, tort, and contract. The
paradigm or metaphor of the facility becomes particularly important in reaching
decisions regarding the details of implementation, particularly details of
organization, eligibility criteria, damage methodology, and the nature of
compensation. When the metaphor underlying the creation of a fund conflicts
with the metaphor for the distribution of the fund, there can be a resulting
cognitive dissonance that adversely impacts the facility.

Claims resolution facilities have become fixtures in the endgame for the
award and allocation of damages. One of their principal assets is that they allow
a severance of decisions regarding liability from the determination of the total
award of damages or the allocation of a predetermined amount of damages
among eligible claimants. This bifurcation of liability and damages encourages
rapid closure or finality of a dispute, mitigating expensive and time-consuming
damage determinations. The existence of claims resolution facilities, however,
creates a dynamic that can enhance the chances of settlement en masse rather
than through the traditional litigation of individual claims with its concomitant
public legitimacy.

Appreciating the nuances in the design of a claims resolution facility can
be critical to its operation. One of the great assets of a facility for damage-
related decisions is its great flexibility to meet the particular needs of a given
situation. A design strategy, however, must consider, ab initio, all potential
consequences of the design choices in order to ensure the predictability of
outcomes and the equivalent treatment of claimants. At the same time, there
should be an explicit balance between the time and cost of the facility's
operations and the error costs associated with a rapid and inexpensive
processing of claims, as well as between the transparency of the proceedings
and the privacy concerns of the beneficiaries.

An examination of the resolution and failure modes of claims resolution
facilities suggests that greater routinization of their negotiation and outcomes
might be worthwhile. Minimum substantive standards and process rules might
allow an elevation of facilities' quality and legitimacy.