

# IN DEFENSE OF PRIVATE CLAIMS RESOLUTION FACILITIES

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## I

### INTRODUCTION

In 2005, Francis McGovern published an insider’s guide to claims resolution facilities (CRFs) which are created and funded by private persons or entities that face large numbers of civil claims.<sup>1</sup> In addition to a wealth of information about the operation of CRFs, McGovern’s article contains a number of helpful analytical observations, one of which is that a CRF “is an alternative to the standard litigation model” for handling claims.<sup>2</sup> Although seemingly banal, this insight contains the seeds of a deep normative justification of private CRFs. Stated simply, the justification is the same as that for settlements in general: As long as claimants have the option of suing in court and their opponents have the option of defending there, allowing parties to opt for “an alternative to the standard litigation model” is likely to make them better off. Many criticisms of CRFs can be set to rest by considering them in light of this justification.

The truth of this point does not depend on the particular characteristics of a private CRF, an important fact because the CRF is a broad category that includes virtually any privately operated process for resolving multiple, related civil claims outside of court. The label applies to a fund administered by a third-party “special master,” the settlement of claims by in-house counsel, inventory settlements, and global settlements.<sup>3</sup> The operations of a CRF may be fully transparent, somewhat

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1. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

2. *Id.* at 1365.

3. For purposes of the current discussion, the CRF category does not include either class action settlements (because they require court approval and are therefore not fully private) or pre-dispute arbitration agreements (because such agreements are *ex ante* rather than *ex post* and do not, indeed cannot, provide meaningful settlement detail beyond the forum in which any eventual dispute will be resolved). *But see* D. Theodore Rave, *Settlement, ADR & Class Action Superiority*, 5 J. TORT L. 91, 93 (2012) (describing defendant-initiated voluntary compensation programs, class action settlements, and mandatory arbitration clauses in form contracts as “functionally quite similar”). In our experience, pre-suit arbitration agreements also regulate individual claims rather than groups of related claims. In fact, a common purpose of these provisions is to prevent claimants from achieving aggregations by means of the

transparent, or completely opaque. It may value claims on the basis of objective characteristics or rely on subjective assessments of their size and strength. It may afford parties an opportunity to be heard in person or permit only written submissions. Regardless of the characteristics of the CRF, as long as parties are rational, they will opt for alternatives to litigation only when they expect to gain, and the win-win nature of their joint decision is sufficient to offset many objections.

CRF design details matter for other reasons, of course. Wanting to attract claimants who might otherwise proceed via courts, potential defendants may see virtue in incorporating features that claimants and their attorneys like, such as easy proof requirements, quick payment, most-favored-nations clauses, partial payments made upfront for filing claims, and, of course, generous payments on the back end.<sup>4</sup> Defendants (or other sponsors or initiators of CRFs)<sup>5</sup> may also emphasize transparency, objectivity, or horizontal equity, in order to put claimants at ease and encourage participation. Claimants, or more often their counsel, may take steps to encourage defendants to create private CRFs too. Certain claimants' counsel may assemble groups of clients in the hope of gaining defendants' attention by offering them the opportunity to resolve a large block of claims.<sup>6</sup> Claimants' counsel and their clients may agree to participation requirements that protect defendants from any attempts by claimants' counsel to cherry-pick—that is, to settle only their weaker cases and to proceed to trial with their strongest ones. Claimants' counsel may accede to a defendant's requirement that settling claims be submitted to a neutral third-party for evaluation and the determination of settlement offer amounts. These techniques, which resemble

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class action mechanism. *See* *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418–19 (2019) (holding that the Federal Arbitration Act permits class-based arbitration only when parties to arbitration provisions clearly agree to it).

4. When commenting on a draft of this Article, Teddy Rave pointed out that most-favored nations clauses can be defendant-friendly rather than claimant-friendly, because they reward defendants for treating non-participating claimants worse than settling claimants. The observation is sound. Whether such a clause is claimant-friendly, defendant-friendly, or both, depends on the context in which it is used.

5. “Sponsor” or “initiator” may be more apt terms because they are more general and therefore encompass CRFs created by those who may be funding the settlement but are not the defendant, such as insurers, as well as potentially responsible parties that may not yet have been sued. But for the sake of convenience and clarity, throughout this Article the term “defendant” will be used.

6. One interesting recent example here is the settlement involving victims of the Las Vegas shooting on October 1, 2017 for which one of us (Baker) served as a consultant. The three law firms that represented the vast bulk of the 4500 or so claimants joined together to negotiate a truly global settlement with the relevant defendants in which claimants represented by other attorneys were permitted to take part. *See, e.g.*, Associated Press, *The Latest: Attorneys Say MGM Deal Settles Most Lawsuits*, ABC NEWS (Oct. 3, 2019), <https://abcnews.go.com/US/wireStory/latest-lawyers-deal-reached-vegas-shooting-law-suits-66034268> [<https://perma.cc/ZYK4-YRFW>] (stating that three attorneys represented 4400 people with claims against MGM in connection with the shooting); Robinson Calcagnie, Inc., *Robinson Calcagnie [sic] Lawyers and Co-Counsel Secure Final Approval Of \$800 Million Settlement For Victims Of Las Vegas Mass Shooting*, PR NEWSWIRE (Sept. 30, 2020), <https://www.prnewswire.com/news-releases/robinson-calcagnie-lawyers-and-co-counsel-secure-final-approval-of-800-million-settlement-for-victims-of-las-vegas-mass-shooting-301142405.html> [<https://perma.cc/A8M5-5FMW>] (referring to the leadership of the law firms of Robinson Calcagnie, Inc., Eglet Adams, and Panish Shea & Boyle LLP in reaching the settlement).

those that retail sellers and shoppers use to facilitate transactions, can determine whether attempts to resolve claims *en masse* outside of courts will succeed or fail.

The views just expressed are not widely shared by scholars. Many commentators find private CRFs deeply troubling. Some, such as Professors Andrew Bradt, Elizabeth Burch, David Jaros, Adam Zimmerman, and our Texas colleague, Teddy Rave, contend that some CRFs do not serve claimants sufficiently well.<sup>7</sup> They convey their distrust of private CRFs and their faith in traditional litigation by calling for judicial supervision or review.<sup>8</sup> Professor Linda Mullenix, another Texas colleague, goes even further. She contends that:

[R]ecourse to compensation funds ought to be limited to a fairly constrained universe of situations that give rise to a need for a public or charitable communal response. . . . [T]he creation of an alternative fund remediation scheme ought not to be countenanced in any situation where [a] liable party is identifiable and capable of being held accountable for corrective justice.<sup>9</sup>

The initiators of private CRFs, however, are often exactly that: identifiable parties that can be sued in courts. Professor Mullenix's critique is therefore a broadside against the use of these facilities, regardless of both the way they are designed and whether claimants and defendants have the option of going to court instead of using them.

This celebration of Professor McGovern's life and accomplishments is a natural occasion on which to assess some of the normative arguments for and against private CRFs. He was one of the most prominent figures in the world of multi-claimant litigation and settlements. He served as a special master in the settlement of claims arising out of the nightclub fire in Rhode Island that killed one hundred young people and injured hundreds more,<sup>10</sup> and in mass litigations involving asbestos, DDT, the Dalkon-Shield, silicone gel breast implants, and

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7. See generally Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545 (2017); Dana A. Remus & Adam S. Zimmerman, *Aggregate Litigation Goes Private*, 63 EMORY L.J. 1317 (2014); Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129 (2015). These scholars focus on non-class aggregate settlements in their critiques of CRFs. Thus, this Article does not critique their views on other types of CRFs.

8. Other commentators, it should be noted, have opposed judicial review of private settlements on various grounds. See, e.g., Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1024 (2013) ("Claims belong to claimants, not to the judge."); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 182 (2012) (concluding that "there is no need or justification for judicial review of private mass tort settlements because such settlements only bind those plaintiffs who affirmatively opt in to them"); Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 353 (2011) (contending judicial review is unwarranted because it "removes claimant autonomy and damages the adversarial system").

9. Linda S. Mullenix, *Designing a Compensatory Fund: In Search of First Principles*, 3 STAN. J. COMPLEX LITIG. 1, 5 (2015).

10. Associated Press, *Proposal for Splitting Money in Rhode Island Club Fire Case*, CLAIMS J. (Jan. 12, 2009), <https://www.claimsjournal.com/news/east/2009/01/12/96875.htm> [<https://perma.cc/RMW8-8SJ7>]; Francis E. McGovern, DUKE L. SCH. (Jan. 5, 2010), <https://law.duke.edu/news/francis-e-mcgovern-0/> [<https://perma.cc/YGC4-RUUN>].

many others.<sup>11</sup> At the time of his death, he was actively engaged in an innovative effort to resolve litigation arising out of the nationwide opioid crisis by means of a first-ever negotiation class.<sup>12</sup> We were privileged to work alongside him in some of these matters and to consider him a friend. We miss him dearly.

The Article begins, in Part II, by describing three core models of private CRFs that are commonly observed in mass tort settings, often in combination: individual settlements by in-house counsel, victim compensation funds, and group settlements (inventory and global).<sup>13</sup> Our view is that variations in the design of CRFs often have functional explanations as responses to the desires and needs of the parties. When the parties differ in their preferred arrangements, the design of a CRF will inevitably reflect inequalities in bargaining power between the parties. That is expected, as each CRF is the product of compromise. With regard to each of the three core models, this second Part will discuss when and why the defendant might prefer it, then go on to discuss its benefits and costs to the plaintiffs (and plaintiffs' counsel). Part III then addresses two criticisms that scholars have levied against one or more of these types of private CRFs: that private CRFs deny claimants corrective justice, and that judicial supervision is needed to protect claimants' autonomy and to police agency failures on the plaintiffs' side. We argue that the first criticism is mistaken because it wrongly contends that corrective justice requires the use of courts, and that the second is erroneous because market forces should encourage plaintiffs' attorneys to protect claimants' autonomy as fully as claimants want and tend to reduce agency costs to an efficient level in multi-claimant settlements no less than in single-client matters. The Article concludes in Part IV with some final thoughts on the limited potential of judicial review to improve private CRFs.

## II

### MODELS OF PRIVATE CLAIM RESOLUTION

We begin this Article by examining a variety of processes that claimants and defendants have used to resolve mass tort claims. Our objective is to inform

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11. See, e.g., Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS., no. 4, 1990, at 61, 63, 68 (explaining the Alabama DDT Settlement Fund); Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 175 (2006) (discussing "trust distribution plans in asbestos bankruptcies"); Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1378 (2005) (discussing strategies behind claims resolution facilities).

12. See, e.g., Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 73 n.\* (2020) (discussing the negotiation-class approach to opioid litigation); Dan Polster, *Francis McGovern: Special Master Par Excellence*, 84 LAW & CONTEMP. PROBS., no. 2, 2021, at 11.

13. In case it is not yet clear, this Article considers private CRFs to be a very broad category, which includes any process or means for resolving mass tort claims outside of a court. See *supra* note 3. This includes the negotiation of a settlement of an individual claim by defendant's in-house counsel, a nationwide settlement program, and everything in between. Thus, for purposes of this discussion, the *sui generis* 9/11 fund administered by Ken Feinberg is, in part, a CRF insofar as it was created by Congress as an alternative to suits against the airline industry. But that unique fund is only one of many instances and types of CRFs.

readers about typical approaches and to explain why the features they display are employed. On reflection, many features ameliorate transaction costs that might otherwise prevent parties from contracting.

The models of claim resolution we will consider vary along many dimensions. Some assign the task of making offers on individual claims to defendants' in-house counsel. Others give the role to liability insurers, mediators, or special masters. The most common arrangement—the lump-sum offer to settle a block of claims—typically leaves the job of allocating sums to plaintiffs' attorneys, who may outsource it or handle it themselves. Different models also use different means to locate claimants, screen their claims, and prepare their files. Although most arrangements leave these tasks to plaintiffs' attorneys, others, including defendants, insurers, and CRF administrators, can also perform them.

Some of these variations are merely different answers to “make or buy” decisions regarding claim resolution. A corporate defendant can respond to liability claims itself via in-house counsel (“make”) or farm out the activity by purchasing insurance (“buy”). An insurer may review and attempt to settle all filed claims, or it may rely on plaintiffs' attorneys to screen out weak cases by giving serious attention only to the claims they accept and sue on. A plaintiffs' attorney can handle settlement negotiations personally or engage another lawyer for the purpose. The same firm may both advertise for clients and prepare their cases, or the tasks may be handled by separate firms that collaborate. No arrangement is intrinsically better than any other. The decision to use one rather than another in a particular situation is simply a matter of preference and compromise, given the relative private costs and benefits of the options that are available.

There are three basic models of private claim resolution that commonly exist for mass tort claims: individual settlements by in-house counsel; victim compensation funds; and group settlements (global and inventory). Over the course of a given litigation, several of these models may be used to resolve the pending claims. Consider, for example, how General Motors (GM) employed each of these models to resolve thousands of claims involving an ignition switch defect found in many of its cars.

#### A. Individual Settlements by In-House Counsel

Many years before the GM ignition switch defect was publicly known, GM confidentially settled numerous claims individually.<sup>14</sup> Each settlement was negotiated by GM's in-house counsel on a one-off basis. Resolving the claims

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14. See, e.g., Christopher Jensen, *In General Motors Recalls, Inaction and Trail of Fatal Crashes*, N.Y. TIMES (Mar. 2, 2014), <https://www.nytimes.com/2014/03/03/business/in-general-motors-recalls-inaction-and-trail-of-fatal-crashes.html> [<https://perma.cc/N2DU-XFHF>] (discussing first death linked to the defect, which occurred on July 29, 2004, and the related lawsuit which was resolved by GM through an individual confidential settlement). See also Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NAT'L PUB. RADIO (Mar. 31, 2014), <https://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect> [<https://perma.cc/W2ML-4WWZ>] (suggesting GM may have known of the problem as early as 2001).

individually provided GM great flexibility and, most critically, complete confidentiality.<sup>15</sup> It also enabled GM to minimize discovery, avoid trials, and insist that victims and their lawyers seal their lips. For the claimants, these individual, confidential settlements likely enabled them each to resolve their claims more quickly and for more money than they would have been able to obtain either without acceding to GM's concerns for confidentiality or by settling as part of a larger group of plaintiffs.

Years down the road, the ignition switch defect and its implications all became public and thousands of individuals (and lawyers) now had the information they needed to pursue a personal injury or wrongful death claim against GM.<sup>16</sup> By early 2014, in addition to a large and growing number of potential tort claims, GM faced criminal charges and a deluge of bad press.<sup>17</sup> GM had apparently known for more than a decade about the potentially fatal defect in a relatively inexpensive component but chose not to take any remedial action.<sup>18</sup> After critical, damning documents and information became public, GM acknowledged liability in accidents involving certain vehicle models and years in which the ignition switch was found in the "off" position and the airbags had not inflated upon impact.<sup>19</sup> GM then deployed two other models of claim resolution: a compensation fund and various "inventory settlements."

## B. Victim Compensation Funds

In order to manage the rapidly growing number of claims once the ignition-switch defect became public and GM acknowledged liability, GM first

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15. The flexibility enabled GM to make each of these early claimants a settlement offer that he or she would accept, which might have been more or less than was ultimately paid to other early claimants.

16. See, e.g., Basu, *supra* note 14 (noting this information became public by 2014).

17. GM also faced a criminal case brought by the Manhattan U.S. Attorney's Office that "charged GM with wire fraud and scheming to conceal material facts from a government regulator." See Mike Spector, *GM Settles Ignition-Switch Lawsuits*, WALL ST. J. (Sept. 17, 2015), <https://www.wsj.com/articles/gm-settles-ignition-switch-lawsuits-1442499604> [<https://perma.cc/4GDG-MXV8>] [hereinafter Spector, *GM Settles Ignition-Switch Lawsuits*]. In September 2015, GM "entered a deferred prosecution agreement under which prosecutors in three years will seek to dismiss criminal charges over the defective switch so long as the auto maker abides by the deal's terms. The auto maker also agreed to pay a \$900 million financial penalty and have safety practices audited for at least three years." Mike Spector, *GM Does U-Turn in Ignition-Switch Motion*, WALL ST. J. (Oct. 6, 2015), <https://www.wsj.com/articles/gm-does-u-turn-in-ignition-switch-motion-1444148648> [<https://perma.cc/QY2V-KZLC>].

18. See, e.g., Basu, *supra* note 14 (noting that in 2001 "GM detects the defect during pre-production testing of the Saturn Ion" and in March 2005 "GM rejects a proposal to fix the problem because it would be too costly and take too long"); Spector, *GM Settles Ignition-Switch Lawsuits*, *supra* note 17 ("GM commissioned a report last year by former U.S. Attorney Anton Valukas that found the auto maker failed for more than a decade to recall millions of vehicles with the faulty switch despite internal evidence of the safety problem. The report found a pattern of incompetence and neglect as opposed to a concerted coverup. Ms. Barra [CEO of GM beginning in 2014] dismissed 15 employees, including lawyers and engineers, in the wake of the report.").

19. Spector, *GM Settles Ignition-Switch Lawsuits*, *supra* note 17 ("GM in 2014 recalled roughly 2.6 million older Chevrolet Cobalts and other small cars equipped with a defective switch that could slip out of the run position, disabling safety features including air bags, power steering and power brakes. . . . The company started cracking down on safety defects and eventually recalled a record 26 million-plus vehicles in 2014.").

established a victim compensation fund and hired Ken Feinberg to run it.<sup>20</sup> Only qualifying claims involving three categories of injuries were eligible to seek compensation through this fund: (1) claims involving physical injuries resulting in quadriplegia, paraplegia, double amputation, permanent brain damage, or pervasive burns (Category One); (2) claims involving physical injuries requiring hospitalization or outpatient medical treatment within 48 hours of the accident (Category Two); and (3) death claims.<sup>21</sup> GM was open about the fact that it was paying Feinberg to administer this fund on its behalf with the goal of resolving all of the qualifying death and serious injury claims.<sup>22</sup> Consider the statement issued by GM's CEO, Mary Barra, in connection with the creation of the compensation fund: "We are taking responsibility for what has happened by treating [victims and their families] with compassion, decency, and fairness."<sup>23</sup> Perhaps GM thought claimants would consider more "fair"—and therefore be more willing to accept—a settlement offer made by the legendary and seemingly neutral Feinberg than an offer by its own less legendary and seemingly biased in-house counsel.<sup>24</sup> In addition, both in his Press Release and at his initial press conference,

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20. GM's CEO, Mary Barra, announced during a congressional subcommittee hearing on April 1, 2014, that the company had "retained the services of Kenneth Feinberg to help explore legal options in dealing with families impacted by faulty ignition switches." Diego Rosenberg, *General Motors Hires Compensation Consultant as Part of Recall Response*, GM AUTH. (Apr. 2, 2014), <https://gmauthority.com/blog/2014/04/general-motors-hires-independent-consultant-on-recall-resonse/> [<https://perma.cc/M9B7-782D>]. The official title of the subcommittee hearing was "The GM Ignition Switch Recall: Why Did It Take So Long?," available at <https://docs.house.gov/committee/Calendar/ByEvent.aspx?EventID=102033> [<https://perma.cc/QN5R-7T4G>].

21. GENERAL MOTORS LLC, GM IGNITION COMPENSATION CLAIMS RESOLUTION FACILITY FINAL PROTOCOL FOR COMPENSATION OF CERTAIN DEATH AND PHYSICAL INJURY CLAIMS PERTAINING TO THE GM IGNITION SWITCH RECALL 4 (June 30, 2014), <https://www.autosafety.org/wp-content/uploads/import/GM%20Ignition%20Compensation%20FINAL%20PROTOCOL.pdf> [<https://perma.cc/6JHP-MEDA>] [hereinafter PROTOCOL]. The Protocol was publicly available via a website dedicated to the compensation program. A qualifying claimant must also have been involved in an accident caused by the defective switch, meaning an accident involving a Chevrolet Cobalt, Saturn Ion, or other small GM car involved in the ignition switch-related recalls that began in February 2014, and the airbag in the GM car involved in the accident must have not deployed during the accident. *Id.* at 2–4. See also Michael A. Fletcher & Rebecca Robbins, *GM Offers Millions to Compensate Some Ignition Switch Victims, Families*, WASH. POST (June 30, 2014), [https://www.washingtonpost.com/business/economy/gm-offers-millions-to-compensate-some-ignition-switch-victims-families/2014/06/30/032d45c0-ffbc-11e3-8572-4b1b969b6322\\_story.html](https://www.washingtonpost.com/business/economy/gm-offers-millions-to-compensate-some-ignition-switch-victims-families/2014/06/30/032d45c0-ffbc-11e3-8572-4b1b969b6322_story.html) [<https://perma.cc/Y2PK-5XSY>] (discussing how settlement funds would be allocated).

22. See, e.g., Rosenberg, *supra* note 20 (quoting GM CEO Mary Barra as announcing the hiring of Ken Feinberg and describing him as "highly qualified" and "very experienced in the handling of matters such this"); Fletcher & Robbins, *supra* note 21 (describing "Lawyer Kenneth R. Feinberg" as "a compensation specialist hired by GM to design and administer the [compensation] fund"); GENERAL MOTORS LLC, GM IGNITION COMPENSATION CLAIMS RESOLUTION FACILITY FREQUENTLY ASKED QUESTIONS 4 (June 30, 2014), <https://www.autonews.com/assets/PDF/CA95360630.PDF> [<https://perma.cc/4D63-5HXU>] [hereinafter FAQ] ("Mr. Feinberg was hired [by GM] to develop and design a Protocol for the submission, evaluation and settlement of death and physical injury claims allegedly resulting from the Ignition Switch Defect.").

23. Fletcher & Robbins, *supra* note 21.

24. While not hiding the fact that he was being compensated by GM for his services, Feinberg emphasized the "neutrality" and "fairness"—indeed the independence—he brought to the role in his

Feinberg emphasized the potential generosity of his compensation plan compared to the tort system.<sup>25</sup> Ultimately, Feinberg found fewer than ten percent of those who filed claims to be eligible to participate in the compensation program. But the eligible claimants did overwhelmingly accept their settlement offers: of the 142 qualifying claims involving deaths (124) and serious injuries (18), all were resolved except one of the latter.<sup>26</sup>

The GM victim compensation fund had three key characteristics: it was administered by a third-party; it provided some—but very incomplete—transparency regarding the settlement values and claim valuation methodology; and it gave Feinberg enough flexibility to enable him to ensure that the cases involving deaths and unusually serious injuries would be resolved. What were the benefits to GM of these characteristics?

GM may have thought or hoped that Feinberg's involvement would generate some much-needed good press by signaling the sincerity of the company's desire to pay fair compensation and put the tragedy behind it.<sup>27</sup> GM may also have

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own press release and press conference regarding the compensation program. Feinberg's press release stated that:

Mr. Feinberg retains complete and sole discretion over all compensation awards to eligible victims, including eligibility to participate in the Program and the amounts awarded. By agreement, GM cannot reject [Feinberg's] final determinations as to eligibility and amount of compensation. . . . The Program has no aggregate cap; GM has agreed to pay whatever [Feinberg] deems appropriate in each and every individual case.

Press Release, *Feinberg Announces GM Ignition Compensation Claims Resolution Facility* (June 30, 2014), <https://s3-prod.autonews.com/s3fs-public/CA95358630.PDF> [<https://perma.cc/D6VP-Q87M>] [hereinafter Press Release]; Fletcher & Robbins, *supra* note 21 (reporting on Feinberg press conference of June 30, 2014, and noting that “Feinberg said that he, not GM, would have final say on who gets paid what,” that “GM has placed no caps on potential awards,” and that “while GM did approve his plan, the company was not happy with all the terms of the compensation fund”).

25. See Press Release, *supra* note 24 (noting that the plan would ignore any “[c]ontributory negligence attributed to the driver of the vehicle, e.g., intoxication, speeding, etc.”). See also Fletcher & Robbins, *supra* note 21 (reporting that Feinberg said at this press conference that “unlike in a court proceeding, the claims process would not factor in whether drivers contributed to the injuries by, for example, speeding, texting or being intoxicated when the accident occurred”).

26. GENERAL MOTORS LLC, GM IGNITION COMPENSATION CLAIMS RESOLUTION FACILITY FINAL REPORT (Dec. 10, 2015), [https://gmo\\_test.gcg-dev.com/index](https://gmo_test.gcg-dev.com/index) [hereinafter FINAL REPORT] (noting that settlement offers were declined by 36 of the 257 qualifying claimants in Category Two). The comparatively high rate of rejection by Category Two claimants is not a surprise, given the pre-set compensation rates specified in the *Protocol* for these claimants, which were as low as \$20,000 gross. PROTOCOL, *supra* note 21, at 7. Although the Final Report does not provide information regarding the individual settlement offer amounts for the eligible claimants, there would be a minimum of \$466 million for the 142 qualifying Death and Category 1 claimants, an average of approximately \$3.3 million per claimant. See FINAL REPORT, *supra* (stating the total amount of compensation offered by GM was \$594,535,752 and that the maximum amount each of the 257 qualifying Category 2 claimants could receive was \$500,000).

27. That this was part of GM's motivation seems clear from both the timing and content of GM's announcements regarding its hiring of Ken Feinberg. CEO Mary Barra announced Feinberg's hiring during her April 1, 2014, appearance at the congressional subcommittee hearing investigating the decade-long delay in GM's recall of the faulty ignition switch. See Rosenberg, *supra* note 20. And in GM's various statements regarding the hiring of Feinberg, he was portrayed as both experienced and “objective.” See, e.g., *id.* (quoting Barra as stating that Feinberg “brings expertise and objectivity to this effort, and will help us evaluate the situation and recommend the best path forward.”); Fletcher & Robbins, *supra* note



thought that it could increase the number of claims resolved by taking advantage of Feinberg's reputation and skills. Even though Feinberg was on GM's payroll, he had carefully preserved his ability to administer the CRF without interference from GM. He possessed "complete and sole discretion over all compensation awards to eligible victims, including eligibility to participate in the Program and the amounts awarded."<sup>28</sup> In the end, as noted, GM obtained nearly complete closure of the qualifying death and serious injury claims.<sup>29</sup>

GM's CRF also provided partial transparency about the claim valuation methodology and values in advance. In the *GM Ignition Compensation Claims Resolution Facility Final Protocol for Compensation of Certain Death and Physical Injury Claims Pertaining to the GM Ignition Switch Recall (Protocol)*, GM publicly and clearly described the program's eligibility requirements, which limited participation to persons who sustained specified injuries while riding in specified cars.<sup>30</sup> It also provided calculation methodologies that showed how settlement offers for eligible claimants would be determined, albeit with specific dollar amounts listed for only claimants with the least serious injuries (Category Two).<sup>31</sup>

Because the *Protocol* left open the values that would be attached to Category One and death claims, Feinberg had to address the resulting uncertainty.<sup>32</sup> He did that by giving examples of specific settlement offer values. For example, he stated at the initial press conference that "[f]or a 10-year-old paraplegic injured in a crash caused by the defect, the fund is offering \$7.8 million," and that "\$2.2 million [would be offered] to the survivors of a 17-year-old student who had no children and was living at home when killed in a crash caused by the defect."<sup>33</sup>

This overall level of partial transparency benefited GM by enabling it to assure claimants, through Feinberg, that it intended to be generous, to employ a fair and transparent methodology in determining settlement values and, relatedly, to treat similarly situated claimants similarly. And these assurances, in

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21 (quoting Barra with regard to the Feinberg administered fund: "We are taking responsibility for what has happened by treating [victims and their families] with compassion, decency and fairness . . ."); FAQ, *supra* note 22, at 4 (describing Feinberg as the "neutral, independent Administrator of the [GM Ignition Compensation Claims Resolution] Facility" while also stating that he "was hired [by GM] to develop and design a Protocol for the submission, evaluation and settlement of death and physical injury claims allegedly resulting from the Ignition Switch Defect.").

28. Press Release, *supra* note 24.

29. FINAL REPORT, *supra* note 21.

30. *Id.* at 2–4.

31. *Id.* at 4–7.

32. The *Protocol* stated that "extraordinary circumstances" could be considered in the economic loss calculations for Category One and Death claims. PROTOCOL, *supra* note 21, at 5–6. It also stated that the non-economic loss compensation for Category One claimants could include "case-specific factors" such as "the lifestyle of the claimant." *Id.* at 6.

33. Fletcher & Robbins, *supra* note 21. Consistent with the *Protocol*, Feinberg stated that the compensation for claims involving death of catastrophic injuries "would be based on their age, earning potential, medical expenses and family obligations." *Id.* See also PROTOCOL, *supra* note 21, at 5–6 (noting settlement amounts were being calculated according to long term "life-care plan[s]" and "non-economic loss").

turn, might be expected to help GM obtain the participation of more claimants than it otherwise would. Finally, the compensation program provided Feinberg enough flexibility in determining the settlement offer amounts for him to be able to resolve all claims involving deaths and the Category One injuries.<sup>34</sup> He could offer additional funds to any resisting claimant knowing that none of the other claimants would learn what that claimant received.

In sum, the compensation program gave GM the same flexibility and confidentiality it would have obtained by having its in-house counsel individually negotiate the settlement of these claims, plus the added benefits of good press, greater claimant trust in the fairness and generosity of their settlement offers, and greater claimant participation, all for the price of Ken Feinberg's fee. The compensation program also provided the eligible claimants many of the same benefits they would have received through individual settlements with GM's in-house counsel. The settlements were all paid relatively quickly and were presumably generous enough for the claimants (at least the Category One and death claimants) to accept.<sup>35</sup> Also, the amounts paid were all confidential and some may have been larger than if the settlement Protocol were fully public, if GM is presumed to continue to value confidentiality. Although the Category Two claimants were all paid pursuant to a simple, publicly available table based on duration of post-accident hospitalization, no one would know which claimants or how many were to be compensated in each of the table's categories. Relatedly, the published table for handling Category Two claims provided an assurance of horizontal equity that claimants may also have valued. When shopping for high-priced goods, consumers often fear that they will pay more than others because sellers will take advantage of their inferior bargaining skills. Sellers can give such skittish buyers greater comfort by explicitly offering a uniform price to all.<sup>36</sup> An analogous problem arises in mass tort cases, where claimants or their lawyers may also fear being taken advantage of. By expressly offering the same payment to all

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34. See generally *supra* note 27.

35. See generally *supra* note 26. See also PROTOCOL, *supra* note 21, at 5 (noting that Category One and death claimants would receive compensation within ninety days from the date their claim submissions are "substantially complete" if they pursue the simpler Track A claim, and would receive compensation within 180 days if they instead pursue Track B which entails a complete, comprehensive economic loss analysis). The *Protocol* suggests that one possible difference between the Victim Compensation Program and an individual settlement negotiated with GM's in-house counsel is the absence of an opportunity to truly negotiate. Although, as noted above, see *supra* note 32 and accompanying text; PROTOCOL, *supra* note 21 at 5–6, the *Protocol* provided Feinberg substantial discretion in arriving at settlement offer values for the death and Category One claims, the *Protocol* also provides no appeals from Feinberg's settlement offer. Rather, it states that the claimant will receive the offer in writing along with a Release to be signed if the claimant accepts the offer, and that the offers "shall be valid for 90 days, after which they are null and void." PROTOCOL, *supra* note 21, at 12.

36. Appreciating many U.S. consumers' distaste for bargaining, the Saturn car was introduced in 1990 with a well-publicized "no-haggle" policy. See, e.g., *Saturn: A Wealth of Lessons from Failure*, KNOWLEDGE@WHARTON (Oct. 28, 2009), <https://knowledge.wharton.upenn.edu/article/saturn-a-wealth-of-lessons-from-failure/> [<https://perma.cc/6HU8-NWRK>] ("The no-haggle policy, the absence of a high-pressure sales environment and the high level of customer satisfaction contributed to a sense of brand loyalty among Saturn's customers . . .").

Category Two claimants in the same sub-category of injury, GM allayed this concern.

Finally, the *Protocol* provided Category One and Death claimants a “Right to be Heard” in the form of a “face-to-face meeting (or telephone meeting) with [Feinberg] prior to his making a determination” pertaining to the claim.<sup>37</sup> This right, however, was not intended to be an appeal process but simply an opportunity for the claimant to tell their story to Feinberg. This was underscored by both the timing of any requested hearing (that is, prior to the receipt of a settlement offer) and the *Protocol’s* statement that “[s]uch a requested meeting will not serve to alter the eligibility, process, or documentation requirements or any allocation amounts set forth in this Protocol.”<sup>38</sup> Through all of these processes, while perhaps not perfect for every claimant, the compensation fund CRF model nonetheless with partial transparency, resolved most claims efficiently and to the satisfaction of both the defendant and settling claimants.

### C. Inventory Settlements

The final model of claim resolution that GM employed in connection with the ignition-switch defect claims was a series of confidential “inventory settlements” with various law firms. These settlements involved the many and various claims that had not been resolved through the Feinberg-administered settlement program, thousands of which were part of the Multidistrict Litigation (MDL) overseen by U.S. District Judge Jesse Furman in Manhattan.<sup>39</sup> In addition, the U.S. Supreme Court revitalized hundreds of death and injury claims against GM when it denied certiorari from the decision of the Court of Appeals for the Second Circuit holding GM liable for those claims arising from the ignition-

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37. PROTOCOL, *supra* note 21, at 11. This right was also provided to GM under the terms of Feinberg’s *Protocol*. *Id.*

38. *Id.*

39. Tina Bellon, *Claims in GM Ignition Switch MDL for First Time Drop Below 1,000*, REUTERS LEGAL (Aug. 22, 2018), <https://www.reuters.com/article/products-gm/claims-in-gm-ignition-switch-mdl-for-first-time-drop-below-1000-idUSL2N1VE008> [<https://perma.cc/D3WY-RLAA>].

switch defect prior to GM's bankruptcy restructuring in 2009.<sup>40</sup> Those claims too were available to be resolved via confidential inventory settlements.<sup>41</sup>

When a defendant undertakes inventory settlements, it seeks to obtain closure by entering into (usually confidential) agreements with law firms that represent large numbers of claimants. Typically, these deals resolve each firm's entire inventory of qualifying claims for a lump-sum dollar amount. To be clear, the settlement agreement neither resolves any individual claim nor determines the amount that any claimant will receive.<sup>42</sup> It operates at a meta level, specifying the maximum amount the defendant will pay and outlining a process through which the plaintiffs' lawyers (perhaps aided by a special master) will make settlement offers to their inventory of qualifying clients that will total the specified dollar amount.<sup>43</sup>

For GM, confidential inventory settlements had many benefits. They enabled the company to obtain maximum finality at a fixed cost that GM could negotiate down to the lowest amount each plaintiffs' firm would accept for its block of

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40. See *In re Motors Liquidation Co.*, 829 F.3d 135, 166 (2nd Cir. 2016), *cert. denied*, 137 S. Ct. 1813 (2017) (reversing the bankruptcy court's decision enforcing the sale order "to enjoin claims relating to the ignition switch defect"). See also Neal E. Boudette, *Supreme Court Rebuffs G.M.'s Bid to Limit Ignition-Switch Lawsuits*, N.Y. TIMES (Apr. 24, 2017), <https://nyti.ms/2pflwVi> [<https://perma.cc/4F5Z-Y2B2>] ("The Supreme Court's rebuff means that several hundred remaining unsolved wrongful death and personal injury claims against G.M. could be sent to state courts for resolution or even trials."). Even prior to the Second Circuit's July 2016 decision, GM resolved pre-bankruptcy claims as part of the compensation program. See, e.g., Mike Spector, *GM Ignition-Switch Fund Offers \$595 Million to Victims*, WALL ST. J. (Dec. 10, 2015), <https://www.wsj.com/articles/gm-ignition-switch-fund-offers-595-million-to-victims-1449755042> [<https://perma.cc/U7B3-S3V8>] (stating in 2015 that "[one] third of the money General Motors Co. is paying from a fund to victims of a defective ignition switch will go to those who under a legal shield granted during the auto maker's government-brokered bankruptcy otherwise might have received nothing").

41. See Boudette, *supra* note 40 (quoting one plaintiffs' lawyer as estimating that "1,000 or more outstanding cases remain" which "are going to have to be settled by G.M. or litigated, now that the Supreme Court is not getting involved").

42. See Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1166–67 (2020) [hereinafter Baker, *Disappearing Defendant*] (noting that the settlement agreement covers the plaintiffs as a group and only specifies the total a defendant will pay to release all of the group's particular claims).

43. The agreement will typically include a variety of terms that ensure that the defendant obtains the desired level of closure and that prevent the plaintiffs' lawyer from engaging in strategic behavior, such as a "participation threshold" and a reduction in the total settlement amount for qualifying claimants who do not ultimately participate in the settlement. Baker, *Disappearing Defendant*, *supra* note 42, at 1166–67. See also Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1946–65 (2017) [hereinafter Baker, *Ethical Finality*] (discussing "five core components of comprehensive finality" commonly seen in non-class mass action settlement agreements).

claims,<sup>44</sup> while also deterring the best firms from taking on more cases.<sup>45</sup> GM could also negotiate payment amounts that varied from one firm to another depending on the quality of the inventory, the skill of the lawyers involved, the firms' financial situations, and so forth. Taken together, these differences across firms may have enabled GM to minimize the total cost of settling all claims relative to the alternative of a single, nationwide settlement program.<sup>46</sup>

In addition, inventory settlements enable defendants to shift to plaintiffs' counsel (or a special master) the costly and time-consuming work of determining each individual claimant's settlement offer amount from the settlement fund.<sup>47</sup> When the allocation is left to plaintiffs' counsel, they are incentivized by the participation threshold, that is a standard feature of agreements for inventory settlements, to arrive at an overall allocation of the settlement fund that maximizes claimant participation. Indeed, plaintiffs' counsel may well be able to do a better job than the defendant of maximizing claimant participation.<sup>48</sup> In addition, plaintiffs' counsel are likely to have better information about individual claimants and the relative strength and value of their claims than the defendant and therefore arguably have an important comparative advantage relative to the defendant when allocating the settlement fund.<sup>49</sup> By outsourcing the settlement offer valuation process in this way, a defendant also obtains the very valuable ability to publicly announce at the earliest possible time that it has "resolved" a significant number of mass tort claims against it.<sup>50</sup> Although, as noted above, the

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44. A series of confidential inventory settlements, if not entered into within a compressed period of time, creates a risk that some plaintiffs' attorneys receiving early settlements may use some of the proceeds to fund advertising for, or trials of, additional claims, thereby potentially increasing the eventual number of viable claims and the total amount ultimately paid by the defendant. *See Baker, Ethical Finality*, *supra* note 43, at 1946–65 (noting that "ordinary media publicity surrounding the early settlements may independently cause additional potential claimants to hire an attorney and pursue their claims").

45. The agreements typically include "no present intention" affirmations that seek to provide the defendant assurance that the settling firm will not be taking on new cases while not running afoul of the ethics rules. *See, e.g., id.* at 1957–62 (discussing how "no present intention" affirmations ethically permit the plaintiffs' firm to provide the defendant some assurance that they will not represent any new clients with similar claims nor advertise for such clients).

46. The select group of plaintiffs' counsel who would be able to negotiate a nationwide settlement program is likely to be among the best bargainers and from the most well-capitalized law firms. *Id.* at 1945.

47. *Baker, Disappearing Defendant*, *supra* note 42, at 1167–68 (detailing the costs including "attorney time and the cost of various scientific and medical experts").

48. *Id.* at 1167.

49. *Id.* at 1167, n.8.

50. To take a recent example, on June 24, 2020, the media reported that Bayer "agree[d] to pay more than \$10 billion to settle tens of thousands of claims." Patricia Cohen, *Roundup Maker to Pay \$10 Billion to Settle Cancer Suits*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/business/roundup-settlement-lawsuits.html> [<https://perma.cc/XLZ5-Q23M>]. The news report added that "[n]egotiations were extraordinarily complex, producing separate agreements with 25 lead law firms whose clients will receive varying amounts." *Id.* Two months later, the MDL Judge, Vince Chhabria held a Zoom hearing "after receiving numerous confidential letters from plaintiffs' attorneys insisting that Bayer had reneged on their agreements." Amanda Bronstad, *Bayer's \$10.9B in Roundup Settlements Unravel, More Trials Possible*, RECORD (Aug. 27, 2020), <https://www.law.com/>

settlement agreement does not itself resolve any individual's claim, official announcements and press coverage nonetheless suggest that the claims no longer loom over the company, and the stock market tends to give these announcements great weight.<sup>51</sup>

For claimants, a confidential inventory settlement has various benefits compared to a compensation program or individual negotiations with in-house counsel. First, such a settlement provides each of the covered claimants complete transparency at the time they receive their individual settlement offer regarding the settlement offers being made to all of the other claimants included in the settlement. This transparency with regard to the allocation of a lump-sum, aggregate settlement is an obligation imposed on the plaintiffs' counsel by the relevant state equivalent of Rule 1.8(g) of the ABA Model Rules of Professional Conduct.<sup>52</sup> The information enables each claimant to confirm both the horizontal equity of his or her individual settlement offer amount, as well as its accuracy relative to the claim characteristics considered in the determination of settlement offer values. Finally, claimants who do not like their settlement offers or any other aspects of the inventory settlement are free to decline their offer and to continue prosecuting their claims in the tort system. In many instances, however, claimants who choose to continue litigating may need to retain new counsel.<sup>53</sup>

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therecorder/2020/08/27/bayers-10-9b-in-roundup-settlements-unravel-more-trials-possible/ [https://perma.cc/PKY6-BZXD]. Judge Chhabria “appeared concerned that Bayer misled the court when it announced, on June 24, that it had resolved 75% of the 125,000 Roundup claims” and said he “was inclined to lift a stay on litigation.” *Id.* It was not until several weeks later, that three leading plaintiffs' firms in the litigation were each able to confirm that “master settlement agreements have now been reached” which reportedly “resolv[ed] 12,000 Roundup cases in state and federal courts.” Amanda Bronstad, *Under Fire From Judge, Bayer Settles Thousands More Roundup Lawsuits*, LAW.COM (Sept. 17, 2020), <https://www.law.com/2020/09/17/under-fire-from-judge-bayer-settles-thousands-more-roundup-lawsuits/> [https://perma.cc/5B3X-D886]. Ten days later, Bayer had “finalized accords to resolve about 44,000 U.S. lawsuits, or about 35% of the more than 125,000 filed and unfiled cases alleging the herbicide causes cancer.” Joel Rosenblatt, *Bayer Confronts Judge's Deadline as Roundup Settlements Lag*, BLOOMBERG (Sept. 27, 2020), <https://www.bloomberg.com/news/articles/2020-09-28/bayer-confronts-judge-s-deadline-as-roundup-settlements-lag> [https://perma.cc/X8EA-A5XA].

51. See *supra* note 50; see also Baker, *Disappearing Defendant*, *supra* note 42, at 1168, n.11 (discussing press announcements and media reports regarding the global Vioxx settlement); Baker, *Ethical Finality*, *supra* note 43, at 1944 n.1 (observing that “on the day Merck announced its \$4.85 billion nationwide settlement of nearly 50,000 Vioxx claims in November 2007, its stock rose 2.3 percent ‘even as the broader stock market was sharply lower’”).

52. For discussion of the operation of and policy reasons underlying ABA Model Rule 1.8(g) and its equivalents in every state, see Baker, *Disappearing Defendant*, *supra* note 42; see also Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 298–303 (2015) [hereinafter Baker, *Aggregate Settlements*].

53. An inventory settlement agreement will typically include an affirmation by plaintiffs' counsel that they will take “all necessary steps to disengage and withdraw from the representation” of any claimant who declines his or her settlement offer “to the extent permitted by the equivalents to Rules 1.16 and 5.6 of the ABA Model Rules of Professional Conduct in the relevant jurisdiction(s).” Baker, *Ethical Finality*, *supra* note 43, at 1962–65. It is critical to note, however, that even without such language in the settlement agreement, plaintiffs' counsel may well be inclined to seek permission from the court to withdraw from representing a claimant who declines his or her settlement offer. In a mass tort context, it will frequently be true that continuing to represent a non-settling claimant will impose “an unreasonable financial burden” on the contingent fee attorney, justifying withdrawal under the relevant

A confidential inventory settlement also has disadvantages for the claimants relative to a victim compensation fund or individual negotiations with the defendant's in-house counsel. The allocation and disclosure processes that enable the transparency and horizontal equity can be expected to slow down the claimants' receipt of their settlement offer amounts and their eventual settlement payments; no claimant can receive his or her individual settlement offer until this information is known for all of the claimants covered by the settlement agreement.<sup>54</sup> Then, in order for the settling claimants to receive their settlement funds, it is likely that a minimum participation threshold set out in the settlement agreement must be met.<sup>55</sup> In addition, an inventory settlement will typically provide claimants an opportunity to tell their story only to their own retained counsel. In contrast, the GM compensation program provided claimants an opportunity to be heard directly by GM's agent, Ken Feinberg, and individual negotiations with GM's in-house counsel plausibly could include an opportunity for the client to speak directly to GM's counsel.

#### D. Lessons Learned from GM's Use of the Core CRF Models

In summary, the models of claim resolution used by GM and described above had unique costs and benefits, both to GM and the claimants, relative to the various alternatives. The models differed along multiple dimensions, but there is no single best model for claimants or a defendant. GM's use of different approaches at different times when dealing with different subgroups of claimants makes this clear. The company tailored the structure of each private CRF in light of the needs that arose in connection with its efforts to settle particular blocks of claims.

From the perspective of the claimants, the calculus is a bit different. Although settlement is a collaborative process and defendants cannot unilaterally dictate terms, claimants' options are also limited. For an individual claimant, the choice is almost always the binary one of whether or not to accept a settlement offer made pursuant to the terms of the available claim resolution process, which the

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state equivalent to ABA Model Rule 1.16(b)(6). *Id.* at 1963. Stated differently, "the settlement offer which the client has chosen to decline may be the best net result the attorney reasonably believes he or she can obtain through settlement for the client in the foreseeable future" and "the expected value of the client's case at trial, even with a favorable verdict, might be too low even to cover the costs of the trial." *Id.*

54. See Baker, *Aggregate Settlements*, *supra* note 52, at 293–95 (describing the process that plaintiffs' counsel would likely use to determine each claimant's allocated share of the lump-sum settlement amount, which includes gathering complete information about each claimant with regard to the claim characteristics that are used to value each claimant's claim). Once each qualifying claimant receives comprehensive information regarding the allocation of the entire settlement fund, including information about every other claimant's settlement offer amount, each claimant is able to decide whether to accept his or her settlement offer. *Id.* at 293-95, 310-14.

55. Baker, *Ethical Finality*, *supra* note 43, at 1947–52 (noting that if a specified minimum number of eligible claimants do not accept their settlement offers, the defendant will have a unilateral option to terminate the settlement). Only if the specified participation threshold is met, or the defendant chooses to waive its option to terminate the settlement, will eligible settling claimants receive their settlement funds. *Id.*

defendant likely designed while negotiating with plaintiffs' counsel. The claimant's settlement decision is always made with an appreciation that continuing in the court system is an option. In some instances, a claimant may anticipate having the additional options of negotiating an individual settlement with in-house counsel or participating in a future inventory settlement—as in the case of claimants who received offers through the GM settlement program but did not accept them.

### III

#### CRITICISMS OF PRIVATE CRFs

Although the creation and maintenance of an impartial judiciary that decides cases on their factual and legal merits is a miraculous accomplishment, there is nothing magical about adjudication as a means of resolving legal claims. Stated simply, there is no reason to require parties to try matters in courts when they prefer to do otherwise, as long as access to courts is available. Parties should be, and normally are, free to use other means to evaluate the merit of claims and set their worth.

Potential plaintiffs and defendants can prefer private CRFs to courts for straightforward reasons. Litigation is expensive, time-consuming, risky, partly opaque, and often inaccurate. Alternative processes can be faster, cheaper, and more predictable. When opting for other methods, defendants and claimants have considerable freedom to design private CRFs as they wish. For example, if claimants (or their attorneys) want to preserve the option to decline a settlement offer received through a CRF and to proceed to court, they need only refuse to file claims with a CRF that does not provide this option. Parties can also allow discovery, forbid it, or permit it within limits. They can require decision makers to offer reasons for their actions or allow them to operate without doing so. They can choose the location of the CRF, the law it will apply, and whether the result will be confidential or public.

Parties enjoy so much latitude in the design of CRFs for the same reason they are free to settle instead of going to trial. Like other rights, the right to adjudicate a claim in court can be waived with the holder's consent.<sup>56</sup> To secure that consent, a party wanting to avoid a trial must offer terms that an opposing party prefers to litigation. The right to have a court decide a claim thus establishes a baseline from which parties may bargain to alternatives that are mutually preferred. The alternative process, which the parties can design as they wish, is normatively defensible because the parties consent to the process knowing that litigation sets the baseline. This Part now considers criticisms of private CRFs, first turning to their limited success in certain contexts and then to normative objections raised by various commentators.

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56. This is not meant to deny that consent can be coerced or lack moral force for other reasons. When this is a problem, however, it is important to be clear that objections to CRFs stem from the circumstances in which consent is obtained, not from the design of the CRF.



### A. The Limited Success of Some CRFs

We do not mean to suggest that all CRFs are successful. The design of a CRF is a matter of prognostication as well as of compromise. Inaccurate predictions in choosing design attributes that will appeal to the relevant claimants can result in CRFs that are not ultimately successful in terms of resolving all or most of the potentially eligible claims. Execution of the CRF design is also important. Any perceived lapses in administering and operating the CRF in accordance with its claimed design attributes can trigger claimant dissatisfaction, generate unfavorable press, and suppress participation rates.

Perhaps the best known CRF that was less than fully successful was the Gulf Coast Claims Facility (GCCF) administered by Ken Feinberg in connection with the BP oil spill.<sup>57</sup> Established by BP on June 16, 2010, less than two months after the explosion on the *Deepwater Horizon* offshore drilling rig, the GCCF was to receive, process, and pay qualifying claims of losses resulting from the oil spill, primarily involving economic and property damages.<sup>58</sup> Within two years, however, the GCCF was replaced by the *Deepwater Horizon* Court Supervised Settlement Program as part of a class action settlement approved by federal MDL Judge Carl J. Barbier.<sup>59</sup> The new Settlement Program included a broader geographical area, covered more claims, and employed somewhat different participation criteria than the GCCF.<sup>60</sup>

Despite being replaced, the GCCF was successful in many respects and by many measures. During its relatively brief tenure, the GCCF “processed over one million claims and paid a total of more than \$6.2 billion to over 220,000 individual and business claimants.”<sup>61</sup> Delivering closure to BP, however, was problematic.<sup>62</sup> From the inception of the GCCF, many potential claimants had preferred to take

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57. For Ken Feinberg’s account of the GCCF, including the unique difficulties it and he faced, see KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 125–83 (2012).

58. See BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE 2–3 (2012), <https://www.justice.gov/iso/opa/resources/66520126611210351178.pdf> [<https://perma.cc/VB6Z-GZMW>].

59. See Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” In The Gulf Of Mexico*, On April, 20, 2010 (*In re Deepwater Horizon*), 910 F. Supp. 2d 891, 904 (E.D. La. 2012) (MDL No. 2179) [hereinafter Order and Reasons] (certifying a settlement class and granting final approval of the Economic and Property Damages Settlement Agreement to be “implemented by the *Deepwater Horizon* Court Supervised Settlement Program.”). See also First Amended Order Creating Transition Process, *In re Deepwater Horizon* (Mar. 8, 2012) (MDL No. 2179), [http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/03082012Order\(TransitionProcess\).pdf](http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/03082012Order(TransitionProcess).pdf) [<https://perma.cc/J4BD-TZ5U>] (creating a transition process from the GCCF to the proposed Court Supervised Claims Program).

60. See Order and Reasons, *supra* note 59.

61. BDO CONSULTING, *supra* note 58, at 1.

62. For an insightful comparison of the GCCF and the class action settlement that replaced it, see Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2013).

their claims to court.<sup>63</sup> And the fact that the GCCF denied compensation to approximately sixty percent of the claims it processed inevitably increased both the number of claimants left to seek redress through the courts and the public criticism of the GCCF by elected officials in the Gulf states most directly affected by the oil spill.<sup>64</sup> In sum, the inability of the GCCF to provide BP sufficient closure forced it (and Judge Barbier) to abandon that CRF and turn to a court-supervised class settlement for resolution.

## B. Normative Objections

Whether one views the GCCF, or any other CRF, as a success or failure, the normative justification for resolving claims through a CRF rather than litigation is the same: the parties' consent. However, not all commentators find this justification sufficient. In this Sub-Part we address two core complaints. The first contends that private CRFs should be prohibited because they deny claimants corrective justice. The second argues that judicial oversight of private CRFs should be required to protect plaintiffs' autonomy and to generate unbiased information about settlement terms and related matters. We believe that both criticisms are mistaken.

### 1. Denials of Corrective Justice

In her critique of CRFs, Professor Linda Mullenix focuses on "victim compensation funds."<sup>65</sup> She sets out three categories of "disaster events," contending that this categorization is "useful in thinking about when a fund

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63. See Transfer Order, *In re Deepwater Horizon* (J.P.M.L Aug. 10, 2010) (MDL No. 2179), [http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/MDL\\_Transfer\\_Order.pdf](http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/MDL_Transfer_Order.pdf) [<https://perma.cc/2LFS-CBYL>] (establishing the Deepwater Horizon MDL and transferring to Judge Carl J. Barbier in the Eastern District of Louisiana 77 cases from the Eastern District of Louisiana (31), the Southern District of Alabama (23), the Northern District of Florida (10), the Southern District of Mississippi (8), the Western District of Louisiana (2), the Southern District of Texas (2), and the Northern District of Alabama (1)). It is interesting that the U.S. Judicial Panel on Multidistrict Litigation (JPML) noted in its order creating the MDL that "[c]entralization may also facilitate closer coordination with Kenneth Feinberg's administration of the BP compensation fund." *Id.* at 3.

64. The independent audit commissioned by the Justice Department determined that these claims were largely denied for legitimate reasons consistent with the announced protocols and methodologies of the GCCF: the claimants' business types were not compensable; the claimants failed to submit required financial documentation; the claimants failed to provide documentation sufficient to establish that their financial losses occurred as a result of the oil spill; never responded to deficiency letters requesting additional documentation; or submitted information that showed their claimed losses were due to alternate causes. BDO CONSULTING, *supra* note 58, at 6–7 (noting that although the audit did find that errors in claims processing negatively affected almost 7300 claims of the more than one million processed by the GCCF, "in general, the GCCF appeared to have consistently applied its protocols and methodologies in processing claims"). For Ken Feinberg's views on why the GCCF faced so much criticism from potential claimants, Gulf state politicians, and plaintiffs' lawyers, see FEINBERG, *supra* note 58, at 145–81.

65. Mullenix, *supra* note 9, at 4–5 ("[T]his article poses the question whether, based on what we have learned from a decade of experience, victim compensation funds accomplish justice for claimants"); *id.* at 6 ("[A]lmost every mass disaster or mass tort event inspires creation of a compensation fund."); *id.* at 19 ("[N]ot all catastrophic events should appropriately be addressed through a fund resolution of claims.").

resolution of claims is appropriate.”<sup>66</sup> Her third category, which contains disasters caused by responsible wrongdoers that are financially solvent, is the only one of the three which involves civil claims that could be litigated.<sup>67</sup> It is therefore the only category that involves a CRF by this Article’s definition. Mullenix includes in this category the funds created in connection with the BP Gulf oil spill and the GM ignition switch defect.<sup>68</sup>

Professor Mullenix argues that claims settled by her third category of fund, and therefore claims settled by all private CRFs, are unjustifiable on the ground that they impede the achievement of corrective justice (or “compensatory” justice, as she sometimes calls it).<sup>69</sup> In her words, corrective justice

requires attention to a victim’s highly individualized injury as well as his or her circumstances both before and after the injury. . . . When mass harms occur, theories of compensatory justice generally eschew remediation schemes that would confer comparable equity across all claimants. Compensatory justice, then, distinguishes individual cases of injury from one another and is highly particularized.<sup>70</sup>

Her opposition to private CRFs thus seems at first to be based mainly on the belief that they deliver rougher justice than courts.

Upon closer scrutiny, however, Professor Mullenix’s concern seems not to be the nature of the justice provided by CRFs but the fact that an individual who is neither a judge nor a juror determines the amount of compensation:

Alternative compensation funds ought not to administer quasi-corrective justice that is divorced from the tort system but instead [is] based on the authority of a single special master’s sense of corrective justice. . . . And, where alternative fund mechanisms appear to be illegitimate circumventions of the adjudicative tort system by a responsible private party or entity, and in turn set up compensation schemes that imperfectly mimic notions of corrective justice, a fund should not be permitted to operate outside judicial auspices.<sup>71</sup>

Thus, Professor Mullenix would seemingly ban private CRFs entirely.

One problem with Professor Mullenix’s view is that, by the standards of corrective justice, the tort system itself is highly imperfect. It routinely undercompensates plaintiffs with valid claims; it shortchanges severely injured plaintiffs to a greater extent than those whose injuries are minor, and it often

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66. *Id.*

67. Her other two categories are “occurrences for which victims are blameless but there is no wrongdoer who is responsible for the harms to the injured” and “events in which victims are blameless for their injuries but the alleged wrongdoers who are responsible for the harms are unavailable as a source for remediation.” *Id.* Her examples of the former include “[n]atural disasters, such as hurricanes,” and her examples of the latter include school shootings and the Boston marathon bombing in which the perpetrator is “most likely financially incapable of making reparation or restitution to his victims.” *Id.*

68. *Id.* at 21.

69. *Id.* She begins by contending that “the creation and implementation of funds are most justified in the context of natural disasters and blameless community tragedies, such as mass shootings” but “[the creation and implementation of funds] are least justified in traditional torts situations, where there is an identifiable alleged wrongdoer who has purportedly committed mass harms.” *Id.* In the very next sentence, however, she clarifies that she considers her “least justified” category of funds actually to be “unjustifiable.” *Id.*

70. *Id.* at 22.

71. *Id.* at 30.

sends deserving claimants home empty-handed.<sup>72</sup> The tort system also causes suboptimal outcomes from a corrective justice perspective by requiring parties to bear sizeable costs and thereby denying relief to victims who can neither bear those costs nor convince lawyers or litigation funders to bear them. Although it is an open empirical question whether the tort system achieves corrective justice more fully than private CRFs do, the evidence favoring the tort system is far from conclusive.

A final, and deeper, problem with Professor Mullenix's position is that the theory of corrective justice provides a normative account of certain duties that people owe each other, not of the means by which the burdens entailed by those duties must be quantified or fulfilled. In other words, corrective justice "explains the relationship between the duty to prevent or avoid harm on the one hand, and the duty to repair its costs on the other . . . . Though it grounds duties of repair, it does not mandate a mechanism by which those duties are to be discharged."<sup>73</sup> A person who owes another a duty of repair can satisfy the duty by paying the proper amount voluntarily. Neither a verdict quantifying the victim's loss nor a coercive order from a court is required. From a corrective justice perspective, then, courts have neither a monopoly nor even necessarily a comparative advantage when it comes to determining the size of compensatory obligations. Other means exist and may be better.<sup>74</sup>

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72. See, e.g., MICHAEL J. SAKS & STEPHAN LANDSMAN, *CLOSING DEATH'S DOOR: LEGAL INNOVATIONS TO END THE EPIDEMIC OF HEALTHCARE HARM* (2021) (discussing the ineffectiveness of medical malpractice litigation for providing negligently injured patients compensation); BERNARD S. BLACK, DAVID A. HYMAN, MYUNGO PAIK, WILLIAM M. SAGE & CHARLES SILVER, *MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHY TORT REFORM HASN'T HELPED* (2021) (discussing developments in medical malpractice litigation, including the effectiveness of policy reforms such as damages caps that responded to insurance spikes). See generally Don Dewees & Michael J. Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence*, 30 *OSGOODE HALL L.J.* 57 (1992) (analyzing recoveries in car accidents, medical malpractice, product liability claims, environmental claims, and workplace injury claims).

73. Jules Coleman, *Theories of Tort Law*, *STAN. ENCYC. OF PHIL.* (Oct. 20, 2008), <https://stanford.library.sydney.edu.au/archives/fall2008/entries/tort-theories/> [<https://perma.cc/B594-BE5U>].

74. For example, academic researchers have used liability insurers' closed-claim data to assess the extent to which payments reflect the merits of claims, the severity of injuries, and other relevant features. See, e.g., David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver & William M. Sage, *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003*, 4 *J. EMPIRICAL LEGAL STUD.* 3 (2007) (explaining that most jury awards in Texas medical malpractice cases received "haircuts"); David M. Studdert, Michelle M. Mello, Atul A. Gawande, Tejal K. Gandhi, Allen Kachalia, Catherine Yoon, Ann Louise Puopolo, & Troyen A. Brennan, *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 *NEW ENG. J. MED.* 2024 (2006) (finding that the "vast majority of expenditures go toward litigation over [medical malpractice] errors and payment of them."); Kathryn Zeiler, Charles Silver, Bernard Black, David A. Hyman & William M. Sage, *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990–2003*, 36 *J. LEGAL STUD.* S9 (2007) (explaining that policy limits act as a de facto cap on payment regardless of the merits of a claim). The same data could be used to develop estimates of claim values that are far more robust and defensible from a corrective justice perspective than those produced by juries and judges. See generally Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 *TEX. L. REV.* 571 (2012); Alexandra D. Lahav, *Rough Justice* (Aug. 9, 2010) (unpublished manuscript), <https://ssrn.com/abstract=1562677> [<https://perma.cc/6WKK-PF84>].

In sum, Professor Mullenix's claim that private CRFs should be prohibited when wrongdoers are identifiable and solvent is not persuasive. Most obviously, such a prohibition would preclude any settlement negotiated outside of court, whether as a one-off resolution or as part of a group settlement program. The in-house counsel for a defendant who settles an individual claim is no less a CRF than a global settlement program with a special master allocating funds. Corrective justice theory does not ground a preference for courts. And the assertion that claim valuations are always more accurate and more consistent with corrective justice when determined by a court rather than by the parties requires empirical support, which Professor Mullenix does not provide. Finally, while recognizing the importance of corrective justice in general, parties can reasonably believe that, at the margin, pursuing it through courts requires too great a sacrifice of other important values they hold because litigation is costly, error-prone, and slow.

## 2. Autonomy and Agency Costs

Some critics find private CRFs troubling because, they believe, mass tort claimants know too little to make intelligent decisions regarding the settlement of their claims. Often, these writers recommend judicial oversight as a means by which plaintiffs can gain unbiased information about the strength of their claims, the likelihood of success at trial, and the larger status of the litigation, including prior rulings and the outcomes of bellwether trials. The hope is that plaintiffs will better evaluate the reasonableness of settlement proposals with more information in hand. Obviously, a common predicate for proposals that call for increased judicial involvement and oversight is the belief that plaintiffs' lawyers cannot be trusted to help their clients make settlement-related decisions that are suitably informed.<sup>75</sup>

When defendants fund private CRFs, judges typically remain on the sidelines because claims are resolved out of court, sometimes without formal complaints even being filed. For example, upon discovering that a product is defective, a manufacturer may promptly and without any litigation offer to fix the item without charge, to replace it, to reimburse buyers for service costs, or to enhance the warranty it came with so that buyers will be covered for future repairs. These programs, which millions of consumers have taken advantage of, raise few hackles, even though consumers surely know less about the products and services at issue than manufacturers do, and even though the programs operate without

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75. See, e.g., Bradt & Rave, *supra* note 7, at 1264–65 (contending that “the principal task of the MDL judge ought to be to generate information to help ensure that the litigants can better monitor and evaluate the performance of their lawyers” and asserting that “the central lawyers—the ones who have that information—may not be entirely forthcoming once they have negotiated a deal that they must close in order to get paid”); Burch, *supra* note 7, at 130 (contending that the “current system” within MDLs is one in which “[d]efendants gain closure, and lead lawyers broker deals that reward them handsomely and sometimes pay litigants very little” and further contending “that suggests that oversight is warranted”); Jaros & Zimmerman, *supra* note 7, at 596–98 (contending that “cases that settle in groups deserve more public scrutiny and regulation than individually negotiated contracts” and advocating “judicial supervision of mass settlement practice”).

judicial supervision. Although consumers could sue manufacturers instead of accepting their terms, and sometimes do, voluntary participation is common and, on the whole, lawsuits are rare.

Judicial oversight is also absent when insurers resolve first-party personal injury and property damage claims without litigation. The vast majority of claims resulting from automobile accidents are handled informally by claims personnel and claimants. The claims that homeowners file for hail damage, water leaks, and roof repairs are also usually resolved without lawsuits. Only help from adjusters and building contractors is normally required. Information imbalances exist in these situations, but so far as we know, no one has called for insurers' ordinary claim settlement practices to be placed under judicial supervision.

Although not normally referred to as private CRFs, the organizational arrangements that manufacturers, insurers, and other businesses create to handle related claims qualify for the label.<sup>76</sup> All are bureaucracies created and funded by private entities for the purpose of handling claims expeditiously and inexpensively. Yet, all operate without judicial oversight and, despite any informational asymmetries that may be present, no one contends that supervision should be required. In view of this, one must ask why private CRFs created for the purpose of resolving mass tort claims are singled out by scholars for the imposition of judicial oversight.

One reason given by some commentators is that mass tort representations and settlements create opportunities for lawyers to exploit clients and entail other agency costs that are exceptionally severe.<sup>77</sup> More specifically, claimants in non-class action mass torts are said to “lack the ability to sufficiently monitor their lawyers” whose interests “may align more with the defendant in getting a deal done (and collecting their fee) than with the claimants in maximizing the value of their claims.”<sup>78</sup> It is certain, however, that these contentions are also true for lawyers who represent victims in other contexts. All clients rely on attorneys for information about the strengths and weaknesses of their cases and for settlement recommendations, and all lawyers who work on contingency get paid only if and when their clients' cases resolve. As Professor Howard Erichson has observed, “[a]rguably, a lawyer-client conflict exists whenever a contingent fee

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76. See, e.g., Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REGUL. 547, 549 (2016) (providing “an institutional account of how companies resolve the most common type of consumer dispute—small-value transactional disputes of a few hundred dollars or less”).

77. See, e.g., Bradt & Rave, *supra* note 7, at 1281–84 (explaining ways lawyers' interests can diverge from claimants); Burch, *supra* note 7, at 80–84 (discussing ethically questionable behavior by mass tort attorneys and conflicts between those attorneys and their clients which the author attributes to the institutionalization of repeat players in the system); Jaros & Zimmerman, *supra* note 7, at 570–73 (discussing aspects of aggregate settlements that arguably undermine legitimacy, loyalty, and the rule of law).

78. Bradt & Rave, *supra* note 7, at 1267–68; see also Burch, *supra* note 7, at 127 (“[W]ith no accountability, repeat players may be tempted to design mutually beneficial deals that allow them to reap the peace premium—not the plaintiffs.”); Jaros & Zimmerman, *supra* note 7, at 571 (contending that “aggregated settlements [also] undermine [attorney-client] loyalty” when they “rely on repeat players who may sacrifice their clients, or the public interest, for other unrelated goals”) (emphasis in original).

lawyer advises a single client about a settlement because the lawyer's fee may depend on the client's decision" and "that level of conflict is inherent in virtually every [contingent fee] lawyer-client relationship."<sup>79</sup>

In fact, in the context of a single-client representation, the attorney's risk of losing his fee if the client does not settle may be *greater*, and the attorney therefore may be *more* likely than in a non-class aggregate litigation to behave disloyally. As one of us has previously explained, the total fee involved will typically be significantly greater in an aggregate settlement than a single-client representation, but the likelihood that the attorney receives no fee at all is much greater in the latter.<sup>80</sup> If the client declines the settlement offer in the single-client representation, there will be no settlement and therefore no fee for the attorney. In the aggregate settlement context, however, the decision of any one client to decline the settlement offer will not derail the entire settlement.<sup>81</sup> The lawyer will simply make a bit less in fees if 999 claimants, rather than 1,000, accept their settlement offers under the aggregate agreement.<sup>82</sup>

The point just made raises two important questions: Why do commentators who recommend judicial involvement in CRFs involving multiple claimants not extend their recommendation to single-claimant settlements? More generally, why do agency costs introduced by plaintiffs' representational arrangements ever justify judicial oversight of settlements between plaintiffs and defendants? In class actions, the answer is straightforward. Because relationships between absent class members and class counsel are created by law, not by contracts, the law must address all problems connected to the principal-agent relationships it creates. Excessive agency costs are one such problem, and the law addresses them

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79. Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1009 (2010). It should be noted that these concerns are not specific to contingent-fee attorneys. Attorneys compensated through an hourly rate or other fee arrangements are also subject to conflicts. Other fee structures simply create different incentives for the attorney to act disloyally in different ways. Thus, for example, an hourly rate attorney has a financial incentive to be too slow to recommend settlement to her clients while the contingent-fee attorney may have an incentive to be too quick to do so. Lynn A. Baker, *Facts About Fees: Lessons for Legal Ethics*, 80 TEX. L. REV. 1985, 1986–88 (2002); see also Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1980 (2002) (“[T]here is no empirical evidence that any type of fee arrangement increases the likelihood of unethical behavior, although the specific nature of unethical conduct most likely does vary depending on the type of payment structure.”).

80. Baker, *Ethical Finality*, *supra* note 43, at 1950.

81. This will be true “even if the if the settlement agreement gives the defendant the option to terminate the settlement if 100 percent of the eligible clients do not accept their settlement offers. Consider a hypothetical settlement involving 1,000 claimants and a 100 percent participation threshold. If the plaintiff's attorney is able to obtain releases from ‘only’ 999 of the claimants, will a self-interested defendant's best course of action really be to terminate the settlement and continue litigating against the 1,000 claimants rather than have prompt, final resolution of the claims of the 999 claimants willing to settle? In my nearly two decades of experience as a consultant on dozens of actual large-group, large-dollar, mass tort settlements, I have never seen a defendant terminate a settlement in which the specified participation threshold, whether 100 percent or less, was not met.” *Id.* at 1950–51.

82. *Id.* at 1951. The fact that defendants regularly and self-interestedly waive their contractual right to terminate aggregate settlements in which the participation requirement is not met is often overlooked by scholars such as Howard Erichson who contend that the plaintiffs' lawyer in an aggregate settlement “stands to lose millions of dollars if any client says no.” Erichson, *supra* note 79, at 1009.

by a variety of means, including mandating judicial review of class action settlements.<sup>83</sup>

When representations arise organically and consensually, as they usually do, the responsibility for ameliorating agency costs rests not with the courts, but with clients and attorneys, both of whom have incentives to reduce them. Principals would rather work with trustworthy agents, and agents can attract business by finding ways to assure principals of their honesty and integrity. Consequently, in markets where agents compete for clients, excessive agency costs should not persist. If proponents of judicial supervision are right to contend that third-party review of settlements is a desirable means of ensuring lawyers' fidelity, market forces should encourage lawyers and clients to opt for it on their own.

Stated differently, third-party review is yet another possible characteristic that parties might choose to include in a CRF. In fact, some private CRFs have employed forms of third-party review. For example, as discussed above, GM's compensation fund was administered by Ken Feinberg, rather than its own in-house counsel, thereby providing a third-party a critical role in assuring the fairness of claimants' settlement offer amounts.<sup>84</sup> In the Vioxx settlement, a rare truly global (and public) settlement, the settlement agreement stated that Judge Eldon Fallon, the MDL judge, would serve as "chief administrator" of the

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83. See, e.g., Bradt & Rave, *supra* note 7, at 1268–69:

In class actions . . . class members have practically no direct control over class counsel, and they do not affirmatively consent to the representation. . . . Absent class members do retain some ability to indirectly police class counsel under Rule 23(b)(3), which allows them to opt out of the class if they are dissatisfied. . . . Alternatively, class members can make their voices heard by intervening in the action or objecting to any settlement.

But both courts and rulemakers have recognized that these indirect means of influencing class counsel's conduct are alone insufficient to guarantee that class counsel will remain loyal to the absent class members. As a result, the Federal Rules of Civil Procedure assign a central role to the judge to look out for absent class members. Indeed, some courts have described the judge as a 'fiduciary of the class.' . . . And Rule 23(e) requires the judge to review all class action settlements for fairness, reasonableness, and adequacy. . . . In short, judicial supervision and solicitude for absentees are essential to making the class-action device legitimate.

(footnotes omitted); see also, e.g., Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.").

Judges also on occasion review non-class aggregate settlements, although they do so less often and despite the fact that neither the MDL statute nor a procedural rule empowers them to provide settlement reviews. See Bradt & Rave, *supra* note 7, at 1298–1301 (discussing "unilateral judicial review" including by Judge Hellerstein of the 9/11 responders' settlement). And sometimes, plaintiffs' counsel voluntarily seek court approval of settlement offers in a mass tort context. See, e.g., Baker, *Aggregate Settlements*, *supra* note 52, at 298–300 (discussing non-class aggregate settlement in which the parties involved the judge in crafting the claim valuation process and then approving both the settlement agreement and individual settlement offer amounts); Bradt & Rave, *supra* note 7, at 1296–97 (discussing various non-class aggregate settlements in which the parties sought judicial review of a private settlement agreement).

84. See *supra* notes 20–24 and accompanying text. As discussed above, Ken Feinberg also served for a time, and less successfully, in a similar capacity with the BP compensation fund. See *supra* text accompanying notes 57–64 (discussing the relative success and shortcomings of the *Deepwater Horizon* oil spill victim compensation fund).



settlement and authorized him to oversee it.<sup>85</sup> Confidential, mass tort “inventory” settlements will sometimes involve an “allocation special master” in the process of determining each claimant’s settlement offer amount.<sup>86</sup> In some cases the settlement agreement will specify the individual who will serve in this capacity or will state that plaintiffs’ counsel will retain a special master of their choice.<sup>87</sup> In others, the settlement agreement is silent on the matter of an allocation special master, but plaintiffs’ counsel will choose to employ one.<sup>88</sup> In each instance, there is the further option for either or both of the parties to formally request a court to “appoint” the allocation special master, notwithstanding the otherwise private and (typically) confidential nature of the settlement.<sup>89</sup> Finally, in some confidential inventory settlements, plaintiffs’ counsel voluntarily involve a court in the process of approving claimants’ individual settlement offer amounts.<sup>90</sup> The chosen court is typically the one, specified in the settlement agreement, that will supervise the Qualified Settlement Fund.

Fear of malpractice lawsuits and breach of fiduciary duty claims contributes to the desire of plaintiffs’ attorneys to involve third-parties, including medical professionals, in aggregate settlements for the purpose of allocating proceeds.<sup>91</sup> Being fiduciaries, lawyers who represent multiple plaintiffs with related claims must act in ways that are expected to make all clients better off (or at least to make some better off without harming others). Because this duty is respected when lawyers seek to maximize the total value of claims, bargaining for the largest possible settlement comports with the fiduciary responsibility. By contrast, the stress on the fiduciary duty is palpable when lawyers allocate a lump-sum recovery among clients, all of whom would rather receive more money than less. Although lawyers are permitted by the ethics rule to handle such allocations themselves, and regularly do so successfully, some would rather engage third-parties who may bring objectivity and independence to the task and whose allocations may, in any event, be viewed by the clients as more “fair.”<sup>92</sup>

Delegating allocations to third-parties also may help mass tort plaintiffs’ lawyers manage settlements involving multiple law firms, including referring

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85. See Settlement Agreement Between Merck & Co., Inc. and [Plaintiffs] (Nov. 9, 2007), §§ 6.1.1, 8.1, 16.4.2, <https://multijurisdictionlitigation.files.wordpress.com/2012/11/vioxx-mastersa.pdf> [<https://perma.cc/TK7X-GSDG>] [hereinafter Vioxx Settlement Agreement]. This settlement occurred in relation to *In re VIOXX Prods. Liab. Litig.*, MDL No. 1657 (E.D. La.).

86. Baker, *Disappearing Defendant*, *supra* note 42, at 1172–83.

87. *Id.* at 1173.

88. *Id.*

89. *Id.*

90. For discussion of such a settlement that became public (in part) as a result of malpractice and breach of fiduciary duty claims filed by certain clients against the plaintiffs’ attorney, see Baker, *Aggregating Settlements*, *supra* note 52, at 298–303.

91. For discussion of the increasing number of large-dollar liability claims brought in recent years against plaintiffs’ attorneys in mass tort settlements, see *id.* at 291–92, 298–305.

92. For a comprehensive discussion of the various ethically permissible processes for allocating lump-sum mass tort settlement funds, see Baker, *Disappearing Defendant*, *supra* note 42, at 1169–72, 1177–83.

lawyers. The fees of all of these plaintiffs' lawyers are tied to their clients' recoveries. Consequently, when cases vary in their characteristics and potential settlement value, as typically is true, referring and other associated lawyers must worry that their clients will be shortchanged in the settlement allocation process and that they will be too. Referring and other associated lawyers are, then, knowledgeable monitors who are incentivized to complain if their clients are treated inequitably.<sup>93</sup> Their presence reduces the agency costs that inhere in aggregate litigation and settlements, and the need to satisfy all these lawyers adds to the pressure mass tort lawyers feel to bring in third-parties to assist with settlement allocations.

In view of the frequency with which plaintiffs' attorneys and defendants engage outsiders to assist with settlements, and the incentives they have to do so when reducing agency costs or transaction costs is a likely result, it is not obvious that mandating judicial supervision will add much. Ironically, one of the CRFs most frequently criticized by commentators is the Vioxx settlement which, as noted above, explicitly provided for the MDL judge to oversee the settlement and, indeed, to serve as its "chief administrator."<sup>94</sup>

Moreover, a mandated judicial role may impose costs on the parties, including delay and errors in decision-making. A judge may be prone to grandstanding or may put subjective assessments of reasonableness ahead of sound economics as, in our opinion, Judge Alvin Hellerstein did when he *sua sponte* reviewed the proposed settlement of the 9/11 first responders' claims and declared the settlement "not enough" and the plaintiffs' lawyers' contractual fees too large.<sup>95</sup> The judge bears few of the risks or costs associated with continued litigation or

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93. See, e.g., *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 433 (3rd Cir. 2016) (suggesting that future claimants were adequately represented in the class settlement because the 3,900 players with no currently compensable injuries were represented by 300 different lawyers—"many sets of eyes reviewing the terms of the settlement"—and chose to remain in the class and benefit from the settlement); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 315–16 (1996) (explaining how referring and associated lawyers are incentivized to monitor settlement processes in order to ensure their own financial interests).

94. Vioxx Settlement Agreement, *supra* note 85, at §§ 6.1.1, 8.1, 16.4.2. For commentary critical of the Vioxx settlement see, for example, Bradt & Rave, *supra* note 7; Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019); Burch, *supra* note 7, at 82, 82 n.57; Erichson, *supra* note 79; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); Jaros & Zimmerman, *supra* note 7, at 559; Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175 (2017); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1208–10 (2013). As one of us has previously explained, many of these criticisms of the Vioxx settlement misunderstand the terms of that lengthy and complex agreement. Baker, *Ethical Finality*, *supra* note 43, at 1953.

95. Transcript of Status Conference at 54, 56, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010) (MDL No. 2037) (noting that the "settlement is not enough" and that the plaintiffs' lawyers, after eight years of litigating the cases "are entitled to a reasonable and perhaps even generous fee. In my judgment, they are not entitled to their contract rights of a third, thereabouts. So I will fix the reasonableness of the fee, and the fee will be payable by the captive insurance, and that amount of money will be available for distribution to the plaintiffs").

delay in reaching a settlement.<sup>96</sup> And, because few judges are former plaintiffs' attorneys,<sup>97</sup> they often have little first-hand knowledge of the urgency of mass tort personal injury clients' needs or of the difficulties that arise when lawyers sue on behalf of large numbers of individually represented claimants.

#### IV CONCLUSION

Many law professors are both suspicious of private orderings and confident that public officials, especially judges, can improve upon them. Often, both the suspicions and the confidence are unwarranted. Markets generate pressures to reduce agency costs and transaction costs. Lawyers can attract clients by assuring them of their loyalty and dedication. Defendants wanting to settle claims *en masse* can attract plaintiffs by guaranteeing them fair treatment. The tools and techniques used to achieve these goals vary from case to case and almost never work perfectly, but they usually work reasonably well. Critically, it is not self-evident that judicial oversight or involvement would make them work appreciably better.

The potential of judicial review is limited partly because settling parties already employ third parties frequently. They use neutrals to help with negotiations, to handle allocations, to ensure fairness, to provide audiences for victims, and to decide minor disagreements that arise as complex settlements play out. Francis McGovern played all these roles many times and in many contexts over a long and distinguished career. And, along the way, he educated us all through scholarly articles that with clarity, sophistication, and analytical rigor shared those experiences and imparted the lessons he had learned. At a conference in Texas held shortly before he died, he described his meetings as a special master with the survivors and the families of those who perished in the

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96. The primary risk borne by the judge is that the parties will not reach an agreement he considers adequately improved, he therefore will not be able to clear the matter from his docket, and litigation continues. But that risk is entirely within the control of the judge who, moreover, will continue to have a docket of cases, whether or not any one dispute is resolved. In contrast, the claimants awaiting their compensation in the settlement that Judge Hellerstein rejected after eight years of litigation, see Transcript of Status Conference, *supra* note 95, at 40, had to suffer the complete uncertainty of when or if a new settlement would be proposed, ultimately waiting an additional three months for a new settlement to be presented and then approved by the Judge. See Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 157, 171 nn.301–02 (2012) (noting that Judge Hellerstein rejected the original proposed settlement as “inadequate” on March 19, 2010, then approved the “modified and improved” settlement agreement on June 29, 2010).

97. See, e.g., JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 17–18 (2021), <http://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> [<https://perma.cc/JE2D-92U5>] (discussing judges with certain professional backgrounds, including those with corporate law and private practice backgrounds, and how that background “affect[s] actual case outcomes”). The report defines a corporate background as meaning the judge was “partner at a Big Law firm or [served] as in-house counsel at a large corporation” and notes that a 2019 study found that 60 percent of sitting U.S. Circuit Court judges had this background. *Id.* at 2–3.

Rhode Island nightclub fire in terms that brought listeners to tears.<sup>98</sup> As a special master in the opioid MDL, he envisioned an encompassing settlement that offered everyone something while ensuring that most of the money would be used to help victims,<sup>99</sup> not to supplement unrelated governmental spending, as happened in the 1998 tobacco settlement.<sup>100</sup> Francis was a great person and a good person. We miss him and are happy to be able to honor him.

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98. See Associated Press, *supra* note 10.

99. Professor McGovern supported the certification of a negotiation class in the opiates MDL partly because any settlement the class action might have produced would have contained a plan for allocating the recovery, and that plan would have had to have been approved by the presiding judge, whose desire to help victims of the opioid crisis has long been clear. On the negotiation class, see McGovern & Rubenstein, *supra* note 12. On the MDL judge's hope that a settlement would benefit the victims of the opioid crisis, see Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [<https://perma.cc/64AL-ZKGGK>].

100. On the uses made of the tobacco settlement funds, see *Broken Promises to Our Children: A State-by-State Look at the 1998 Tobacco Settlement 21 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jan. 15, 2021), <https://www.tobaccofreekids.org/what-we-do/us/statereport/> [<https://perma.cc/N2DV-WBX5>].