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## Aggregate Litigation Goes Private

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## AGGREGATE LITIGATION GOES PRIVATE

Dana A. Remus<sup>\*</sup>  
Adam S. Zimmerman<sup>\*\*</sup>

### ABSTRACT

*In Disaggregative Mechanisms, Professor Jaime Dodge documents how corporate defendants increasingly design their own mass resolution systems to avoid collective litigation—what she calls “disaggregative” dispute resolution. According to Dodge, such schemes promise benefits not only to putative defendants, but also to plaintiffs—resolving disputes quickly, handling large volumes of claims predictably, and sometimes, offering more compensation than would be available through aggregate litigation. She observes, however, that these systems also risk underdeterrence. Dodge concludes by endorsing disaggregative mechanisms while suggesting a need for more public oversight.*

*In the following response, we argue that, left unregulated, such high-volume claim systems threaten transparency, deterrence, and even the rule of law. We therefore agree with Dodge’s call for public oversight. But we observe that a number of policing and oversight mechanisms already exist. Today, lawmakers and regulators police collective arbitration and private settlement funds, in a wide variety of areas—from financial and environmental regulations to employment and consumer protection laws. After reviewing the ways that policymakers currently regulate corporate dispute resolution, we examine their effectiveness by exploring two regulated private settlement systems in more detail: (1) regulations developed by the Obama Administration that require airlines to offer “liquidated damages” using a preapproved settlement grid when they overbook customers on a flight and (2) regulations imposed by the Office of the Comptroller of the Currency following accusations that many of the nation’s largest banks executed “robo-signed” mortgages that required banks to perform a detailed “independent foreclosure*

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review” of past loans with borrowers. These case studies demonstrate both the challenges to, and opportunities for, government bodies that attempt to encourage sound regulation of mass private settlement systems without compromising their potential contributions to increased access, equality, and efficiency.

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## INTRODUCTION

Much like everything else in the United States today, American civil justice is increasingly outsourced and mass-produced. So says Professor Jamie Dodge in her new article, *Disaggregative Mechanisms*.<sup>1</sup> From grounded cruise ships off the coast of Italy<sup>2</sup> to the tiny “Aqua Dots” beads that once induced comas in children,<sup>3</sup> Professor Dodge documents a rising trend—the bulk outsourcing of civil justice. When threatened by many similar claims, corporate defendants are increasingly using entirely private and ready-made dispute resolution systems to avoid mass litigation.<sup>4</sup> Relying on arbitration agreements and privately-managed, mass settlement funds, they are finding new ways to

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<sup>1</sup> Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253 (2014).

<sup>2</sup> See Nicole Winfield, *Costa Cruises Offers \$14,460 per Person for Concordia Cruise*, HUFFINGTON POST (Jan. 27, 2012, 3:05 PM), [http://www.huffingtonpost.com/2012/01/27/costa-cruises-disaster-compensation\\_n\\_1236148.html](http://www.huffingtonpost.com/2012/01/27/costa-cruises-disaster-compensation_n_1236148.html).

<sup>3</sup> See generally *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377 (N.D. Ill. 2010) (refusing to certify a putative class, which consisted of consumers who purchased toys that induced comas when swallowed, because of a voluntary recall and refund program).

<sup>4</sup> See Dodge, *supra* note 1, at 1256.

resolve disputes privately and efficiently, without class actions or other kinds of aggregate litigation. Hence the tag: “disaggregative mechanisms.”<sup>5</sup>

Dodge shows that the charged, but generally distinct, debates over mandatory arbitration and large settlement funds are part of the same phenomenon. Both reflect a comprehensive strategy by corporate defendants to bypass class actions and other traditional aggregative court procedures.<sup>6</sup> For Dodge, the main difference is timing—while people generally enter arbitration agreements before a dispute arises, they decide to participate in mass settlement funds after the fact.<sup>7</sup> But whether corporations sidestep the courtroom through *ex ante* boilerplate agreements or their own *ex post* private settlement facilities, Dodge details how they similarly benefit from outsourced dispute resolution.<sup>8</sup> Relying on commercial economies of scale, corporate actors hope to resolve disputes cheaply, quickly, predictably, and in a high volume.<sup>9</sup>

These goals are consistent with rationales the Supreme Court<sup>10</sup> and some scholars<sup>11</sup> have offered for favoring arbitration and settlement agreements. But, as Dodge acknowledges, disaggregative mechanisms can also impose heavy costs. They risk underdeterrence as corporate defendants resolve disputes quickly, quietly, and out of public view. They may allow corporations to exploit differences in bargaining power with their customers.<sup>12</sup> And they may permit defendants to contract around important laws, undermining the consistent, open development of legal rules.<sup>13</sup> Disaggregative mechanisms therefore threaten to become even more controversial than the class actions they seek to replace.<sup>14</sup>

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<sup>5</sup> *Id.* at 1257 (“These emerging systems are based upon a wholly different dispute resolution methodology than those described in the existing literature—one that bypasses the determination of common questions, at the core of aggregate mechanisms, entirely.”).

<sup>6</sup> *Id.* at 1257–59.

<sup>7</sup> *Id.* at 1256.

<sup>8</sup> *See id.* at 1258–59.

<sup>9</sup> *See id.*

<sup>10</sup> *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (enforcing forum selection as a method of reducing inefficiency); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14, 17 (1972) (citing “certainty” as a justification for enforcing a forum-selection provision).

<sup>11</sup> *See* Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 518 (2009); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856–78 (2006).

<sup>12</sup> *See* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. (forthcoming 2015) (manuscript at 25–27), available at <http://ssrn.com/abstract=2414754>.

<sup>13</sup> *See* Dodge, *supra* note 1, at 1261.

<sup>14</sup> *See id.* at 1260.

In light of this, Dodge cautiously embraces mass private dispute resolution. She acknowledges its advantages and limits and suggests a need for more public regulation.<sup>15</sup> Her goal is not to articulate the precise contours of an effective system of oversight but rather to establish its importance in ensuring legitimacy, neutrality, and consistency. In this response, we build on Dodge's insights by exploring a number of ways that policymakers may police mass dispute resolution.

We agree that, left unregulated, corporate high-volume claim systems threaten transparency, deterrence, and the rule of law. But we argue that policymakers already have a number of oversight tools at their disposal.<sup>16</sup> Currently, lawmakers and regulators require and oversee collective arbitration and private settlement funds in a variety of ways. In some cases, they regulate the process and substance of mass arbitration and settlement agreements openly and prospectively. In other cases, they rely on retrospective, informal, and more flexible governmental actions, such as agreements not to prosecute companies that adopt desired dispute resolution agreements. In all cases, the core challenge is to encourage the sound regulation of private settlement agreements without compromising their potential contributions to increased access, equality, and efficiency.

This Response proceeds as follows. In Part I, we survey a range of existing public regulatory approaches to private arbitration agreements and settlement funds. In Part II, we examine two regulated private settlement systems in more detail: (1) regulations developed by the Obama Administration that require airlines to offer "liquidated damages" using a preapproved settlement grid when they overbook customers on a flight, and (2) regulations imposed by the Office of the Comptroller of the Currency following the "robo-signing" scandal that required banks to perform a detailed "independent foreclosure review" of past loans with borrowers. These case studies demonstrate both challenges and opportunities for government agencies that regulate privatized

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<sup>15</sup> See *id.* at 1262, 1314.

<sup>16</sup> Professor Dodge acknowledges that "no public [disaggregative] mechanism exists," *id.* at 1262, and that there is not currently a good way to achieve the benefits of disaggregation while avoiding its pitfalls, but calls for scholarship to fill that gap, *see id.* at 1314 ("[I]t seems there must be a better way to obtain the benefits of disaggregation without the legitimacy challenges of privatization nor the costs imposed by the current backstop of aggregation. . . . This Article therefore offers a call to a new line of scholarship exploring the ways in which these new private ordering mechanisms are changing not only our conceptualization and use of aggregate procedure but also the enforcement of substantive law and the nature of the private right of action. In the wake of this transformation, what is the right approach?"). In this Response, we contribute to the range of potential responses by collecting and examining current and future legislative and regulatory reforms.

mass settlement systems. In both cases, government actors hoped private dispute resolution would offer more flexible and timely relief than court for large groups of similarly injured parties. But they soon confronted other significant regulatory challenges, such as (1) policing deeply sophisticated settlement systems at a reasonable cost; (2) preserving transparency, participation, and flexibility; and (3) ensuring such systems remained current and legitimate.

Accordingly, in Part III, we recommend two reforms to improve the disaggregative mechanisms described by Dodge: (1) consumer or other stakeholder participation in the design of the private resolution system and (2) administrative regulation designed to avoid coercive settlement practices and increase transparency.

### I. REGULATING PRIVATE AGGREGATE SETTLEMENT

In recent years, federal laws and administrative agencies have increasingly encouraged or required various forms of private dispute resolution, but with different approaches to oversight and regulation. As described in this Part, these approaches vary in terms of timing, formality, and substance.

With respect to timing, governmental bodies may regulate mass settlement systems before or after a dispute arises. Some legislation and agency actions lay ground rules for the resolution of future mass disputes. For example, the Financial Industry Regulatory Authority sets broad rules for arbitration agreements between brokers and investors to guard against the imposition of one-sided burdens on investors.<sup>17</sup> Among other things, FINRA requires that arbitration agreements (1) alert customers to the presence of an arbitration agreement and inform them of how arbitration differs from litigation,<sup>18</sup> (2) determine hearing locations based on the investor's residence,<sup>19</sup> (3) permit extensive document discovery,<sup>20</sup> and (4) mandate that the arbitral forum subsidize and, in some cases, waive investors' fees.<sup>21</sup>

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<sup>17</sup> See *FINRA Rules*, FINRA, r. 12508, available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4096](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096).

<sup>18</sup> See *id.* rr. 12200–12201.

<sup>19</sup> See *id.* r. 12213.

<sup>20</sup> See *id.* rr. 12505–12513.

<sup>21</sup> See *Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 183 (2009) (statement of Richard G. Ketchum, Chairman & CEO, FINRA).

Other examples of prospective regulation abound. The National Labor Relations Board recently barred class action or collective litigation waivers from labor agreements.<sup>22</sup> Congress has similarly enacted specialized bills that prohibit or regulate arbitration agreements in residential mortgage agreements, consumer-credit agreements with the armed forces, and livestock and poultry agreements.<sup>23</sup> More broadly, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 provides that parties responsible for environmental disasters will have to resolve disputes privately, often through claim settlement facilities, subject to very basic ground rules.<sup>24</sup>

But government actors do not only regulate private settlement systems prospectively; they often do so after a dispute arises. In recent years, government actors have required, or taken into account, corporate attempts to develop high-volume settlements in areas ranging from false advertising scams<sup>25</sup> to cable subscription overcharges<sup>26</sup> to unlawful credit card fees.<sup>27</sup> Under the terms of a recent settlement with the FTC, for example, Apple is required to administer a settlement fund that will reimburse consumers who

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<sup>22</sup> See D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012). The Board concluded that such agreements interfere with employees' rights under the National Labor Relations Act to engage in concerted action for their protection. See *id.* at \*5; see also Charles A. Sullivan & Timothy P. Glynn, Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution, 64 ALA. L. REV. 1013, 1015 (2013).

<sup>23</sup> See, e.g., 7 U.S.C. § 197c(a) (2012) (providing that "any livestock or poultry contract that contains a provision requiring the use of arbitration . . . shall contain a provision that allows a producer or grower . . . to decline to be bound by the arbitration provision"); 10 U.S.C. § 987(f)(4) (2012) (providing, in the context of the armed forces, that "no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable"); 15 U.S.C. § 1639c(e)(1) (2012) (providing that "[n]o residential mortgage loan . . . may include terms which require arbitration . . . as the method for resolving any controversy").

<sup>24</sup> See 42 U.S.C. § 9622(a) (2006).

<sup>25</sup> In one case, for example, a magistrate judge was appointed to examine the sufficiency of Newsday's own \$90 million reimbursement program arising out of an alleged multimillion-dollar false advertising scheme. See *United States v. Brennan*, No. 08-MISC-96, 2008 WL 4279570, at \*1 (E.D.N.Y. Sept. 18, 2008); *United States v. Brennan*, 526 F. Supp. 2d 378, 379, 381 (E.D.N.Y. 2007).

<sup>26</sup> See, e.g., Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Obtains \$2.2 Million in Refunds for 18,000 Time Warner Cable Consumers Upstate (Mar. 7, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-22-million-refunds-18000-time-warner-cable-consumers-upstate> (describing the settlement in which Time Warner Cable itself would refund thousands of consumers an average of \$119 in overcharges).

<sup>27</sup> JP Morgan Chase Bank, N.A., No. 2013-CFPB-0007 (Consumer Fin. Prot. Bureau Sept. 19, 2013) (consent order), available at [http://files.consumerfinance.gov/f/201309\\_cfpb\\_jpmc\\_consent-order.pdf](http://files.consumerfinance.gov/f/201309_cfpb_jpmc_consent-order.pdf) (ordering JP Morgan to refund an estimated \$309 million to more than 2.1 million customers for "illegal credit card practices").

were billed for accidental or unauthorized in-app charges incurred by children.<sup>28</sup>

In addition to varying in their timing, regulatory approaches vary in their formality. Some regulation results from formal government action after legislative debate, administrative hearings, or formal study. BP's multibillion-dollar Gulf Coast Claim Facility was governed by a comprehensive governmental scheme, the Oil Pollution Act, adopted with overwhelming bipartisan support following the 1990 Exxon Valdez oil spill.<sup>29</sup> More recently, Congress has instructed both the newly created Consumer Financial Protection Bureau<sup>30</sup> and the Securities Exchange Commission<sup>31</sup> to investigate and formally regulate class action waivers in financial and shareholder arbitration agreements.

But not all regulation is the result of formal legislative or agency action. In some cases, the mere threat of a lawsuit or other adverse action may persuade a potential defendant to drop unwanted provisions from an agreement to

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<sup>28</sup> See Cecilia Kang & Hayley Tsukayama, *FTC Says Apple Will Pay at Least \$32.5 Million over In-App Purchases*, WASH. POST (Jan. 15, 2014), [http://www.washingtonpost.com/business/technology/ftc-says-apple-will-pay-at-least-325-million-over-in-app-purchases/2014/01/15/7c2ebc54-7e13-11e3-95c6-0a7aa80874bc\\_story.html](http://www.washingtonpost.com/business/technology/ftc-says-apple-will-pay-at-least-325-million-over-in-app-purchases/2014/01/15/7c2ebc54-7e13-11e3-95c6-0a7aa80874bc_story.html). The settlement agreement required Apple to pay out a minimum total amount of \$32.5 million (noting that if it pays out less, it must remit the remainder to the FTC). *Id.* Furthermore, it required Apple to provide notice to all consumers who it charged for unauthorized in-app purchases and to pay full refunds “promptly” upon request by an injured consumer. Press Release, FTC, Apple Inc. Will Provide Full Consumer Refunds of at Least \$32.5 Million to Settle FTC Complaint It Charged for Kids’ In-App Purchases Without Parental Consent (Jan. 15, 2014), <http://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million>.

<sup>29</sup> The original bill enjoyed such widespread support that it passed the House 375–5 and the Senate by voice vote, before passing unanimously in both chambers after conference. See 135 CONG. REC. 28,270, 30,150–51 (1989). Among other things, the enacted bill, the Oil Pollution Act of 1990, requires defendants to establish their own claim settlement facilities to promote finality and to “avoid costly and cumbersome litigation.” *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310–11 (E.D. Va. 1993) (citing 135 CONG. REC. H7962, H7965 (daily ed. Nov. 2, 1989) (statements of Rep. Lent and Rep. Hammerschmidt)) (relying on the OPA’s legislative history to dismiss the litigation because the plaintiff failed to exhaust remedies through defendant’s settlement facility); *accord* 33 U.S.C. § 2702(a) (2012); *Boca Ciego Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 240 (11th Cir. 1995).

<sup>30</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1964, 2151 (codified in sections 7, 12, and 15 of the U.S.C.).

<sup>31</sup> See 15 U.S.C. § 78o(o) (granting the SEC authority to “prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients . . . to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors” (emphasis added)).



arbitrate.<sup>32</sup> The Carlyle Group, a giant private equity firm, dropped a controversial effort to require that its future shareholders waive rights to collective litigation and pursue mandatory arbitration after consulting with the SEC.<sup>33</sup> The SEC only had to warn that its staff “was not prepared” to clear Carlyle’s regulatory filing to go public with its controversial provisions for arbitration.<sup>34</sup>

Finally, regulatory approaches vary in their target, with some focusing on the process and others on the substance of mass dispute resolution agreements. Some regulation identifies best practices for settlement procedures, setting forth guidelines and rules for corporations that design their own mass dispute resolution programs. For example, the Department of Labor has recommended that corporations adopt in-house ADR systems in response to a 400% increase in employment grievances over twenty years.<sup>35</sup> Among other things, the DOL strongly advised that such dispute resolution systems should (1) include the participation of employees and employee committees in their design, investigations, and hearings; (2) provide for neutral arbitrators and very limited discovery; and (3) be offered only after a dispute arises and not be made a condition of employment.<sup>36</sup>

Other regulatory approaches may address the substance of the ultimate agreement. The Oil Pollution Act, discussed above, requires responsible parties to offer emergency payments and relief to injured parties in the wake of a devastating spill and prohibits them from conditioning receipt on a waiver of legal rights to additional funds.<sup>37</sup>

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<sup>32</sup> See Greg Roumeliotis & Jonathan Stempel, *Carlyle Retreats on Shareholder Lawsuit Ban*, REUTERS (Feb. 3, 2012, 6:16 PM), <http://www.reuters.com/article/2012/02/03/carlyle-idUSL5E8D34FF20120203>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 7–8 (2012).

<sup>35</sup> See Office of the Sec’y, U.S. Dep’t of Labor, *IV. Employment Litigation and Dispute Resolution*, U.S. DEP’T LAB., [http://www.dol.gov/\\_sec/media/reports/dunlop/section4.htm](http://www.dol.gov/_sec/media/reports/dunlop/section4.htm) (last visited May 16, 2014). The regulation of ADR in employment cases was the product of intensive study and promotion by “a Special Task Force created by the leaderships of the National Academy of Arbitrators, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution, and the National Employment Lawyers Association.” Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 371–72; see also Arnold M. Zack, *Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model*, 7 WORLD ARB. & MEDIATION REP. 10, 10 (1996). Their proposed protocol required “an equal role for the employee in selecting the arbitrator, discovery, and review for errors of law.” See Carrington & Haagen, *supra*, at 372.

<sup>36</sup> See Office of the Sec’y, U.S. Dep’t of Labor, *supra* note 35.

<sup>37</sup> See 33 U.S.C. § 2715 (2012); see also *supra* note 29 and accompanying text.

These distinct regulatory approaches—*ex ante* versus *ex post*, formal versus informal, and procedural versus substantive—do not establish six mutually exclusive categories of regulation. They do, however, illustrate a diverse range of existing approaches to the regulation of private settlement arrangements, which extends far beyond court oversight.

## II. TWO EXAMPLES OF EXISTING PRIVATE REGULATION

In this Part, we describe in more detail two recently adopted government-regulated settlement systems, one involving bumped airline passengers and the other, the mortgage foreclosure crisis. The former was formal, prospective regulation adopted after several years of administrative hearings and legislative debate involving airlines, consumers, and other interest groups. The latter was *ex post* and informal—after years of failed attempts in Congress to respond to a growing housing crisis, federal and state officials quietly brokered the terms of a multibillion-dollar settlement agreement for struggling homeowners. Both regulated settlement systems struggled with similar challenges in calculating damages, notifying claimants of their rights, and ensuring effective monitoring. But together, they suggest new opportunities for government actors who hope to encourage fair outcomes in mass settlements without compromising their stated goals of increased legal access, consistency, and efficiency.

### A. Airlines

Airlines regularly and intentionally overbook flights. By selling more tickets than seats, they can account for inevitable last minute cancellations and no-shows and optimize the number of filled seats on each flight.<sup>38</sup> Travelers in the aggregate benefit from this practice, as it allows for flexible reservation and cancellation policies and reduces pressures on higher fares.<sup>39</sup> Recognizing these advantages, federal regulators have not prohibited the practice.<sup>40</sup> Instead, they require airlines to adopt regulated settlement practices designed to allocate the risk of overbooking to the least inconvenienced travelers while guaranteeing some compensation to bumped passengers.<sup>41</sup>

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<sup>38</sup> See Elliott Blanchard, Note, *Terminal 250: Federal Regulation of Airline Overbooking*, 79 N.Y.U. L. REV. 1799, 1802 (2004).

<sup>39</sup> See *id.* at 1803–04.

<sup>40</sup> See 14 C.F.R. § 250.2a (2013).

<sup>41</sup> See *id.* §§ 250.2a–.2b, 250.5; Oversales, 47 Fed. Reg. 52,980, 52,982 (Nov. 24, 1982) (codified at 14 C.F.R. pt. 250) (“The rule facilitates the resolution of airline-passenger disputes because passengers are immediately informed of their rights and options. There is no question about how much and when a passenger

In 1978, the now-defunct Civil Aeronautics Board issued regulations that required airlines to offer “liquidated damages” to passengers who were involuntarily bumped from overbooked flights.<sup>42</sup> This now-familiar “denied boarding compensation” program involved two steps. First, airlines had to ask passengers on overbooked flights to give up their confirmed reservations voluntarily in exchange for some agreed-upon compensation, often set by the airline.<sup>43</sup> If that process failed, the airline had to provide government-set compensation for passengers involuntarily bumped off the plane, according to a fixed schedule with a statutory maximum.<sup>44</sup> Under the 1978 regulations, an involuntarily bumped passenger who suffered up to a two-hour delay in arrival time received 100% of the value of the ticket, up to a maximum of \$200; if the delay exceeded two hours, the passenger received 200% of the value of the ticket, up to a maximum of \$400.<sup>45</sup>

These statutory ceilings remained constant until the Obama Administration revisited the denied boarding regulations in 2008. Under current regulation, an involuntarily bumped passenger who suffers a delay of between one and two hours (up to four hours for international flights) now receives 200% of the customer’s airfare up to a maximum of \$650.<sup>46</sup> After two hours, the compensation doubles.<sup>47</sup> The new rules require compensation even for passengers traveling on frequent flier tickets.<sup>48</sup> They also provide for an inflation-based increase in the \$650 and \$1,300 statutory ceilings every two years.<sup>49</sup>

The federal regulations account for the advantages that overbooking at an appropriate level can deliver to airlines and passengers alike, while recognizing that the costs of overbooking practices fall exclusively and unfairly on a small

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must be paid. The problem is generally resolved on the spot, thus maintaining passenger goodwill and eliminating the need for costly lawsuits.”); *see also* Note, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200, 1201–02 (1976) (noting that the rule was spurred by passenger anger at “ticketing time limits” and the “imposition of reservation service charges”).

<sup>42</sup> See 14 C.F.R. § 250.4(b) (1982); Priority Rules, Denied-Boarding Compensation Tariffs and Reports of Unaccommodated Passengers, 41 Fed. Reg. 16,478, 16,478 (Apr. 19, 1976) (codified at 14 C.F.R. pt. 250).

<sup>43</sup> 14 C.F.R. § 250.2b(a).

<sup>44</sup> *Id.* §§ 250.2b(b), 250.5.

<sup>45</sup> *Id.* § 250.5.

<sup>46</sup> *Id.* §§ 250.5(a), 250.9 (2013).

<sup>47</sup> *Id.* § 250.5(a).

<sup>48</sup> *Id.* § 250.5(d).

<sup>49</sup> See *id.* § 250.2b (providing the procedures for requesting volunteers); *id.* § 250.5 (discussing involuntary-bumping compensation); *id.* § 250.10 (providing the reporting requirements of bumped passengers); *id.* § 250.11 (discussing the public disclosure requirements of deliberate overbooking and boarding procedures).

minority of travelers, who are involuntarily bumped. Because individuals are not likely to have the financial resources or incentives to sue, the regulatory scheme offers efficient access to compensation.

But while facilitating a practice that is broadly considered desirable at appropriate levels, the airline compensation program also illustrates three difficulties with substantive, prospective, and formal settlement arrangements. The first is determining how much compensation is enough. Just as consumers criticized the mandatory payments as too low, many international carriers argued they were too high—such that they would chill overbooking practices, and, ultimately, increase fares.<sup>50</sup> Moreover, a uniform system of damages may punish airlines that choose not to overbook and reward airlines that frequently overbook.<sup>51</sup> This illustrates one of the difficulties of *ex ante* regulation—policymakers will lack accurate information regarding the value of an injury before it has occurred.

The second difficulty, even for formal and open forms of regulation, is ensuring sufficient notice and public participation. Notwithstanding statutory disclosure requirements,<sup>52</sup> many travelers remain unaware of their legal rights, either because the airlines are not complying with the requirements or because the requirements are an ineffective means of placing passengers on actual notice.<sup>53</sup> Accordingly, while the overwhelming majority of overbooked and bumped passengers accept what airlines offer, this may just reflect a lack of awareness that bumped passengers are legally entitled to more.<sup>54</sup>

The third and final difficulty entails effective monitoring and enforcement to ensure compliance with mass settlement regulations. In the absence of sufficient oversight, some airlines have taken advantage of unsophisticated passengers to evade the airline compensation regulations. In 2012, for

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<sup>50</sup> See *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110, 23,135 (Apr. 25, 2011) (codified at 14 C.F.R. pts. 244, 250, 253, 259, and 399) (summarizing the objections of consumer groups, AirTran Airways, and Virgin Atlantic).

<sup>51</sup> Blanchard, *supra* note 38, at 1811.

<sup>52</sup> Airlines are required to advise any volunteer whether he or she might be involuntarily bumped and, if that were to occur, the amount of compensation that would be due. 14 C.F.R. § 250.2b(b). They are required to give involuntarily bumped passengers a written statement describing their legal rights. *Id.* § 250.9(a).

<sup>53</sup> See Christopher Elliott, *A Long, Bumpy Ride to Denied-Boarding Compensation*, CHI. TRIB. (Dec. 25, 2012), [http://articles.chicagotribune.com/2012-12-25/travel/sns-201212211100—tms—traveltrctntt-ee20121225-20121225\\_1\\_passenger-rights-departure-time-flight-vouchers](http://articles.chicagotribune.com/2012-12-25/travel/sns-201212211100—tms—traveltrctntt-ee20121225-20121225_1_passenger-rights-departure-time-flight-vouchers) (“Few air travelers know that there are rules governing oversales, so it isn’t uncommon to see passengers simply walk away when they’re bumped, without asking for any compensation.”).

<sup>54</sup> See *id.*

example, United Airlines refused compensation to an individual bumped from a fifty-seat regional jet,<sup>55</sup> citing an exemption to the rules for aircrafts with fewer than sixty seats where extra passengers would prevent the plane from operating safely.<sup>56</sup> United eventually agreed to compensation, but only after the individual, who was an Air Force attorney, carefully read the regulations and filed suit in Virginia district court.<sup>57</sup> Meanwhile, a DOT “investigation found that ‘on numerous instances’ in 2009, Southwest either failed to pay bumped passengers the appropriate amount or failed to inform them that they were entitled to cash instead of a voucher.”<sup>58</sup>

### *B. Mortgage Foreclosure Review*

In contrast to airline compensation, the regulation of mortgage foreclosure payouts was retrospective, informal, and largely procedural. After years of failed legislative attempts to respond to the mortgage foreclosure crisis,<sup>59</sup> federal and state officials covertly brokered the terms of a multibillion-dollar settlement agreement.<sup>60</sup> But much like the airline compensation program, the foreclosure review struggled to calculate damages, notify homeowners, and effectively monitor dispute resolution between mortgage banks and distressed borrowers.

In April 2011, following accusations that many of the nation’s largest banks executed “robo-signed” mortgages and engaged in “[u]nsafe and

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<sup>55</sup> *Id.*

<sup>56</sup> *See id.* According to the article, the DOT said the regulation “is unambiguous and as written completely exempts only planes with 30 or fewer seats.” *Id.* Planes with sixty or fewer seats are only exempt where the bumping is for safety reasons. *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> Hugo Martin, *Southwest Fined for ‘Bumping,’* L.A. TIMES, Apr. 28, 2010, <http://articles.latimes.com/2010/apr/28/business/la-fi-southwest-fine-20100428>.

<sup>59</sup> *See, e.g.,* CONG. OVERSIGHT PANEL, AN ASSESSMENT OF FORECLOSURE MITIGATION EFFORTS AFTER SIX MONTHS 1, 97 (2009); CONG. OVERSIGHT PANEL, FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION 1–4, 11, 14, 37, 48 (2009). The few government programs that executive policymakers adopted without Congress also failed. The FHASecure refinancing program refinanced only around 4,100 delinquent borrowers before the program ended in December 2008. *See* Michael Corkery, *Mortgage ‘Cram-Downs’ Loom as Foreclosures Mount*, WALL ST. J., Dec. 31, 2008, at C1. The HOPE for Homeowners program refinanced only 130 loans between October 2008 and September 2010. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 4 n.5 (2011).

<sup>60</sup> *See Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews: Hearing Before the Subcomm. on Hous., Transp., & Cmty. Dev. of the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 114 (2011) [hereinafter *Helping Homeowners I*] (testimony of Anthony B. Sanders, Professor of Real Estate Finance, George Mason University).

unsound practices,”<sup>61</sup> the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Reserve entered into a landmark settlement with major mortgage-servicing banks.<sup>62</sup> The settlement required that the banks perform an independent review of loans for which foreclosure was “initiated, pending, or completed during 2009 or 2010” upon request of the borrower.<sup>63</sup> The intent of the reviews was to identify wrongdoing by mortgage servicers in individual foreclosure cases and to compensate the victims appropriately.<sup>64</sup>

The Independent Foreclosure Review program operated in tandem with the National Mortgage Settlement, which was announced nine months later.<sup>65</sup> An agreement among the U.S. attorney general, forty-nine state attorneys general, and five of the largest mortgage servicers, the National Mortgage Settlement was designed to offer fast and automatic payouts, in the range of \$1,500 to \$2,000, to borrowers who had lost their homes to foreclosure.<sup>66</sup> In response to critics of its one-size-fits-all approach, proponents cited the Independent Foreclosure Review as a program that would offer an individualized and neutral review.<sup>67</sup>

Like the airline compensation system, the Independent Foreclosure Review illustrates many of the potential strengths and efficiencies of out-of-court

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<sup>61</sup> See *Failure to Recover: The State of Housing Markets, Mortgage Servicing Practices, and Foreclosures: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 3–4 (2012) [hereinafter *Failure to Recover*] (internal quotation mark omitted) (statements of Rep. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform; and Rep. Elijah E. Cummings, Member, H. Comm. on Oversight & Gov't Reform).

<sup>62</sup> *Helping Homeowners I*, *supra* note 60, at 38 (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

<sup>63</sup> *What You Need to Know: Independent Foreclosure Review*, BOARD GOVERNORS FED. RES. SYS. (Jan. 27, 2014), <http://www.federalreserve.gov/consumerinfo/independent-foreclosure-review.htm>.

<sup>64</sup> See *id.*

<sup>65</sup> See Press Release, Nat'l Ass'n of Attorneys Gen., State Attorneys General, *Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs* (Feb. 9, 2012), <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php>.

<sup>66</sup> Morgan Brennan, *How the \$25 Billion Foreclosure Settlement Will Really Affect the Housing Market*, FORBES (Feb. 9, 2012, 4:31 PM), <http://www.forbes.com/sites/morganbrennan/2012/02/09/how-the-25-billion-foreclosure-settlement-will-really-affect-the-housing-market/>.

<sup>67</sup> See, e.g., Broderick Perkins, *National Foreclosure Review Offers Potential \$100,000 or More per Household, but Deadline Looms for Millions*, DEADLINE NEWS.COM (May 30, 2012), <http://www.deadline.com/2012/05/30/national-foreclosure-review-offers-potential-100000-or-more-per-household-but-deadline-looms-for-millions/>; see also *Help for Homeowners*, NAT'L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/help> (last visited May 16, 2014) (“[B]orrowers will not . . . relinquish the right to participate in the independent review process being conducted by federal banking regulators.”).

settlement systems. In theory, it offered efficient access to compensation to qualifying borrowers, who might lack the resources to bring a challenge in court.<sup>68</sup> Whereas litigation could last for years, the OCC aspired to make the Independent Foreclosure Review prompt and efficient.<sup>69</sup> Moreover, it was designed to offer individualized recourse, using information about actual losses to calculate damages (and thus, minimizing the difficulties of *ex ante* calculations like with the airline regulations).<sup>70</sup> And while waiting for individualized review, borrowers could receive immediate (albeit incomplete) relief through the National Mortgage Settlement.<sup>71</sup>

Once implemented, however, the program was quickly bogged down in problems, illustrating the risks associated with regulated settlement agreements.<sup>72</sup> The individualized reviews were much more complex, time-consuming, and expensive than anticipated.<sup>73</sup> As with the airline regulations, ensuring adequate and meaningful notice was a problem, leading to low participation levels.<sup>74</sup> In addition, the OCC failed to monitor and oversee the program to ensure consistent and truly independent reviews.<sup>75</sup> The banks hired independent consulting firms to conduct the reviews,<sup>76</sup> but the OCC permitted the banks themselves to do much of the work of reviewing the loans and

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<sup>68</sup> See *Failure to Recover*, *supra* note 61, at 14, 18–26 (statement of Morris Morgan, Deputy Comptroller, Office of the Comptroller of the Currency) (describing the independent foreclosure review process).

<sup>69</sup> See *id.* at 18, 21.

<sup>70</sup> See *Helping Homeowners I*, *supra* note 60, at 5–6 (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

<sup>71</sup> See *About the Settlement*, NAT'L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/about> (last visited May 16, 2014).

<sup>72</sup> See *Helping Homeowners I*, *supra* note 60, at 51–79 (statement of Alys Cohen, Staff Attorney, National Consumer Law Center).

<sup>73</sup> See *id.* at 51–87.

<sup>74</sup> See *id.* at 65. Many homeowners thought the letter was a scam, didn't know how to fill it out, or didn't understand what they stood to gain from filling it out. CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS VIII: LACK OF BANK ACCOUNTABILITY PLAGUES CALIFORNIANS 10 (2012), <http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTIvMDQvMTIvMDJfMjJfMjEwX0NvdW5zZWxvclN1cnZleUZJTkFMLnBkZiJdXQ/CounselorSurveyFINAL.pdf>.

<sup>75</sup> See *Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews—Part II: Hearing Before the Subcomm. on Hous., Transp., & Cmty. Dev. of the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. 23, 29–31 (2013) [hereinafter *Helping Homeowners II*] (statement of Lawrence L. Evans, Jr., Director, Financial Markets and Community Investment, U.S. Government Accountability Office). Among other things, the GAO found that the OCC's Independent Foreclosure Review suffered because "regulators missed opportunities to develop common criteria or reference documents to help consultants navigate complexities involving State foreclosure law." *Id.* at 3.

<sup>76</sup> See *Helping Homeowners I*, *supra* note 60, at 66 (statement of Alys Cohen, Staff Attorney, National Consumer Law Center).

gathering the information that would determine whether and how much a homeowner would be compensated.<sup>77</sup> The OCC's decision to rely on the very institutions implicated in the foreclosure crisis to compensate aggrieved borrowers is a common feature of many mass dispute resolution systems. In the interest of efficiency, public officials often depend on private parties most familiar with the nature of the claims.<sup>78</sup> Here, for example, the OCC cited the banks' comparative expertise in evaluating distressed loans. But the additional efficiency can come at the price of accountability, which was evident here. A recent study by the Consumer Financial Protection Bureau showed that banks profited by deliberately underinvesting in their servicing processes.<sup>79</sup> And although federal regulators intended to combat such problems by maintaining an oversight role, they reviewed only a minuscule number of the total foreclosure files—far less than a statistically reliable sample.<sup>80</sup>

These problems proved to be so great that in January 2013, with fewer than 104,000 reviews completed, regulators announced a new agreement with most of the banks to replace the independent review process with direct payouts.<sup>81</sup> The direct payouts, which would range from \$300 to \$125,000, would go to homeowners who had been in some stage of foreclosure in 2009 or 2010, regardless of whether there was evidence of wrongdoing by the banks.<sup>82</sup> The amount would be determined by a matrix that accounted for the stage of the foreclosure process and whether the borrower had requested review under the Independent Foreclosure Review process.<sup>83</sup>

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<sup>77</sup> See *id.* at 73. Accordingly, although the independent consultants technically made the compensation decisions, those decisions were based on work performed by the banks themselves. See *id.* at 72. Moreover, while the banks had the opportunity to challenge the decisions before they became final, homeowners had no such opportunity. See *id.* at 73.

<sup>78</sup> See Remus & Zimmerman, *supra* note 12 (manuscript at 22).

<sup>79</sup> Cf. CONSUMER FIN. PROT. BUREAU, CFPB STUDY OF OVERDRAFT PROGRAMS: A WHITE PAPER OF INITIAL DATA FINDINGS 4–7 (2013), [http://files.consumerfinance.gov/f/201306\\_cfpb\\_whitepaper\\_overdraft-practices.pdf](http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf) (highlighting costly and often unnecessary overdraft protection programs).

<sup>80</sup> See *Helping Homeowners II*, *supra* note 75, at 3 (statement of Lawrence L. Evans, Jr., Director, Financial Markets and Community Investment, U.S. Government Accountability Office).

<sup>81</sup> See Jessica Silver-Greenberg, *Regulators and 13 Banks Complete \$9.3 Billion Deal for Foreclosure Relief*, DEALBOOK (Feb. 28, 2013, 12:24 PM), <http://dealbook.nytimes.com/2013/02/28/regulators-and-13-banks-complete-9-3-billion-deal-for-foreclosure-relief/>. This would include \$3.6 billion in direct compensation to eligible homeowners and \$5.7 billion allocated for loan modifications, forgiveness of deficiency judgments, and other mortgage assistance. See *id.*

<sup>82</sup> See Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of Currency, Payments to 4.2 Million Borrowers Covered by Foreclosure Agreement to Begin April 12 (Apr. 9, 2013), <http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-60.html>.

<sup>83</sup> *Id.* (“In determining the payment amounts, borrowers were categorized according to the stage of their foreclosure process and the type of possible servicer error. Regulators then determined amounts for each



In announcing the new plan, OCC Director Thomas Curry explained that it would “get more money to more people more quickly.”<sup>84</sup> Stated otherwise, it would achieve the benefits of private aggregate settlement systems—efficient recourse to large numbers of people. But it would also come at the cost of individualized review and compensation. The settlement continued to offer some variation in payouts, and therefore remained distinct from the National Mortgage Settlement’s one-size-fits-all approach.<sup>85</sup> But in place of individual case review, regulators relied on a rigid matrix to determine the likely value of homeowners’ injuries.<sup>86</sup> This ensured less accurate compensation and fewer answers about how banks themselves contributed to the mortgage foreclosure crisis. As many critics of the settlement pointed out, government actors terminated the review process before a sufficient number of reviews were completed to determine the full scope of harm that occurred.<sup>87</sup> Congressman Elijah Cummings of Maryland expressed a sentiment of many: “I am deeply concerned by the lack of transparency surrounding this settlement and by the fact that we still have no idea how many illegal foreclosures each bank committed.”<sup>88</sup>

### C. Challenges to Administrative Regulation

As these examples highlight, both government regulators and the public at large benefit from regulated forms of mass dispute resolution. Private dispute resolution can offer faster, more sophisticated, and in some cases, more flexible forms of relief to large groups of similarly injured parties than can courts. But government actors face other significant challenges in regulating settlement systems, such as (1) policing deeply sophisticated transactions at a

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category using the financial remediation matrix published in June 2012 as a guide, incorporating input from various consumer groups.”).

<sup>84</sup> Press Release, Office of the Comptroller of Currency, Statement from Comptroller of the Currency Thomas J. Curry on the IFR Settlement (Jan. 7, 2013), <http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-4.html>.

<sup>85</sup> See Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of Currency, *supra* note 82.

<sup>86</sup> See Joe Mont, *OCC’s Curry Defends End of Independent Foreclosure Reviews*, COMPLIANCE WEEK (Feb. 13, 2013), <http://www.complianceweek.com/occs-curry-defends-end-of-independent-foreclosure-reviews/article/280293/>.

<sup>87</sup> See, e.g., Julie Schmit, *Foreclosure Settlement a Billion-Dollar Bust*, USA TODAY (June 25, 2013, 12:36 PM), <http://www.usatoday.com/story/money/business/2013/06/24/independent-foreclosure-review-payments/2390073/> (citing the testimony of Lawrence L. Evans, Jr., of the GAO at an April 2013 Senate hearing).

<sup>88</sup> *Id.* (internal quotation marks omitted).

reasonable cost; (2) preserving transparency, participation, and flexibility; and (3) ensuring such systems remain current and legitimate.

### 1. *Cost*

Regulation requires time, money, and effort. These costs inevitably interfere with one of the primary advantages of large private settlement systems—their efficiency.<sup>89</sup> Commercial airlines continue to complain that preset compensation for bumped passengers imposes costs that, in turn, are unfairly passed onto all passengers in the form of increased airfare. And one of the core problems with the Independent Mortgage Review program was the expense and delay entailed in individualized review and federal oversight.

Sometimes regulators will determine that the value of efficiency outweighs the cost of more regulation. In the mortgage foreclosure settlement, government regulators ultimately abandoned the time-consuming, individual review process in favor of efficient payments based on a simple grid. But efficiency is only one of many important system values. Regulatory responses must strike a desirable balance between the cost of new regulation and the parties' interests in accurate, transparent, and legitimate mass compensation.

### 2. *Capture and Ossification*

Regulators often delegate responsibility in private settlement systems to improve efficiency. In doing so, they rely on the implicated parties' expertise, familiarity with the issues, and economies of scale. The danger is that they will do so in coercive, inconsistent, or self-interested ways, such as when banks underinvested in their investigation of shoddy mortgage foreclosure practices. Many privatized forms of regulation suffer from this problem,<sup>90</sup> which is exacerbated rather than mitigated when regulators are “captured” by the very industries they regulate.<sup>91</sup> Indeed, some argue that the OCC's decision to

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<sup>89</sup> See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 224–25 (1997).

<sup>90</sup> See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 6–8 (2007).

<sup>91</sup> See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1059–67 (1997) (describing the theory of agency capture—“the agency often becomes closely identified with and dependent upon the industry it is charged with regulating”—and its development).

delegate file reviews to the banks themselves may have been the result of regulatory capture.<sup>92</sup>

Another danger of regulation is “ossification,” where agencies, encumbered by administrative procedures and the threat of defending new regulations in court, fail to adapt to changed circumstances.<sup>93</sup> As an example, initial airline regulations remained unchanged for over three decades before the Obama Administration revisited them in 2008.<sup>94</sup> Ossification is a particular problem when administrative regulations prescribe specific awards through a rigid grid. Such regulation may fail to account for inflation or the full range of variation among injured parties that might emerge over time. This is particularly true of airlines, which increasingly charge separately for services, like baggage fees, that once were included in the final ticket price and were, thus, reimbursable.<sup>95</sup> When government institutions fail to revisit and update settlement provisions regularly, they risk legitimacy and accuracy.

### 3. *Timing*

Finally, timing matters. Even as *ex ante* regulation offers more certainty and predictability, policymakers seeking to set appropriate compensation levels in advance will invariably struggle. Among other things, individuals tend to assign significantly different values to injuries before and after they experience them, generally discounting their value in advance.<sup>96</sup> Thus, even when

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<sup>92</sup> See, e.g., *Helping Homeowners II*, *supra* note 75, at 10 (statement of Sen. Robert Menendez, Chairman, S. Subcomm. on Hous., Transp., & Cmty. Dev.) (“Since the OCC and the Federal Reserve abandoned the review, to what extent will they be able to further examine whether certain banks committed systematic errors in their foreclosures based on either preliminary results or based on information that they gathered through regular bank examinations or other sources?”).

<sup>93</sup> See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1397–98 (1992) (describing ossification in the rulemaking process); see also Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 533–36 (1997).

<sup>94</sup> To be fair, “[t]he Department of Transportation considered updating these compensation amounts in 2001.” Blanchard, *supra* note 38, at 1801 n.6. But it delayed action because of the airline industry’s financial woes following the September 11 terrorist attacks. *Id.* (citing Jane Costello, *Airlines Cut Payments to Bumped Flyers*, WALL ST. J., Nov. 12, 2002, at D1).

<sup>95</sup> See Joe Sharkey, *Checked Baggage Fee? That’s Not the End of It*, N.Y. TIMES, Oct. 29, 2013, at B8 (observing that “airlines are heavily into the game [of upselling], as they slice and dice every aspect of air travel to find creative ways to charge fees for just about everything except the use of the restrooms”).

<sup>96</sup> See Shane Frederick, George Lowenstein & Ted O’Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 382 (2002); Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States*, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 178, 194 (Joseph P. Forgas ed., 2000); Daniel Kahneman & Richard H. Thaler, *Anomalies: Utility Maximization and Experienced Utility*, 20 J. ECON. PERSP. 221, 224

lawmakers and administrative agencies solicit direct input from interest groups in advance of a dispute, the results may not adequately reflect their injuries.

*Ex post* settlement regulation presents different challenges. Although policymakers may determine compensation more accurately after the fact, *ex post* regulation may be uncertain, unpredictable, and frequently resolved hurriedly behind closed doors. For example, part of the problem with the Independent Mortgage Review may have been haste in designing and announcing the program.

In sum, government regulation of out-of-court mass dispute resolution systems involves great risks and rewards. Government regulation of private settlement systems attempts to deliver the public goals of transparency, accountability, and fairness, without compromising the private settlements' strengths of efficiency, flexibility, and access.

### III. REFORM

We agree with Professor Dodge that the advantages of private mass settlement systems will only be realized with sufficient independent oversight.<sup>97</sup> Below, we offer two proposals: (1) consumer or other stakeholder participation in the design of private resolution systems and (2) administrative regulation designed to avoid coercive settlement practices and increase transparency.

#### A. Stakeholder Participation

Involving consumers and other stakeholders in the design of private settlement systems will increase both legitimacy and transparency. Participation could take a number of different forms. Putative defendants choosing mass settlement systems could voluntarily solicit opinions and advice regarding the types and degree of process that will be perceived as fair<sup>98</sup> or the requisite notice to ensure that waiver of future rights is truly informed. For example, they could employ focus groups to determine appropriate processes

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(2006); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1150–54 (2010) (describing theory of consumers' "time-inconsistent preferences" and hyperbolic discounting).

<sup>97</sup> See *supra* note 15 and accompanying text.

<sup>98</sup> See Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, LAW & CONTEMP. PROBS., Autumn 1990, at 199, 204 ("[H]aving one's day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved.").

and payouts for different types of injuries following an accident or incident.<sup>99</sup> According to the Government Accountability Office, the banks that participated in the Independent Mortgage Review and the National Mortgage Settlement would have greatly benefited from borrower feedback on a range of issues, from acceptable waiting periods and adequate compensation schemes, to sufficient notice and ease of understanding of the requisite paperwork.<sup>100</sup>

Alternatively, prospective regulation could require parties to solicit stakeholder participation as part of the dispute resolution process. As part of a negotiated rulemaking, an agency could require a potential defendant to negotiate with injured parties to produce a proposed recovery plan, which the agency would then review and potentially adopt as an official administrative response. Finally, like in Department of Labor guidelines for workplace disputes, stakeholders themselves could participate in hearing, evaluating, or even deciding claims.<sup>101</sup>

By soliciting and accounting for a wide variety of viewpoints, regulators and potential defendants can increase the likelihood that settlement programs will remain current. They can also increase the likelihood that these programs will satisfy injured parties and members of the public at large. By requiring potential defendants to solicit diverse viewpoints, regulators can bring the programs out from behind closed doors, disseminating relevant information about the procedures and substantive outcomes.

### *B. Administrative Regulation*

With respect to settlement programs required by federal law, lawmakers and administrative bodies should carefully consider the timing and scope of any waivers sought by potential defendants, the transparency of the agreements struck, and tools for monitoring private settlement systems. Both the denied-boarding regulations and the Independent Mortgage Review agreement provide that by accepting compensation, parties do not waive their rights to pursue additional compensation in court. But this is not always the case. Too

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<sup>99</sup> The GAO, for example, recently recommended similar “best practices” to improve the multibillion-dollar Independent Foreclosure Review. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-277, FORECLOSURE REVIEW: LESSONS LEARNED COULD ENHANCE CONTINUING REVIEWS AND ACTIVITIES UNDER AMENDED CONSENT ORDERS 7 (2013) (recommending regulators use “tests or focus groups, to assess the readability of the outreach materials” and “solicit input from consumer groups when reviewing initial communication materials”).

<sup>100</sup> *See id.*

<sup>101</sup> *See supra* note 35 and accompanying text.

frequently, claimants who participate in private dispute resolution arrangements unwittingly waive their rights to sue.<sup>102</sup> Prospective regulations could address these situations, by prohibiting waiver as a condition of participation entirely,<sup>103</sup> barring waivers in emergency situations or that frustrate regulatory policies,<sup>104</sup> or at the very least, imposing disclosure requirements that mandate that claimants knowingly consent to the waiver.<sup>105</sup>

Where appropriate, regulations could also require publication and dissemination of recovery grids or formulas. Even when such information is publicly available in the Federal Register, it may not be widely known, as is the case with the airline regulations. Sometimes, it may therefore be appropriate to require not only public disclosure, but also active dissemination and educational efforts by the potential defendants.<sup>106</sup>

Finally, regulations should specify oversight and monitoring mechanisms. As noted above, airlines are sometimes inconsistent in following the promulgated compensation scheme, likely because they think they can get away with doing so.<sup>107</sup> And although federal regulators claimed to “spot check” the banks’ work in the Independent Mortgage Review, they only reviewed roughly 100,000 foreclosure files out of 4 million, far short of a statistically reliable sample.<sup>108</sup> These sorts of problems can and should be avoided through specified oversight mechanisms, either in the governing

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<sup>102</sup> See, e.g., Campbell Robertson, *Along Gulf, Many Wary of Promises After Spill: Remembering the Fight for Money After Katrina*, N.Y. TIMES, May 10, 2010, at A12; Josh Wingrove, *BP Pulls Disputed Waiver for Workers*, GLOBE & MAIL, May 3, 2010, at A11 (describing allegations that BP sought “to pull the wool over” the eyes of local fishermen by requiring litigation waivers as part of its compensation program in violation of the Oil Pollution Act).

<sup>103</sup> This is already the case for mass criminal restitution schemes, which bar consideration of future civil recoveries. See 18 U.S.C. § 3664(f)(1)(B) (2012) (“In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.”); *United States v. Cienfuegos*, 462 F.3d 1160, 1168 (9th Cir. 2006) (holding that the district court abused its discretion in considering the civil availability of restitution in a criminal case).

<sup>104</sup> The Oil Pollution Act, for example, bars waivers for “interim, short-term” emergency payments made to aggrieved victims and businesses immediately after a spill. See 33 U.S.C. § 2705(a) (2012).

<sup>105</sup> Such disclosures are already required by FINRA before disputes arise, as well as by CERCLA and the Oil Pollution Act, after disputes arise. See *supra* Part I; see also 33 U.S.C. § 2714 (setting forth “advertisement” requirements for “responsible part[ies]” of an oil spill).

<sup>106</sup> Two months into its own compensation process, BP consulted with charter-boat crews to develop a compensation template to account for the seasonal nature of the charter-fishing business. See Pete Spotts, *BP: We’ve Been Too Slow to Pay Oil Spill Claims*, CHRISTIAN SCI. MONITOR (June 10, 2010), <http://www.csmonitor.com/USA/2010/0610/BP-We-ve-been-too-slow-to-pay-Gulf-oil-spill-claims>.

<sup>107</sup> See *supra* note 53 and accompanying text.

<sup>108</sup> See Silver-Greenberg, *supra* note 81; *supra* note 75 and accompanying text.

regulations or the terms of a settlement agreement. The Obama Administration's new airline regulations, for example, require that airlines report all bumped passengers to the Department of Transportation and publish new compensation amounts in print and on their websites.<sup>109</sup> Airlines must also automatically adjust payments to passengers to account for inflation.<sup>110</sup> In including this provision, regulators responded to widespread criticism that the DOT failed to effectively monitor and update airline regulations for thirty years.

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<sup>109</sup> See 14 C.F.R. §§ 250.9–.10 (2013).

<sup>110</sup> See *supra* note 49 and accompanying text.