



Statement # 13

Dispute Resolution Procedure in Reparations and Similar Cases

(Adopted June 10, 1988)

Where Congress has established private rights, effective means of protecting them are crucial. Congress has used a variety of procedures to protect consumers, workers and certain others. In many cases, it has established formal adjudicatory process (e.g., within regulatory agencies like the Federal Trade Commission or review agencies like the Occupational Safety and Health Review Commission). Congress has also recognized that, in many cases, formal agency hearings or court litigation may be unnecessary or too costly. Thus, alternative or supplementary agency procedures or even private-sector procedures have been established to resolve disputes that formerly would have been left to the formal adjudication process.

Agencies' use and oversight of these dispute processes has become even more important in light of recent congressional developments and Supreme Court decisions. The Supreme Court recognized in *Shearson/American Express, Inc. v. McMahon*, 107 Sup. Ct. 2332 (1987), for example, that arbitration processes are often adequate to protect statutory rights, particularly where an agency can oversee their operation to ensure their adequacy. Indeed, that case enforced an arbitration agreement even for a treble damage case brought under the Racketeer Influenced and Corrupt Organizations Act by a plaintiff acting much like a "private attorney general."

Agencies' approaches to "reparations" and similar programs to safeguard consumers reflect the diversity of approaches that are available. The Securities and Exchange Commission, so far at least, has relied on a purely private resolution mechanism—exchange-based arbitration. The Commodity Futures Trading Commission ("CFTC") has developed, pursuant to statutory mandate, its own distinctive dispute resolution program. Since it was formed in 1974, the CFTC has administered a "reparations" program that adjudicates between commodity futures salespersons (known as "futures commission merchants") and aggrieved customers.¹

¹ Other agencies, like the Federal Maritime Commission and the U.S. Department of Agriculture, have reparations programs that differ in significant respects.



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The CFTC's program provides an interesting alternative to civil litigation, formal hearings under the Administrative Procedure Act, and commercial arbitration.² Like arbitration (which is also an option available to aggrieved customers), the reparations program uses decisionmakers familiar with the industry from which the disputes arise. But these decisionmakers are CFTC employees, rather than arbitrators drawn from industry—either agency administrative law judges or other specially-designated agency employees known as "judgment officers."

The CFTC has been creative in fashioning procedures for the reparations program. The "formal" procedure, for claims of more than \$10,000, is akin to the adjudicatory procedure provided in section 554 of the APA. The "summary" procedure for claims under \$10,000 dispenses with several formalities, including the right to an oral hearing. It does permit a telephonic hearing. A third, "voluntary" procedure, is available for claims of any size and must be elected by both parties. It dispenses with a written opinion by the presiding judgment officer and appeal rights. While the CFTC's program had a troubled early history, characterized at times by crippling case backlogs and severe budgetary constraints, recent years have seen enhanced resources and a considerable improvement in case management.

The Administrative Conference has begun exploring these processes with its research into the CFTC's innovative approach to consumer protection. The Conference sees important benefit in programs like the CFTC's that offer complainants procedural options. Creation of an agency review process for consumer complaints benefits the regulatory agency because the process provides a valuable pipeline into the problems of the industry; resolving these complaints serves as a constant challenge and impetus to the agency to interpret its statutory mandate. A three-tiered approach like the CFTC's permits added opportunities for procedural tailoring. On the other hand, the parallel private decisional process may be less expensive, faster, and more responsive. Parties benefit from having both a choice of forums and an opportunity to select a dispute resolution procedure that suits their needs.

Much remains to be done in considering the best approach for particular agencies, and this statement is intended as an initial foray. The Administrative Conference suggests that continued experimentation with alternative types of procedures for resolving issues arising in consumer protection programs is justified. Agencies administering statutes that recognize a private right of action should consider establishing, or seeking authority to establish, a

² Persons with reparations claims may pursue several other avenues of redress (National Futures Association arbitration, private suits), so the entire CFTC program is in essence voluntary.



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reparations program offering creative procedures for "formal," "summary" and "voluntary" dispute resolution, along the lines of the CFTC's where:

(1) An agency statute provides for and engenders substantial private litigation and/or arbitration; or

(2) An agency regulatory program centers on a single industry or group of similar industries, such as would permit creation of "expert" decisionmakers.

An agency with both of the characteristics listed above would be a prime candidate for a reparations program. Each program of course would be crafted to meet the special needs of the agency's particular regulatory jurisdiction.

Management of reparations programs should take into account these factors:

(1) Where complaints are to be resolved by summary or voluntary procedures, the discovery process should be streamlined to comport with the goals of less formal procedures. For example, the number of interrogatories and requests for admissions may be substantially limited; and summary information rather than facsimiles could be deemed responsive to requests for the production of documents.

(2) The judgment officers used in summary and voluntary procedures need not always be administrative law judges or even attorneys, so long as they demonstrate sufficient experience in, or knowledge of, the regulated industry or applicable law.

(3) While summary procedures by their nature may not require an in-person hearing, telephone hearings may provide a useful and inexpensive way of allowing the judgment officer to question parties and witnesses. Telephone hearings should be available whenever a judgment officer believes such a hearing is appropriate to the resolution of a dispute.

(4) Since complainants in reparations proceedings frequently appear without a lawyer, agencies should make the dispute resolution process understandable to the lay person. Toward that end, notices and descriptions of the process should avoid whenever possible the use of legal terms (e.g., "pleadings" or "discovery") where a colloquial term will suffice. Where use of a lay term would mislead, or where no appropriate term is available, agencies should make every effort to assure that the legal term of art has been translated for the lay party or even provide a glossary of such terms for the benefit of the lay reader.



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(5) Managers should assure that a sufficient number of judgment officers are employed to reduce the overall processing time for summary and voluntary proceedings, and thus to permit those forms of procedure to fulfill their promise.

(6) Case tracking systems for reparations cases should be used, or modernized, so that the location and progress of any case can be quickly identified and bottlenecks eliminated.

Citations

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