

# **DISASTERS, VICTIM COMPENSATION, AND ALTERNATIVE DISPUTE RESOLUTION**

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## INTRODUCTION

The September 11th Victim Compensation Fund (VCF) is a design system in need of redesign. The VCF was enacted by Congress shortly after 9/11 to provide compensation for economic and non-economic loss to the injured victims and the deceased victims' families.<sup>1</sup> The Fund was a no-fault alternative to tort litigation.<sup>2</sup> An individual who elected the Fund waived his rights to pursue litigation to seek damages.<sup>3</sup>

I have been chosen by Congress to assist in a redesign of the VCF, with the goal of making the system more efficient and effective, as well as making it applicable to certain types of future disasters in the US. This system was chosen because disasters will unfortunately continue to occur, and the need for victim compensation will be an ongoing concern, so we want a system that is as painless and easy as possible for the victims. Of course, each disaster is unique, but the redesign of the VCF can help provide a workable framework for future victim compensation relief, with adjustments being made depending on the nature of the specific catastrophe.

Part I of the system redesign discusses the main problems associated with the VCF. Part II examines the stakeholders and how to identify them. Part III explores the initial strategizing of the redesign, including feedback mechanisms and dispute resolution processes. Finally, Part IV describes the work in progress by following how a test case proceeds through the system.

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<sup>1</sup> *September 11th Victim Compensation Fund*, <http://www.vcf.gov/faq.html> (last visited March 25, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; Raymond L. Mariani, *INDUSTRY IN CRISIS: A PROGRESS REPORT ON VICTIM COMPENSATION AND THE AIRLINES AFTER THE SEPTEMBER 11TH LEGISLATION*, 68 J. Air L. & Com. 253, 269 (2003) (The Fund specifically permits victims to maintain lawsuits against terrorists and their conspirators who perpetrated the terrorist attacks).

## 1. PROBLEMS

The main problems in need of redesign can be distilled into four categories. First, there were the perceptions of arbitrariness surrounding the amounts received by the victims and the families, and the figures used to calculate the compensation awards.<sup>4</sup> Many victims' families felt the VCF placed a higher value on the lives of those individuals who made a higher wage versus those who worked for next to nothing.<sup>5</sup> In other words, certain stakeholders felt that the Fund was putting a value on the worth of the victim, basically telling the family that their loved one was less valuable than someone else who earned a higher salary. Therefore, some victims refused to participate in the system.<sup>6</sup>

Second, because the system was no-fault, a lack of accountability and sense of justice was ever-present on the minds of many of the victims.<sup>7</sup> Certain stakeholders instead preferred to pursue litigation in the hopes of getting some answers as to what occurred and holding someone accountable for the disaster.<sup>8</sup>

Third, the system was not efficient or transparent enough. For instance, mediation was not an available option for victims who wanted to dispute the compensation amounts they were awarded.<sup>9</sup> Also, the feedback mechanisms utilized were insufficient for gathering and disseminating information to various stakeholders.<sup>10</sup>

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<sup>4</sup> Jessica Ramirez, *THE VICTIMS COMPENSATION FUND: A MODEL FOR FUTURE MASS CASUALTY SITUATIONS*, 29 Transp. L.J. 283, 298 (2002).

<sup>5</sup> *Id.* at 298.

<sup>6</sup> *Id.*

<sup>7</sup> Linda S. Mullenix & Kristen B. Stewart, *THE SEPTEMBER 11TH VICTIM COMPENSATION FUND: FUND APPROACHES TO RESOLVING MASS TORT LITIGATION*, 9 Conn. Ins. L.J. 121, 130 (2002).

<sup>8</sup> Ramirez, *supra* note 4, at 296.

<sup>9</sup> Maria R. Volpe & Staci Strobl, *RESPONSES TO 9/11 REVEAL OPPORTUNITIES--AND BARRIERS--FOR COMMERCIAL ADR*, 23 Alternatives to High Cost Litig. 93, 103 (2005) (Fund cases were not mediated).

<sup>10</sup> Ramirez, *supra* note 4, at 297 (For instance, some of the victims and family members did not even know the Fund existed, and therefore failed to take advantage of the system).

Finally, there was an imbalance of power between the system administrators and the victims. The Special Master of the Fund, Kenneth Feinberg, was given substantial discretion over the compensation scheme by Congress, essentially making him the sole judge of how much each victim should receive.<sup>11</sup> Furthermore, the trauma that the victims experienced likely affected their decision-making capacity and emotional states, increasing the imbalance of power in favor of the Special Master.<sup>12</sup>

## 2. STAKEHOLDERS

Identifying the stakeholders is an important step for determining which feedback mechanisms should be applied. To quickly get the word out to a large number of potential stakeholders, television and newspaper advertisements should be run in the immediate aftermath of a disaster, and for at least one month after that. These ads should be focused in the general area of where the disaster occurred, and provide guidance on accessing the system, with ads being run in multiple languages to ensure all stakeholders are reached.<sup>13</sup> A website must be set up with all the relevant information about the system, and include options for victims to apply online or by mail.<sup>14</sup> Accessing the system should be as simple and fast as possible to ensure victims do not get confused or give up because they are overwhelmed.<sup>15</sup> This would

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<sup>11</sup> Mariani, *supra* note 3, at 258 (The Special Master fulfills simultaneous multiple roles for the Fund).

<sup>12</sup> Elizabeth Baker Murrill, *MASS DISASTER MEDIATION: INNOVATIVE ADR, OR A LION'S DEN?*, 7 Pepp. Disp. Resol. L.J. 401, 417 (2007).

<sup>13</sup> Of course, these ads cost considerable money, so they must be utilized as sparingly as possible while still ensuring that all potential stakeholders are aware of the system and how to access it. Focusing on specific areas as opposed to national ads will help reduce costs and increase the effectiveness of the outreach.

<sup>14</sup> Fraud prevention is key to efficient functioning of the system. Possible techniques could include documentation proving the victim was at the site of the disaster, or medical records showing injuries consistent with the disaster. This aspect of the redesign will have to be developed more robustly as use of the system becomes more prevalent over time.

<sup>15</sup> *Relatives of victims rush to file for 9/11 fund*, Chicago Tribune (December 23, 2003), [http://articles.chicagotribune.com/2003-12-23/news/0312230194\\_1\\_victims-relatives-kenneth-feinberg-victim-compensation-fund](http://articles.chicagotribune.com/2003-12-23/news/0312230194_1_victims-relatives-kenneth-feinberg-victim-compensation-fund) (Some victims were too overwhelmed by grief and the complex application process, and failed to successfully apply for the system even though they attempted to).

be an improvement on the current system, as some stakeholders did not even know that the VCF existed until it was too late to apply.<sup>16</sup>

The main stakeholders include: the injured and deceased victims of a disaster and their families, who are interested in receiving justice and fair compensation; the taxpayers, who want to limit the amount they must pay; the airlines, who want to prevent their companies from going out of business; Congress and the Federal Government, who want an efficient and cost-effective compensation system for disasters; lawyers for the victims, who are interested in winning their client's cases; the system designers and implementers, who wish to see their system function perfectly, and ADR personnel such as mediators, who want to resolve disputes fairly and quickly.<sup>17</sup>

### **3. INITIAL STRATEGIZING**

#### **A. Feedback Mechanisms**

One core goal of the redesign is greater stakeholder participation in the system. Community forums are an effective way to achieve this goal.<sup>18</sup> These forums allow for feedback and dialogue between the victims/families and the system designers/administrators.<sup>19</sup> This in turn leads to enhanced transparency, making it more likely victims will eventually accept the compensation.

I chose community forums as a way to gather feedback because with such a large group of stakeholders, namely the victims, community forums are a good way to let the stakeholders voice their concerns about the problems with the system in an efficient and timesaving manner. Many of the victims will have similar concerns, so community forums may save time by having a

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<sup>16</sup> Ramirez, *supra* note 4, at 297.

<sup>17</sup> Indirect stakeholders include foreign governments, such as Saudi Arabia, who are likely to be sued by victims who do not accept the system, and federal agencies like the FBI and CIA, whom many victims hold partially responsible for failing to prevent 9/11.

<sup>18</sup> Volpe, *supra* note 9, at 102.

<sup>19</sup> *Id.*

question that many victims have answered all at once, instead of each person requiring an individual answer. Community forums are also beneficial because they involve substantial stakeholder involvement in the system's design, which empowers stakeholders and incentivizes them to participate in the system.<sup>20</sup> Facilitation and dialogue are important outcomes of community forums.<sup>21</sup> Such forums also are useful because they can help identify stakeholders and inform them of the system.<sup>22</sup>

With so many potential stakeholders, it might be beneficial to have representatives from different classes of victims, instead of all the victims, attend the forums, or multiple forums could be deployed throughout the affected area over a period of time.<sup>23</sup> These forums are an effective way to let people know about the system quickly.<sup>24</sup>

There are several other feedback mechanisms that are helpful considering the vast number of potential stakeholders after a mass disaster occurs. Surveys can help the designer determine the most prominent problems in need of redesign. I chose surveys because they provide for more individualized questions and answers from the stakeholders than forums do. Surveys are also helpful for stakeholders who are unable to attend the community forums. Of course, sending out surveys to all the stakeholders and compiling the information received is a daunting, but not impossible, task, which requires a long period of time for

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<sup>20</sup> Stephanie Smith & Janet Martinez, *AN ANALYTIC FRAMEWORK FOR DISPUTE SYSTEMS DESIGN*, 14 Harv. Negot. L. Rev. 123, 128 (2009) (Substantial stakeholder involvement and system transparency and accountability are characteristics of high quality systems. These are important goals of the redesign).

<sup>21</sup> Volpe, *supra* note 9, at 102.

<sup>22</sup> Community forums should also be utilized after implementation of the redesign as one method for gauging the success of the system and identifying any weaknesses.

<sup>23</sup> Smith, *supra* note 20, at 136 (Another option for increasing dialogue and transparency involves creation of a permanent stakeholder advisory committee that provides a clear statement of the redesign's goals and effectively communicates those goals to the victims/families and provides updates).

<sup>24</sup> Volpe, *supra* note 9, at 102 (The only community forums utilized after 9/11 were the Listening to the City sessions, which focused on the economic and business aspects of rebuilding the World Trade Center and had nothing to do with the VCF, hence some victims were left in the dark).

preparation.

Finally, online bulletin boards and forums aid in the dissemination and collection of information by their ability to relay important information to a large swath of stakeholders at the same time, saving time and money. Online boards are also a good way for ADR personnel and other stakeholders to voice their concerns about the system and their ideas for improvements without the fear of offending someone, a fear that is more prevalent in community forums.<sup>25</sup>

## B. Dispute Prevention, Management, and Resolution Processes

Besides facilitation and dialogue, the most important ADR process that will be used in the redesign is mediation.<sup>26</sup> I chose mediation for several reasons.<sup>27</sup> First, mediation greatly reduces the imbalance of power. Under the VCF, if a victim wanted to appeal the compensation amount, mediation was not an available option to resolve the dispute.<sup>28</sup> There simply was no process for obtaining a mediator to preside over the appeal.<sup>29</sup> The only structure for resolution was to hold a hearing with the Special Master, where the victim presents evidence for an increased compensation amount.<sup>30</sup> This lack of multiple processes for dispute

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<sup>25</sup> Surveys and online forums are less reliable than community forums because it may be unclear who filled out the survey or posted on the forum and if they are actually a potential stakeholder or not.

<sup>26</sup> Smith, *supra* note 20, at 131.

<sup>27</sup> *Id.* at 147 (“Mediation was chosen in order to offer an interest-based option with the potential of enabling parties to preserve their relationship, create a broader, more creative array of settlement options than the court could order, reach more durable solutions and reduce cost and delay.”).

<sup>28</sup> Volpe, *supra* note 9, at 102.

<sup>29</sup> Kim Payne & Alan Gross, *New York & Kings Counties: Safe Horizon Mediation Program: Response to September 11<sup>th</sup>*, [http://www.nycourts.gov/ip/adr/Publications/Info\\_for\\_Programs/ProgramNotes\\_Web.pdf](http://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/ProgramNotes_Web.pdf), 16 (last visited March 28, 2014); Volpe, *supra* note 9, at 103 (In fact, the only mediation that was utilized in connection with the system was the Safe Horizon’s 9/11 Family Mediation project. This process focused on who was to be the personal representative of the victim and the proposed distribution of funds to family members, but did not cover disputes regarding compensation. Furthermore, this use of mediation was extremely modest, with merely five cases going to mediation, resulting in agreements in only three instances).

<sup>30</sup> *September 11th Victim Compensation Fund: Hearing/Appeals*, <http://www.vcf.gov/faq.html#hap1> (last visited March 28, 2014).

resolution kept some victims from participating in the system, as they felt there was an imbalance of power and that their options were limited.<sup>31</sup>

Mediation lessens this imbalance by providing a third-party neutral, instead of having the victim go up alone against the Special Master.<sup>32</sup> Neutrality creates an atmosphere of credibility and transparency, creating a more efficient system for all stakeholders. This means that the Special Master cannot be the mediator. One way to incentivize stakeholders to use this process is to demonstrate to them the benefits of using mediation, specifically the leveling of the playing field by use of a neutral party. Utilizing mediation to enhance the fairness of the process will also lead to greater stakeholder involvement.

Mediation can also help ameliorate the due process concern posed by this strange appellate process.<sup>33</sup> The VCF makes the appellate judge the same person as the trial judge. In other words, if a victim appealed their award amount, their appeal would be heard by the same person who decided that amount in the first place, the Special Master.<sup>34</sup> This not only added to the imbalance of power, it created a perception among many victims that the system was biased and lacked transparency.<sup>35</sup> Mediation is a principal way to avoid this perception, because it substitutes a third-party neutral in the place of the Special Master.<sup>36</sup> Since the mediator has no affiliation with the Fund and did not make the original calculations, the sense of bias will also be reduced, making it more likely the victim and the Special Master can come to an

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<sup>31</sup> Mariani, *supra* note 3, at 268.

<sup>32</sup> Mel Rubin, *DISASTER MEDIATION: LESSONS IN CONFLICT COORDINATION AND COLLABORATION*, 9 Cardozo J. Conflict Resol. 351, 357 (2008) (“To ensure the program’s credibility, a neutral administrator must be appointed to oversee, implement and maintain the program.”).

<sup>33</sup> Another due process concern is whether the redesign can mandate victim participation in the system, eliminating the opt-out option. The question of whether due process can be preempted by requiring mediation and not allowing the victims to sue is not addressed by this redesign, but will need further inquiry.

<sup>34</sup> *September 11th Victim Compensation Fund: Hearing/Appeals*, <http://www.vcf.gov/faq.html#hap1> (last visited March 28, 2014).

<sup>35</sup> Ramirez, *supra* note 4, at 288 (Many victims felt the Fund was solely established as a cost saving mechanism for the airlines and that it was not intended, first and foremost, to benefit the victims and their families).

<sup>36</sup> Smith, *supra* note 20, at 127.

agreement about how much compensation is deserved.<sup>37</sup>

Using mediation also achieves the goal of greater transparency and efficiency. This goal is achieved through the use of “earliness.”<sup>38</sup> By “looking upstream” to assess how conflicts can be prevented or managed at the earliest possible stage, and sending those problem cases to mediation, the whole system will become more efficient and cost-effective.<sup>39</sup> Figuring out the best way to identify these possible conflicts early on will be an important aspect of the redesign that will require further review.

While adding mediation to the system as an available ADR process is a critical component of the redesign, there is a spectrum of ADR processes that should be utilized to increase efficiency and likelihood of system success, as well as provide flexibility.<sup>40</sup> Flexibility is imperative because the redesigned system will be applied to numerous types of disasters in the US, including terrorist incidents, plane crashes, and natural disasters. The system should be able to adjust to the specific disaster it is confronting and the particular needs of the various stakeholders. To ensure flexibility, the spectrum should include multiple ADR processes.

The effectiveness of the system is increased if multiple process options are available to the stakeholders, including rights-based and interest-based processes.<sup>41</sup> This redesign uses mediation as an interest-based option, and arbitration as a rights-based option.<sup>42</sup> However, informal processes should be the first ones utilized on the ADR spectrum. Negotiation and informal discussions are good mechanisms for preventing and managing disputes when they arise under the system, and allowing for compromise.<sup>43</sup> These processes could save money because they

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<sup>37</sup> The mediator should be an expert in dealing with disasters and compensation to ensure the mediation runs smoothly and legitimately.

<sup>38</sup> John Lande, *THE MOVEMENT TOWARD EARLY CASE HANDLING IN COURTS AND PRIVATE DISPUTE RESOLUTION*, 24 Ohio St. J. on Disp. Resol. 81, 129 (2008).

<sup>39</sup> Smith, *supra* note 20, at 138.

<sup>40</sup> *Id.* at 127.

<sup>41</sup> Smith, *supra* note 20, at 128.

<sup>42</sup> *Id.* at 126.

<sup>43</sup> *Id.* at 166-67 (Other informal processes can include conciliation, with a focus on improving communication and clarifying issues between the parties, and

may settle disputes without involving a third-party neutral, unlike mediation.<sup>44</sup> Since the parties retain control over both the process and the outcome, negotiation is an effective way to empower and incentivize stakeholders to engage in the system.<sup>45</sup> Solving the conflict with informal processes saves time, money, and human resources.

If the informal aspects of the spectrum fail to produce a positive result, then mediation would be the next step on the ladder. The lack of someone with authority to impose a binding decision, however, may prevent some disputes from being resolved through mediation.<sup>46</sup> This is when the final step on the spectrum, arbitration, can be employed. Since an arbitrator imposes a binding decision,<sup>47</sup> some victims may prefer this process because they will not have to be worried about the opposing party backing out of the compromise in the future. However, one disincentive is that arbitration is the most time-consuming and costly process amongst the spectrum.<sup>48</sup>

This ADR spectrum should be linked together in an integrated system.<sup>49</sup> This involves first utilizing earliness to discover problematic cases, referring them for negotiation and other non-formal processes, and evaluating the results. Then more formal processes like mediation and arbitration may be employed. Therefore, an integrated database must be created and maintained to track the success at each level and provide recommendations for further action.<sup>50</sup> Furthermore, an effective redesign for this facet of the system includes imposition of some form of regulatory authority, possibly from Congress, that mandates this integration and linking of processes, requiring stakeholders to utilize the steps

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Early Neutral Evaluation (ENE), which is an informal meeting designed to identify areas of agreement and focus areas at issue).

<sup>44</sup> Smith, *supra* note 20, at 127.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 139.

<sup>49</sup> *Id.* at 131.

<sup>50</sup> Volpe, *supra* note 9, at 104.

in this precise order to ensure efficiency, lower costs, and provide uniformity of process.<sup>51</sup>

#### 4. WORK IN PROGRESS

The redesign can best illustrated through a description of a test case, in order to see how the system progresses through a conflict. The system process would begin directly after a disaster, with identification and education of stakeholders. An important goal of the redesign is more effective communication. Utilizing community forums with experienced ADR personnel can help achieve this goal.<sup>52</sup> One issue with the system is the perceived arbitrariness of the compensation amounts.<sup>53</sup> Community forums can alleviate this perception by allowing for open feedback and dialogue. Those victims who are concerned about arbitrariness can have their worries dispelled through the use of better communication.<sup>54</sup> Namely, the system administrators must communicate to the victims that the figures are based on objective criteria and have nothing to do with perceptions of the victim's value as a person.<sup>55</sup> Getting individualized feedback may allow for more victims to eventually accept the system, if their concerns are adequately addressed in a transparent manner. Showing sensitivity to the victim's needs is crucial at this stage, because the more sensitive the system is to the victims, the more likely they will participate.<sup>56</sup> Sensitivity can help lessen the imbalance of power as well. By lowering the emotional state of the victim/family member through direct communication and recognition of their fragile emotional state, their decision-making capacity may be increased,

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<sup>51</sup> Rubin, *supra* note 32, at 358 ("The related governmental regulatory agency must provide immediate regulations that are the framework within the model established...The regulations must protect the rights of both the victims and all contractual obligations of the parties").

<sup>52</sup> Volpe, *supra* note 9, at 103 ("Skilled personnel who bring substantive expertise are essential in order to provide effective dispute resolution services.").

<sup>53</sup> Ramirez, *supra* note 4, at 298.

<sup>54</sup> Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 40 (Bruce Patton, ed., 2011).

<sup>55</sup> *Id.* at 83 (Objective criteria helps lead to amicable and efficient agreements).

<sup>56</sup> *Id.* at 31, 33 (Showing sensitivity can be done by making emotions explicit, acknowledging them as legitimate, and by putting yourself in the victim's shoes).

further leveling the playing field between the victim and the Special Master.<sup>57</sup>

Another incentive of enhanced communication is that it increases the goal of greater transparency and efficiency. The forums and other feedback mechanisms achieve this goal by allowing system administrators to transparently communicate to the victim that forgoing the system and pursuing litigation is against their interests. Educating these recalcitrant victims on the low prospective likelihood of winning such a lawsuit, as well as the high costs and long timeframe of such suits, may help them change their minds and accept the VCF.<sup>58</sup> More victim participation in the system leads to greater efficiency through less court congestion because of fewer lawsuits.

These forums and other information-gathering processes, such as surveys, also accomplish the goal of “earliness”, by allowing for possible problematic cases to be discovered earlier on in the process.<sup>59</sup> When such cases are pinpointed, those stakeholders can be interviewed to determine precisely what their concerns are. Using this data, they can be then referred to the ADR spectrum, discussed *supra*. The appropriate ADR process will depend on the nature of their specific issue. For instance, if a victim does not agree with the amount of compensation they were awarded, he first can be referred to negotiation with the Special Master.<sup>60</sup> If no compromise is reached, then mediation can be employed, with arbitration coming last.<sup>61</sup>

The use of mediation in this context raises an ethical concern. The question is how private and confidential should the mediations and the compensation amounts awarded to the victims

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<sup>57</sup> Murrill, *supra* note 12, at 417.

<sup>58</sup> Ramirez, *supra* note 4, at 291 (They may not achieve a sense of accountability and justice because of the difficulty of obtaining judgment and compensation from groups such as Al Qaeda or the airlines/federal government).

<sup>59</sup> Lande, *supra* note 38, at 129.

<sup>60</sup> Of course, negotiating with the Special Master may create an imbalance of power as well, which is why many other processes on the spectrum are in place in case of failed negotiations.

<sup>61</sup> Carroll E. Dubuc, *THE 9/11 VICTIM COMPENSATION FUND HEARINGS: One Success or Future ADR Model?*, 47 No. 4 DRI For Def. 54 (2005) (suggesting the use of mediation to dispose of the more adamant claimants).

be. While system transparency is an important goal, this aspect of the redesign should be kept private and confidential for two reasons. Firstly, confidentiality in this context serves the goal of enhanced efficiency.<sup>62</sup> If the victims do not know the amounts of the compensation awards of any of the other victims, it is less likely they will perceive bias or arbitrariness in the amount they received because they will have nothing to compare their amount to, leading to fewer disputes. Secondly, privacy serves the goal of increased stakeholder involvement. If victims know their private information and possible compensation awards will be kept out of view of the public, they will be more likely to utilize mediation instead of proceeding to litigation, where such information would almost certainly be open to public scrutiny.<sup>63</sup> Both of these reasons can serve as further incentives for stakeholders to engage the system and receive the compensation that is rightfully due to them.

To ensure flexibility of the system, there should be several process pathways for arriving at resolution of the dispute. Once the feedback mechanisms have identified a problematic case, there should be two possible avenues for how the case should proceed. The first path is utilizing the ADR spectrum, starting with informal processes and working up towards arbitration over time. The second path involves bypassing the ADR spectrum and jumping directly to arbitration. Determining which path to set the stakeholders on involves evaluating the victim's reluctance and concern regarding their possible participation in the system. Only through community forums and surveys will the system be able to pick out those most difficult cases, and refer them directly to arbitration.<sup>64</sup> However, even with arbitration, it is inevitable some victims will still refuse to accept the system.<sup>65</sup> Allowing for

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<sup>62</sup> Smith, *supra* note 20, at 128 (Effective design systems require participation that is voluntary, *confidential* and assisted by impartial third-party neutrals) (emphasis added).

<sup>63</sup> *Id.* at 134 (Mediation/arbitration is superior to litigation in terms of protection of privacy).

<sup>64</sup> *Id.* at 128 (This requires education and training of stakeholders on the use of these multiple process options to ensure they are aware of the different pathways available to them. Victims who are chosen for the second path should be consulted to determine if they have a preference for a specific path).

<sup>65</sup> Some victims will want to see their day in court, regardless of the probable negative consequences of such litigation. This redesign does not attempt to

multiple pathways increases efficiency and reduces costs by skipping processes that are unlikely to achieve compromise in specific problematic instances.

## CONCLUSION

The final facet of the redesign involves gauging the success and accountability of the improved system.<sup>66</sup> A helpful way to determine if the redesign is effective is to use an evaluation component such as exit surveys.<sup>67</sup> An exit survey evaluating this redesign can be found in the appendix. Such surveys can help the designer identify any recurring problems that the redesign does not address, as well as allowing the stakeholders to compare the improved system against the old one, in order to see if the redesign is achieving its goals or not.<sup>68</sup> Other ways to measure success and accountability include periodic reviews and meetings among victims and system administrators. These processes incentivize continued stakeholder involvement because they allow for victims to express their views of the redesign to a group of people that can actually address and fix the problems. This is why these periodic meetings must involve system coordinators who have the authority to effect change in the system if needed, as opposed to just a figurehead that needs approval for any changes by his/her superiors. Dealing with those in authority streamlines the process and lowers costs.

This redesign has provided a clear framework for future compensation efforts surrounding disasters. By increasing efficiency and transparency through the use of an ADR spectrum and the availability of multiple process pathways, more victims will want to join the system, making it more effective and more likely that this system will become the national standard for compensating disaster victims in the future. Each new disaster can provide further opportunities for improving the system, as new issues will arise over time. Having a comprehensive system to deal with these vital concerns after a disaster will not only benefit those

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achieve 100% compliance with the VCF, which is unrealistic. It simply strives to increase stakeholder participation as much as is reasonably possible.

<sup>66</sup> Smith, *supra* note 20, at 132.

<sup>67</sup> *Id.* (Including an evaluation component helps assess success of the system).

<sup>68</sup> *Id.*

victims affected, but will also benefit the nation as a whole through reduced court congestion, lowered costs (which means taxpayers will have to pay less into the Fund), and increased security.<sup>69</sup>

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<sup>69</sup> If the system functions highly effectively, the government can be less concerned about the process of compensating the victims and avoiding large economic losses, and more concerned about preventing the disaster from ever happening again. This leads to increased security.

**APPENDIX A:**  
**EXIT SURVEY FOR VICTIM STAKEHOLDER**

1. Do you feel that the redesign was needed, or was the system functioning effectively as is?
2. What were your primary concerns that you hoped the redesign would fix?
3. Did the redesign address your concerns?
4. Did the redesign adequately solve your concerns?
5. Was the designer sensitive to your needs and emotions?
6. Did the design create an atmosphere of compromise or an atmosphere of conflict?
7. Did you perceive any bias in the redesigned system?
8. Are you more or less likely to accept the system now that the redesign has occurred?
9. Did the redesign provide enough incentive for you to join the system?
10. How did the redesign affect the communication between you and the system coordinators, if at all?
11. How have your perceptions about the arbitrariness of the compensation figures changed, if at all?
12. Did the redesign miss discussing any important issues?
13. Do you prefer for the mediations and award amounts to be open or confidential?
14. Describe your experience dealing with the Special Master after the redesign.

15. Overall, was the redesign a success or failure in your opinion? Please explain.

16. Is it better to allow for more victim choice among processes, or to impose regulatory authority mandating options and eliminating choices, and why?

17. Has the redesign increased your sense of justice and accountability regarding the system?

18. Are you less likely to pursue litigation after this redesign?

19. Do you have any suggestions for further improvements to the redesigned system?

**APPENDIX B:**  
**DIALOGUE BETWEEN SYSTEM DESIGNER**  
**AND VICTIM**

**Designer:** What are your main problems with the VCF?

**Victim:** I feel that the Fund is putting a value on my wife and telling me she is worth less than my friend's wife, because she made less than his wife. I feel as if they're saying she is not as good as this other victim, and that makes me want to refuse compensation. I also feel that this system is set up to protect the government and airlines from getting screwed. It was their fault that 9/11 happened, and since they failed to prevent it, I want to hold them responsible, so that's why I can't join the system. I want answers about why this happened, not just money to keep me quiet.

**Designer:** I am very sorry for your loss, and I want to help you as best I can. I understand your concerns and I think they are very valid. My goal is help you participate in the system. Do you have any ideas of what I can do to improve the system so that your concerns are alleviated?

**Victim:** First, I want justice and accountability, so let me sue whomever I want even if I join the VCF.

**Designer:** I want you to have justice too. But I am looking out for your interests, too. If you decide to sue the federal government or the airlines, this will end up being very costly and time-consuming for you. There is a strong chance you will not prevail, because your opponent is so formidable and powerful.

**Victim:** That's true, but I also want to know where these compensation amounts come from and why my wife deserves less than some other guy's wife.

**Designer:** That is a very valid question. Would it help if all the calculations and figures were available on a website for you to examine, along with an explanation of how these figures were arrived at? It would then be possible for you to see that the

amounts were simply based on economic and non-economic loss, and had nothing to do with the value of your wife as a person.

**Victim:** I think that might help, but I would want to be able to discuss any concerns with the amounts with someone that knows what they're talking about and that has the authority to make changes if necessary.

**Designer:** I agree that providing an option for feedback and dialogue is crucial. I will incorporate that into the redesign.

**Victim:** I also feel that I'm screwed if I don't like my award amount. I have no resources and I'm going up against the Special Master, who has power over the entire system.

**Designer:** The imbalance of power is definitely a big problem. How would you feel about using mediation to resolve your dispute, instead of dealing head-on with the Special Master?

**Victim:** I think that's a great idea. If I knew the mediator was a neutral party and was experienced in these matters, that would probably make me more likely to join the system because I would feel that I have a viable way to appeal, instead of just a symbolic appellate process that would almost certainly result in my defeat on appeal.

**Designer:** That's great news. Also, do you think the taxpayers should pay for the Fund, or do you have any ideas for whom else could pay instead?

**Victim:** I don't think the taxpayers should pay, since it's not their fault. The airlines and the federal government, along with foreign governments that aided 9/11, should have to pay for the whole system because the responsibility for what happened rests mostly on their shoulders, and getting money from terrorist groups will likely be very difficult.