

REFORMING CONSUMER-INSURER DISPUTE RESOLUTION IN THE AUTO INSURANCE INDUSTRY

*Cassandra B. Roeder**

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INTRODUCTION

Disputes over insurance claims are notoriously difficult for consumers to successfully navigate, especially in the context of automobile insurance. Public perception of this truism is fueled by the insurance industry's reputation for utilizing every weapon in its well-stocked arsenal to avoid and minimize payment of claims.¹ Further, research has revealed that consumers of insurance frequently do not understand even the basic terms of their policies and thus can be easily taken advantage of by insurance

* J.D. Candidate 2014, William & Mary Law School; B.A. 2007, University of Virginia.

1. See, e.g., JAY M. FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* (2010).

companies.² Consumers accept imperfect information about their policies because non-price terms of coverage are often complicated, and in some cases, auto insurance purchases must be made quickly—in conjunction with the purchase of an automobile.³

Although consumers typically lack a full and complete understanding of their policies, auto insurance injury claims are commonplace in American society, and make up a much larger percentage of claims than those occurring in other contexts.⁴ Not surprisingly, disputes over the terms of coverage arise frequently. The outcomes of these disputes often turn on exactly which avenues are available to consumers to contest and appeal the final coverage determinations made by their auto insurers.

This paper explores the current options available to American auto insurance consumers looking to appeal perceived mishandling of submitted first-party claims by insurers and proposes an improved dispute resolution system.⁵ It begins in Part I by introducing the law of consumer auto insurance contracts and explaining the process through which consumers may submit complaints against their auto insurers to state regulators. This typically takes the form of alternative dispute resolution (ADR), termed “mediation,” and in certain cases may lead to a more formal complaint process: when a violation is found, the department may issue a direct order to the company. It then describes the private, policy-mandated arbitration system—another form of ADR—where these disputes often end up if consumers choose to exercise their contractual right to review. Finally, this paper provides insight into the state regulatory system as it currently operates, describing the system’s operational troubles and briefly canvassing alternative proposals for insurance regulation in the United States.

Moving on from the current landscape of consumer auto insurance claim disputes, Part II describes three related phenomena that inform this paper’s proposal for a revised system of auto insurance dispute resolution:

2. See Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 305 (1998).

3. See Daniel Schwarcz, *Regulating Insurance Sales or Selling Insurance Regulation?: Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707, 1745 (2010).

4. See Jennifer Wiggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the “Choice Architecture” of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69, 79-80 (2010); see also Jeffrey E. Thomas, *Insurance Law Between Business and Consumer Law*, 58 AM. J. COMP. L. 353, 355 (2010) (noting that auto insurance makes up the largest portion of the property and casualty insurance market, accounting for 36% of net premiums in 2008).

5. First-party insurance protects against damage to personal property and personal injury, as opposed to liability insurance, which protects insureds against claims brought by third parties. TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY: CASES AND MATERIALS* 133, 305 (3d ed. 2013).

(1) increased use of online dispute resolution (ODR) generally; (2) Israel's Benoam system of auto insurance dispute resolution; and (3) the United Kingdom's Financial Ombudsman Service (FOS) for resolving consumer financial disputes. Part III proposes combining state-run consumer complaint review with the private arbitration system to create a federally administered program of online dispute resolution for auto insurance consumers seeking to appeal their insurers' coverage determinations. This final section draws upon the experiences elucidated in Part II to propose a better system of first-party consumer auto insurance dispute resolution in the United States—one that aims to improve upon the failures and drawbacks of the current system described in Part I by providing prompter and more economical resolution of disagreements between consumers and their insurers.

I. THE CURRENT SYSTEM (AND ITS PROBLEMS)

A. *Auto Insurance Contracts and the Processing of Consumer Complaints*

Insurance agreements between consumers and private companies exist in the form of a contract, albeit one to which special rules apply.⁶ These contracts are regulated by state administrative bodies, and auto insurance—which consists of a wide variety of policy offerings and premium amounts and is mandated for all drivers in nearly every state—is among the most highly regulated lines of insurance.⁷ Insurance agreements are generally considered to be contracts of adhesion: insureds typically lack complete information before entering the contract—for example, they rarely have the opportunity to review the actual policy before agreeing to sign up with the insurer—and contracts “are offered on a take-it-or-leave-it basis, which reduces the voluntariness of the consumer's consent.”⁸ Traditionally, when

6. See *id.* at 1. Although contract law predominantly defines the interactions between the parties to an insurance agreement, scholars have made theoretical arguments for conceiving of insurance through different lenses. See, e.g., Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653 (2013) (conceptualizing insurance four ways: contract, public utility, product, and governance); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007) (arguing insurance policies are more aptly characterized as consumer products rather than contracts); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010) (arguing that insurance policies should be interpreted not just as contracts, but also as social and economic instruments).

7. See Abraham, *supra* note 6, at 663.

8. Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 238-39 (1995). Rappaport argues, however, that consumers are not disadvantaged. He posits that (i) they are adequately protected from imperfect information by insurance companies' information dissemination practices, accountability created by consumers who demand complete

insurance contracts contain ambiguous language, courts invoke the doctrine of *contra preferendum* to interpret ambiguities against the drafter of the contract: the insurance company.⁹ In recent years, courts have moved toward strictly applying this and other contract law principles to insurance disputes.¹⁰ Disagreements over the meaning of contract language traditionally go directly to courts,¹¹ as opposed to going through the administrative process discussed below. This brief overview of the approach of courts to adjudicating disputes over auto insurance policies provides a necessary backdrop to the focus of this paper: prelitigation options for resolving disagreements over submitted first-party claims.

The majority of first-party auto insurance disputes arise when an insured asserts that their insurer has failed to pay a covered claim—in part or in full—or delayed the payment of a covered claim.¹² Insurers are required to act in good faith when processing claims, as the relationship should not be adversarial at this stage.¹³ If an insured consumer believes, for example, that their claim of injury has been wrongly denied, they have the option of filing a complaint with the state insurance department, the administrative body tasked with regulating auto insurers who write policies in that state.¹⁴ A department analyst is then assigned to the claim. The analyst is expected to review the complaint in a timely manner, contact the insurer to gather further information, and either mediate a resolution between the parties or suggest alternative options to the complaining

information, and regulations; and (ii) standardization of policy offerings reduces transaction costs, which benefits consumers in the form of lower premiums. *Id.* at 240-49; *see also* Thomas, *supra* note 4, at 353 (“[E]ach of the fifty states has a comprehensive and robust system of insurance regulation through statutes, administrative regulations, and common law rules. . . . State regulatory regimes protect . . . consumers through market conduct regulation, approval of policy forms, and price regulation.”).

9. *See* Abraham, *supra* note 6, at 664.

10. *See* Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 110-11 (2007). Randall argues that strict application of contract law is inappropriate given the lack of freedom of contract in the insurance context; it cannot be said that the parties bargain when insurers are subject to extensive statutory and regulatory restrictions and insureds typically have little control over the terms of policies, as they are contracts of adhesion. *Id.* at 107-08. *But see* Jared Wilkerson, Student Article, *Adjudicating Insurance Policy Disputes: A Critique of Professor Randall’s Proposal to Abandon Contract Law*, 23 LOY. CONSUMER L. REV. 294 (2011).

11. *See* Willy E. Rice, *Insurance Decisions—A Survey and an Empirical Analysis*, 35 TEX. TECH L. REV. 947, 949 (2004).

12. *See generally* Jay M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, 47 TORT TRIAL & INS. PRAC. L.J. 693 (2012) (exploring the law of bad faith in first-party insurance cases).

13. *Id.* at 724.

14. *See* NAT’L ASS’N OF INS. COMM’RS, CONSUMER COMPLAINTS WHITE PAPER 3 (2000) [hereinafter WHITE PAPER], available at <http://www.naic.org/store/free/CCW-OP.pdf>.

consumer (often a pre-set arbitration process laid out in the policy).¹⁵ The analyst may mediate between the parties, but wields no legal power over the insurer at this stage of review. In the majority of cases—even those including apparently legitimate complaints—the analyst is unable to reach a resolution between the parties.¹⁶ The National Association of Insurance Commissioners (NAIC), an organization comprising insurance regulators from all fifty states,¹⁷ in its white paper describing best practices for consumer complaint resolution characterized the analyst’s role as one of “informal dispute resolution,” “advocacy” (as “clearly distinguished from enforcement”), and a “less legalistic” approach.¹⁸

If the analyst concludes that the company has committed a legal violation in a particular case and is unable to reach a resolution between the parties, they may forward the matter to a department attorney or investigator to consider taking direct action.¹⁹ In many states, this more formal process begins with the department sending a demand letter to the company, for example, requiring immediate payment of the contested claim.²⁰ If the company does not cooperate, the department can then compel the company to attend an administrative hearing.

Additionally, each state has an Unfair Claims Practices Act that allows state regulators to file enforcement actions against insurers for handling consumer claims unfairly.²¹ If a department analyst deems it appropriate, the analyst may forward notice—of either one particularly egregious complaint or of a group of complaints that suggests a company is systematically handling claims unlawfully—to department market conduct personnel for review.²² A market conduct examination may be pursued from that point and may ultimately lead to litigation—if the unfair conduct is indicative of a “general business practice,” as opposed to the singular mishandling of a particular claim, and if the department determines such an action is a worthwhile use of its limited resources.²³ The next subsection describes the binding private arbitration option typically available to consumers through

15. *Id.* at 6-8.

16. See Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TUL. L. REV. 735, 755-56 (2009).

17. The NAIC describes itself as “the U.S. standard-setting and regulatory support organization created and governed by chief insurance regulators from the 50 states.” *About the NAIC*, NAT’L ASS’N INS. COMMISSIONERS, http://www.naic.org/index_about.htm (last visited Dec. 15, 2013).

18. WHITE PAPER, *supra* note 14, at 22.

19. *Id.*

20. *Id.* at 23.

21. See Schwarcz, *supra* note 16, at 745; WHITE PAPER, *supra* note 14, at 17.

22. See WHITE PAPER, *supra* note 14, at 23.

23. See *id.*

the terms of their policy and often required before they may initiate litigation against their insurer by filing a complaint in a court of law.

B. Arbitration

1. Introduction

“Arbitration is generally defined as a system under which parties voluntarily agree to submit a dispute to an impartial person or persons selected by them or appointed by some agency they have chosen to select the arbitrator.”²⁴ This arrangement is agreed upon prospectively—before a dispute arises—at the moment parties enter into a contract.²⁵ The vast majority of state and federal courts apply a deferential standard of review to arbitration outcomes and will only overturn an arbitrator’s decision if: (1) the award was procured by fraud; (2) the arbitrator was plainly partial to one party or corrupt; (3) the arbitrator exceeded their powers; or (4) the arbitrator misconducted the hearing in such a way that caused prejudice to one of the parties.²⁶

2. Pros and Cons

Questions of fairness infuse the debate over arbitration in all contexts,²⁷ and its now-commonplace use in adhesive consumer contracts has been scrutinized especially heavily.²⁸ Professor Jean Sternlight offers two overarching criticisms of mandatory arbitration in consumer contracts: first, she expresses concern that consumers—who are sometimes unaware that they are consenting to binding arbitration of any and all future disputes—are unfairly disadvantaged by this system, where their more

24. PRACTISING LAW INSTITUTE, *ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS 2* (Alan I. Widiss ed. 1979).

25. *See id.*

26. Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 *CARDOZO J. CONFLICT RESOL.* 509, 521-22 (2009).

27. Discussing arbitration in the context of reinsurance, Robert Magino and Anne Flynn list its general disadvantages as: (1) difficulty finding adequately experienced panel members; (2) unpredictability; (3) inflexibility (exclusion of relevant third parties); (4) misuse of arbitration as a tool to ultimately litigate; (5) nonuse of discovery and depositions; (6) gravitation towards compromise; and (7) expenses must be covered by the parties. Robert M. Magino & Anne M. Flynn, *Alternative Dispute Resolution: A Reinsurance Perspective*, in *AM. BAR ASS’N, RESOLVING REINSURANCE DISPUTES* 73, 79-87 (1989). *See generally* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *HARV. L. REV.* 668 (1986) (suggesting the legal profession should reflect on the goals of alternative dispute before pursuing it further).

28. Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternate Judicial Systems?: Repeat Players in ADR*, 15 *OHIO ST. J. ON DISP. RESOL.* 19, 52 (1999).

powerful future adversaries craft and control the mechanisms for dispute resolution and often have the advantage of selecting the arbitrator who will issue the decision; and second, she criticizes the privacy of arbitration, arguing that justice requires dispute adjudication to be transparent and open to the public.²⁹ Others have suggested arbitration clauses disincentivize consumers from pursuing claims³⁰ and that companies gain repeat player advantage by virtue of their regular appearances in front of the same preselected arbitrators.³¹

Finally—and of particular importance in the context of low-dollar first-party consumer automobile complaints—arbitration can be costly for consumers; most arbitration clauses require the policyholder to cover upfront arbitrator fees, which can reach hundreds of dollars.³² If the policyholder seeks legal representation, they may have to pay both initial and ongoing attorneys' fees.³³ Arbitration often costs substantially more at the outset than litigation, where court filing fees are much cheaper than arbitrators' fees and many plaintiffs' attorneys will agree to represent clients on a contingent basis.³⁴

Despite these commonly voiced concerns, arbitration has proponents.³⁵ Supporters argue that in the context of mandatory arbitration in consumer contracts, arbitration provides a “cheaper, quicker, and more accessible” alternative to litigation, and that companies' overall cost savings are returned to consumers in the form of lower prices.³⁶ Additionally, under the Federal Arbitration Act (FAA), arbitration agreements are valid and enforceable as long as they involve commerce,³⁷ and nearly all fifty states have adopted some form of the Uniform Arbitration Act, which is nearly identical to the FAA.³⁸

29. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005).

30. See Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 188 (2012).

31. See Geraint Howells & Rhoda James, *Litigation in the Consumer Interest*, 9 ILSA J. INT'L & COMP. L. 1, 13 (2002).

32. See Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 260 (2005).

33. See *id.* at 259-60.

34. See *id.* at 259.

35. Again discussing arbitration in the reinsurance context, Magino and Flynn list its advantages as (1) speed and affordability, as compared to litigation; (2) privacy for parties; (3) arbitrators typically have knowledge and experience in the disputed subject matter; (4) finality; (5) preservation of relationships due to its less adversarial nature than litigation; (6) decision-making flexibility; (7) encouragement of early-stage dispute resolution; and (8) reasonable damage awards. Magino & Flynn, *supra* note 27, at 77-79.

36. Sternlight, *supra* note 29, at 1633-34.

37. 9 U.S.C. § 2 (2012).

38. See Huber, *supra* note 26, at 521.

3. Arbitration of Insurance Contract Disputes

Arbitration clauses are included in most insurance contracts.³⁹ Although the FAA preempts contradictory state law, courts have held that state laws and regulations specifically governing the arbitration of insurance disputes inversely preempt the FAA under the McCarran-Ferguson Act.⁴⁰ Subsequently, about one-third of states have passed laws limiting or prohibiting the use of arbitration agreements in insurance contracts.⁴¹ Professor Susan Randall, who is generally suspicious of mandatory arbitration in the insurance context, states that arbitration of auto insurance disputes is appropriate given that payouts are capped, typically ranging from \$2,500.00 to \$5,000.00.⁴² Although she condones the use of arbitration in the context of auto insurance, Professor Randall cautions generally that insureds are vulnerable to unjust arbitration outcomes because: (1) companies avoid public scrutiny that would otherwise incentivize better treatment of consumers; (2) limited discovery prevents policyholders from gaining access to claim-supportive information from companies; (3) arbitrators are typically selected by insurers and thus may be biased; and (4) consumers must often bear substantial up-front costs.⁴³ These four concerns fit within the two overarching criticisms of arbitration detailed above; unfairness and cost.

It should be noted that although insurance disagreements in litigation may contain arbitration-like elements, such court-ordered dispute resolution techniques are typically not considered “arbitration” and thus will not be included in the meaning of the term for purposes of this paper.⁴⁴ As used here, the term “arbitration” refers to the prelitigation dispute resolution process outlined at the beginning of this subsection.

39. See Yvette Ostolaza, *Overview of Arbitration Clauses in Consumer Financial Services Contracts*, 40 TEX. TECH L. REV. 37, 38 (2007).

40. See Randall, *supra* note 32, at 269.

41. See *id.* at 270-71.

42. *Id.* at 254 n.5.

43. *Id.* at 257-63.

44. For example, some disputes concern disagreements over the value of damage to an insured’s automobile. Most auto insurance contracts include an appraisal clause, which allows the contesting party to hire a disinterested appraiser. See Christopher P. Leise, *Property Insurance Appraisal: Popular but Limited Device for Ending the Fight*, in AM. BAR ASSOC., PROPERTY INSURANCE COVERAGE DISPUTES 117, 120 (1992). If the newly hired appraiser values the damage differently than the initial appraiser, a court may appoint an umpire to resolve the dispute. See *id.* Because appraisers only consider damages, as opposed to terms of coverage, however, their role is typically not considered to be that of an arbitrator. See *id.* But see Schwarcz, *supra* note 16, at 760 (including appraisal in a discussion of arbitration of consumer disputes).

C. Examination of Current Regulators: State Insurance Departments

1. Inadequate Consumer Protection

Some have suggested that state insurance departments underperform in their efforts to protect and support consumers' interests.⁴⁵ For example, one commentator writing in support of California's consumer-friendly auto insurance industry reforms noted approvingly: "If the Department of Insurance fails to enforce the law or respond effectively to consumers' complaints, consumers will not be 'locked out' of the courts with no remedy, *as often occurs in states with lax regulators.*"⁴⁶ An example of this alleged laxity occurred in New York, where the State of New York Insurance Department enacted a regulation requiring auto injury claims to be filed with insurers within thirty days of an accident, as opposed to ninety days, as previously required.⁴⁷ The Supreme Court of New York found the department's regulation an arbitrary and capricious abuse of discretion and admonished the department for its apparent awareness of both the "difficulty applicants [would] have in complying with the rules" and the ease with which auto insurance companies would "avoid the payment of claims."⁴⁸

Academics have suggested a variety of reasons for regulators' purportedly weak support of consumers. Many state insurance commissioners are former industry executives, and thus some believe the regulatory environment is stacked against consumer interests due to industry capture.⁴⁹ It has also been argued that the nature of the company-consumer relationship causes an inherent power imbalance; a small group of organized, highly motivated companies is better-equipped to lobby effectively than a large group of consumers, each of whom has only a small stake in a given financial service contract.⁵⁰ Finally, regulators may ultimately be incapable of adequately vindicating consumers' interests, as elected or appointed officials may lack the skills, time, political freedom, or

45. See, e.g., Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 113, 115-16 (1998) ("'Capture' of the regulators by the regulated industry is common in state-based insurance systems."). But see Roger M. Baron & Anthony P. Lamb, *The Revictimization of Personal Injury Victims by ERISA Subrogation Claims*, 45 CREIGHTON L. REV. 325, 328 (2012) ("The states have . . . successfully struck a balance that accommodates consumer protection and also fosters an environment where insurance companies are able to conduct business.").

46. Rosenfield, *supra* note 45, at 113-14 (emphasis added).

47. *Med. Soc'y of State of N.Y. v. Levin*, 712 N.Y.S.2d 745, 746-47 (N.Y. Sup. Ct. 2000), *aff'd*, 723 N.Y.S.2d 133 (N.Y. App. Div. 2001).

48. *Id.* at 752.

49. See, e.g., Rosenfield, *supra* note 45, at 115.

50. See Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1644-45 (2011).

motivation to fully explore and implement the most effective consumer-friendly regulatory policies.⁵¹

2. *Limited Resources*

State insurance departments frequently lack adequate financial resources and as a result are often understaffed.⁵² With respect to auto insurance, presumably states focus their energies on policy licensing, market conduct regulation, and ensuring insurer solvency, as reports indicate that processing consumer complaints against auto insurers is not their first priority; a 2008 NAIC survey of the fifty states revealed that forty-five percent of the responding states did not process all of the complaints they received.⁵³ Additionally, in its white paper on consumer complaint resolution, the NAIC noted, “[s]taffing and budgetary restrictions will affect the level of service a department can provide.”⁵⁴

Professor Susan Randall reported three startling anecdotes about state insurance departments in her 1999 article on insurance regulation.⁵⁵ The Indiana Department of Insurance reported that in response to the 21,000 consumer complaints it received against insurers between 1993 and 1997, only 211 warning letters were issued to seventy-two companies and only one disciplinary action was taken. Additionally, the California Department of Insurance reported that despite a backlog of 5,000 insurance consumer complaints, its staff had been cut and the remaining staff’s time was reallocated to focus on other tasks. And finally, in 1997, the Colorado Division of Insurance received 7,000 complaints, but issued only seven fines in response.⁵⁶

Notably, as states look ahead, the federal health care law and NAIC solvency initiatives will add to their already heavy regulatory burden. For example, under the Patient Protection and Affordable Care Act (ACA), states may establish and run health insurance exchanges, and they must

51. *See id.* at 1645.

52. *See, e.g.,* Angelo Borselli, *Insurance Rates Regulation in Comparison with Open Competition*, 18 CONN. INS. L.J. 109, 154-55 (2011) (arguing that open competition would free up the limited resources of state insurance departments for more important tasks, such as ensuring solvency); Max Huffman, *Competition Policy in Health Care in an Era of Reform*, 7 IND. HEALTH L. REV. 225, 232 (2010) (noting that many states lack the resources to bring consumer protection actions they might otherwise choose to pursue against insurers).

53. *See* Schwarcz, *supra* note 16, at 757.

54. WHITE PAPER, *supra* note 14, at 4.

55. Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 661-62 (1999).

56. *Id.*

review insurer premiums.⁵⁷ Particularly germane to this paper, states must also establish and run offices to respond to health insurance complaints from consumers.⁵⁸ Although the states will receive federal funding to do so, it seems likely that this and other tasks stemming from the passage of the ACA will draw state insurance departments' attention even farther from their responsibility to provide adequate assistance to auto insurance consumers.

Additionally, in 2008 the NAIC took up the Solvency Modernization Initiative (SMI) with the goal of examining and improving state regulation of insurer solvency.⁵⁹ As part of the SMI, the NAIC has issued a model law that, where adopted, will require insurers to conduct carefully prescribed ongoing Own Risk and Solvency Assessments (ORSA) and to submit annual reports detailing their findings to state regulators.⁶⁰ The NAIC predicts that all states will have passed ORSA legislation by 2015.⁶¹ As with federal health care reform, oversight requirements stemming from the NAIC's ORSA initiative will add substantially to the work of state insurance regulators in coming years.

3. *Alternative Proposals for Insurance Regulation*

Over the years, commentators have offered a wide variety of proposals to improve upon the current system of state-regulated insurance. Arguments against state regulation include hefty compliance costs for insurance companies, regulatory gaps between the financial service industries, and difficulty competing on an international scale, among others.⁶² Although the system remains state-regulated today, the Dodd-Frank Act did create a federal entity, the Federal Insurance Office in the U.S. Treasury Department, which is tasked with monitoring and reporting on the insurance industry, making recommendations to the Financial Stability Oversight Council, and representing the United States in discussions of international

57. See Timothy Stoltzfus Jost, *Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 2043, 2044 (2011).

58. *Id.*

59. See Kelly Kirby, *Supervisory Colleges: Improving International Supervisory Coordination*, 19 CONN. INS. L.J. 149, 150-51 (2012).

60. *Own Risk and Solvency Assessment (ORSA)*, NAT'L ASS'N INS. COMMISSIONERS, http://www.naic.org/cipr_topics/topic_own_risk_solvency_assessment.htm (last updated Jan. 27, 2014).

61. *Id.*

62. See, e.g., Elizabeth F. Brown, *Will the Federal Insurance Office Improve Insurance Regulation?*, 81 U. CIN. L. REV. 551, 560-79 (2012); Leo Donatucci, *Federal Regulation of the Insurance Industry: One for All and All for Who? How Federal Regulation Would Help the Industry into the New Millennium*, 7 RUTGERS J.L. & PUB. POL'Y 398, 403-04 (2010).

insurance standards.⁶³ There is speculation that the FIO will act to regulate insurer solvency in coming years.⁶⁴

Under the McCarran-Ferguson Act, state laws regulating insurance are protected from federal preemption unless a federal law directly regulates “the business of insurance.”⁶⁵ Some have argued for the repeal of the McCarran-Ferguson Act and the complete federalization of insurance regulation.⁶⁶ Others have posited that insurance regulation would be more effective if divided evenly between federal and state control: insurance companies could be given the option of establishing a federal charter to avoid licensure requirements on a state-by-state basis, for example.⁶⁷ Alternatively, some argue that states are more reliable than the federal government, as they have developed the necessary expertise to regulate insurance effectively, and they can do so with an eye to serving their unique populations and economic environments.⁶⁸ It has been argued that states could improve upon the current system by officially delegating regulatory power to the NAIC.⁶⁹ Finally, some commentators have suggested that states could enter binding interstate compacts that would establish shared minimum standards among joining states.⁷⁰

Although the proposals made to date inform the considerations of this paper, none have focused specifically on restructuring the handling of prelitigation first-party consumer automobile insurance disputes. This paper concentrates exclusively on auto insurance—instead of proposing an entirely new system of insurance regulation—because: (1) an industry-tailored approach to a single practice within that industry may have a greater likelihood of success and be received more comfortably by stakeholders who might not otherwise support a complete overhaul of insurance regulation impacting all lines of insurance (or even of the auto insurance industry exclusively); (2) despite its narrow focus, this paper’s proposal has the potential to impact the review process afforded a significantly large subset of insurance consumers whose options currently vary drastically from state to state; and (3) this proposal would have the effect of freeing up substantial state insurance department resources, perhaps improving departments’ ability to effectively regulate insurance.

63. See Brown, *supra* note 62, at 580-84.

64. *Id.* at 594-95. See generally Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567 (2011) (noting that expansion of federal control during President Obama’s tenure has typically included increased resources and autonomy for states).

65. 15 U.S.C. § 1011 (2012).

66. See, e.g., Randall, *supra* note 55, at 687.

67. See, e.g., *id.* at 687-89.

68. See *id.* at 685-86.

69. See, e.g., *id.* at 693-94.

70. See, e.g., *id.* at 694-95.

II. RECENT DEVELOPMENTS IN DISPUTE RESOLUTION

Three notable developments in dispute resolution have the potential to inform the processing of disputes over first-party consumer auto insurance claims: (1) Online Dispute Resolution (ODR); (2) Israel's Benoam system of auto insurance dispute resolution; and (3) the United Kingdom's Financial Ombudsman Service (FOS) system for resolving financial disputes between companies and consumers. This Section will introduce and describe each in order to lay the groundwork for the proposal delineated in Part III.

A. *Online Dispute Resolution (ODR)*

The first forays into ODR were driven by the need to resolve disputes over online e-commerce interactions.⁷¹ As these initial attempts achieved successful outcomes, the field of ADR began to shed its attachment to face-to-face interactions and view ODR as a potentially useful tool. This evolution has taken place outside the context of e-commerce primarily over the last ten years.⁷²

Experiments with ODR have revealed certain valuable attributes of ODR systems. These characteristics allow the systems to simultaneously mimic useful elements of in-person communication while utilizing technology to enhance both the quality and efficiency of the ADR experience. Importantly, this functionality has been used in both the mediation and the arbitration frameworks.⁷³ Commentators have observed that technology can “play the role of a ‘fourth party,’ not replacing the human third party, [the mediator or arbitrator,] but aiding the third party and perhaps enhancing third-party skills.”⁷⁴ One example of this is SquareTrade, an ODR system that presents parties with a variety of form questions based on the circumstances surrounding their disputes. The parties' answers—which are kept confidential—are used not only to aid the mediator assigned to a particular case in understanding the parties' agreements, goals, and expectations, but also to create a dynamic collection of live data that is constantly used to enhance the system's interactions with parties overall.⁷⁵

71. See generally Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175 (1998).

72. Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 164-65 (2012).

73. *Id.* at 169-77, 196.

74. *Id.* at 178.

75. See *id.* at 172-73 (“[SquareTrade] understood that in order for every part of the company to improve, every part of the company needed to both use data and to generate data that might be used by other parts.”).

Another example of ODR operating successfully as a “fourth party” is the Mediation Room. In this system, parties can meet virtually via videoconference while their mediator listens in, facilitates discussion, and selectively communicates with each party on an individual basis by sending them short, typed messages or displaying relevant documents on their screen. This setup mimics in-person mediation, but provides the mediator with an enhanced set of tools to guide discussion.⁷⁶ A final example is the Benoam system used in Israel, discussed in greater detail in the next subsection.

Experiences of private and government entities indicate that effective utilization of ODR begins with careful system design.⁷⁷ For example, the U.S. Office of Government Information Services (GIS) was established in 2007 to review appeals of agency rejections of citizen document requests submitted under the Freedom of Information Act. The staff of only seven prepared to handle thousands of complaints by hiring system design experts to create an adaptable ODR system tailored to meet their unique processing needs. As the GIS began to receive both information requests and complaints, they learned that an important part of their role would involve communicating with citizens to mitigate the need to process complaints—predispute resolution, in a sense. Because their ODR system was flexible and designed specifically for them, it was able to effectively aid the GIS’s small staff.⁷⁸

If thoughtfully implemented, ODR offers numerous advantages to its users. First, it can provide a cheaper alternative to classic ADR techniques.⁷⁹ Additionally, it offers a more efficient and convenient alternative to traditional mediation and arbitration: parties do not have to travel to attend meetings or hearings, for example. Professor Amy Schmitz notes that ODR may be more efficient when systems include arbitration—“OArb”—because its ultimately binding effect motivates the participants in a way that virtual mediation may not.⁸⁰ Finally, ODR affords operators the ability to create a tailored degree of transparency, depending on the needs of their program. For example, when ODR is used for both mediation and arbitration, administrators can offer to refrain from posting records of disputes when the parties reach fair settlements within two weeks. In this scenario, the system

76. *See id.* at 177.

77. *See id.* at 191-92.

78. *See id.* at 190-94.

79. *See* Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 223-25 (2010).

80. *Id.* at 226-28. Without face-to-face interactions forcing parties to make cost-benefit determinations before they decide whether to contest claims and proceed with appeals, nonbinding ODR mediation may be drawn out unnecessarily. *Id.* at 228.

incentivizes quick and fair settlements and preserves ADR energies for more complex and protracted disagreements.⁸¹

The NAIC noted in its 2000 white paper advising state insurance departments on best practices for processing consumer complaints that thirty-five of the then forty-eight department websites provided consumer complaint forms online, and seventeen websites allowed those forms to be submitted online or via email.⁸² The NAIC encouraged departments to accept submissions “through any mode of communication” and declared “[a]cceptance of a consumer complaint by email . . . consistent with the best practices for handling complaints.”⁸³ Although online capacities have largely been used by state regulators only to process complaints and communicate with parties, movement towards ODR may not be an unnatural next step for auto insurance dispute resolution.

B. Israel's Benoam System

In 2000, changes in Israel's insurance industry prompted the fifteen operational auto insurers to suddenly begin litigating previously ignored subrogation claims. The Israeli courts were subsequently flooded with a high volume of fact-intensive, pleading-heavy claims between opposing insurance companies for relatively small amounts of money. The Israel Insurance Association, a private nonprofit industry trade group, worked with private attorneys to devise a privately run and operated online arbitration system. To win the buy-in of auto insurance companies, the system incorporated certain formalistic elements atypical of private arbitration, such as predetermined case timelines executed automatically by the online system.⁸⁴ Since its launch in 2000, the Benoam system has successfully arbitrated over 100,000 claims.⁸⁵

The Benoam system operates entirely online from start to finish for each claim. All case files, pleadings, reports, and photographs are available online and are easily searchable.⁸⁶ Additionally, the system only accepts subrogation claims for under a certain monetary value. The process is governed by a formal set of rules that dictates process norms and deadlines, and arbitrators are carefully selected and come from a variety of professional backgrounds.⁸⁷

81. *Id.* at 240-43.

82. WHITE PAPER, *supra* note 14, at 4.

83. *Id.*

84. Orna Rabinovich-Einy & Roei Tsur, *The Case for Greater Formality in ADR: Drawing on the Lessons of Benoam's Private Arbitration System*, 34 VT. L. REV. 529, 542-44, 548 (2010).

85. *See id.* at 545.

86. *See id.*

87. *See id.*

Two features that distinguish Benoam from many arbitration systems are its ability to enforce arbitrator decisions and the availability of an internal appeals process that generates precedential determinations, which are made available to the public. Benoam operates a clearinghouse that allows it to transfer funds automatically from one party to another. The parties knowingly consent to this when they agree that subrogation claim disputes will be handled by Benoam. Parties may appeal to a single arbitrator or a panel of arbitrators; in either case, the review standard is de novo, and reviewers are free to consider all elements of the claim, not just legal questions.⁸⁸ Although most complaints are handled on an ad hoc basis, “precedent setting cases”—often reviewed on appeal—are released to insurers in order to clarify how arbitrators will approach certain murky issues.⁸⁹ Both of these features boost the legitimacy of the Benoam system by indicating to the public that decisions will be enforced promptly and principles will be applied evenly and fairly.

“The Benoam case is a good demonstration of the ways in which digital technology can blur clear distinctions between ADR and formal dispute resolution, and, consequently shift the focus within ADR systems to systemic goals that have typically been associated with the court system.”⁹⁰ Not only does the system make impressive use of ODR, it retains a relatively high level of structure and formality, unlike traditional ADR techniques, which often do not.⁹¹ According to observers, “[i]n the case of uniform contracts, one party exerts absolute control while the other enjoys no control at all; in the case of Benoam, all users enjoy limited control over the system, resembling the remote sense in which parties consent to the power and authority of courts.”⁹² The fact that Israeli auto insurance companies elect to renew their agreements with Benoam each year speaks to their satisfaction with the system.⁹³ Although Benoam arbitrates disputes between companies—as opposed to between consumers and companies—it provides a useful model for successful implementation of ODR in the context of high-volume, low-dollar insurance dispute resolution. Importantly, it avoids two drawbacks commonly complained of in traditional arbitration; participating parties perceive it to be both fair and affordable.

88. *See id.* at 546.

89. *See id.* at 550-51.

90. Rabinovich-Einy & Katsh, *supra* note 72, at 196.

91. *See* Rabinovich-Einy & Tsur, *supra* note 84, at 548-49.

92. *Id.* at 550.

93. *See id.* at 558.

C. The United Kingdom's Financial Ombudsman Service (FOS)

The British FOS utilizes a private ombudsman system to resolve consumer disputes with banks, insurance providers, and financial service organizations, a popular approach that is also used to resolve consumer disputes in Australia, Canada, and New Zealand.⁹⁴ It began as an independent organization established by three British insurance companies in the 1970s for the purpose of resolving consumer disputes. Other insurance providers quickly joined, and companies in other industries developed similar organizations. By 2000, the British Parliament had joined these private ombudsman systems into one, evolving the FOS into an independent government entity.⁹⁵

The FOS's consumer dispute resolution process can be divided into four parts. First, a complaining consumer must notify the company of their grievance. The company then has eight weeks to respond, and in doing so, it must provide the consumer with a brochure (created by the FOS) explaining their options for utilizing the FOS's process.⁹⁶ If the consumer is not satisfied with the company's response, they may then submit their complaint to the FOS call center. Here, employees perform triage similar to the process undertaken by United States state insurance departments; they review the claims, gather information, and communicate with the parties to attempt a quick and easy resolution.⁹⁷ If this cannot be accomplished, the employee handling the complaint elevates it to official "case" status. With this designation, the matter is assigned to an adjudicator, and the company involved is automatically fined £450.⁹⁸

The adjudicator serves the role of a mediator. They spend substantially more time than the employees at the call center gathering and reviewing information and communicating with the parties involved. They are statutorily required to manage these disputes while aiming to apply a "fair and reasonable" standard to the insurer's actions. These adjudicators are not empowered to issue legally binding decisions, and they have no regulatory authority. They can, however, easily refer matters to the proper regulatory authority when complaints raise red flags.⁹⁹ An impressive ninety-four percent of the complaints that reach an adjudicator are settled at this stage.¹⁰⁰

If the parties do not settle their dispute with the help of an adjudicator the matter is elevated to ombudsman review. The reviewing ombudsman

94. See Howells & James, *supra* note 31, at 10-11.

95. See Schwarcz, *supra* note 16, at 769-70.

96. See *id.* at 771.

97. See *id.* at 772.

98. See *id.*

99. See *id.* at 772-75.

100. See *id.* at 783.

may require insurers to pay up to £100,000, and although the final decision is binding upon the insurer, the insured is not precluded from litigating the dispute in a court of law.¹⁰¹ When reviewing complaints, ombudsmen use the entirety of the record created by the call center employees and the adjudicator, and—like adjudicators—they apply a “fair and reasonable” standard to the acts of the company. Final decisions are then shared with the parties and later made public, although the parties’ identities are not revealed. The six ombudsmen are high-ranking public officials, who, in addition to arbitrating claims, are responsible for managing the FOS.¹⁰²

The FOS system is celebrated by companies and consumers alike, both for its efficiency and impartiality.¹⁰³ Commentators attribute its popularity and success to a number of factors, two of which include: (1) its comprehensive tiered structure and (2) its status as a nonregulatory public entity.

The FOS creates a clear and reliable framework that sees each consumer complaint through a well-established process; its involvement begins where the complaint starts (mandated reporting to the actual company) and does not terminate until the complaint has been resolved in some manner.¹⁰⁴ The FOS enjoys an impressive rate of success at the mediation stage handled by adjudicators, which may be due in part to three factors: (1) the parties are aware of the looming possibility of ombudsman review if they cannot reach an agreement; (2) at the arbitration stage, the parties no longer have the opportunity to exert control over the outcome of the dispute; and (3) the final arbitration determination is binding (although consumers are not precluded from filing in court afterwards).¹⁰⁵ Companies may be motivated to avoid the risk of being fined an unforeseen amount. Additionally, even employees who operate at the call center stage have some leverage when dealing with companies. If companies wish to resolve a dispute without incurring any fines from the FOS, they must do so at this stage; otherwise, they will be fined automatically when the complaint is elevated to an adjudicator for more substantial mediation.¹⁰⁶ The architecture of the system gives the actors at each stage a meaningful role to play and adequate tools with which to operate.

Furthermore, as a nonregulatory public entity, the FOS enjoys the trust and legitimacy afforded government agencies, which presumably are not biased toward the industries whose conduct they review.¹⁰⁷ Yet the FOS’s

101. *See id.* at 776-77.

102. *See id.* at 777-78.

103. *See id.* at 783-84.

104. *Id.* at 789.

105. *Id.* at 790-92.

106. *Id.* at 795-96.

107. *Id.* at 802-04.

independence from regulatory responsibilities may make companies feel more comfortable being forthcoming about their transgressions. The FOS can pass issues along to the proper regulatory body when it sees fit, of course, but industry actors may find the degree of separation reassuring. Because it does not perform a regulatory function itself, its energies can be fully devoted to dispute resolution.¹⁰⁸ Although the FOS system handles a much broader set of disputes than the Benoam system and uses an entirely different ADR process, like Benoam it avoids two problems often associated with traditional methods of arbitration: unfairness and prohibitive cost.

III. PROPOSAL

This final section will introduce a proposal for a reformed first-party consumer auto insurance dispute resolution system in the United States. The description of the proposal will be followed by an explanation of how it incorporates the three recent trends in dispute resolution: (1) ODR; (2) the Benoam system in Israel; and (3) the British FOS. The section will conclude by explaining how this proposal would improve upon the current system.

A. Description

This paper proposes the creation of an independent nonregulatory federal entity that would both mediate and arbitrate first-party consumer auto insurance complaints through a system of ODR, at no cost to consumers or insurers. For the remainder of the paper, the proposed entity will be called the Auto Insurance Complaint Bureau (AICB). Notably, unlike many proposals for insurance regulation reform, this system would not require the amendment or repeal of the McCarran-Ferguson Act. Under the Act, the states currently have the right to reverse preempt the FAA when regulating the arbitration of disputes over insurance claims. This is because the FAA does not directly regulate the business of insurance. The statute Congress would pass in order to implement this paper's proposal would directly regulate the business of insurance, and thus would not be subject to state law preemption under McCarran-Ferguson.¹⁰⁹

The federal government would establish the AICB wholly separate and apart from the FIO, and its employees would be encouraged to share market conduct concerns with the FIO as needed. As an initial matter, the ODR database would be designed and tested by private consultants, who would tailor the system to match the needs of the AICB—an entity preparing to: (1) process and review thousands of complaints dealing with

108. *Id.* at 799-802.

109. 15 U.S.C. § 1011.

fact-specific, document-heavy claims; (2) mediate disputes, mostly through review of online documentation but occasionally through virtual teleconference meetings; (3) keep consumer case files protected and confidential; (4) issue precedential decisions to the public with the ability to select whether to keep the parties anonymous; (5) organize its employees and caseload by state; and (6) track the processing of all complaints in order to report certain metrics to the FIO.

The AICB would be the mandatory and exclusive appellate step for dissatisfied auto insurance consumers looking to air first-party coverage grievances, and neither insurers nor insureds would have to pay to participate. The system would require that all complainants first attempt to resolve disputes directly with insurance companies before filing a claim with the AICB. Companies would have a maximum of eight weeks to resolve matters with an insured. Companies would also be required, during this eight-week period, to gather and organize all relevant records pertinent to an insured's complaint. If the insured then decides to file a formal complaint with the AICB, the company would be required to upload all relevant case documents into the ODR database within one week of being notified of the complaint. This upload would include all documents relevant to the consumer's policies with the insurer generally, as well as all documents related to the claim under review. The insurer would also be required to provide documentation of its communications with the insured during the recent period when their complaint was under review.

Once the insured files an official complaint with the AICB, the complaint would be handled in no more than two phases. First, it would be assigned to a mediator specializing in the auto insurance laws of the insured's state. All mediators would be full-time employees of the AICB. The mediator would perform an initial intake and review of the complaint and all accompanying documents provided by the insurer in the online database. The mediator would then determine whether the dispute has the potential to be resolved in the immediate short term without utilizing formal mediation techniques. If so, the mediator would attempt to do so. If not, they would undertake a more extensive review of the circumstances surrounding the complaint. The mediator would not only utilize the documents uploaded by the insurer, but they would also require the two parties—or their representatives—to answer a number of form questions regarding their perceptions of the dispute, goals for resolution of the dispute, and any potential points of compromise. Parties' answers to these questions would be tracked and entered into an ongoing live data pool, which would be used in conjunction with mediator feedback to improve the utility of party forms in future mediations. Parties' answers would also assist the mediator in attempting to reach a mutually agreeable outcome to their dispute.

If the mediator determined to undertake a more extensive review, the ODR system would alert mediators and parties alike to built-in deadlines guiding their complaint. The mediator would have the ability to override the system to extend deadlines in cases where doing so would be productive, but otherwise these deadlines would dictate the timeframe within which each dispute is mediated. Certain types of disputes, if consistently more complex and time-consuming to investigate, would default to an extended timeframe. System tracking of dispute data would assist in streamlining these deadlines over time. The mediator would apply the laws of the pertinent state when reviewing the facts and gauging how to assist the parties in reaching a just outcome.

If, at the end of the predetermined mediation period, no settlement was reached between the parties, the mediator would forward the case to an arbitrator. Like mediators, all arbitrators would be full-time employees of the AICB. The arbitrator—who would also be assigned to handle complaints arising in the insured's state—would have access to all documents in the database, including the records and notes from the mediator's attempts to aid the parties in reaching a resolution. The arbitrator would also apply the appropriate state's law to judge the actions taken by the insurer. Similar to the mediation stage, the ODR system would automatically calculate arbitration deadlines and alert the parties, including the arbitrator, to those deadlines. If one of the parties was dissatisfied with the arbitrator's final decision, they would have the right to appeal to a panel of three different arbitrators. These arbitrators would apply a fair and reasonable standard of review to the proceedings and would make new inquiries of the parties only as needed. Arbitrator damage awards would be limited to \$40,000, and this cap would be adjusted every five years for inflation. The final decision issued either by the assigned arbitrator or a panel of three reviewing arbitrators would be binding on both parties. These decisions would be released to the public, but the parties involved would be kept anonymous. Although not precedential, these decisions would provide useful examples of AICB interpretations and rulings, both to companies and to the public.

All AICB employees, especially arbitrators, would be carefully selected based on qualifying knowledge and experience as well as demonstrations of impartiality. Further, parties to disputes would have the option of submitting allegations of bias against their mediator or arbitrator to the FIO for independent review and, if deemed necessary, investigation.

Initially, this system would be limited to first-party auto complaints, the majority of which involve disputes over coverage (usually how much, if anything, an insured is owed) or delayed claim payments.¹¹⁰ This would

110. See Feinman, *supra* note 12, at 693.

allow the program to have a meaningful impact on a large number of dissatisfied consumers without initially handling the added complexities of third-party claims. If, after a significant trial period, the AICB was successful, the legislature and by extension the system's administrators could consider incorporating third-party consumer auto complaints as well.

B. Incorporating Lessons from Dispute Resolution Trends

The three recent developments in dispute resolution discussed in Part II figure heavily into the AICB proposal. From the ODR experiences of other entities, the proposal incorporates tailored online system design at the outset; carefully facilitated data gathering allowing for rich data improvements over time; and utilization of virtual "Mediation Room" techniques in real time.¹¹¹ By utilizing ODR, the proposal aims to take advantage of the benefits realized by other organizations: namely, long-term cost efficiency, convenience for all participants, and transparency through online publication of arbitration outcomes.¹¹²

Israel's Benoam system provides an example of ODR operating efficiently and effectively and includes certain attributes that support this paper's proposal. Although Benoam handles a different body of disputes—subrogation claims between insurance companies—it provides a useful example of a binding online arbitration system focused on a subset of claims within the insurance industry. Benoam offers an impressive level of structure and formality, lending it the legitimacy an entirely online system might otherwise lack.¹¹³ The AICB proposal attempts to emulate these qualities by providing a clearly delineated step-by-step process and requiring participants to stick to a preordained timeline. Additionally, Benoam selects and publishes precedential decisions in order to give the public notice of how it will interpret certain types of disputes, to provide ongoing evidence of its utility, and to hold companies accountable for their actions.¹¹⁴ The AICB proposal borrows from this practice in part; it would publish all arbitration outcomes while keeping the parties anonymous.

Finally, although the British FOS system covers a much broader range of consumer disputes than first-party auto insurance claims, it provides useful insights into the successful implementation of a third-party ombudsman service and serves as the foundation for certain elements of this paper's proposal. First, the FOS utilizes a tiered system that begins by requiring consumers to log complaints directly with companies and moves through multiple stages that may lead to a binding arbitration decision (with

111. See Rabinovich-Einy & Katsh, *supra* note 72, at 171-73, 177, 191-92.

112. See Schmitz, *supra* note 79, at 226-28.

113. See Rabinovich-Einy & Tsur, *supra* note 84, at 548-49.

114. See *id.* at 550-51.

the option to appeal).¹¹⁵ Although the particulars of each AICB stage are unique, the proposal mirrors the FOS's structured, multi-tiered approach. Additionally, the FOS's status as a public entity with no regulatory power is key to its success; it garners trust and legitimacy from both the public and private companies.¹¹⁶ Its official yet independent status allows it to maintain a direct and meaningful connection to regulators without being so closely connected as to alienate companies.¹¹⁷ The AICB's status as a nonregulatory government entity is modeled directly after the FOS, and like the FOS, the AICB would publish its decisions keeping the parties anonymous.

C. Improving Upon the Current System

This paper's proposal would improve upon the currently fragmented dispute resolution systems in a number of ways. Unlike the consumer complaint process offered by some state departments of insurance, the AICB program would provide a fully resourced avenue for consumers to air their grievances. It would exist for the sole purpose of resolving first-party consumer auto insurance disputes. First, this would answer the concerns of those who argue that state insurance departments fail to make consumer protection a priority.¹¹⁸ Second, proper program funding and staffing from the federal government would guarantee that adequate resources exist to support the enterprise of processing consumer complaints—presently lacking in a number of states.¹¹⁹

Additionally, the AICB arbitration tier would be a fairer, more objective, and more convenient option for consumers than the private arbitration currently in place in most states. At present, arbitrators are typically selected by insurance companies; consumers must arrange their schedules to travel to hearings as necessary; consumers must take affirmative steps to trigger arbitration and may feel compelled to consult an attorney when doing so; and final decisions remain private, shielding unsavory industry practices from public view.¹²⁰ In the AICB, mediators and arbitrators would be full-time employees of the AICB, and if necessary, parties questioning their objectivity would have the option of raising concerns with the independently operated FIO. By offering services online, the AICB would provide greater flexibility and avoid common logistical complications, such as travel costs and inflexible work schedules. Furthermore, consumers and insurers would already be active participants in

115. See Schwarcz, *supra* note 16, at 789.

116. See *id.* at 799-802.

117. See *id.* at 802-04.

118. See *supra* Part I.C.1.

119. See *supra* Part I.C.2.

120. See *supra* Part I.B.2.

the AICB system before reaching the arbitration stage. After undergoing an unsuccessful attempt at mediating the dispute, if either party believed that further review might provide a more favorable outcome, they would be in a comfortable position to elevate the matter to arbitration. Once an arbitrator reached a decision, the result would be made available to the public without identification of the parties involved. This would prevent companies from being unfairly subjected to public judgment without the due process of law afforded by litigation, while still allowing the public to observe industry practices generally.

Finally, in addition to providing an objective, fully operational, and convenient avenue for consumers to seek review of their complaints, the AICB would eliminate the burdensome up-front funding requirements of the current arbitration system.¹²¹ It would come at a cost to the government, as it would not require consumers to pay to file a complaint, nor would it compel insurance companies to fund the processing of complaints. Although this system would place a financial burden on the federal government—as its success would require adequate funding—it would have the positive effect of incentivizing consumers to voice their concerns without first pausing to consider the potential cost. Consumers who are currently forced to undertake this cost-benefit analysis may determine the potential payout is not worth the time and money required to arbitrate.

The suggestion that state regulators, in response to local political pressures, may be more apt to handle consumer complaints adequately than federal regulators could be seen as a basis for arguing against this paper's proposal.¹²² Upon closer examination, however, the concern is not warranted because the proposed AICB would handle consumer complaints, but would not perform a regulatory function. AICB mediators and arbitrators would merely follow applicable state laws and regulations, set by state legislators and administrators who would presumably consider local circumstances when passing and implementing insurance policy.

CONCLUSION

In 2008, Congress passed the Genetic Information Non-Discrimination Act (GINA) to protect Americans from employer and insurer discrimination based on genetic makeup.¹²³ Prior to the Act's passage, states had enacted a wide range of laws on the subject, and the protections available to citizens varied drastically from state to state.¹²⁴ This important issue had the

121. See *supra* Part I.B.2.

122. See Donatucci, *supra* note 62, at 413.

123. See Representative Louise Slaughter, *Genetic Information Non-Discrimination Act*, 50 HARV. J. ON LEGIS. 41, 56 (2013).

124. See *id.* at 47.

potential to directly impact the majority of American citizens, and Congress chose to put an end to the glaring gaps and inconsistencies in genetic protection rights among the states by setting a federal policy. Although substantively different from the considerations of this paper, GINA provides an appropriate backdrop to its conclusions.

This paper has addressed the inadequacies of first-party automobile insurance claims dispute resolution in the United States by proposing the creation of a federally administered system of online dispute resolution for consumers seeking third-party review of their insurers' coverage determinations. Although this proposal argues for change on a modest scale compared to suggested reforms that would overhaul insurance regulation entirely, it does so purposefully, with an eye to practical considerations: (1) manageable implementation; (2) impacting a large number of consumers, whose options are currently inconsistent from state to state; and (3) freeing up resources for taxed state insurance regulators. Like genetic information protection rights before Congress enacted GINA, consumer options for appealing auto insurance claim determinations vary widely among the states, and in many cases are functionally nonexistent. This paper's AICB proposal would improve the current system by providing a streamlined avenue for reviewing complaints lodged by all-too-often-unheard consumers of automobile insurance in the United States.