Consumer Problems and ADR: An Analysis of the Federal Trade Commission-Ordered General Motors Mediation and Arbitration Program

Arthur Best
CONSUMER PROBLEMS AND ADR: AN ANALYSIS OF THE FEDERAL TRADE COMMISSION-ORDERED GENERAL MOTORS MEDIATION AND ARBITRATION PROGRAM

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I. INTRODUCTION

This Article evaluates a controversial mediation and arbitration program established by General Motors (GM) for owners of certain cars. It began in 1984, under the terms of a Federal Trade Commission (FTC) consent order settling charges that GM had deceptively failed to inform buyers that particular models of cars contained components that had unusually low durability. When the settlement was proposed, debate centered on whether the public interest would be served best by: 1) creation of mediation and arbitration opportunities for individual owners; or 2) prosecution of a single action seeking uniform compensation for all owners. One commissioner feared that the dispute resolution process "could substitute 'random redress' for the automatic restitution to which these consumers are entitled." 1 Twenty-nine state attorneys general wrote that "the amount of redress will turn on factors personal to each consumer, and not necessarily on the vehicle problem." 2 A commissioner in favor of the settlement replied that it "offers the Commission the fastest and indeed the only feasible way to redress the injury suffered by many GM owners." 3

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Although the commissioners did not refer to academic literature, their positions raised issues of primary concern to dispute resolution scholarship. Does obtaining the benefits of non-traditional procedures, such as speed, fairness, and satisfaction for individual disputants, justify giving up the benefits of authoritative and coercive dispute resolution, such as establishment of clear rules for future conduct and allocation of redress to a broader class of recipients? How accurate are the descriptions of the strengths and weaknesses of alternative dispute resolution procedures?

Using reports of 81,055 cases processed in the GM program in 144 cities in a thirty-four month period, this article compares the program's performance with the expectations its proponents have expressed, and evaluates it in the broader context of the adaptability of alternative forms of dispute resolution to consumer problems. The program has reached only a small fraction of the individuals potentially affected by GM's alleged misconduct. For those cases it did process, the program seemingly failed to give similar cases similar treatment, despite the hope that it would produce fair results well matched to the circumstances of particular cases. A full calculation of the resources devoted to the program calls into question any claim that it produced overall economic savings. With respect to savings of time, redress has been directed to some consumers more quickly than might have been the case with a single government action aimed at mass compensation. However, the program's ability to process individual cases in less time than full-fledged FTC-GM litigation would have required has provided only slight benefit to consumers who used the program after its initial few years of operation, and has provided no benefit at all to consumers who have never used it.

From a law enforcement perspective, the program has significant weaknesses. It did not produce major savings of cost or time, yet it may have redressed only a small proportion of the total consumer injury and it apparently produced varied results in cases with similar facts. A less complicated method of redress such as uniform payments to owners of the affected vehicles might have been a better public response to an alleged pattern of wrongdoing. Operation of the program does show, however, that many buyers are willing to use alternative dispute resolution (ADR) as part of a seller's complaint handling process. Flaws in the program that make it an unsatisfactory means of government deceptive trade practice regulation would be far less detrimental in the context of a voluntarily established complaint handling mechanism offered to customers for buyer-seller

4. A recent article suggests that the ways in which academic students of dispute resolution organize their research and characterize their discipline control or "enable" the debates about such processes within the institutions which the academics study. The total lack of attention to scholarly work by those involved in creating the FTC-GM settlement provides an instance in which this "scholar-centered" hypothesis fails to provide an accurate description of reality (unless a claim can be made that the real actors in the debate were influenced unconsciously by the work of academics). See Silbey & Sarat, Dispute Processing in Law and Legal Scholarship: From Institutional Critique to Reconstruction of the Juridical Subject, 66 Die REV. 437, 440 (1989) ("The struggle within the field of institutional practice is enabled by the outcome of a particular struggle among legal scholars.").
disputes in general. Creating any additional medium of consumer redress is likely to benefit any buyers who learn about it and use it.

II. THE FTC-GM SETTLEMENT

A. FTC Allegations

Reacting to consumer complaints, published articles and other information, the FTC began in 1979 to investigate whether certain components used in a variety of GM vehicles had unusually high failure rates.\(^5\) The agency issued a formal complaint in 1980, charging that three vehicle components\(^6\) all exhibited worse than normal performance and durability, that GM knew or should have known about it, and that GM’s failure to disclose it to buyers violated the FTC Act.\(^7\) Failure to disclose information about a product’s atypical attributes violates the FTC Act if the information concerns something important and if consumers, in the absence of explicit information, are likely to assume that the attribute has typical characteristics.\(^8\) Motors and transmissions are important, and buyers are likely to assume that their durability is within the normal range unless a car seller reveals that they are likely to fail sooner or more often than such components typically do.

As many as twenty million cars may have been involved in the alleged violation.\(^9\) Camshafts and lifters involved in the case were used in vehicles sold as Chevrolets, Buicks, Oldsmobiles, and Pontiacs, manufactured from the beginning of the 1974 model year through April, 1983. The engines involved in the case, known as 305 and 350 cubic inch displacement engines, were used in a variety of vehicles manufactured for sale in the years 1974 through 1983, and the transmission that was allegedly of low durability, the THM 200, was used in various GM passenger cars from 1976 through 1982.\(^10\)

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6. The components were described in the complaint as THM-200 automatic transmissions produced since 1975 by Hydra-Matic Division, camshafts or lifters in 305- or 350-cubic inch displacement engines produced by Chevrolet Division, and fuel-injection pumps or injectors in diesel engines produced by Oldsmobile Division since 1977.


8. See, e.g., Thompson Medical Co. v. FTC, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) ("Aspercreme" was deceptive when used as the name of an analgesic ointment that contained no aspirin).

9. Antitrust & Trade Reg. Rep. (BNA) No. 1112, at 872 (April 28, 1983). Other estimates are lower. For example, the Washington Post reported that one of the named components, the allegedly defective transmission, was installed in at least 3.3 million cars. Wash. Post, August 8, 1983, at D.C. 11.

10. Wisconsin Justice Department, ARBITRATION INFORMATION KIT (GENERAL MOTORS).
B. Probable Uniformity of Consumer Harm

The homogeneity of the potentially large number of instances of consumer injury involved in the case is relevant to evaluating the settlement. The specified components were "used over many years in many different models of vehicles. Thus, any unusually poor performance could have had different consequences for various owners of the vehicles in which they were installed. On the other hand, the instances of possible consumer abuse in this case must have much less variation than would be found in other groups of consumer experiences with substandard purchases, where the universe of purchases might be all cars, and the flaws might be shortcomings in any features of the cars. The specified components are, in fact, three narrowly defined automobile parts that can fail in ways that are less numerous than potential failures of all automobile parts. The idea that specified components problems are likely to be less diverse than problems with other attributes of automobiles is supported, inferentially, by the FTC-GM settlement itself. Besides committing GM to offering ADR for buyer-seller disputes involving the specified components, the settlement also provides that ADR shall be available for disputes involving automobile powertrains. The definitions of "specified components" and "powertrain" highlight the narrowness of the definition of "specified components." The specified components are:

"THM 200 automatic transmissions," "camshafts or lifters in 305 or 350 cubic-inch displacement (CID) gasoline engines" produced in Chevrolet plants, and "fuel injection pumps or fuel injectors in 350 CID diesel engines" produced in Oldsmobile plants.11

In contrast to this limited list of specifically identified components, "powertrain" parts are defined as:

- cylinder blocks and heads, and all internal parts, including camshafts and lifters, manifolds, timing gears, timing gear chains or belts and covers, flywheels, harmonic balancers, valve covers, oil pans, oil pumps, engine mounts, seals and gaskets, water pumps and fuel pumps, and diesel injection pumps; also, turbocharger housings and internal parts, turbocharger valves, seals and gaskets... [transmission] [c]ases and all internal parts, torque converters, vacuum modulators, seals and gaskets, and transmission mounts; also, transfer cases and all internal parts, seals and gaskets.12

Since the marketing impropriety alleged in the case was the failure to reveal specific weaknesses in three vehicle components, it can be said theoretically that GM's conduct caused identical injuries to all buyers, to the extent that the buyers paid more for the cars than they would have paid if accurate information about the weaknesses had been disclosed. In this sense, the consumer problems involved in the case have great uniformity, since they started out as identical instances of nondisclosure of a product's inherent weakness. In another sense, the product

11. *General Motors Corp.*, 102 F.T.C. at 1750.
12. *Id.* at 1753-54.
failures are not uniform, since the allegedly weak components did not all fail in the same way or at the same time. Nonetheless, the settlement's coverage does represent a group of potential problems far narrower than all problems with all vehicles or even all GM vehicles. The FTC has noted that in broad outline there are similarities among all the problems possibly present among vehicles covered by the settlement.\textsuperscript{13}

C. Analogous FTC Cases

In several similar cases, the FTC obtained settlement provisions providing redress to owners of affected vehicles either automatically or upon satisfaction of very simple requirements. For example, Chrysler Corporation agreed in 1980 to replace rusted front fenders on certain cars or reimburse owners who had previously made such replacements, requiring only that customers sign a statement that rust had appeared within the first three years of use of the car.\textsuperscript{14} Honda made a similar agreement, also related to front fenders subject to premature rusting, in 1982.\textsuperscript{15} Ford agreed to a uniform extension of warranty periods to permit compensation to owners of particular 1979 and 1980 model cars that had been subject to piston scuffing, allegedly due to the absence of necessary oilsquirholes.\textsuperscript{16}

D. Settlement Terms and Early Reactions

In the GM case, FTC staff attorneys negotiated a settlement, which the FTC provisionally approved in April, 1983,\textsuperscript{17} and finally approved, by a 3-2 vote, in November, 1983.\textsuperscript{18} GM refused to provide uniform redress as Honda, Chrysler and Ford had done previously. Instead, it agreed to offer owners of vehicles with the specified components the opportunity to participate in a combined mediation and one-way-binding arbitration program operated by a Better Business Bureau.

\textsuperscript{13} The FTC implicitly concedes that cases eligible for treatment in the program have large similarities. A Bureau of Consumer Protection analysis of statistical data stated: "[T]he number of consumers with a specified component complaint participating in the program is expected to decline over the duration of the program. This is partly due to the fact that only a certain number of vehicles with specified components were manufactured, and these vehicles are getting older and have higher mileage." \textit{Analysis of Data on Results of General Motors' Third Party Arbitration Program For the Period October 1985 Through July 1987}, FTC Press Release (Sept. 9, 1988) at 4-5 (hereinafter FTC Analysis 1985-87).

\textsuperscript{14} Chrysler Corp., Trade Reg. Rep. (CCH) ¶ 21,677 (August 12, 1980). The company had previously replaced rusted fenders free or at reduced cost to customers who had complained. The settlement required Chrysler to mail notices about the program to car owners in states where road conditions made the problem particularly likely to occur.


\textsuperscript{16} Ford Motor Co., Trade Reg. Rep. (CCH) ¶ 21,662 (October 2, 1980).

\textsuperscript{17} Trade Reg. Rep., \textit{supra} note 3.

\textsuperscript{18} \textit{General Motors Corp.}, 102 F.T.C. 1741.
(BBB) in each of a large number of cities. The program has two parts. The owner of a car within its coverage who presents his or her problem to a participating BBB is asked to quantify the redress he or she wants. GM then has the opportunity to offer a settlement payment. GM and the BBBs characterize this process as mediation. For consumers who reject the "mediation" offer, the program provides arbitration that will be binding on GM but not on the consumer.

As outlined in the Introduction, controversy surrounded the settlement. One commissioner was strongly opposed to the use of case-by-case dispute resolution, one considered it inferior to direct redress but worthy of support because GM would not agree to other settlement terms, and another considered it preferable to litigation seeking direct redress because it would make more money available to consumers than would probably be available through litigation. The commissioner most in favor of the settlement stated that "[I]t nevertheless provides an immediacy of relief and a far higher degree of certainty for a much wider range of injured consumers than the Commission could expect

19. GM also promised to publicize the program and make its formerly confidential service bulletins available to the public. "Specified components" has been used as a term of art by the FTC, GM and Better Business Bureaus. The term refers to the particular components alleged by the FTC to have been of deficient durability. See supra notes 11-12 and accompanying text. The GM mediation-arbitration program was expanded by GM to cover more cars and types of problems than the consent order required, but the cases involving "specified components" have been tabulated separately, to comply with a reporting provision of the consent settlement.

20. In General Motors Corp. v. Abrams, 703 F. Supp. 1103, 1110 (S.D.N.Y. 1989) (holding that a New York state statute was preempted by the FTC-GM consent order) reversed, General Motors Corp. v. Abrams, 897 F.2d 34 (2d Cir. 1990), the court described the arbitration phase of the GM program, quoting in part from an affidavit by a BBB official:

[Arbitration] is an informal procedure at which both parties explain their positions to an impartial lay arbitrator or arbitrators. The arbitrators are volunteers representing broad segments of the local community. Having heard the parties, the arbitrators "are then free to make common sense adjudications based on their own sense of fairness." . . . [T]hey are instructed to "apply their own concept of fairness to the facts in the cases they hear. They are not taught the various state laws which would apply if the disputes they were hearing had been brought in court. In fact, while the arbitrators are told that they may allow parties to present the substantive law from the state where they are sitting or even from other states, they are specifically instructed that they are not to apply any particular law, but instead are to do what they personally believe is right.

General Motors Corp. v. Abrams, 703 F. Supp. at 1110.

21. See supra notes 1-3 and accompanying text.

22. Commissioner Pertschuk wrote that "case-by-case arbitrations of a common defect, in which each consumer has to prove a right to redress, is wrong in concept and in operation." General Motors Corp., 102 F.T.C. at 1744 (Separate Statement of Commissioner Pertschuk) (emphasis added).

23. "The settlement here would be . . . preferable to me . . . if it provided direct redress. . . . The plain fact is that altering the order in these various ways is simply not an alternative available to us in the context of a settlement." Id. at 1745 (Separate Statement of Commissioner Patricia P. Bailey).

24. "According to my estimates, the value to consumers in terms of redress by arbitration will approach . . . six times the expected value of the consumer redress that could be anticipated through litigation." Id. at 1949 (Separate Statement of Commissioner George W. Douglas).
to secure through litigation."\textsuperscript{25} A similar view was expressed by the agency's Director of the Bureau of Consumer Protection, who praised the settlement's dispute resolution procedures as "fair, fast and impartial."\textsuperscript{26} The commissioner most opposed to the settlement argued that "[t]he only rational and equitable remedy for the common injury suffered in a case like this is automatic compensation for damages, not standardless mini-trials pitting individual consumers against the largest company in the world!"\textsuperscript{27}

III. THE PERSPECTIVE OF ADR SCHOLARSHIP

Scholarship on alternative dispute resolution provides a further context for evaluating the settlement. With a great deal of individual variation in supporting evidence, and citing many different bases in public policy, proponents of ADR usually suggest that its use will ameliorate the problem of overloaded dockets in conventional courts.\textsuperscript{28} They argue that avoiding the delays of the standard judicial system will save money for the disputants (as well as for the government).\textsuperscript{29} Although they use many definitions of justice, ADR scholars sometimes have contended that the results it produces will be better than those achieved in other modes, since they are less likely to turn on issues of procedure.\textsuperscript{30} The decision-maker in ADR may be the parties themselves, cooperatively;\textsuperscript{31} or an expert selected for knowledge and skill rather than mere impartiality.\textsuperscript{32} A great deal of writing on ADR recognizes that disputes have many characteristics, and that an ideal match between a particular dispute and a type of ADR will be determined by a range of factors such as the likelihood that the disputants share a desire to continue a relationship in the future,\textsuperscript{33} the disputants' cultural expectations concerning their rights and the process of disputing,\textsuperscript{34} and the balance of power between the disputants.\textsuperscript{35}

\textsuperscript{25} *Id.* at 1745.
\textsuperscript{26} Antitrust & Trade Reg. Rep., *supra* note 9, at 872.
\textsuperscript{27} *General Motors Corp.*, 102 F.T.C. at 1744 (Separate Statement of Commissioner Pertschuk).
\textsuperscript{32} Lieberman & Henry, *supra* note 30, at 431.
\textsuperscript{33} Fuller, *supra* note 31, at 325-27.
\textsuperscript{34} Merry, *Disputing Without Culture*, 100 Harv. L. Rev. 2057, 2072 (1987).
A major concern in evaluating dispute resolution processes is that expediency may supplant justice as the fundamental goal. It has been argued that disputants derive benefits from participating in the standard litigation process that cannot be equaled in alternative systems. It is also suggested that important society-wide benefits of traditional litigation are lost when disputes are treated in alternative processes. Opponents of ADR have argued that it may deprive disputants of important aspects of fairness and justice, and that concentrating on measures such as speed of resolution or numbers of cases resolved distracts attention from that fundamental shortcoming. Professor Stephen N. Subrin has characterized contemporary resolution practices which avoid standard litigation as "bargaining in the shadow of a shadow."

Some of the debate about the quality of justice in alternative processes is equivalent to the broader question of defining justice itself, in any setting. Professor David Luban has characterized four criteria for measuring the quality of justice in ADR. They are participant satisfaction, the furtherance of social justice, empowerment of the parties and facilitation of the parties' abilities to acknowledge each other's perspectives, and common humanity. Professor Robert Baruch Bush has carefully outlined the variety of responses that scholars and practitioners of dispute resolution give to the question of what represents quality in dispute resolution, and has suggested a categorization of typical formulations. Analysis of the FTC-GM settlement may illuminate whether certain of these conceptualizations of quality can be achieved in practice. They include: individual satisfaction, individual autonomy, social justice, social solidarity, and personal transformation.

Luban's and Bush's overlapping taxonomies include attributes that may have some mutual inconsistencies. For example, participant satisfaction may not be

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41. Id.
48. Riskin, supra note 43, at 34.
achieved in some settings consistently with social justice; empowerment of parties may or may not lead to social justice or social solidarity. A full evaluation of the GM-BBB program and the context in which it has operated could reveal whether these possible contradictions have serious practical consequences.

For all conceptions of the role dispute resolution processes may play in promoting or delivering just orderings of societal relationships, an important set of questions involves identifying the disputants entering the processes and the types of disputes involved. For consumer disputes, analysis should begin with identifying flaws that buyers perceive in purchases. Professor Marc Galanter’s work involving the prevalence of litigation supports this approach. Past research has shown strikingly little use of third parties by people involved in consumer disputes. Some have sought to explain this avoidance by examining how much knowledge potential complainants have about techniques of complaining, or by pointing to the costs involved in making complaints. Another perspective involves social orientation towards disputing or avoidance. Professor Carol Greenhouse has demonstrated that antipathy towards disputing can itself be a central attribute of people’s notions of how to conduct themselves in society. In other work, the concept of rights consciousness has been central in the attempt to explain lower than expected complaint-making conduct. It is indicative of the elusiveness of the issue of "exit," people’s tendency to opt out of the dispute resolution process, that the FTC and New York’s Attorney General have each praised automobile dispute resolution systems in reports that merely

49. A. Best, When Consumers Complain (1981). Defining the total universe of consumer abuse, I characterized product shortcomings unknown to buyers as problems in part of my analysis. This was criticized in Silbey, Who Speaks for the Consumer? (Book Review), 1984 AM. B. FOUND. RES. J. 429 (1984). Throughout the book’s treatment of "unvoiced complaints," however, all analysis was based on product or service deficiencies that respondents actually described. To explore the efficacy of ADR institutions in treating disputes, the most logical starting place is the group of problems buyers actually perceive.


state numbers of cases processed and amounts of refunds ordered paid to buyers.\textsuperscript{56} Understanding why some people who are aware of a problem may avoid seeking redress is fundamentally important to designing effective responses to consumer abuse. It must be remembered, additionally, that it would promote economic justice to provide compensation to all victims of a consumer problem, including those who are unaware of the shortcomings of a flawed product.

IV. FTC Analysis of the Program

The FTC published statistical reports on the program’s operation in 1985,\textsuperscript{57} 1986,\textsuperscript{58} and 1988,\textsuperscript{59} and accompanied the data with staff analyses and press releases quoting the agency’s chairman.\textsuperscript{60} This Article’s statistical analysis is based on data released in 1988, describing the performance of the program in 144 cities from October 1985 through July 1987.\textsuperscript{61}

In the period covered by the FTC report, the data show that 81,055 consumers participated in the program, and that GM made payments totalling approximately $22 million.\textsuperscript{62} Cases resolved in mediation numbered 70,340. Mediation required a consumer to prepare a claim and present it in person or by mail to a BBB office, and required GM employees to analyze the case and present an offer to the consumer through the medium of a BBB employee. There were 11,140 cases pursued beyond the mediation stage to arbitration. Arbitration required in-person appearances by the consumer and a GM representative, and required the work of a volunteer arbitrator to conduct the hearing and write an opinion. Also, 23,707 individuals requested redress but did not accept a mediation offer or choose to participate in arbitration.\textsuperscript{63} There is no information available regarding how many people might have learned about the claim process but decided not to enter the program at all.

In material released with the statistical information, the FTC’s chairman, Daniel Oliver, described the program as an "overwhelming success" that "shows government, private industry, consumer groups, and individual consumers working

\begin{quote}
57. FTC Press Release (June 25, 1985); FTC Press Release (October 24, 1985).
58. FTC Press Release (September 22, 1986).
59. FTC Press Release (September 23, 1988).
60. Quotations from the chairman are included only in the press releases of June 25, 1985, and September 23, 1988.
61. FTC Analysis 1985-87, supra note 13.
62. An analysis by the FTC Bureau of Consumer Protection states that "$21,598,621.14 was dispersed (sic) to consumers." Is this a Freudian slip for "disbursed"? To disburse means to pay. To disperse means to cause to evaporate or vanish, to cause to be spread widely, or even to break up in random fashion (as when a crowd disperses). FTC Analysis 1985-87, supra note 13, at 3.
63. An unknown proportion of these people were served by another GM-BBB program established under the consent order and limited to power-train components.
\end{quote}
together for the common good." The staff report concluded that "the mediation/arbitration program is very beneficial to consumers and is operating efficiently." It also noted a wide range in individual settlements, and stated that "[s]ince each case is a unique set of circumstances and is decided on an individual basis, this variation of payments was foreseen. Consumers seek a wide range of payments and receive a wide range of compensation." These views are apparently based on the large total dollar amount of redress and the large number of program participants. However, this assessment fails to consider whether the program's size indicated that most of the eligible consumers were being served by it or whether the compensation provided was as large and as well-directed as fairness would require. This approach ignores issues (discussed in the Article's next section) which a straightforward examination of the data would have suggested. Large unexplained differences appear among the participating cities. While varied individual results in different cases would be expected, varied average results in different cities are surprising, unless there are large differences in the types of cars or types of car owners from city to city. For example, a comparison can be made between two cities with similar caseloads: Houston, which processed 1,016 cases, and Akron, which processed 1,026 cases. The mean mediation settlement in Houston was $352.39, compared with a mean in Akron of $240.56. The mean arbitration award in Houston was $223.26, while the mean in Akron was $113.08. Mediation represented 68 percent of the caseload in Houston, and 90 percent of the caseload in Akron.

Earlier comments by an FTC chairman and earlier staff analyses accompanying data releases for prior periods of the program's operation also reflect an uncritical evaluation. They highlight the total numbers of participants and total amounts of redress, while ignoring evidence of possible flaws in the program's operation. In connection with release of data on the program's 1984 operation FTC chairman James C. Miller III was quoted as saying "We are extremely pleased at these results . . . . [W]e were successful in getting money directly into the hands of consumers in a short period of time." The staff analysis covering that data noted that individual consumers received different results from the program, but stated that "[t]he very advantage of the arbitration program is that, unlike traditional redress programs or class actions, different problems can be addressed individually, and relief can be provided that is appropriate to the

64. FTC Press Release, supra note 59.
65. FTC Analysis 1985-87, supra note 13, at 5. See also Adams, Consumer Complaint Arbitration: The Corporate View, 43 ARB. J. 41, 43 (Dec. 1988) ("Inherent strengths of the arbitration process were further documented in a recently completed analysis of GM's consumer arbitration program. . . . The program was able to deal flexibly with a wide range of individual circumstances.").
66. FTC Analysis 1985-87, supra note 13, at 3.
specific circumstances of each case." The same idea was expressed in a staff analysis of data covering a later period of the program's work (its first twenty months). The staff analysis stated: "The wide range in settlements and awards underscores one of the primary attributes of the program; the ability to deal flexibly with individual consumer claims."

V. STATISTICAL ANALYSIS OF THE PROGRAM

Individual cases in the program undoubtedly should have different outcomes. However, it is this study's hypothesis that if the program has treated cases equitably, individual cities in which it operates should have roughly similar records in terms of all the important measures of their operation. In particular, cities with relatively high caseloads should produce results similar to those of cities with relatively low caseloads. Proportions of cases resolved in mediation (and therefore proportions of cases resolved in the post-mediation phase of arbitration) should be similar among the program's cities. The means for measures such as the amounts requested by complainants, mediation settlement amounts, arbitration requests and arbitration awards should not show marked variation among program cities. This hypothesis is based on the idea that while individual cases might have some variation in harm claimed and harm actually suffered, the entire group of cases at any city probably was comparable to the entire group of cases at other cities; therefore, the mean or average values for various quantitative measures should not vary much from city to city.

A related hypothesis is that variations (with statistical and practical significance) among the means in the program's cities suggest that there have been systematic failures to provide resolutions tailored to the unique circumstances of particular cases. If consumers receive more money in some cities than in others, while types of consumers and types of vehicle deficiencies can be assumed, on average, to be similar from place to place, the FTC and independent researchers ought to acknowledge the reality of these differences, and should seek to explain them.

The published data cover a number of aspects of the program for each participating BBB. Since each BBB unit operates in a separate location, it is convenient to refer to them by city. For each city's mediated cases, the data report the mean amount requested, mean settlement amount, mean settlement as a percent of mean request, and the total number of (mediated) cases. For arbitrated cases, the data report the mean amount requested, the mean offer made

68. FTC Memorandum, from Roger N. Kirkpatrick and Lewis Silversin to the Commission, June 23, 1985, at 5 (Subject: Preliminary Data on General Motors Arbitration Program Required by Commission Consent Order in Docket 9145). This statement is repeated verbatim in a staff analysis that was released several months later in 1985, accompanying a fuller release of data from the program's early months of operation. See Analysis of Data on Results of General Motors, Third Party Arbitration Program, FTC Press Release (Oct. 24, 1985) at 4.

69. FTC Analysis 1985-87, supra note 13, at 4.
to and rejected by the consumer in mediation, the mean award, the mean award as a percent of the mean request, and the total number of (arbitrated) cases. The data report for each city the overall consumer recovery in both mediation and arbitration as a percent of the total amounts requested. Three variables have been derived from data reported by the FTC in other forms. One is the percent of total caseload resolved through mediation. A second is each city's percentage of fully-treated cases (the ratio of cases reported as completed to the total of cases reported as completed and cases reported as "left program"). The third variable reports the ratio of cases with repairs to total cases, since free repairs are provided as part of the resolution of some cases.

The FTC has not reported individual case data for each city, but has only reported means, summary percentages and total numbers of cases and repairs. This precludes a typical statistical significance analysis, such as one that would analyze the different cities to determine whether they had significantly different characteristics. Because only means or totals for the values in each city (and not the standard deviations) were released, the data cannot be analyzed to make comparisons between individual cities. An analysis can, however, group the cities according to certain attributes, calculate the means of each group's means for various program attributes, and then explore the statistical significance of variations among those means of means. The mean for any city is a characteristic of that city. For example, a typical hypothesis in this study is that cities where dispute settlement is dominated by mediation (and arbitration is therefore infrequent) have different characteristics from cities where mediation is less prevalent. Grouping cities by high and low mediation ratios allows us to determine the significance of differences between the mean mediation ratios of the two groups of cities.

Table 1 illustrates differences of statistical and practical significance between groups of cities for every important variable associated with this program. When the cities are ranked according to the mean mediation amounts requested in each city, the mean of the mean mediation request in the 36 cities in the highest quartile is $666.90. The mean of the mean mediation amount request in the 37 cities in the lowest quartile is $460.80. Of greater importance than amounts requested, however, is amounts actually received.
<table>
<thead>
<tr>
<th>Attribute</th>
<th>Bottom Quartile</th>
<th>Top Quartile</th>
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<tbody>
<tr>
<td>Mean mediation request ($)</td>
<td>460.80</td>
<td>666.90</td>
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<tr>
<td>Mean mediation settlement ($)</td>
<td>236.90</td>
<td>377.70</td>
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<tr>
<td>Mean arbitration request ($)</td>
<td>407.80</td>
<td>871.02</td>
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<td>Mean mediation offer refused by arbitrating claimant ($)</td>
<td>17.80</td>
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<td>Mean arbitration award ($)</td>
<td>70.82</td>
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<td>Mean mediation settlement as percent of mean request (%)</td>
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<td>Percent caseload resolved in mediation (%)</td>
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<tr>
<td>Mean arbitration award as percent of mean request (%)</td>
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<td>57.4</td>
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<tr>
<td>Percent of cases with repairs obtained by owner (%)</td>
<td>0.7</td>
<td>2.6</td>
</tr>
</tbody>
</table>

70. Differences in each row are statistically significant at the 95% confidence level.
The mean of the means for cities in the highest quartile with respect to that variable is $377.70. The mean of the means for cities in the lowest quartile is $236.90. The difference of greater than $140 is huge, in the context of a $236 to $377 range. It represents about 60 percent of the $236 figure for the lowest quartile cities.

Means of cities' mean arbitration awards present an even starker pattern of possibly disparate treatment of consumers: the mean of the lowest quartile cities' means for arbitration awards is $17.80, while the comparable figure for highest quartile cities is $107.70. The figure for the highest quartile cities is six times as great as the figure for the lowest quartile cities.

An initial hypothesis to explain the variations in these attributes was that programs with high caseloads might develop patterns different from those with low caseloads. This might be expected because intake personnel might become familiar with the results in past cases and might communicate encouragement or discouragement to claimants. In the BBB program, mediation does not require an in-person appearance by a GM representative, since GM makes its offer in writing or by telephone to a BBB employee. Arbitration, however, requires both the claimant and a GM employee to attend the hearing. Possibly, a high volume of cases may lead the GM personnel to make more generous initial offers than they would make where low overall case volume decreases the risk that frequent appearances at arbitrations will be required. Another consequence of high caseload might be that the GM representatives may become conditioned to participation in the program and more willing to approve payments that could seem unusual to less habituated representatives.

When cities are grouped into the bottom and top quartiles with respect to total caseloads, statistically significant differences appear between the values present in each quartile for the following variables: amount received in mediated settlements, the percentage of claimants' requests obtained in mediated settlements, the percentage of all claimants' requests obtained through both mediation and arbitration, and the proportion which mediation represents of the cities' total caseloads. Table 2 shows the values for the means of the means of the variables for which there was statistically significant variation between cities in the high and low caseload volume quartiles. Illustratively, the mean of the mean mediation settlement amounts consumers receive in the cities in the lowest quartile of caseload size was $289.38. The corresponding amount for cities in the highest quartile of caseload size was $327.45. This suggests that many cases processed in the system might have been subject to variation in the range of plus or minus at least ten percent due merely to the accident of their being presented at a low or a high volume location.

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71. The low value for bottom-quartile cities is affected by the presence in the sample of some cities in which no arbitrations occurred, so that a value of zero is reflected in the calculation.
Table 2

VARIABLES WHICH HAVE STATISTICALLY SIGNIFICANT\textsuperscript{72} VARIATION ACCORDING TO CITIES' TOTAL CASELOADS

<table>
<thead>
<tr>
<th>Variable</th>
<th>Bottom Quartile Cities (137 or Fewer Cases)</th>
<th>Top Quartile Cities (715 or More Cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation settlement accepted</td>
<td>289.38</td>
<td>327.45</td>
</tr>
<tr>
<td>Mediation settlement as percent of request</td>
<td>51.7</td>
<td>56.7</td>
</tr>
<tr>
<td>Total awards as percent of total requests</td>
<td>46.6</td>
<td>53.0</td>
</tr>
<tr>
<td>Mediated cases as percent of total cases</td>
<td>78.1</td>
<td>86.0</td>
</tr>
</tbody>
</table>

Another indication of the significance of a program's total caseload appears when the programs are grouped according to the mean settlements in mediation. Cities in the highest quartile on that measure had mean mediation settlements of $346.26 or more. Cities in the lowest quartile on that measure had mean mediation settlements of $265.65 or less. While there is no reason that cities processing many cases would handle cases deserving higher payments than the cases in cities which process relatively fewer cases, the mean total number of mediated cases in the low settlement payment cities was 327.6, compared with 687.9 for the same measure in high settlement payment cities.

Another attribute in which there was large variation among cities was the percentage of caseload resolved in mediation. It ranged from a low of 14.3 to a high of 100. Cities in the lowest quartile on this measure resolved an average 78.1 percent of their cases in mediation, while cities in the highest quartile resolved an average 91.1 percent of cases that way. The cities where mediation more strongly dominates the dispute resolution program report values that have statistically significant differences from the corresponding values for cities where mediation is less prevalent. The differences show that those cities yield consumers an overall higher percentage of consumers' requests than consumers receive in the cities where mediation is less dominant. The comparable percentages are 46.6 and 51.3, representing a typical difference of about five percent. That percentage is important, given that consumers in the program typically request at least $500.

\textsuperscript{72} Differences are significant at the .05 level.

https://scholarship.law.missouri.edu/jdr/vol1990/iss2/2
There is also a large difference in the mean of mean caseloads, with mediation dominant in cities where caseloads are, on average, about twice as large as the caseloads in cities where mediation is somewhat less dominant. These data are shown in Table 3.

Table 3

VARIABLES WHICH HAVE STATISTICALLY SIGNIFICANT\textsuperscript{73} VARIATION ACCORDING TO CITIES' PERCENTAGES OF CASELOAD RESOLVED IN MEDIATION

<table>
<thead>
<tr>
<th>Variable</th>
<th>Bottom Quartile Cities (78.1% cases resolved in mediation)</th>
<th>Top Quartile Cities (91.1% cases resolved in mediation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total awards as percent of total requests</td>
<td>46.6</td>
<td>51.3</td>
</tr>
<tr>
<td>Cases completed (as percent of total case intake)</td>
<td>75.1</td>
<td>80.4</td>
</tr>
<tr>
<td>Total caseload</td>
<td>307.6</td>
<td>652.2</td>
</tr>
</tbody>
</table>

A regression analysis shows that several variables have large positive relationships to a city's percentage of caseload resolved by mediation. These factors are mediation awards as percents of mediation requests, arbitration requests, and overall recoveries as a percent of total requests. Programs where mediation represents a larger percentage of total caseload treatment are also programs where consumers' overall success is higher.

In another effort to discover whether there are statistically significant differences between the results for various program attributes among different cities, two other groupings were defined. Each of these groups of cities processed, in total, about one quarter of the whole program's caseload. One of the groups is comprised of the cities with the lowest individual caseloads which processed, as a group, about one-quarter of the total caseload in the program. The other group is comprised of the cities with the highest individual caseloads which processed, as a group, about one-quarter of the total program caseload. The low caseload group includes 93 cities which processed a total of 19,355 cases. The high caseload group includes seven cities which processed a total of 19,842 cases. Cities in the low caseload group processed less than 560 cases each. Cities in the

\textsuperscript{73} Differences are significant at the .05 level.
high caseload group processed more than 1,900 cases each. As is shown in Table 4, the two groups had statistically different mean values for total awards as a percent of total requests, mediation awards as a percent of total mediation requests, and for the ratio of mediation cases to total cases processed. For the total awards as a percent of total requests, the mean value in the low volume cities was about 49 percent, compared with about 56 percent in the high volume cities. This reinforces the likelihood that there are aspects of the operation of the program in high volume locations that favor consumers; or, correspondingly, that it hurts consumers to have their cases treated at the lower volume locations.

Table 4

VARIABLES WHICH HAVE STATISTICALLY SIGNIFICANT\(^74\) VARIATION BETWEEN LOW-VOLUME CITY GROUP AND HIGH-VOLUME CITY GROUP

<table>
<thead>
<tr>
<th>Variable</th>
<th>Lowest Volume Cities Processing Approximately 25% of Program Caseload</th>
<th>Highest Volume Cities Processing Approximately 25% of Program Caseload</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation awards as percent of mediation requests</td>
<td>53.2</td>
<td>58.7</td>
</tr>
<tr>
<td>Total awards as percent of total requests</td>
<td>48.8</td>
<td>55.7</td>
</tr>
<tr>
<td>Percent caseload resolved in mediation</td>
<td>82.8</td>
<td>87.3</td>
</tr>
</tbody>
</table>

VI. CONCLUSION

A. Fairness

The pattern of operation at the various program locations suggests that FTC endorsements of the program have been simplistic. A lot of money has been distributed, but there is considerable reason to question the fairness of its allocation. The variations between groups of cities cannot reasonably be

\(^74\) Differences are significant at the .05 level.
attributed to variations in the types of cars or car owners found in the various cities. Only a few types of components are involved in all of the 81,055 cases analyzed. Furthermore, variations among individual cases, such as vehicle age, initial vehicle cost, individual driving styles, and individual response style to consumer problems, could be expected to be distributed randomly among participating cities. Since many participating cities processed hundreds of cases each, the overall composition of caseloads in the various cities can be assumed to have been fairly similar.

Further, if variation in results was explained by variation in the actual condition of the cars whose alleged defects were the subjects of the cases, there would be no link between the total caseload of a participating city and the results achieved in the city, in terms of mean mediation settlement or other factors. Total caseload and percentage of caseload treated through mediation seem to have a positive influence on the absolute amounts of recoveries consumers receive and on the relationship of those amounts to the claims consumers present. These relationships suggest that factors in the programs, rather than in the population of problems presented to the programs, have caused disparate treatment of similar cases.

The data show that the apparent discrepancies in recoveries among cities are genuine differences, far larger than random distribution would likely produce. The differences among cities might be caused by variation in how the programs’ staff members react to consumers seeking to participate in the program, to variation in the conduct and perceived incentives of GM personnel in different locations, or to variation in training and supervision received by the volunteer arbitrators who staff the program’s arbitration phase. Alternatively, differences among cities might be related to the composition of cases presented for treatment. While it is reasonable to suppose that cases eligible for processing are randomly distributed among the cities where the program operates, BBBs may have particular prominence in some places. In those locations, individuals with car trouble would be especially likely to seek redress through the BBB. This would affect the severity of cases, on average, presented to the program in each city, since in a place where access to the BBB was unusual, presumably a person would have to be highly motivated to seek BBB help. Such a person would likely be one whose car trouble was relatively severe, compared with the degree of car trouble that might lead a person to a BBB in a place where use of BBBs was more common, or where for any reason it was simpler to discover and enter the program.

A disadvantage of prosecuting a single FTC case to a possible conclusion providing uniform payments to all owners of affected cars would have been a lack of sensitivity to the particular circumstances of individual cases. Some owners would have been overcompensated and some would have been undercompensated. Apparently a similar result has occurred in the context of ADR, where well-tailored results might have been anticipated (and where the FTC has stated, apparently incorrectly, that they have been achieved). The number of instances of each method’s misallocation of compensation cannot be known, nor can the magnitude of the misallocations be estimated. It seems clear, though, that ADR
has not produced results that demonstrate greater fairness than the rough justice offered by litigation resulting in uniform payments. Precise and fair payments directed to owners through ADR would have been ideal, but it seems that the ADR process produced unexplained differences in similar cases when dispositions are compared between groups of cities.

B. Economy

Most ADR proponents assert that non-traditional procedures are less costly than standard litigation. For the FTC-GM settlement, a full accounting of all expenditures suggests that cost savings have not been accomplished. It cannot be known what the total expense of formal litigation of an FTC action seeking uniform redress would have been. However, the costs expended in the GM program under the settlement can be described. Each mediated case required a personal visit or detailed correspondence and telephone communications by the aggrieved vehicle owner. It also required analysis by GM personnel. Each arbitrated case involved all of the expenses of mediation, and additionally required the personal appearance of the owner and a GM representative, and the work of an unpaid volunteer arbitrator. The arbitrators in the program were required to attend training sessions and prepare written resolutions of their cases.

Looking first at arbitrated cases, which required the greatest investment of resources, there were 14,187 arbitrations from the beginning of the program through July 1987. Each arbitration required the participation of the car owner, a GM representative, and a volunteer arbitrator. If a fair estimate of the time each of these individuals devoted to each arbitration would be between one and four hours, the total amount of labor represented would be from about 42,000 to 170,000 hours. If those hours were valued at between $10 and $50 an hour, that labor cost would be somewhere between $420,000 and $8.5 million. These figures are selected arbitrarily, but if accurate information were available, it is reasonable to assume that a documented estimate would fall within the wide range provided by these examples. Far from being cost-free, the ADR program is expensive. Besides these estimated costs of participation in arbitration, other expenditures were required: the BBB offices maintained records and trained arbitrators, BBB employees reviewed arbitrators’ decisions, and GM trained its representatives and developed procedures for monitoring the program.

The mediation component of the program preceded each arbitrated case, and was also the program’s sole procedure for a great many other cases. About 194,000 cases were involved in mediation through July 1987. What is a fair estimate of the costs involved in each of these cases? The owner was required to communicate with a BBB, usually in person. GM’s employees analyzed each case and formulated a settlement offer. A BBB employee communicated the GM

75. FTC Press Release (September 22, 1986) reports a total of 4,487 cases pursued through arbitration from January 1984 through September 1985. FTC Press Release (September 23, 1988) at 5, reports 9,700 cases pursued through arbitration, from October 1985 through July 1987.
decision to the car owner. Records were kept of these procedural stages. If all this effort cost only $10 a case, $1.94 million was expended. If a fair estimate would be $20 a case, then the total cost was nearly $4 million.

Adding these rough valuations, the total expenditure for the mediation and arbitration program, to serve 194,000 cases, was many millions of dollars in resources. Traditional litigation would have required FTC staff work for several years, defense costs for GM for several years, and costs of administering the agency trial process and possible judicial review of the agency’s action. Huge costs might have been required for the traditional process, but it is clear that bit by bit and case by case, ADR has been extremely costly itself.

C. Speed

Each individual case handled in the program was resolved in a much shorter span of time from initiation to completion than would have been the case had the FTC prosecuted a single action on behalf of all affected owners. As events have shown, however, the commissioners supporting the settlement may have overestimated the total savings of time. An anticipated benefit of the settlement was that it would deliver compensation to owners more quickly than standard litigation. This undoubtedly was true for many early participants in the program. It should be noted, however, that the program will continue through 1991, and that a significant number of cases were resolved in the period ending as late as July 1987. FTC cases often take many years to reach their conclusions. So, when the settlement was being considered in 1983, it may have seemed clear that money available to owners in 1984 would be much more worthwhile to them than money possibly available to them at some distant time in the future. Hindsight shows that many participants in the program did not receive payments until 1987, and that many more will be paid in the period from 1987 through 1991. The gap between the possible ending date of an FTC action and the time at which money was made available to consumers through the ADR process approved in the settlement was very large for cases that reached the ADR process in the early period of its existence. For the many cases that reached the process in 1988 or 1989, or that will reach it during the final years of its existence, the time savings issue is much less important.\textsuperscript{76}

\textsuperscript{76} According to the FTC Press Releases (Sept. 22, 1986, and Sept. 23, 1988), 75,458 cases were processed in the program’s first 13 months; 37,832 cases were processed in the next seven months; and 81,055 cases were processed in the next 22 months. These three periods vary in length, but it may be instructive to note that the average number of cases per month, from the first reporting period through the third reporting period, was 5,804, 5,404 and 3,684. Apparently, redress came to many consumers several years after the initial occurrence of the alleged GM wrongdoing.
The quantitative data provided by the FTC provide very little evidence about how well users of the program liked it. Some people who made an inquiry and then did not pursue a case to mediation or arbitration were probably dissatisfied with some aspects of the program, such as the amount of effort required to obtain redress, or the amount of anticipated redress to be received from their efforts. Others left the program because their complaints were suitable for treatment in a separate GM-BBB process. More than 20 percent of participants failed to complete the program in the period ending July 1987. A uniform resolution achieved through traditional regulatory action would have directed a remedy to these individuals.

Those continuing past the mediation phase to arbitration were obviously dissatisfied with the mediation results. As was seen in Table 1, the percent of caseload resolved in mediation varied widely from city to city. For cities in the lowest quartile on that measure, the average percent of caseload resolved in mediation was 70.4 percent. This suggests that, in at least some cities, a major component of the program failed to satisfy a large number of participants. The fact that some other cities were able to resolve almost all of their complaints in mediation suggests that in the low mediation percentage cities, something was flawed in the procedures themselves. Suspecting that the process was flawed is reasonable, since it would be hard to believe that the customers and GM representatives in some cities were very different in their demands and incentives from those in other cities.

In considering user satisfaction, a vital issue is determined by the definition of "user." In one sense, this dispute resolution process was intended to serve all victims of the alleged abuse—all purchasers of cars with the "specified components." If about 20 million vehicles were affected, the rate of participation in the ADR program indicates that about one out of a hundred potential victims sought redress. A program that delivers justice to such a small subset of victims ought not to be thought of as satisfying the legitimate compensation needs of the overall

77. In addition to the program established under the settlement, GM has provided mediation at BBBs for some owners of other vehicles voluntarily and without the reporting requirements of the FTC-ordered program. See FTC Analysis 1985-87, supra note 13, at 2 (Besides the arbitration and mediation required for "specified components" disputes, GM offered similar dispute resolution options for car owners with disputes concerning automobiles' power-trains).

78. The FTC's data on those who dropped out of the program report cases where consumers were found to be ineligible for the program because their complaint did not involve one of the "specified components" and cases where consumers decided not to pursue eligible claims. Some of those whose problems did not involve specified components were eligible to have their cases treated in another GM-BBB program dealing with power-train disputes. In the reporting period covering October 1985 through July 1987, 104,672 people entered the program, but only 81,055 completed it. This represents a loss of 23,707 individuals, or 22.6 percent of participants. See FTC Analysis 1985-87, supra note 13, at 4.

79. This estimate is based on the total number of participants through July 1987, stated as about 194,000. (200,000 is 1% of 20,000,000.)
group. Delivery of redress to only a small percentage of those eligible for it is particularly unjust in the circumstance of an innovative third party system, since it is likely that those who participated in it were disproportionately drawn from the better educated and better informed owners among all the owners of affected cars. Under the settlement, special notification of the ADR process was to be made to individuals who had already complained to law enforcement officials or to the FTC, and notification of the program was also required to be given to consumers who "identify a specified component." These notification provisions favored articulate and rights-conscious customers.

E. Relationship Between Scholarly Expectations and Actual Experience

Expectations typically expressed by scholars and advocates of ADR seem not to have been fulfilled by the GM program. This reflects some special aspects of its organization. The mediation component did not involve face-to-face discussions between car owners and GM representatives, and apparently consisted only of the communication of owners' requests and GM's settlement offers through the medium of a passive BBB employee. This prevented the parties from having the benefit of hearing each other's point of view on past occurrences and proper future actions in response to those past events. It also prevented the parties from developing collaborative relationships in which they might have developed innovative resolutions.

Certain social factors that may facilitate successful mediation are not present in the buyer-seller context. For example, buyers and a single car company do not have a shared perception of the need for their relationship to continue after the current dispute is ended. In buyer-seller disputes between a large seller and a local buyer, there is not likely to be any background of previous successful interactions to provide a common base for developing a solution to the present problem. The third parties involved in the GM program were either non-interactive BBB employees who conveyed information between the buyer and GM without elaboration during the mediation phase, or non-expert volunteer arbitrators. While these third parties were assuredly neutral, they did not possess expertise in mediation, arbitration, or car problems.

The possible failure of the program to reach large numbers of affected consumers could have been predicted, since recourse to third parties is a highly unusual response to buyer-seller problems. Particularly where the subject matter of a dispute involves issues of judgment or difficult proof, consumers may be reluctant to invest the time and psychological resources required to participate in an ADR program, because predictable rewards for that effort are not present. While benefits of ADR such as individual satisfaction and self-transformation may have been realized by some program participants, those social gains must be

80. General Motors Corp., 102 F.T.C. at 1763.
81. A. Best, supra note 49, at ch. 3.
balanced against the failure of the system to demonstrate that it provided equal treatment to equivalent cases and delivered redress to a significant portion of those eligible for it.

The GM program had its strongest impact on car owners who participated in it. In contrast, traditional litigation and regulatory processes could have affected third parties as well as the disputants. Conventional procedures might have produced authoritative or standard-setting results and might have created broad social consequences. It cannot be known whether the burdens GM has borne as a result of the FTC settlement have influenced GM and other car manufacturers to avoid the type of marketing practice that allegedly violated the FTC Act. Moreover, the settlement provided no guide for future actions by GM and other sellers with regard to what disclosures should be made when marketing vehicles with components of less than typical durability. And as a deterrent to conduct that might in the future overstep the as yet undrawn line of legality on this topic, the settlement cannot be seen as a strong force. Handling the disputes in the program may have cost GM less than it would have spent operating in standard corporate channels. Compared to the cost of litigation, the program was probably a bargain for the company, and thus cannot sensibly be characterized as providing any incentive for GM to change future conduct.

F. Recommendations for Future FTC Actions

The data analyzed in this Article suggest that the GM-BBB program has not applied uniform standards to similar cases to produce similar results. Rather, case outcome seems to be affected significantly by factors ordinarily considered extraneous to justice, such as the total caseload of the program in which a case is handled. Ignorance regarding the causes of the apparent city-to-city discrepancies in the program's operation presents a dilemma for consumer advocates, proponents of alternative dispute resolution, and the FTC. A hypothetical consumer who compared the prospects of obtaining no recovery at all or obtaining recovery through an informal process would be wise to choose the recovery, even if the consumer knew its amount ultimately might not have a fair relationship to recoveries obtained by other consumers with similar claims. Failure to provide similar results in similar cases is disturbing, but the program has delivered hundreds of dollars to many individual participants.

The FTC's choice to secure mediation and arbitration instead of attempting to obtain uniform payments to the entire class of customers with cars containing specified components calls into question a range of political issues. Professor Sally Engle Merry has urged that analysis of dispute resolution must consider its political implications. At one extreme, this point of view requires considering

82. See Widdows, Consumer Arbitration as a Dispute Resolution Mechanism in Customer-Seller Disputes over Automobile Purchases, 42 ARB. J. 17, 22 (Mar. 1987) ("[A]rbitration may be a better deal for sellers than for consumers.").
83. Merry, supra note 34.
whether dispute processes are a means to palliate masses of abused consumers while diverting them from a revolutionary struggle for democratic socialism.\textsuperscript{84} On a smaller but highly important scale, "political" analysis recalls the hypothesis that "repeat players" who are experienced in particular types of disputes have major advantages, as in a set of disputes involving millions of individual buyers and only one manufacturer.\textsuperscript{85}

The question "compared to what?" is therefore crucial for evaluating the program. If consumers' alternative to the establishment of the program was to obtain no recovery, the program has been a success. If, in the absence of the program, consumers might have received court-ordered payments of redress (after lengthy FTC litigation), then the desirability of the program is less clear. Long-delayed uniform payments to car owners are less beneficial to them than prompt payments. Balanced against that fact, however, are two aspects of the program. First, it is not free to participants, in the sense that it requires significant expenditures of time, effort, and emotional involvement. It also has been costly to General Motors. Second, the program's lack of uniform payments may not indicate the virtue of precisely tailored responses to individual cases, but may relate more to other factors such as the volume of caseload at a particular program location. Uniformity of payment might be considered an undesirable attribute of the redress mode that seeks judicial determination of a standard reimbursement. However, if the varied payments produced through the expenditures of money and time required in mediation and arbitration are themselves not well-related to the specifics of particular cases, then their variety is irrelevant to the goal of fair compensation, and it cannot support a preference for the case-by-case method of dispute resolution.

The FTC has not called for or conducted an analysis of possible explanations for the discrepant treatment of claims in the various participating cities. It ought to do so, and it should not praise the program in the absence of information revealing the causes of its apparent city-to-city discrepancies. The FTC should also refrain from replicating the GM program in new cases. It is unfortunate that the FTC recently settled a complaint against the makers of Volkswagen automobiles by accepting the company's agreement to adopt a BBB mediation and arbitration similar to the GM program.\textsuperscript{86} The GM program has been beneficial to some consumers. If similar programs are adopted by manufacturers as a matter of business judgment, they may succeed or fail in the marketplace.\textsuperscript{87} However,


\textsuperscript{87} The invisible hand may touch complaint-handling operations only lightly. Consumers are often unaware of them and may lack any ability to know which are operating well and which are operating unfairly.
a government agency should accept a mediation-arbitration program as an adequate means of providing a correction for past misconduct only if there is confidence that the mechanism will work fairly. Experience with the FTC-GM settlement does not justify that confidence.