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# Fixing the Vaccine Act's Structural Moral Hazard

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## I. INTRODUCTION

On March 26, 2003, Rolf and Angela Hazlehurst filed a claim to recover damages for injuries their son allegedly sustained after receiving a measles, mumps, and rubella (MMR) vaccine.<sup>1</sup> Four years of discovery followed, during which counsel for the Hazlehursts requested documents and deposed officials from three federal agencies.<sup>2</sup> They next sought to subpoena extensive product safety information from Merck & Company,<sup>3</sup> and as the trial date approached, the attorneys even considered asking a court in the United Kingdom to unseal expert reports in a case involving similar claims of vaccine injury.<sup>4</sup>

When the Hazlehurst case finally reached trial in October 2007,<sup>5</sup> the record contained 1,085 medical articles and 50 expert reports.<sup>6</sup> Seven experts testified for the Hazlehursts, with specialties ranging from toxicology to gastroenterology.<sup>7</sup> The defense responded by calling fourteen of its own experts, including four immunologists, two child psychiatrists,

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1. *Hazlehurst v. Sec'y of Health & Human Servs.*, No. 03-654V, 2009 U.S. Claims LEXIS 183, at \*2 (Fed. Cl. Feb. 12, 2009).

2. *Id.* at \*8-9. A group of attorneys known as the Petitioners' Steering Committee represented the Hazlehursts and coordinated proceedings for thousands of cases alleging vaccine-related autistic disorders. *Id.* at \*7.

3. *Id.* at \*9-10. The discovery request sought "any research, survey, study, test or other investigation, whether published or not, that was not conducted by Merck . . . but that Merck was aware of, regarding the neurological and neurodevelopment human . . . health effects of the MMR [vaccine]." *Id.* at \*10 n.9.

4. *Id.* at \*308.

5. *Id.* at \*14.

6. *Id.* at \*18.

7. *Id.* at \*23.

and an infectious disease specialist.<sup>8</sup> It took the presiding judicial officer sixteen months to weigh all of the evidence, and in February 2009, she issued a two-hundred page decision denying compensation.<sup>9</sup> The Hazlehursts then continued to pursue their case on appeal, asking two separate courts to reverse the adverse decision.<sup>10</sup> Only after losing both appeals did they finally give up.<sup>11</sup>

In many ways, the Hazlehurst case moved through the legal system like a typical complex products liability lawsuit—the plaintiffs engaged in an adversarial process over the course of several years that involved numerous depositions, hundreds of documents, and dozens of experts.<sup>12</sup> The Hazlehursts, however, did not file a products liability lawsuit.<sup>13</sup> Nor were they litigating in federal district court.<sup>14</sup>

The Hazlehursts filed their claim for damages in the Vaccine Injury Compensation Program (Vaccine Program or Program),<sup>15</sup> a supposedly streamlined, nonadversarial alternative dispute resolution scheme that compensates those injured by government-recommended vaccines.<sup>16</sup> Congress designed the Program as an informal adjudicative process that would “work faster and with greater ease than the civil tort system.”<sup>17</sup> But as the Hazlehurst case demonstrates, the Program does not always achieve those ideals.<sup>18</sup> Claims filed in the Program often take several years to resolve, cost tens of thousands of dollars to pursue, and eventually percolate to traditional federal courts.<sup>19</sup> The Program is failing to accomplish its purpose.

This Article examines why proceedings in the Vaccine Program are mimicking the adversarial nature of traditional tort litigation. Part I reviews the socio-legal environment that prompted Congress to create the Program. Part II outlines the basic structure of the Program and highlights many of its alternative features. Part III then discusses a flaw in the statute creating the Program that incentivizes claimants to adopt litigious and adversarial postures—namely, that claimants have no reason to stop fighting their cases

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8. *Id.* at \*34-35.

9. *Id.* at \*543.

10. See *Hazlehurst v. Sec'y of Health & Human Servs.*, 604 F.3d 1343 (Fed. Cir. 2010); *Hazlehurst v. Sec'y of Health & Human Servs.*, 88 Fed. Cl. 473 (2009).

11. *Hazlehurst*, 604 F.3d at 1354.

12. See *id.* at 1343; *Hazlehurst*, 88 Fed. Cl. 473; *Hazlehurst*, 2009 U.S. Claims LEXIS 183.

13. *Hazlehurst*, 2009 U.S. Claims LEXIS 183, at \*2.

14. *Id.*

15. 42 U.S.C. § 300aa-10 (2006).

16. See *infra* Part II.

17. *Shalala v. Whitecotton*, 514 U.S. 268, 269 (1995).

18. *Hazlehurst v. Sec'y of Health & Human Servs.*, 604 F.3d 1343, 1354 (Fed. Cir. 2010).

19. See *infra* Part IV.

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because all costs that they incur while appealing an adverse decision are reimbursable regardless of the outcome of the appeal. Part IV provides both empirical and anecdotal evidence to illustrate why this “free appeals” design flaw is a type of structural moral hazard that has permitted the Program to devolve into a litigious adjudicatory process. Finally, Part V proposes statutory amendments and other solutions that can restructure the Program into the streamlined, efficient alternative forum for dispute resolution that Congress intended, and it responds to potential criticisms of the proposed solutions.

## II. THE 1980S VACCINE LIABILITY CRISIS

### A. Benefits and Risks of Vaccines

Vaccination against infectious diseases “has been one of the most spectacularly effective public health initiatives this country has ever undertaken.”<sup>20</sup> A series of routine injections now prevents illnesses that once injured or killed thousands of children each year.<sup>21</sup> Before creation of the measles immunization program in 1963, 3 to 4 million people suffered from measles each year in the United States;<sup>22</sup> by 2002, only 44 cases were reported.<sup>23</sup> Deaths caused by tetanus have also rapidly declined, falling by 99% since a vaccine against the toxin gained licensure in the 1940s.<sup>24</sup> Other immunization achievements include the global eradication of small pox in 1979<sup>25</sup> and the elimination of poliomyelitis from all but a few countries.<sup>26</sup>

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20. H.R. REP. NO. 99-908, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6345; see also Fangjun Zhou, *Economic Evaluation of the 7-Vaccine Routine Childhood Immunization Schedule in the United States, 2001*, 159 ARCHIVES PEDIATRICS & ADOLESCENT MED. 1136, 1136 (2005) (“Vaccines are one of the greatest achievements of biomedical science and public health and represent one of the most effective tools for the prevention of diseases.”).

21. Zhou, *supra* note 20, at 1140.

22. H. Cody Meissner, Peter M. Strebel & Walter A. Orenstein, *Measles Vaccines and the Potential for Worldwide Eradication of Measles*, 114 PEDIATRICS 1065, 1065 (2004).

23. *Id.* at 1066. The World Health Organization recently predicted that effective international vaccine programs could wholly eradicate measles by 2020. Press Release, World Health Org., Experts Assessing Measles Eradication Feasibility (July 28, 2010), available at [http://new.paho.org/hq/index.php?option=com\\_content&task=view&id=3282&Itemid=1926](http://new.paho.org/hq/index.php?option=com_content&task=view&id=3282&Itemid=1926).

24. Ctrs. for Disease Control & Prevention, *Tetanus Surveillance—United States, 2001-2008*, 60 MORBIDITY & MORTALITY WKLY. REP. 365, 365 (2011).

25. *Smallpox*, World Health Org. (2001), <http://www.who.int/mediacentre/factsheets/smallpox/en/>.

In addition to their enormous public health benefits, vaccines are also “one of the most . . . cost-effective prevention measures available.”<sup>27</sup> By proactively averting—instead of responsively treating—contagious illnesses, vaccines substantially reduce medical costs.<sup>28</sup> The United States, for example, spent \$84 million between 1967 and 1977 to eradicate smallpox.<sup>29</sup> That investment now saves \$150 million per year in domestic control measures.<sup>30</sup>

Immunization, however, “is not always without risk.”<sup>31</sup> Many vaccines contain attenuated viruses, chemical preservatives, and adjuvants<sup>32</sup> that can cause severe adverse reactions in “a small but significant number” of people.<sup>33</sup> Those risks cannot be entirely eliminated even if the vaccine is perfectly manufactured and administered.<sup>34</sup>

The discrete individual risks of vaccination are worth the overall societal reward that comes with a comprehensive immunization program. Although vaccines inevitably harm some people each year, widespread immunization saves many more people—including the most vulnerable among us—from acquiring potentially fatal illnesses.<sup>35</sup> For that reason, all

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26. Philippe Duclos et al., *Global Immunization: Status, Progress, Challenges and Future*, 9 (Supp. 1) BMC INT’L HEALTH & HUM. RTS. 1, 2 (2009); see also Kimberly J. Garde, Note, *This Will Only Hurt For . . . Ever: Compulsory Vaccine Laws, Injured Children, and No Redress*, 3 PHOENIX L. REV. 509, 519-21 (2010) (listing examples of how mass-vaccination efforts have reduced the occurrence rates of communicable diseases).

27. Walter A. Orenstein et al., *Financing Immunization of Adults in the United States*, 82 CLINICAL PHARMACOLOGY & THERAPEUTICS 764, 764 (2007).

28. *See id.*

29. Chester A. Robinson & Stephen J. Sepe, *Immunization Policies for the 1990s and Beyond*, in *SUPPLYING VACCINES: AN ECONOMIC ANALYSIS OF CRITICAL ISSUES* 29, 32 (Mark Pauly, Chester A. Robinson, Stephen J. Sepe, Merrile Sing & Mary Kaye Willian eds., 1996).

30. *Id.* Another study found that routine childhood immunization saves society over \$40 billion for each annual birth cohort. Zhou, *supra* note 20, at 1141; cf. Press Release, Ctrs. for Disease Control & Prevention, Most U.S. Parents Are Vaccinating According to New CDC Survey Vaccine Coverage Rates for Children Remain High (Sept. 4, 2008), *available at* <http://www.cdc.gov/media/pressrel/2008/r080904.htm> (“[D]uring a given year . . . [v]accination results in a total savings of \$43.3 billion, including \$9.9 billion in direct medical costs.”).

31. INST. OF MED., ADVERSE EFFECTS OF PERTUSSIS AND RUBELLA VACCINES 1 (Christopher P. Howson, Cynthia J. Howe & Harvey V. Fineberg eds., 1991).

32. *See generally* Paul A. Offit & Rita K. Jew, *Addressing Parents’ Concerns: Do Vaccines Contain Harmful Preservatives, Adjuvants, Additives, or Residuals?*, 112 PEDIATRICS 1394 (2003) (reviewing data on the chemical composition of vaccines).

33. H.R. REP. NO. 99-908, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6345.

34. *Possible Side-Effects from Vaccines*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/side-effects.htm> (last modified Feb. 2, 2012) (“Any vaccine can cause side effects. For the most part these are minor (for example, a sore arm or low-grade fever) and go away within a few days.”).

35. A high rate of vaccination among the general population achieves herd immunity, “the resistance of a group to attack by a disease to which a large proportion of the members are immune,

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fifty states have passed compulsory vaccination laws.<sup>36</sup> Though controversial, the U.S. Supreme Court upheld these statutes against constitutional attack, reasoning that a tiny risk of harm to a subset of the population does not “strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease.”<sup>37</sup> In other words, mandatory vaccination laws create a social contract:<sup>38</sup> to enjoy the public health benefits of widespread disease prevention, individuals must bear the small burden of enduring the risk of vaccination.<sup>39</sup>

### B. A Growing Public Health Emergency

The inherent risks of mass inoculation present the difficult question of who should bear the costs of compensating rare and unavoidable adverse reactions. If most vaccine injuries occur through no fault of manufacturers, it seems unfair to burden them with liability. But it also seems unfair not to give injured persons a viable legal remedy, especially if the government requires them to be vaccinated.

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thus lessening the likelihood of a patient with a disease coming into contact with a susceptible individual.” John P. Fox et al., *Herd Immunity: Basic Concept and Relevance to Public Health Immunization Practices*, 94 AM. J. EPIDEMIOLOGY 179, 180 (1971) (quoting DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (W.B. Saunders Co. 1965)); *see also* M. Brisson & W.J. Edmunds, *Economic Evaluation of Vaccination Program: The Impact of Herd-Immunity*, 23 MED. DECISION MAKING 76, 76 (2003) (stating that mass immunization “not only reduces the incidence of disease in those immunized but also indirectly protects nonvaccinated susceptibles against infection”); Guilherme Gonçalves, *Herd Immunity: Recent Uses in Vaccine Assessment*, 7 EXPERT REVIEWS 1493, 1493 (2008) (describing herd immunity as a process by which “[h]uman communities defend themselves against specific infectious agents in a way that extends beyond the simple sum of the immune status of its individuals”). *See generally* Paul Fine, Ken Earnes & David L. Heymann, “*Herd Immunity*”: A Rough Guide, 51 CLINICAL INFECTIOUS DISEASES 911 (2011).

36. See Garde, *supra* note 26, at 555 app.A (collecting state mandatory vaccination laws).

37. Jacobson v. Massachusetts, 197 U.S. 11, 37 (1905); cf. Mary Beth Neraas, Comment, *The National Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149, 150-51 (1988) (noting that “severe reactions” are “an unavoidable cost of mass inoculation . . . [but] the consensus of health and medical experts is that children should continue to be immunized”).

38. Edward P. Richards, III, *Evolving Viruses and Stagnant Public Health Policies: Flu, Fear, and Free Riders*, 37 A.B.A. J. LITIG. 42, 44 (2010).

39. *Id.*

Before 1986, those harmed by vaccines attempted to gain compensation in the courts, the best available legal forum at the time.<sup>40</sup> As the number of government-recommended vaccines increased in the 1970s and 1980s, so too did the number of design defect, manufacturer defect, and other product liability lawsuits against pharmaceutical companies.<sup>41</sup> The number of suits increased from approximately 24 in 1980 to nearly 150 in 1985,<sup>42</sup> exposing “a small number of manufacturers to high litigation costs and enormous potential liabilities.”<sup>43</sup>

In response to the rising costs of defending against these claims, many pharmaceutical companies stopped or threatened to stop producing vaccines.<sup>44</sup> By 1984, Lederle was the only commercial manufacturer of the

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40. For an overview of the theories of recovery that plaintiffs injured by vaccines most frequently asserted in civil court, see generally Okianer Christian Dark, *Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?*, 19 U. TOL. L. REV. 799, 817-34 (1988).

41. See generally *id.*

42. Neraas, *supra* note 37, at 151 & n.15; see also Merrile Sing & Mary Kaye Willian, *Supplying Vaccines: An Overview of the Market and Regulatory Context*, in *SUPPLYING VACCINES: AN ECONOMIC ANALYSIS OF CRITICAL ISSUES* 45, 51-52 (Mark Paulty, Chester A. Robinson, Stephen J. Sepe, Merrile Sing & Mary Kaye Willian eds., 1996) (“The number of product-liability lawsuits filed against DTP vaccine manufacturers began to increase in 1972 (17 DTP lawsuits), and peaked in 1985 and 1986 at 219 and 255 lawsuits, respectively . . . . As the number of lawsuits filed against DTP vaccine manufacturers began to increase, DTP prices increased and the number of domestic DTP manufacturers decreased.”).

43. Neraas, *supra* note 37, at 151; see also Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL’Y & L. 59, 60-62 (1999) (noting that vaccine manufacturers were exposed to \$3.5 billion in potential liability between 1980 and 1986). The Supreme Court recently detailed one theory of why lawsuits against manufacturers increased in the 1970s and 1980s: “[V]accines became, one might say, victims of their own success. They had been so effective in preventing infectious diseases that the public became much less alarmed at the threat of those diseases, and much more concerned with the risk of injury from the vaccines themselves.” *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1072 (2011). In other words, the American public became complacent with the successfulness of vaccines, which made “it easier to forget the value of vaccines and to focus on their potential risks.” *Vaccines—Finding the Balance Between Public Safety and Personal Choice: Hearing Before the H. Comm. on Gov’t Reform*, 106th Cong. 14 (1999) (statement of Rep. Henry A. Waxman, Member, H. Comm. on Gov’t Reform); see also Joanna B. Apolinsky & Jeffrey A. Van Detta, *Rethinking Liability for Vaccine Injury*, 19 CORNELL J.L. & PUB. POL’Y 537, 550 (2010) (“[A]s the occurrence of many historically common and very serious childhood diseases had seemingly been all but eradicated, many people became less concerned with these diseases themselves and more concerned with the risk of potential side effects from the vaccinations.”); E.J. Gangarosa et al., *Impact of Anti-Vaccine Movements on Pertussis Control: The Untold Story*, 351 LANCET 356, 360 (1998) (“[S]uccessful disease-control encourages complacency . . . ”).

44. Charles F. Hagan, *Vaccine Compensation Schemes*, 45 FOOD DRUG COSM. L.J. 477, 479 (1990); see also INST. OF MED., VACCINE SUPPLY AND INNOVATION 27-28 (1985); Sara Wexler, Recent Case, *Bruesewitz v. Wyeth: The “Unavoidable Vaccine Problem”*, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 93, 98 (2011) (“In the ten years prior to [1986], the number of vaccine manufacturers shrank from twenty-six to just four.”).

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diphtheria, tetanus, and pertussis (DTP) vaccine, and “its potential liability was over 200 times greater than its annual sales.”<sup>45</sup> To reduce that exposure, the few manufacturers remaining in the market raised their prices to cover the increasing costs of insurance premiums and the projected costs of future litigation.<sup>46</sup> Vaccine prices then “skyrocketed as much as 2,000 percent,” which threatened to make immunizations prohibitively expensive.<sup>47</sup> The legal system’s failure to provide a suitable adjudicative process for compensating vaccine injuries had created a public health emergency.

“Congress, faced with the prospect of an ever-shrinking vaccine supply and the potential devastation that could result from this shortage, got involved.”<sup>48</sup> Recognizing that exposing vaccine manufacturers to continued tort liability would further drive up prices and force additional suppliers out of the market, Congress began searching for a legislative fix to the crisis.<sup>49</sup> It had to strike a delicate balance.<sup>50</sup> On the one hand, Congress needed to reduce or eliminate manufacturer liability so that pharmaceutical companies would continue to produce immunizations; on the other, it needed to provide a legal forum to compensate those “deserving victims of vaccine-related injuries.”<sup>51</sup> Congress attempted to strike this balance by passing the National Childhood Vaccine Injury Compensation Act of 1986 (Vaccine Act or Act).<sup>52</sup>

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45. Sing & Willian, *supra* note 42, at 52.

46. *Id.*

47. H.R. REP. NO. 101-247, at 509 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2235; see also Randall B. Keiser, *Deja Vu All Over Again? The National Childhood Vaccine Injury Compensation Act of 1986*, 47 FOOD & DRUG L.J. 15, 16 (1992) (“In 1980, a single dose of the measles, mumps, and rubella (MMR) vaccine cost \$2.71 under a federal contract. In 1986, the same dosage cost the federal government \$8.47.”).

48. Elizabeth C. Scott, *The National Childhood Vaccine Injury Act Turns Fifteen*, 56 FOOD & DRUG L.J. 351, 354 (2001); see also Keiser, *supra* note 47, at 16 (“Faced with a decreasing supply of vaccine products, as well as a corresponding increase in their price, the federal government acted to try to rectify the crisis situation.”).

49. *O’Connell v. Shalala*, 79 F.3d 170, 173 (1st Cir. 1996) (citations omitted); see also Richards, *supra* note 38, at 47.

50. For a discussion of the public policy challenges of “ensuring a continuous supply of safe and effective vaccines at prices that do not increase rapidly in real terms,” see Sing & Willian, *supra* note 42, at 45-49.

51. *O’Connell*, 79 F.3d at 173 (citations omitted).

52. 42 U.S.C. §§ 300aa-1 to -34 (2006); see also *Schafer ex rel. Schafer v. Am. Cyanamid Co.*, 20 F.3d 1, 2 (1st Cir. 1994) (Breyer, J.) (“Congress passed the law after hearing testimony (1) describing the critical need for vaccines to protect children from disease, (2) pointing out that vaccines inevitably harm a very small number of the many millions of people who are vaccinated,

### III. THE VACCINE ACT

The Vaccine Act is a legislative tort shield that prevents those who believe they were injured by specified immunizations from suing the administrator or manufacturer without first filing a petition for compensation in the Vaccine Program.<sup>53</sup> All Program claims must be filed in the U.S. Court of Federal Claims with the Secretary of Health and Human Services (Secretary) listed as the named defendant.<sup>54</sup> Attorneys from the Department of Justice represent the Secretary in these proceedings.<sup>55</sup>

Once a petition for compensation is filed, decision makers called “special masters” determine whether to award compensation and, if so, how much.<sup>56</sup> If claimants are dissatisfied with the special master’s resolution of their claim, they may reject the judgment and file a traditional civil action,<sup>57</sup> with some limitations.<sup>58</sup> All awarded compensation is paid from a trust that is funded by an excise tax levied against each dose of certain vaccines.<sup>59</sup> The tax is justified by the theory that all children benefit from federally

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and (3) expressing dissatisfaction with traditional tort law as a way of compensating those few victims.”).

53. 42 U.S.C. § 300aa-11(a)(2)(A) (“No person may bring a civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine . . . .”); *see also* Sing & Willian, *supra* note 42, at 52 (“No vaccine manufacturer, physician, or health facility can be designated a defendant.”). For an overview of the Vaccine Act’s preemption provisions, see Nitin Shah, Note, *When Injury Is Unavoidable: The Vaccine Act’s Limited Preemption of Design Defect Claims*, 96 VA. L. REV. 199, 202-08 (2010).

54. 42 U.S.C. § 300aa-11(a)(1).

55. MOLLY T. JOHNSON, CAROL E. DREW & DEAN P. MILETICH, FED. JUDICIAL CTR., USE OF EXPERT TESTIMONY, SPECIALIZED DECISION MAKERS, AND CASE-MANAGEMENT INNOVATIONS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM 4, 12 (1998).

56. 42 U.S.C. § 300aa-12(d)(3).

57. *Id.*

58. *See, e.g., id.* § 300aa-22(b)(1) (“No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.”); *id.* § 300aa-22(b)(2) (creating a presumption that vaccines are accompanied by proper directions and warnings, and setting a “clear and convincing evidence” burden of proof for establishing lack of compliance).

59. *See id.* § 300aa-15(i)(2); *see also* 26 U.S.C. § 9510 (2006) (establishing the “Vaccine Injury Compensation Trust Fund”); *id.* § 4131(d) (imposing a “75 cents per dose” tax on certain vaccines to fund the trust). Special masters may compensate claimants for a variety of expenses, including costs for “rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.” 42 U.S.C. § 300aa-15(a).

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compelled vaccination,<sup>60</sup> so “all people, through the federal government, hold the responsibility of providing a means of compensation for those children that [sic] are injured.”<sup>61</sup>

#### A. “Alternative” Features of the Vaccine Program

Congress intended the Program to compensate vaccine-injured persons “quickly, easily, and with certainty and generosity.”<sup>62</sup> To accomplish those goals, the Act includes several streamlining measures, including requiring special masters to issue a ruling “not later than 240 days . . . after the date the petition was filed.”<sup>63</sup> If the special master denies compensation, claimants may file an appeal with an Article III judge at the U.S. Court of Federal Claims in a process that is also expedited: parties have 30 days to file a motion for review, the Secretary has 30 days to file a response, and the judge has 120 days to make a decision.<sup>64</sup> Alternatively, instead of filing an appeal, a claimant may reject the special master’s judgment and file suit in state or federal court.<sup>65</sup> The statute, however, strongly discourages claimants from filing a traditional civil suit by making it difficult for plaintiffs to prevail in tort actions against vaccine manufacturers.<sup>66</sup>

The following discussion highlights three other streamlining features of the Act, all of which Congress included to make the Program a less adversarial, more efficient route to compensation than traditional civil litigation.

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60. See Richards, *supra* note 38, at 48.

61. Hagan, *supra* note 44, at 480.

62. H.R. REP. NO. 99-908, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6344; see also H.R. REP. NO. 101-247, at 510 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2236 (stating that the Program was intended to be “a quick, flexible, and streamlined system”); Shalala v. Whitecotton, 514 U.S. 268, 269 (1995) (stating that the Program was “designed to work faster and with greater ease than the civil tort system”); Katherine E. Strong, Note, *Proving Causation Under the Vaccine Injury Act: A New Approach for a New Day*, 75 GEO. WASH. L. REV. 426, 441 (2007) (“Congress intended that the Program render quick, certain, and generous determinations to petitioners.”).

63. 42 U.S.C. § 300aa-12(d)(3). A special master may suspend this 240-day requirement up to 180 days. *Id.* § 300aa-12(d)(3)(C). Thus, the Act theoretically limits the adjudicative process to 420 days. *But cf. infra* Part IV.B (discussing how long it actually takes to resolve cases filed in the Program).

64. 42 U.S.C. § 300aa-12(e).

65. *Id.* § 300aa-21(a).

66. See, e.g., *id.* § 300aa-22(b)(2) (creating a presumption that the manufacturer exercised due care if it complied with federal regulations); *id.* § 300aa-22(c) (barring liability based on failure to warn); *id.* § 300aa-22(b)(1) (eliminating strict tort liability for unavoidable side effects).

## 1. A No-Fault Prima Facie Case

The main way the Vaccine Act facilitates less adversarial case adjudication is by eliminating fault from the prima facie case. Claimants need only prove they suffered a vaccine injury; no one inquires into whether the manufacturer or any other party was negligent.<sup>67</sup> By removing questions of fault from the claims-resolution process and easing claimants' burden of proof, the Program simplifies what would otherwise be a complex, expensive, and lengthy discovery process.<sup>68</sup> Congress wanted all parties in the Program to focus on efficiently compensating victims of vaccine injuries, not using litigation strategies to obscure relevant facts or defeat the opposing party at all costs.<sup>69</sup> If a vaccine harmed someone, that person should receive compensation.

## 2. The Vaccine Injury Table

### a. The Goal

Although it simplified the relevant inquiry in Program cases to a relatively "straightforward proposition" by eliminating the element of fault from the prima facie case,<sup>70</sup> Congress recognized that proving causation is still a heavy burden, especially because vaccines can trigger an array of complex physiological reactions that are "hitherto unproven in medicine."<sup>71</sup> The Program thus further assists claimants with meeting their prima facie

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67. Lowry *ex rel.* Lowry v. Sec'y of Health & Human Servs., 189 F.3d 1378, 1381 (Fed. Cir. 1999); *see also* 42 U.S.C. § 300aa-22(b)-(c); Keiser, *supra* note 47, at 18; Robinson & Sepe, *supra* note 29, at 35; Scott, *supra* note 48, at 355.

68. O'Connell v. Shalala, 79 F.3d 170, 173 (1st Cir. 1996) (citations omitted); *see also* Stevens v. Sec'y of Health & Human Servs., No. 99-594V, 2001 U.S. Claims LEXIS 67, at \*20-21 (Fed. Cl. Mar. 30, 2001), *overruled on other grounds* by Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274 (Fed. Cir. 2005) ("[T]he Vaccine Program was created to reduce tort litigation against manufacturers and administrators and to provide compensation to injured parties without requiring the difficult proofs of individual causation, negligence, and product defectiveness. Hence, the Program was designed as 'no fault' . . . ."); Neraas, *supra* note 37, at 164-65 ("Because the only issues relevant to the compensation proceeding are whether the petitioner suffered a compensable injury and, if so, the extent of compensable damages, there is no need for inquiry into the issues that would be raised in a civil action. Consequently, the entire proceeding can be expeditiously completed.").

69. Cf. Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 663, 699 (2006) [hereinafter Grey, *Permanent Compensation System*] (noting that Congress designed the Program to be "a more efficient administration of damages than the traditional tort system").

70. Zeagler v. Sec'y of Health & Human Servs., 19 Cl. Ct. 151, 153 (1989).

71. Althen, 418 F.3d at 1280.

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burden “to allow the finding of causation in a field bereft of complete and direct proof of how vaccines affect the human body.”<sup>72</sup> Specifically, claimants may establish entitlement to compensation by proving that they suffered an injury listed on the “Vaccine Injury Table” (Table or Vaccine Table),<sup>73</sup> a feature of the Program that one special master referred to as the “cornerstone” of the alternative dispute resolution scheme.<sup>74</sup>

Petitioners who prove by a preponderance of the evidence that they suffered an injury listed on the Table within the requisite post-immunization timeframe are presumptively entitled to compensation;<sup>75</sup> no showing of actual causation is required.<sup>76</sup> The burden instead shifts to the government, which must prove that the claimant’s injury or death was “due to factors unrelated to the administration of the vaccine described in the petition.”<sup>77</sup> If claimants cannot establish an “on-Table” injury, the case is not over; they may proceed “off-Table” and prove causation-in-fact by a preponderance of the evidence.<sup>78</sup>

Congress intended that the Table’s presumptions would significantly streamline proceedings in the Program.<sup>79</sup> The Federal Circuit described the on-Table route to compensation as “easy, as far as evidentiary proof goes . . . [because] the statute does the heavy lifting.”<sup>80</sup> In other words, the Table

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72. *Id.*

73. 42 U.S.C. § 300aa-14(a) (2006); *see also* 42 C.F.R. § 100.3 (2010) (reporting the current version of the Table).

74. Stevens v. Sec’y of Health & Human Servs., No. 99-594V, 2001 U.S. Claims LEXIS 67, at \*21 (Fed. Cl. Mar. 30, 2001), *overruled on other grounds by Althen*, 418 F.3d at 1274.

75. Andreu v. Sec’y of Health & Human Servs., 569 F.3d 1367, 1374 (Fed. Cir. 2009) (“[A] claimant who shows that he or she received a vaccination listed in the Vaccine Injury Table . . . and suffered an injury listed in the table within a prescribed period is afforded a presumption of causation.”); *see also* Gruber v. Sec’y of Health & Human Servs., 61 Fed. Cl. 674, 678 (2004).

76. Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1074 (2011).

77. 42 U.S.C. § 300aa-13(a)(1)(B).

78. *Id.* § 300aa-13(a); *see also* H.R. REP. NO. 99-908, at 15-19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6356-60 (describing the function of the Table); Shyface *ex rel.* Shyface v. Sec’y of Human & Health Servs., 165 F.3d 1344, 1352 (Fed. Cir. 1999) (differentiating between “on-Table” and “off-Table” claims). To establish an off-Table claim, petitioners must establish “(1) a medical theory causally connecting the vaccination and the injury, (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury, and (3) a showing of a proximate temporal relationship between vaccination and injury.” Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005).

79. Cf. Bruesewitz, 131 S. Ct. at 1073 (“Fast, informal adjudication is made possible by the Act’s Vaccine Injury Table . . . .”).

80. Hodges v. Sec’y of Health & Human Servs., 9 F.3d 958, 961 (Fed. Cir. 1993).

increases the probability that petitioners will receive compensation:<sup>81</sup> “[C]lose calls regarding causation are resolved in favor of injured claimants.”<sup>82</sup> Here again, the statute was designed to alleviate contentiousness between the parties by encouraging the government to dispute only those cases that appear to be truly meritless, letting close calls advance immediately to a determination of damages.<sup>83</sup> Recognizing these potential benefits of reducing litigiousness, the Government Accountability Office described the Table as the Program’s “most important feature.”<sup>84</sup>

### *b. The Problem*

When Congress initially drafted the Table, it recognized that a sense of urgency to respond to the 1980s liability crisis caused it to rely on incomplete data when identifying injuries causally related to vaccines<sup>85</sup>—that is, some injuries that should be on the Table were not included in the original version. To remedy those oversights,<sup>86</sup> Congress gave the Secretary power to modify the Table after a period for public comment.<sup>87</sup> That authority is two-fold: the Secretary may (1) add new vaccines to the Table

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81. Sing & Willian, *supra* note 42, at 53.

82. *Althen*, 418 F.3d at 1280; see also U.S. GOV’T ACCOUNTABILITY OFFICE, VACCINE INJURY COMPENSATION: PROGRAM CHALLENGED TO SETTLE CLAIMS QUICKLY AND EASILY 19 (1999) [hereinafter GAO, VACCINE INJURY COMPENSATION], available at <http://www.gao.gov/new.items/he00008.pdf> (“In establishing the vaccine injury table as a desirable alternative for petitioners over the civil tort system, the Congress was initially willing to accept the risk that some compensation would be provided for injuries where the role of vaccines is uncertain.”); *Compensating Vaccine Injuries: Are Reforms Needed?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy & Human Res. of the H. Comm. on Gov’t Reform*, 106th Cong. 10 (1999) [hereinafter *Are Reforms Needed?*] (statement of Rep. Henry A. Waxman, Member, H. Comm. on Gov’t Reform) (“There have been disputes about the science and epidemiology of vaccine injury. We have always erred on the side of compensating children, if there was a scientific argument that injuries were vaccine related. At least that was our intent—to err on the side of making sure that we compensated people who were injured.”).

83. Cf. *Shifflett v. Sec’y of Health & Human Servs.*, 30 Fed. Cl. 341, 345 (1994) (explaining that “Congress designed the Vaccine Table Injury to be overinclusive” so that vaccine-injured persons could receive compensation for their injuries “quickly, easily, and with certainty and generosity” (quotation marks omitted)).

84. GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 5.

85. See *O’Connell v. Shalala*, 79 F.3d 170, 173 (1st Cir. 1996) (stating that Congress’s delegation of power to the Secretary to amend the Table “probably reflected a congressional consensus that the first iteration of the Table was not perfect”).

86. *Id.*

87. 42 U.S.C. § 300aa-14(c) (2006). This authority to modify the Table does not violate the Presentment Clause of the U.S. Constitution because “the Vaccine Act does not authorize the Secretary to amend or repeal portions of the Act, but rather merely grants her the power to promulgate new regulations as contemplated in the Act.” *Terran v. Sec’y of Health & Human Servs.*, 195 F.3d 1302, 1312 (Fed. Cir. 1999).

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when the Centers for Disease Control and Prevention recommends them for routine administration to children, and (2) modify the list of injuries, illnesses, and conditions presumptively associated with each vaccine listed on the Table.<sup>88</sup>

Delegating that administrative amendment power to the Secretary reflected a congressional consensus that the Table should be regularly and liberally amended to ensure claim adjudication in the Program remained streamlined and simple.<sup>89</sup> That efficiency probably would not occur if Congress retained the amendment power for itself. Maneuvering a technically complex bill through the legislative process is much more difficult than passing a regulation, and without a flexible administrative means to amend the Table in response to new medical discoveries, the “alternative” benefits of the Table would be gradually lost over time.<sup>90</sup> So too would the Table’s function of “providing fair recovery for petitioners.”<sup>91</sup> Congress thus effectively charged the Secretary with maintaining the Table as a viable evidentiary tool that petitioners could use to establish their claims quickly and easily without resorting to the more difficult, timely, and costly process of establishing an off-Table claim.

Since Congress created the Vaccine Program in 1986, however, the Secretary has rarely amended the Table. And on those rare occasions when the Secretary does exercise the amendment authority, usually only new vaccines are added to the Table, not new *injuries*. The Secretary has added six new vaccines to the Table since 1997, but has not included any corresponding presumptive injuries in those rulemakings.<sup>92</sup>

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88. 42 U.S.C. § 300aa-14(e)(2); *see also* H.R. REP. NO. 99-908, at 19 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6360-61.

89. Cf. H.R. REP. NO. 99-908, at 20, 1986 U.S.C.C.A.N. at 6361 (“As new vaccines are developed, licensed, or required by State law, the Committee intends that the Secretary make recommendations of modification as soon as possible.”); Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 346 (2011) [hereinafter Grey, *Plague of Causation*] (“Congress . . . expected that as evidence developed HHS would expand the Table to list additional combinations of injuries and vaccines, and the need for off-Table claims would be reduced or eliminated.”).

90. Elizabeth Breen, *A One Shot Deal: The National Childhood Vaccine Injury Act*, 41 WM. & MARY L. REV. 309, 326 (1999).

91. *Id.* at 309.

92. See National Vaccine Injury Compensation Program: Addition of Trivalent Influenza Vaccines to the Vaccine Injury Table, 70 Fed. Reg. 19,092 (Apr. 12, 2005) (adding trivalent influenza vaccine to the Table); National Vaccine Injury Compensation Program: Revisions and Additions to the Vaccine Injury Table, 67 Fed. Reg. 48,558, 48,560 (July 25, 2002) (codified at 42 C.F.R. pt. 100) (adding pneumococcal conjugate vaccine); National Vaccine Injury Compensation

The Secretary's failure to add new injuries to the Table has caused an incredible shift in the type of claims filed in the Program. In the 1980s and 1990s, most claimants pursued on-Table theories of recovery, and case proceedings thus entailed straightforward evidentiary questions.<sup>93</sup> Today, however, "the relevance of the Vaccine Injury Table has greatly diminished."<sup>94</sup> One special master even postulated that the Secretary's failure to add new injuries to the Table has "flip-flopped" the percentages of off-Table and on-Table claims: "[P]rior to the amendments 90% of cases were Table cases, while after the amendments 90% of cases [are] actual causation cases."<sup>95</sup> Most petitioners now pursue off-Table theories of recovery, which present complex questions of actual causation without the help of the Table's streamlining presumptions.<sup>96</sup>

The consequences of this "flip-flop" have been dramatic. Because proving causation in off-Table cases is more difficult than in on-Table cases,<sup>97</sup> more money and time is now required to resolve claims filed in the Program,<sup>98</sup> which means that many of the alternative features of the Program have been diminished or lost. As the former chief special master described:

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Program: Addition of Vaccines Against Rotavirus to the Program, 64 Fed. Reg. 40,517, 40,518 (July 27, 1999) (codified at 42 C.F.R. pt. 100) (adding rotavirus vaccine); National Vaccine Injury Compensation Program (VICP): Effective Date Provisions of Coverage of Certain Vaccines to the Vaccine Injury Table, 63 Fed. Reg. 25,777 , 25,778 (May 11, 1998) (codified at 42 C.F.R. pt. 60) (adding hepatitis B, Hib, and varicella vaccines). The last time the Secretary added injuries to the Table was 1997. National Vaccine Injury Compensation Program: Revisions and Additions to the Vaccine Injury Table—II, 62 Fed. Reg. 7685 (Feb. 20, 1997) (codified at 42 C.F.R. pt. 100).

93. See *Stevens v. Sec'y of Health & Human Servs.*, No. 99-594V, 2001 U.S. Claims LEXIS 67, at \*23-25, \*21 n.10 (Fed. Cl. Mar. 30, 2001), *overruled on other grounds by Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1274 (Fed. Cir. 2005) (stating that, before 1995, most claims filed in the Program were Table cases, which the special masters decided "relatively quickly" because "the Table foster[s] limited factual issues and medical testimony and rather speedy decisions").

94. *Id.* at \*21 n.10.

95. *Id.* at \*25 ("[P]ractice has shown that virtually all of the cases proceed as causation-in-fact disputes.").

96. As one example of how complex an off-Table claim may be, consider *Hargrove v. Secretary of Health & Human Services*, No. 05-0694V, 2009 U.S. Claims LEXIS 171 (Fed. Cl. Apr. 14, 2009). There, the claimant's theory of causation was that a tetanus vaccine triggered an "anamnestic reaction" through a process called "molecular mimicry," during which "an invading epitope cross-reacts with a self-protein." *Id.* at \*20-21 (quoting the claimant's expert witness).

97. See Grey, *Permanent Compensation System*, *supra* note 69, at 704 (stating that proving causation in the Program is "not a difficult problem, except in 'off-Table' cases"); see also GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 14 ("[P]etitioners with injuries not listed on the injury table historically have had a lower probability of being compensated than those with injuries that were listed."); Lainie Rutkow et al., *Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades*, 111 PENN ST. L. REV. 681, 720 (2007) (noting that those claimants alleging on-Table injuries are nearly three times as likely to succeed as those alleging off-Table injuries).

98. See *supra* notes 76-80 and accompanying text; *infra* notes 218-22 and accompanying text.

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[L]itigating Table cases has met Congress's programmatic desire; that is, the special masters handle the cases relatively quickly and render decisions with certainty. This is mostly because the straightforward requirements of the Table foster limited factual issues and medical testimony and rather speedy decisions. Unfortunately, litigating actual causation cases clearly fails in this regard. . . . The cases take longer to prepare, longer to present, and longer to decide. Even though the same vaccines and injuries are represented in the cases, clear answers have proven elusive . . . . In short, litigating causation cases has proven the antithesis of Congress's desire for the Program. Instead of speed, certainty, and fairness, costly lengthy case presentations, inconsistent outcomes, and disparate treatment of similarly-situated litigants has resulted.<sup>99</sup>

In sum, by adding new vaccines to the Table without adding new injuries that enjoy a presumption of causation, nearly all petitioners now pursue their claims on a causation-in-fact basis. The result of that transformation has been “full blown litigation” in the Vaccine Program.<sup>100</sup> “Clearly, that is not what Congress intended when it designed the Program as an *alternative* to tort litigation.”<sup>101</sup>

### 3. Special Masters

A final streamlining characteristic of the Vaccine Program is the Office of Special Masters.<sup>102</sup> Judges of the U.S. Court of Federal Claims appoint up to eight special masters to four-year terms.<sup>103</sup> The special masters serve as the initial decision makers for all petitions filed in the Program, determining whether to compensate a claim and, if so, setting the amount of the award.<sup>104</sup>

Because their dockets consist exclusively of Program petitions, special masters develop expertise with the law, science, and medicine surrounding vaccine-injury claims. Special masters are much more than ordinary fact finders or generalist trial judges; they are judicial specialists who have the “unique ability . . . to adjudge cases in the light of their own acquired specialized knowledge and expertise.”<sup>105</sup> And because of their accumulated

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99. Stevens, 2001 U.S. Claims LEXIS 67, at \*23-24.

100. *Id.* at \*25.

101. *Id.* (emphasis in original).

102. 42 U.S.C. § 300aa-12(c)(1) (2006).

103. *Id.* § 300aa-12(a), (c).

104. *Id.* § 300aa-12(d)(3); *see also supra* text accompanying note 49.

105. Sword *ex rel.* Sword v. United States, 44 Fed. Cl. 183, 188 (1999); *see also* Hodges *ex rel.* Hodges v. Sec'y of Health & Human Servs., 9 F.3d 958, 961 (Fed. Cir. 1993) (describing the special masters as a “group of specialists”); JOHNSON, DREW & MILETICH, *supra* note 55, at 41 (noting that

expertise, special masters are able to decide cases more expeditiously, fairly, and “correctly,” which ultimately improves the predictability of Vaccine Act case law and enhances claimant satisfaction with the adjudicative regime.<sup>106</sup>

The expertise of special masters also helps to explain why Congress gave them so much control over the claims-resolution process<sup>107</sup> and protected their decisions with the highly deferential “abuse of discretion” standard of review.<sup>108</sup> The Act even permits special masters to “fit the forum to the fuss”<sup>109</sup> by promulgating their own rules of evidence and procedure.<sup>110</sup> Congress constrained the creation of those rules by stating only that they should “provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions,” and “include flexible and informal standards of admissibility of evidence.”<sup>111</sup>

Due in large part to their ability to control proceedings in the Program, special masters “retain[ ] considerable discretion in almost every element of the Act’s enforcement.”<sup>112</sup> They can limit discovery, require testimony, and

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special masters “develop extensive familiarity with the scientific and medical issues that recur” in the Program, which helps them to “focus in on the critical issues in a case”).

106. Cf. Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 81 N.Y. ST. B.A. J. 20, 20 (2009) (noting that a primary benefit of arbitration is the ability to have a case resolved by “adjudicators with the expertise necessary to decide complex issues”). But cf. JOHNSON, DREW & MILETICH, *supra* note 55, at 42-43 (reviewing some disadvantages of specialized adjudicators, including the decision makers “think[ing] they know more than they actually do”).

107. See Davis v. Sec’y of Health & Human Servs., No. 07-451, 2010 U.S. Claims LEXIS 525, at \*29 (Fed. Cl. July 12, 2010) (“It is axiomatic that special masters in vaccine cases have great leeway in building a record for decision.”); see also Grey, *Permanent Compensation System*, *supra* note 69, at 702 (“The special masters of the [Vaccine Program] hold immense power over the claims they administer.”).

108. See *infra* notes 123-29 and accompanying text.

109. Frank E.A. Sandler & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994) (discussing considerations that should inform the creation of an ideal dispute resolution scheme for various types of conflicts).

110. 42 U.S.C. § 300aa-12(d)(2) (2006); cf. Keiser, *supra* note 47, at 23 (“The Act gives the special master authority to require such evidence as necessary while conducting a proceeding.”). The Federal Rules of Evidence, therefore, do not apply to the Vaccine Program. See, e.g., Hazlehurst *ex rel.* Hazlehurst v. Sec’y of Health & Human Servs., 604 F.3d 1343, 1349 (Fed. Cir. 2010); Andreu *ex rel.* Andreu v. Sec’y of Health & Human Servs., 569 F.3d 1367, 1383 (Fed. Cir. 2009); see also FED. CL. R. app.B, VACCINE R. 8(b) (“In receiving evidence, the special master will not be bound by common law or statutory rules of evidence . . . .”), available at [http://www.uscfc.uscourts.gov/sites/default/files/court\\_info/rules\\_071309\\_v8.pdf](http://www.uscfc.uscourts.gov/sites/default/files/court_info/rules_071309_v8.pdf).

111. 42 U.S.C. § 300aa-12(d)(2).

112. Breen, *supra* note 90, at 328; see also Perreira v. Sec’y of Health & Human Servs., 27 Fed. Cl. 29, 31 (1992) (“The . . . Office of Special Masters . . . [has] exceptional authority with considerable administrative independence in decisions on claims for compensation under the Program.”).

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demand any other information necessary to make an informed decision.<sup>113</sup> In fact, special masters can render a decision—entered as a formal court judgment<sup>114</sup>—without even holding a hearing on the claim.<sup>115</sup> Congress gave special masters that power because it was “concerned that the routine use of hearings” to gather evidence would “produce unnecessary formality . . . and may tend to create an adversary process rather than a no-fault compensation proceeding.”<sup>116</sup>

#### IV. PERVERSE INCENTIVES

In many ways, the alternative features of the Vaccine Program give it the form of arbitration: Congress intended it to be a quick, efficient, and informal alternative to litigation where a third-party expert (the special master) issues a binding decision without the burden of having to comply with a variety of formal rules.<sup>117</sup> But, much like modern-day arbitration,<sup>118</sup> the Program struggles to achieve those benefits of alternative dispute resolution because attorneys can still borrow strategies and tactics from litigation, obfuscating the potential for a streamlined, efficient, and nonadversarial claims-resolution process. As discussed below, the Vaccine

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113. Erica A. Little, Note, *The Role of Special Masters in Off-Table Vaccination Compensation Cases: Assuring Flexibility over Certainty*, 16 FED. CIR. B.J. 355, 362 (2007).

114. 42 U.S.C. § 300aa-12(d)(3); see also H.R. REP. NO. 101-247, at 509 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2235.

115. The main drawback of vesting special masters with such incredible control and discretion over the claims-resolution process is that it leads to unpredictable and conflicting case law in the Vaccine Program, a problem that I have discussed elsewhere. See Brandon L. Boxler, Note, *What to Do with Daubert: How to Bring Standards of Reliable Scientific Evidence to the National Vaccine Injury Compensation Program*, 52 WM. & MARY L. REV. 1319, 1338-43 (2011).

116. H.R. REP. NO. 101-247, at 512-13, 1989 U.S.C.C.A.N. at 2238-39.

117. Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in THE HANDBOOK OF DISPUTE RESOLUTION 318, 318 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (defining arbitration as “a process by which a private third-party neutral renders a binding determination of an issue in dispute”); see also Christopher R. Drahoszal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 77-78 (2008) (noting that parties agree to arbitration because it “may resolve disputes more quickly and at lower cost than litigation” and “may result in better outcomes because the decisionmakers are experts”); L. Tyrone Holt, *Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation’s Ill Effects*, 7 DEPAUL BUS. & COM. L.J. 455, 463 (2009) (“Whenever a dispute requires technical knowledge, arbitration will always be superior to the courts . . . ”).

118. See Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 28 (2010) (noting the modern trend toward “legalized” arbitration, which involves “contentious tactics” that create conflict instead of mutually beneficial communication).

Act does little to guard against this spillover from the traditional court system; in fact, its structure gives claimants and their attorneys an incentive to transform the Program into full-blown civil litigation.

This section highlights a structural flaw in the design of the Vaccine Act that arises from the intersection of two features of the Program. The first feature provides multiple layers of review of special master decisions, and the second reimburses all claimants for fees and costs they incur while prosecuting a claim that was filed in “good faith” with a “reasonable basis.” These two statutory provisions combine to create a system of adjudication that encourages litigious posturing, undermines the finality of special master decisions, and erodes the alternative nature of the Program.

#### A. *Several Layers of Appeal*

Although Congress intended that special master decisions would effectively end proceedings on a claim,<sup>119</sup> the Vaccine Act provides for several levels of appeal.<sup>120</sup> Special master decisions are initially reviewable at the U.S. Court of Federal Claims, then at the U.S. Court of Appeals for the Federal Circuit, and eventually at the U.S. Supreme Court.<sup>121</sup> The Supreme Court has never expressly stated what standard of review it applies to Vaccine Act cases,<sup>122</sup> but the statute states that the U.S. Court of Federal Claims may set aside special master decisions only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”<sup>123</sup> and the Federal Circuit also applies that standard.<sup>124</sup> Congress intended for the “highly deferential”<sup>125</sup> abuse of discretion standard to make review of special master decisions an “extraordinary event.”<sup>126</sup> By ensuring the rarity of reversal, the Act promotes finality and efficiency—two of the principal benefits of alternative dispute resolution processes.<sup>127</sup>

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119. See *infra* text accompanying notes 130-32.

120. 42 U.S.C. § 300aa-12(e) (2006).

121. *Id.*; see also JOHNSON, DREW & MILETICH, *supra* note 55, at 16-17 (discussing the process of appealing special master decisions).

122. The Supreme Court has decided only one case that originated from within the Vaccine Program, and it presented a pure question of law. *Shalala v. Whitecotton*, 514 U.S. 268 (1995) (involving the procedure by which the Secretary may rebut a claimant’s *prima facie* case).

123. 42 U.S.C. § 300aa-12(e)(2)(B); see also *Little*, *supra* note 113, at 363-64 (2007).

124. See, e.g., *Munn v. Sec’y of Health & Human Servs.*, 970 F.2d 863, 870 (Fed. Cir. 1992).

125. *Hodges v. Sec’y of Health & Human Servs.*, 9 F.3d 958, 961 (Fed. Cir. 1993).

126. *Piper v. Sec’y of Health & Human Servs.*, 29 Fed. Cl. 628, 632 (1993).

127. See, e.g., Amy J. Schmitz, “*Drive-Thru Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*”, 62 BAYLOR L. REV. 178, 205-06 (2010); Brian T. Burns, Note, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1813, 1814 (2010) (noting “arbitration’s fundamental values of efficiency, finality, and autonomy”); cf. *Westvaco Corp. v.*

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Indeed, because they recognize that special masters have unique expertise to weigh the medical evidence in vaccine-injury cases, appellate courts are especially hesitant to set aside special master decisions. The Federal Circuit even declared that a special master's assessments about witness credibility and the relative persuasiveness of competing medical theories are "virtually unchallengeable on appeal."<sup>128</sup> It reasoned that Congress did not want the court to "second guess the Special Masters [sic] fact-intensive conclusions," so it uses a "uniquely deferential" standard of review.<sup>129</sup> Such respect for special master expertise "effectively ensures that [their determinations] will not be overturned"<sup>130</sup>—a statement that has proven true in the case law.<sup>131</sup> In *Cucuras v. Secretary of Health & Human Services*, for example, the special master held that the diphtheria, tetanus, and pertussis vaccine cannot cause chronic encephalopathies.<sup>132</sup> A different case decided one year later by the same special master reached the exact opposite conclusion.<sup>133</sup> The U.S. Court of Federal Claims affirmed both decisions on appeal.<sup>134</sup>

Despite this deferential posture of review, which makes overturning special master decisions an incredibly difficult task, it is very common for

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United Paperworkers Int'l Union, 171 F.3d 971, 975 (4th Cir. 1999) ("Because judicial interference with an arbitrator's interpretation threatens both the efficacy and finality of arbitration, judicial review of that interpretation is highly constrained.").

128. *Lampe v. Sec'y of Health & Human Servs.*, 219 F.3d 1357, 1362 (Fed. Cir. 2000) (emphasis added); *see also Porter v. Sec'y of Health & Human Servs.*, 663 F.3d 1242, 1249 (Fed. Cir. 2011) ("[A]s long as a special master's finding of fact is based on evidence in the record that is not wholly implausible, we are compelled to uphold that finding as not being arbitrary or capricious." (quotations and alterations omitted)); *Cedillo v. Sec'y of Health & Human Servs.*, 617 F.3d 1328, 1338 (Fed. Cir. 2010) ("Our role is not to second guess the Special Master's fact-intensive conclusions, particularly in cases in which the medical evidence of causation is in dispute." (quotations and citation omitted)); *Hines v. Sec'y of Health & Human Servs.*, 940 F.2d 1518, 1528 (Fed. Cir. 1991) ("If the special master has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate.").

129. *Hodges*, 9 F.3d at 961.

130. *Apolinsky & Van Detta, supra* note 43, at 578; *see also Hazlehurst ex rel. Hazlehurst v. Sec'y of Health & Human Servs.*, 604 F.3d 1343, 1349 (Fed. Cir. 2010); Brittani Scott Miller, *The National Vaccine Injury Compensation Program: The Unavailability of Experienced Attorneys Places Petitioners at an Institutional Disadvantage*, 19 FED. CIR. B.J. 253, 261 (2009) ("[A] court cannot reverse a decision by the special master merely because the court would have reached a different conclusion than the special master based on the facts in the record.").

131. *See generally infra* Appendix.

132. *Cucuras v. Sec'y of Health & Human Servs.*, 26 Cl. Ct. 537, 543 (1992).

133. *Estep ex rel. Estep v. Sec'y of Health & Human Servs.*, 28 Fed. Cl. 664, 668-69 (1993).

134. *Id.* at 669.

Vaccine Program claimants to appeal denials of compensation to the U.S. Court of Federal Claims and then appeal for a second time to the Federal Circuit.<sup>135</sup> That seems counterintuitive. It makes sense, however, when one considers another feature of the Program: claimants do not pay their own fees and costs even if they lose on appeal. Claimants thus have little incentive to accept an adverse special master decision because they have a right to appeal their case for free—twice.

#### B. Reimbursable Attorneys' Fees and Costs

To ensure that all vaccine-injured persons have an opportunity to obtain financial assistance,<sup>136</sup> and to complement the no-fault nature of the Program,<sup>137</sup> section 15(e)(1) of the Vaccine Act provides that special masters may award attorneys' fees and costs "incurred in any proceeding" on a petition for compensation.<sup>138</sup> The statute expressly provides that these expenses are recoverable *even if* the special master "does not award compensation . . . if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought."<sup>139</sup>

These standards of "good faith" and "reasonable basis" theoretically limit the right of recovery, but that rarely occurs. The "good faith" standard is subjective, and is thus a "very low" hurdle to satisfy.<sup>140</sup> Claimants are

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135. See *infra* notes 227-32 and accompanying text.

136. See *Browning v. Sec'y of Health & Human Servs.*, No. 02-929V, 2010 U.S. Claims LEXIS 761, at \*16-17 (Fed. Cl. Sept. 27, 2010) ("In designing the Act, Congress sought to spare injured persons, who often have mounting health expenses, from delays, court payments, and the expense of attorneys' fees. To further that end, the Vaccine Act forbade an attorney from charging a petitioner a fee, and instead permitted the court to award reasonable attorneys' fees and costs both to successful and unsuccessful petitioners."); *see also Doe v. Sec'y of Health & Human Servs.*, 19 Cl. Ct. 439, 443-44 (1990) (explaining that section 15(e)(1) is consistent with the purpose of the Vaccine Act because "potential petitioners who seek compensation under the vaccine program, including those with limited resources, should be able to obtain representation"); GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 5.

137. Keiser, *supra* note 47, at 26.

138. 42 U.S.C. § 300aa-15(e)(1) (2006). If the special master does not award fees and costs, "counsel are *forbidden* from soliciting or accepting any fee from the petitioner." *Jessen v. Sec'y of Health & Human Servs.*, No. 94-1029V, 1997 U.S. Claims LEXIS 20, at \*17 n.7 (Fed. Cl. Jan. 17, 1997).

139. 42 U.S.C. § 300aa-15(e)(1)(B) (emphasis added); *see also* *Saxton v. Sec'y of Health & Human Servs.*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) ("If the petition for compensation is denied, the special master may award reasonable fees and costs if the petition was brought in good faith and upon a reasonable basis." (quotation and citation omitted)).

140. *Holmes v. Sec'y of Health & Human Servs.*, No. 08-185, 2011 U.S. Claims LEXIS 406, at \*5 (Fed. Cl. Feb. 28, 2011); *see also* *Hamrick v. Sec'y of Health & Human Servs.*, No. 99-683V, 2007 U.S. Claims LEXIS 415, \*9 (Fed. Cl. Jan. 9, 2008); *Turner v. Sec'y of Health & Human*

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also entitled to a presumption of good faith when they file a petition, and the government cannot overcome that presumption without “direct evidence of bad faith.”<sup>141</sup> So any claimant who files a petition in the Program satisfies the “good faith” standard unless the government can show that the claimant knew the petition was meritless—that is, unless the government can show that the claimant knew a vaccine did not cause the alleged injuries. That effectively means that anyone who believes they suffered a vaccine injury meets the good faith standard. And that effectively means that anyone who files a claim in the Vaccine Program meets the standard. And that effectively means there is no standard. As one special master described: “The good faith requirement is an easy test to satisfy. In this case, Petitioner believed that [her son] suffered a vaccine-injury, *thereby satisfying the good faith requirement.*”<sup>142</sup> Special masters have even awarded claimants fees and costs in cases that are “a longshot attempt to recover under the vaccine program”<sup>143</sup> or that contain *no evidence* of a causal connection between immunization and injury other than a mother’s affidavit.<sup>144</sup>

The “reasonable basis” prong of section 15(e)(1), though an objective requirement,<sup>145</sup> is just as easy to establish as the “good faith” prong. “Historically, special masters have been quite generous in finding a reasonable basis for petitioners.”<sup>146</sup> Cases finding that a claimant did not have a reasonable basis to file a claim are extremely rare,<sup>147</sup> and special

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Servs., No. 99-544V, 2007 U.S. Claims LEXIS 394, at \*21 (Fed. Cl. Nov. 30, 2007) (“[T]he ‘good faith’ requirement of section 15(e)(1) is a subjective standard that focuses upon whether petitioner honestly believed he had a legitimate claim for compensation.”).

141. *Grice v. Sec’y of Health & Human Servs.*, 36 Fed. Cl. 114, 121 (1996).

142. *Browning v. Sec’y of Health & Human Servs.*, No. 07-453V, 2010 U.S. Claims LEXIS 765, at \*24 (Fed. Cl. Sept. 27, 2010) (emphasis added); *see also Arbuthnott v. Sec’y of Health & Human Servs.*, No. 90-1739V, 1994 U.S. Claims LEXIS 9, at \*3 (Fed. Cl. Jan. 7, 1994) (finding petitioner brought the claim in “good faith” because the special master had “no reason to doubt that petitioner honestly believed in the validity of her claim”).

143. *Doe v. Sec’y of Health & Human Servs.*, 19 Cl. Ct. 439, 443 (1990).

144. *Lamar v. Sec’y of Health & Human Servs.*, No. 99-584V, 2008 U.S. Claims LEXIS 442, at \*11-12 (Fed. Cl. July 30, 2008).

145. *Turner*, 2007 U.S. Claims LEXIS 394, at \*6.

146. *Browning*, 2010 U.S. Claims LEXIS 765, at \*27 (quotation and citations omitted); *see also Schueman v. Sec’y of Health & Human Servs.*, No. 04-693V, 2010 U.S. Claims LEXIS 639, at \*10 (Fed. Cl. Aug. 11, 2010) (“Special masters have liberally interpreted the good faith and reasonable basis requirements.”).

147. *Rydzewski v. Sec’y of Health & Human Servs.*, No. 99-571V, 2008 U.S. Claims LEXIS 30, at \*23 (Fed. Cl. Jan. 29, 2008); *see also Brown v. Sec’y of Health & Human Servs.*, No. 99-539V, 2005 U.S. Claims LEXIS 122, at \*8 (Fed. Cl. Mar. 11, 2005) (“[V]ery few cases have been denied fees and costs based upon the reasonability standard.”).

masters admittedly construe section 15(e)(1) “liberally”<sup>148</sup> to ensure that attorneys will eagerly represent claimants in the Program.<sup>149</sup>

That “relaxed standard”<sup>150</sup> for evaluating the reasonableness of bringing a claim has become synonymous with frivolity.<sup>151</sup> In *Rydzewski*,<sup>152</sup> for example, the special master found that a claimant lacked a reasonable basis for filing a petition because she had no reasonable basis for believing that she even received the purportedly harmful immunization.<sup>153</sup> The claimant alleged that she slipped into a coma for two days after doctors injected her with “an experimental form of the hepatitis B vaccine that was being given to soldiers.”<sup>154</sup> The special master, however, was “not aware of any experimental forms of the hepatitis B vaccine.”<sup>155</sup> Nor did the hospital records show that the claimant was ever in a coma.<sup>156</sup> Other than “her own questionable statements,” the petitioner presented no evidence to support a finding that she received the vaccination.<sup>157</sup>

The *Rydzewski* standard for establishing “reasonableness” is so low that it is essentially identical to the burden of establishing that a claim falls within the subject matter jurisdiction of the Act. Section (11)(b) lists requirements that determine whether someone *may* file a petition:

[A]ny person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person

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148. *Melbourne v. Sec'y of Health & Human Servs.*, No. 99-694V, 2007 U.S. Claims LEXIS 221, at \*19 (Fed. Cl. June 22, 2007); *cf. Grice v. Sec'y of Health & Human Servs.*, 36 Fed. Cl. 114, 121 (1996) (“[Claimants] are entitled to a presumption of good faith.”).

149. *Hamrick v. Sec'y of Health & Human Servs.*, No. 99-683V, 2007 U.S. Claims LEXIS 415, at \*15-16 (Fed. Cl. Nov. 19, 2007) (describing why “[I]atitude in evaluating the reasonable basis for filing a petition comports with public policy” and is consistent with Congress’s goals for the Program); *see also Jessen v. Sec'y of Health & Human Servs.*, No. 94-1029V, 1997 U.S. Claims LEXIS 20, at \*16 (Fed. Cl. Jan. 17, 1997) (“[I]f the special masters were to set too high a standard as to the reasonable basis issue, and too often deny fees awards on that basis, it surely would discourage some attorneys from even taking cases involving vaccine injuries in the first place, for it would face such counsel with the prospect of working through a Program proceeding and then possibly receiving no compensation whatever for that work.”).

150. *Hamrick*, 2007 U.S. Claims LEXIS 415, at \*18.

151. *E.g., Perreira v. Sec'y of Health & Human Servs.*, 27 Fed. Cl. 29, 35 (1992) (citing to a discussion about “frivolous” cases from the Model Rules of Professional Conduct when explaining why a petitioner’s request for fees and costs was denied).

152. *Rydzewski v. Sec'y of Health & Human Servs.*, No. 99-571V, 2008 U.S. Claims LEXIS 30 (Fed. Cl. Jan. 29, 2008).

153. *Id.* at \*13.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at \*11; *cf. 42 U.S.C. § 300aa-12(a) (2006)* (“The special master or court may not [award compensation] based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.”).

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who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table, *may, if the person meets the requirements of subsection (c)(1) of this section, file a petition for compensation under the [Act].*<sup>158</sup>

This language defines who *may* file a petition in the Program; therefore, those who do not meet the requirements of section 11(c)(1) *may not* (or cannot properly) file a claim.<sup>159</sup> First among the section 11(c)(1) requirements is proof that the injured person “received a vaccine set forth in the Vaccine Injury Table.”<sup>160</sup> When read in conjunction with section 11(b), this provision establishes an *a fortiori* jurisdictional requirement that an injured person prove receipt of a covered vaccine before filing a petition.<sup>161</sup> And the standard for meeting that jurisdictional requirement seems to be identical to the standard for filing a “reasonable basis” claim worthy of attorneys’ fees and costs.<sup>162</sup>

The point is simply that the bar for obtaining attorneys’ fees pursuant to section 15(e)(1) is extremely low. If special masters have jurisdiction over the claim, which is almost always the case,<sup>163</sup> they award fees and costs

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158. 42 U.S.C. § 300aa-11(b)(1)(A) (emphasis added).

159. *Cf.* H.R. REP. NO. 99-908, at 13 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6354 (stating that claimants must establish “eligibility” for compensation “before entering” the Vaccine Program).

160. 42 U.S.C. § 300aa-11(c)(1)(A).

161. No Federal Circuit decision has expressly described the requirements of section 11(c)(1) as jurisdictional per se, but at least one lower court has treated section 11(c)(1) as a jurisdictional provision. In *McGowan v. Secretary of Health & Human Services*, 31 Fed. Cl. 734 (1994), a claimant appealed a special master’s decision dismissing her case for failing to return to the United States within six months after vaccination, as required by section 11(c)(1)(B)(i)(III). The *McGowan* court described the issue before it as jurisdictional: “When dealing with issues of jurisdiction, as in this case, the statute must be construed strictly, as it is a limited waiver of sovereign immunity.” *McGowan*, 31 Fed. Cl. at 740; *see also id.* (“Only those petitioners who are eligible under the Vaccine Act can avail themselves of the remedial nature of the Vaccine Act.”) (emphasis added). Ultimately, the *McGowan* court held that the special master correctly dismissed the petition because the claimant did not return to the United States within the meaning of section 11(c)(1)(B)(i)(III), and thus “fail[ed] to meet the jurisdictional requirements of the Vaccine Act.” *Id.*

162. *Cf.* *Brice v. Sec’y of Health & Human Servs.*, 358 F.3d 865, 868 (Fed. Cir. 2004) (holding that the court must have jurisdiction over a Vaccine Act claim in order to award attorneys’ fees and costs).

163. In *Melbourne v. Secretary of Health & Human Services*, No. 99-694V, 2007 U.S. Claims LEXIS 221, at \*8 (Fed. Cl. June 22, 2007), the chief special master reasoned that a claimant need only *allege* that she “received a covered vaccine” to bring her case within the Vaccine Act’s jurisdiction. With such a low standard, it is unsurprising that “[t]here are few established instances in which this court lacks jurisdiction over petitioner’s claim and thus, lacks jurisdiction to award attorneys’ fees and costs.” *Id.* at \*7.

unless the claim is “patently unreasonable,”<sup>164</sup> brought in “bad faith,”<sup>165</sup> or “where truly there existed no logical basis for the claim.”<sup>166</sup> Some special masters even award fees when claimants do not file an immunization record to prove they received a covered vaccine.<sup>167</sup> Those cases are particularly shocking considering the Act expressly provides that each petition “*shall contain . . . vaccination records associated with the vaccine allegedly causing the injury.*”<sup>168</sup>

### C. The Structural Problem

Because the Vaccine Act’s generous fee shifting provision is not limited to proceedings conducted before special masters, claimants may recover fees and costs incurred while appealing their cases to the U.S. Court of Federal Claims, the Federal Circuit, and the Supreme Court—even if they lose at each forum.<sup>169</sup> That statutory structure creates perverse incentives. Claimants and their attorneys essentially have no reason to stop litigating their claims. By appealing a case as far as possible, the attorney gets to bill more hours and make more money, the client gets extra free chances at winning the case and receiving compensation, and *neither attorney nor client incurs any risk of loss or financial cost for doing so*. One could even argue that *not* appealing an adverse special master decision would constitute professional malpractice.<sup>170</sup> If a disabled client gets another free chance to obtain thousands of dollars in compensation, the attorney should take it, especially if the government will pay all fees and costs for taking that chance, regardless of the outcome.

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164. Perreira v. Sec’y of Health & Human Servs., 27 Fed. Cl. 29, 33 (1992).

165. Grice v. Sec’y of Health & Human Servs., 36 Fed. Cl. 114, 121 (1996); cf. Smith v. Sec’y of Health & Human Servs., No. 91-57V, 1992 U.S. Cl. Ct. LEXIS 400, at \*6 (Cl. Ct. Aug. 13, 1992) (denying an award of fees and costs when the petitioner did not argue that the claim was filed in good faith).

166. Jessen v. Sec’y v. Health & Human Servs., No. 94-1029V, 1997 U.S. Claims LEXIS 20, at \*17 (Fed. Cl. Jan. 17, 1997).

167. See, e.g., *Melbourne*, 2007 U.S. Claims LEXIS 221, at \*9.

168. 42 U.S.C. § 300aa-11(c) (2006). *But see* Brown v. Sec’y of Health & Human Servs., No. 99-539V, 2005 U.S. Claims LEXIS 122, at \*5-6 (Fed. Cl. Mar. 11, 2005) (finding no reasonable basis when the only documents supporting the petition were e-mails sent between the law firm and the claimant); Di Roma v. Sec’y of Health & Human Servs., No. 90-3288V, 1993 U.S. Claims LEXIS 317, at \*5 (Cl. Ct. Nov. 18, 1993) (denying a motion for attorneys’ fees and costs when “minimal investigation would have revealed the absence of any legal or medical support for petitioner’s claim”); Murphy v. Sec’y of Health & Human Servs., 30 Fed. Cl. 60, 61 (1993) (finding no reasonable basis when the medical records directly contradicted statements in the petition).

169. 42 U.S.C. § 300aa-15(e)(1).

170. Provided, of course, that a nonfrivolous argument supports the appeal.

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The Vaccine Act thus establishes a structural moral hazard. “In the economics literature and in the law and policy debate that draws upon this literature, ‘moral hazard’ refers to the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss.”<sup>171</sup> Within the Vaccine Program, claimants have a type of insurance (free appeals) that reduces their incentives to minimize economic losses (the cost of litigating and pursuing an appeal). Because the Act effectively eliminates the burdens of appealing a meritless case, it encourages claimants to continue litigating their claims, generating costs that they ultimately will not bear.<sup>172</sup> The *claimant* decides how much risk to take while the *government*—via the Vaccine Trust Fund—bears the costs “if things go badly.”<sup>173</sup> That situation stands in stark contrast to traditional civil litigation, where attorneys and clients carefully evaluate whether to appeal an unfavorable verdict because the client bears both the risks and costs of seeking review.

Professor Michael LeRoy has argued that a similar moral hazard exists in certain employer liability arbitration agreements.<sup>174</sup> Many of these agreements force employees to adjudicate their claims in binding arbitration<sup>175</sup> yet also provide employers with the right to seek de novo judicial review of the arbitrator’s award.<sup>176</sup> Thus, even if an arbitrator finds in favor of the employee, the employer still has a second chance to avoid “the financial consequences of its wrongdoing” because the agreement preserves access to the courts.<sup>177</sup> As a result, the substitute forum provision

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171. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238-39 (1996).

172. Cf. *id.* at 238 (“What moral hazard means is that, if you cushion the consequences of bad behavior, then you encourage that bad behavior.”).

173. PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008, at 63 (2009) (defining moral hazard to be when one person decides the amount of risk to take when another person bears all the costs of taking that risk).

174. Michael H. LeRoy, *Do Courts Create Moral Hazard?: When Judges Nullify Employer Liability in Arbitrations*, 93 MINN. L. REV. 998 (2009). A compulsory arbitration agreement is a “binding agreement between an employer and an employee to arbitrate future employment disputes.” Marcela Noemi Siderman, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Provisions*, 47 UCLA L. REV. 1885, 1891 (2000).

175. Like the Vaccine Program, arbitration typically enjoys a more informal, flexible, and less adversarial dispute resolution process than traditional civil litigation. See generally R. Wilson Freyermuth, *Foreclosure by Arbitration?*, 37 PEPP. L. REV. 459, 471-76 (2010) (describing the process characteristics of arbitration).

176. LeRoy, *supra* note 174, at 1008-09.

177. *Id.* at 1008.

in the employment contract is undermined and “employers have two separate adjudications to avoid liability.”<sup>178</sup>

The “free appeals” structure of the Vaccine Program similarly undermines its usefulness as a substitute forum. Congress intended the Program to be *the forum* to resolve claims of vaccine injury. The entire point of establishing the Program was to remove such claims from the civil court system.<sup>179</sup> But because claimants get a risk-free second—and third and fourth—chance to obtain compensation by appealing to traditional federal courts, the finality and effectiveness of the Program as a viable alternative legal forum is undermined.

This erosion of finality is especially troublesome because it creates a two-tiered compensation scheme, making the Program a *less efficient* alternative to civil litigation, the exact opposite of what Congress intended.<sup>180</sup> By encouraging claimants to appeal adverse judgments, special master decisions become merely precatory, not final, because a judge on the U.S. Court of Federal Claims or the Federal Circuit will ultimately resolve the case. In other words, the alternative dispute resolution process conducted before special masters in the Program is a mere prelude to the “real” dispute resolution process that will be conducted before federal judges in the appellate courts. The Program, therefore, becomes a fourth step in “the usual three instances of litigation in the ordinary courts.”<sup>181</sup>

Congress did not foresee these structural defects when it passed the Act in 1986. Back then, it expected that review of special master decisions would be rare and that the costs of pursuing a claim would be low.<sup>182</sup> Adding section 15(e)(1) to the statute was thus a relatively benign tradeoff in exchange for encouraging attorneys to help injured parties:

[Congress] has assumed that costs under a no-fault, non-adversarial system will be significantly lower. With most evidentiary requirements specified in the legislation, with prohibitions on traditional discovery and courtroom procedure, and with no obligations to demonstrate negligence or product defectiveness, the costs of legal services will more

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178. *Id.* For a critique of Professor LeRoy’s argument, see generally Lisa Blomgren Bingham & David Henning Good, *A Better Solution to Moral Hazard in Employment Arbitration: It Is Time to Ban Predispute Binding Arbitration Clauses*, 93 MINN. L. REV. HEADNOTES 1 (2009).

179. *See supra* Part II.

180. *See supra* Part II.

181. Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147, 149 (1997) (explaining why broad judicial review of arbitral awards would undermine finality); cf. Grey, *Plague of Causation*, *supra* note 89, at 404 (warning that, unless the Program is reformed, it “could become nothing more than a costly exercise that is a precondition for filing a tort suit, placing vaccine claimants in a worse position than they were in prior to the [P]rogram’s enactment, since tort suits traditionally do not have antecedent administrative procedures that must be exhausted”).

182. *See supra* notes 125-27 and accompanying text.

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closely approximate those incurred in such systems as the Black Lung benefits program or workers' compensation programs. In these systems, legal costs rarely rise above \$10,000 per case. The Committee has, therefore, assumed that legal costs may be as much as \$15,000 per case in the compensation Program.<sup>183</sup>

Congress's assumption has proven to be wrong. Really wrong. Not only are the costs of pursuing a claim in the Program routinely "as much as" \$15,000, they usually total three-to-four times that amount. Due largely to the increased adversarial nature of Program proceedings,<sup>184</sup> resolving a claim filed under the Act often takes several years<sup>185</sup> and costs tens of thousands of dollars to pursue.<sup>186</sup> Many recent awards for fees and costs even approach—or exceed—\$100,000.<sup>187</sup> In fiscal year 2009, petitioners whose cases went *uncompensated* received an average award of \$43,254 for attorneys' fees and costs.<sup>188</sup> That amount was \$2,000 *higher* than the average amount awarded in compensated cases.<sup>189</sup>

## V. EVIDENCE OF INCREASED CONTENTIOUSNESS AND MORAL HAZARD

To sum, the Vaccine Act's "free appeals" configuration undermines the intended expeditious, alternative nature of the Program by inviting and encouraging claimants to continue fighting their cases as long as possible. It

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183. H.R. REP. NO. 99-908, at 36 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6377-78.

184. See *infra* Part IV.A.

185. See *infra* text accompanying notes 216-17.

186. See *infra* notes 76-80, 218-22 and accompanying text.

187. See, e.g., Finet v. Sec'y of Health & Human Servs., No. 03-348V, 2011 U.S. Claims LEXIS 120, at \*11 (Fed. Cl. Jan. 31, 2011) (awarding \$82,327.93 for attorneys' fees and costs); Hibbard v. Sec'y of Health & Human Servs., No. 07-446V, 2011 U.S. Claims LEXIS 439, at \*18 (Fed. Cl. Mar. 7, 2011) (\$130,500); Mersburgh v. Sec'y of Health & Human Servs., No. 04-997V, 2011 U.S. Claims LEXIS 327, at \*7 (Fed. Cl. Jan. 28, 2011) (\$70,561.18); Browning v. Sec'y of Health & Human Servs., No. 02-929V, 2010 U.S. Claims LEXIS 761, at \*59 (Fed. Cl. Sept. 27, 2010) (\$99,023.50); Nordwall v. Sec'y of Health & Human Servs., No. 05-123V, 2010 U.S. Claims LEXIS 392, at \*5 (Fed. Cl. May 26, 2010) (\$82,500.00); Stewart v. Sec'y of Health & Human Servs., No. 06-287V, 2010 U.S. Claims LEXIS 336, at \*23 (Fed. Cl. May 17, 2010) (\$77,036.21); Stone v. Sec'y of Health & Human Servs., No. 04-1041V, 2010 U.S. Claims LEXIS 753, at \*32 (Fed. Cl. Sept. 8, 2010) (\$131,614.84); see also *infra* Part IV.C.

188. This figure was calculated by dividing the "Attorneys' Fees/Costs Payments" by the "Number of Payments to Attorneys" for dismissed cases in fiscal year 2009, according to statistics reports posted on the website of the Department of Health and Human Services. See *National Vaccine Injury Compensation Program: Statistics Reports*, HEALTH RESOURCES & SERVICES ADMIN. (U.S. Dep't of Health & Human Servs., Wash., D.C.), Feb. 2, 2012, at tbl.3 [hereinafter *Statistics Reports*], <http://www.hrsa.gov/vaccinecompensation/statisticsreports.html#Stats>.

189. The average fees and costs awarded in compensated cases during fiscal year 2009 was \$41,147. See *id.* (using data for compensated cases).

should come as no surprise, then, that both petitioners and the government have become increasingly adversarial, adopting litigious postures and tactics despite Congress's intention to create an informal compensation system.

#### A. *Congressional Concern*

After creating the Vaccine Program, members of Congress soon realized that they had failed to design a truly alternative adjudication process. Claimants were "fighting everything," racking up large bills for attorneys' fees and costs, and filling appellate courts with vaccine cases.<sup>190</sup> With a near-limitless supply of "free" money to establish causation, claimants began requesting depositions, calling expert witnesses, and moving to exclude harmful evidence. The Program quickly became "a microcosm of the system it was designed to replace."<sup>191</sup>

In 1989, just three years after passing the Act, Congress declared that participants in the Program had "maintained their traditional adversarial litigation postures" and "virtually foreclose[d] any opportunity for petitioners [and] respondents to proceed without litigators at their sides."<sup>192</sup> Claimants, for example, were pursuing "traditional rights of exclusion of evidence" and failing to comply with many of the Act's procedural streamlining measures, including filing initial petitions with the statutorily required information.<sup>193</sup>

Making matters worse, the special masters have not used their authority to remedy the petitioners' noncompliance with statutory mandates. Some special masters have even expressly permitted such noncompliance by allowing claimants to file one-page "short-form" petitions for compensation

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190. Laura Mazzuca, *Shot Through with Problems—A Partial Success, Vaccine Injury Fund Faces Case Logjam, Funding Shortfalls*, BUS. INS., Aug. 24, 1992 (quoting Thomas G. Wilson, Chair of the Vaccine Litigation Group of the Association of Trial Lawyers of America).

191. *Id.*; see also Knudsen *ex rel.* Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 549 (Fed. Cir. 1994) ("The Vaccine Act does not contemplate full blown tort litigation in the Court of Federal Claims."); *supra* text accompanying notes 62-66.

192. H.R. REP. NO. 101-247, at 510 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2236. Scholars have observed a similar phenomenon in the context of arbitration, where parties seek a fast and flexible alternative dispute resolution process but have difficulty shedding their comfort with litigation tactics, rules, and procedures. See, e.g., Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37 (2003) (discussing concerns that arbitration is becoming overly formalized); Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 314 (2003) (using the term "arbigation" to describe the contentious postures of parties in arbitration proceedings); *infra* text accompanying note 210.

193. H.R. REP. NO. 101-247, at 510, 1989 U.S.C.C.A.N. at 2236.

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that contain *no* medical records.<sup>194</sup> Those filings violate the unambiguous language of section 11(c), which provides that all medical records “shall” accompany claims filed in the Program.<sup>195</sup>

The government also deserves a portion of the blame. Some claimants’ attorneys, for example, have noted that “government lawyers want to defeat every claim at all costs and for any reason.”<sup>196</sup> As a result, “[t]here is now no difference in the level of litigation than if the case were in state or federal court.”<sup>197</sup> Winning seems to have become the government’s focus, so much so that it often “mount[s] defenses incompatible with a nofault system of compensation.”<sup>198</sup> An analysis of claims data by the *Los Angeles Times* in 2004 revealed some troubling examples:

In one case, government representatives argued that \$150 a year was too much to spend on wheelchair maintenance. They have haggled over how much to allow for replacement shoes and braces for people with polio. Another time, they recommended rubber sheets for the bed of an incontinent person because they were cheaper, although less comfortable, than disposables costing \$135 a year.<sup>199</sup>

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194. See, e.g., *Stewart v. Sec'y of Health & Human Servs.*, No. 02-819V, 2003 U.S. Claims LEXIS 275, at \*13 (Fed. Cl. Sept. 3, 2003) (finding that special masters may refuse to dismiss short-form petitions and may refuse to order production of all medical records required by section 11(c)). For an example of a short-form petition, see *Filing a Pro Se Short Form Autism Petition*, SHOEMAKER & ASSOCIATES, available at [http://www.shoemakerassociates.com/potentialclients/Short\\_formAutismPetition.doc](http://www.shoemakerassociates.com/potentialclients/Short_formAutismPetition.doc) (last visited Feb. 24, 2012).

195. 42 U.S.C. § 300aa-11(c) (2006) (listing what a petition for compensation “shall contain,” including medical records and affidavits). For a discussion about why permitting short-form petitions in the Vaccine Program could harm claimants, see generally Gordon Shemin, Comment, *Mercury Rising: The Omnibus Autism Proceeding and What Families Should Know Before Rushing Out of Vaccine Court*, 58 AM. U. L. REV. 459 (2008) (explaining that a short-form petition is not a proper petition under section 11(c) and so claimants who do not re-file a compliant petition may fail to satisfy the Act’s statute of limitations, thereby waiving their rights to reject an adverse special master decision and file a lawsuit in civil court).

196. JOHNSON, DREW & MILETICH, *supra* note 55, at 45 (quoting an anonymous claimant’s attorney); cf. Rachel A. Greenleaf, *Why Plaintiffs Shouldn’t Have It Their Way—Revisiting Concurrent Jurisdiction of Autism Claims Against Thimerosal Manufacturers*, 21 FED. CIR. B.J. 299, 307 (2011) (“[D]espite being touted as less adversarial than traditional litigation, the U.S. Department of Justice assigned more than a dozen veteran litigators to zealously defend the government’s coffers.”).

197. JOHNSON, DREW & MILETICH, *supra* note 55, at 45.

198. H.R. REP. NO. 101-247, at 510, 1989 U.S.C.C.A.N. at 2236; cf. Sussman, *supra* note 106, at 22 (“If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator’s ability to achieve efficiency goals.”).

199. Myron Levin, *Vaccine Injury Claims Face Grueling Fight; Victims Increasingly View U.S. Compensation Program as Adversarial and Tightfisted*, L.A. TIMES, Nov. 29, 2004, at A1.

These illustrations of the government’s “contentious and even stingy”<sup>200</sup> posture are inconsistent with Congress’s goal of generously compensating victims in an informal, nonadversarial process.<sup>201</sup>

Although claimants and the government share some of the blame for permitting the Program to “become very adversarial,”<sup>202</sup> the special masters deserve most of the blame. After all, they have incredible power to control the claims-resolution process,<sup>203</sup> but have not used that authority to insulate the Program from the combative tactics of civil litigation. As one extreme example, consider *Cedillo v. Secretary of Health & Human Services*, a case filed in 1998.<sup>204</sup> The special master did not issue a ruling in the case until 2009.<sup>205</sup> Over that 11-year period, the parties developed a record of nearly 8,000 pages, 23 expert reports, and 6 post-hearing briefs totaling 462 pages.<sup>206</sup> As another example, consider *Kolakowski v. Secretary of Health & Human Services*, which also took the special master 11 years to resolve.<sup>207</sup> In that timeframe, the special master held 2 separate trials in 2 separate states.<sup>208</sup> The *Kolakowski* decision denying compensation spans almost 200 pages.

The special masters need to take control of the Vaccine Program. Congress has called for a “re-dedication of all parties to the creation of an expeditious, non-adversarial, and fair system.”<sup>209</sup> The impetus for such change must come from the top down. Claimants understandably fight zealously for their cases, and the government understandably responds in kind. It is not understandable, however, for the special masters to allow the parties to transform the Program into an “adversarial process [that] will serve neither to compensate injured children nor maintain the stability of the immunization programs of the U.S.”<sup>210</sup>

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200. Scott, *supra* note 48, at 362.

201. H.R. REP. NO. 99-908, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6344.

202. Levin, *supra* note 199, at A1 (quoting Rep. Dan Burton).

203. See *supra* notes 107-16 and accompanying text.

204. *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 U.S. Claims LEXIS 146 (Fed. Cl. Feb. 12, 2009).

205. *Id.* at \*42-44.

206. *Id.* at \*46-47.

207. *Kolakowski v. Sec'y of Health & Human Servs.*, 2010 U.S. Claims LEXIS 1035 (Fed. Cl. Nov. 23, 2010). The *Kolakowski* case was filed on August 4, 1999, and decided on November 23, 2010. *Id.* at \*2.

208. *Id.* at \*2-3.

209. H.R. REP. NO. 101-247, at 509 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2235; see also *id.* at 513, 1989 U.S.C.C.A.N. at 2239.

210. *Id.* at 510, 1989 U.S.C.C.A.N. at 2236; see also *id.* at 513, 1989 U.S.C.C.A.N. at 2239 (“The Committee reiterates its concern that [the new amendments to the Act] not be used to re-create an adversarial process before the Special Masters.”).

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In arbitration, it is common for arbitrators to “get swept along” with lawyers who “retreat to tried and true litigation methods.”<sup>211</sup> The same thing is happening in the Program. And just as arbitrators must guard against proceedings becoming unproductively adversarial, so too must special masters use their authority to prevent the parties from morphing the Program into a microcosm of the civil tort system. Such pseudo-litigation has eroded the alternative features of the Program. In 1989, Congress described the adversarial nature of the Program as one of the “most important . . . fundamental problems” with the adjudicatory process.<sup>212</sup> Over the ensuing twenty years, the special masters have idly, meekly, and passively let things get worse.

#### B. Slow Case Resolution Times

As the eleven-year disposition times of *Cedillo* and *Kolakowski* demonstrate, case resolution within the Program is incredibly slow.<sup>213</sup> The Act requires special masters to issue their decisions within 240 days of a petition’s filing,<sup>214</sup> but they meet that deadline in only a small fraction of cases. The Government Accountability Office reports that only 14% of claims are resolved in 1 year or less.<sup>215</sup> A staggering 18% took 5 years or more to process.<sup>216</sup>

Indeed, case resolution in the Program may take *longer* than it would in the traditional court system. Between 2002 and 2007, it took an average of 1,000 days (33.3 months) for special masters to resolve a vaccine petition.<sup>217</sup> That timeframe is *longer* than the average disposition time for all cases filed

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211. Holt, *supra* note 117, at 459.

212. H.R. REP. NO. 101-247, at 509, 1989 U.S.C.C.A.N. at 2235; *see also* JOHNSON, DREW & MILETICH, *supra* note 55, at 44 (reporting that making proceedings “less adversarial and litigious” was the most common suggestion for how to improve the Program in a survey of claimants’ attorneys, government attorneys, and special masters); Scott, *supra* note 48, at 363 (stating that “the biggest problem” with the Vaccine Program is “its adversarial nature that has angered parties on both sides and hindered recovery for injured children”).

213. *Kolakowski*, 2010 U.S. Claims LEXIS 1035; *Cedillo v. Sec’y of Health & Human Servs.*, No. 98-916V, 2009 U.S. Claims LEXIS 146 (Fed. Cl. Feb. 12, 2009).

214. 42 U.S.C. § 300aa-12(d)(3)(A)(ii) (2006).

215. GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 7.

216. *Id.* at 8 fig.1; *see also* Levin, *supra* note 199 (“[C]ases dragging beyond five years have become increasingly common.”).

217. *Advisory Commission on Childhood Vaccines, Meeting and Conference Call Minutes*, Health Resources & Services Admin. (U.S. Dep’t of Health & Human Servs., Wash., D.C.), Mar. 7-8, 2007, at 18, available at <ftp://ftp.hrsa.gov/vaccinecompensation/ACCVMinutesMar7-8-07.pdf>.

in state court (30.2 months) and only slightly shorter than the mean disposition times for medical malpractice (38.4 months) and toxic tort cases (35.8 months).<sup>218</sup> It is also substantially longer than the median length of time that it takes to arbitrate business-to-business cases (7.9 months) and complex international disputes (12 months).<sup>219</sup>

These prolonged case disposition times have many adverse consequences within the Program. Delays usually lead to increased litigation costs, spoliation of evidence, and the disappointment and frustration of those seeking compensation.<sup>220</sup> One of Congress's goals for the Program—and one of the primary advantages of any alternative dispute resolution scheme—is speedy case resolution.<sup>221</sup> Parties in the Program do not enjoy that benefit.

### C. Increasing Fees and Costs

Given the increasingly prolonged and adversarial nature of proceedings in the Program, one would expect that the cost of pursuing a claim has increased over the years.<sup>222</sup> That hypothesis is also suggested because a greater proportion of claimants are pursuing off-Table theories of causation,<sup>223</sup> which require more evidence—and thus more time and effort—to establish than their on-Table counterparts.

Data from the Program confirm this hypothesis. As Chart 1 shows, the average fees and costs awarded in *uncompensated* cases substantially outpaced inflation over the past two decades:

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218. Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 833 fig.1 (2000).

219. Sussman, *supra* note 106, at 21.

220. Heise, *supra* note 218, at 814-15 (discussing how delays impact the civil justice system).

221. See, e.g., Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 12 tbl.2 (2006) (quantifying the ability of mediation, mini-trials, summary jury trials, early neutral case evaluation, arbitration, and adjudication to satisfy a variety of dispute resolution goals); Sussman, *supra* note 106, at 20 (noting that arbitration is often preferable to litigation because arbitration can “provide for a much speedier resolution than can be found in court”).

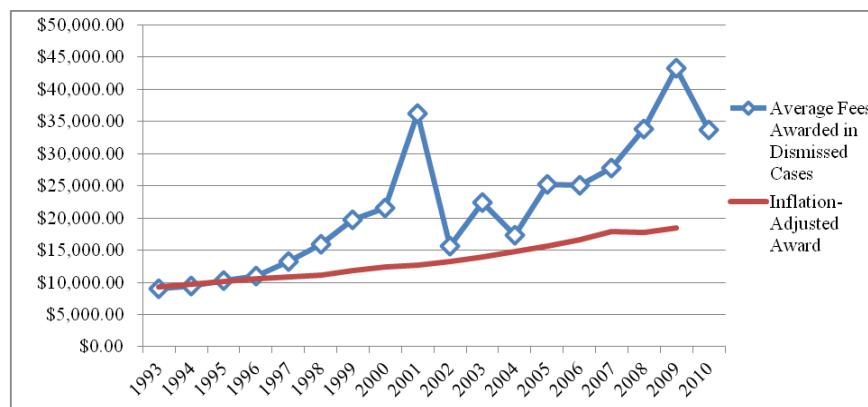
222. Cf. Scott, *supra* note 48, at 362 (“The adversarial nature of the program undoubtedly contributes to the cost and reduces the efficiency of the program . . . ”).

223. See *supra* notes 94-96 and accompanying text.

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**Chart 1: Average Fees and Costs Awarded in Dismissed Cases<sup>224</sup>**



The historical trend of awards in dismissed cases outpacing inflation is particularly pronounced in recent years. In 2002, the average fees and costs awarded was \$15,593; in 2010, that amount more than doubled to \$33,683.<sup>225</sup> These figures prove that modern-day petitioners and their attorneys spend significantly more time and money pursuing uncompensated claims than their predecessors did in the 1990s.<sup>226</sup> Although the data do not reveal exactly where these additional costs are occurring—for example, in proceedings before special masters or appellate courts—they do show that

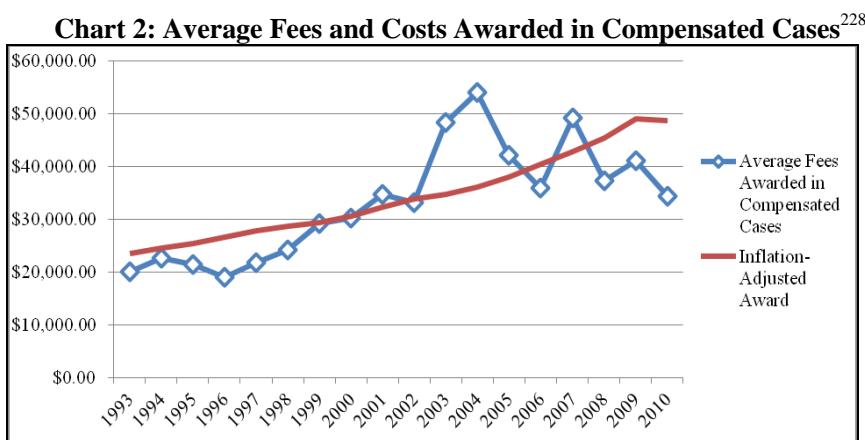
224. The data for the average annual fees and costs awarded are derived from statistics reports released by the U.S. Department of Health and Human Services. See *Statistics Reports*, *supra* note 188, at tbl.3. The average award was calculated by dividing the figure for “Attorneys’ Fees/Costs Payments” by the figure for “Number of Payments to Attorneys.” The inflation-adjusted data are calculated by increasing the average award in 1993 by the annual rate of inflation as derived from the Consumer Price Index released by the Bureau of Labor Statistics. See *Consumer Price Index*, BUREAU LAB. STAT. (U.S. Dep’t of Labor, Wash., D.C.), Feb. 17, 2012, <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt>.

225. See *Statistics Reports*, *supra* note 188, at tbl.3; *supra* note 224 and accompanying text.

226. See *Statistics Reports*, *supra* note 188, at tbl.3; *supra* note 224 and accompanying text.

claimants and their attorneys are fighting harder than ever to obtain compensation in the Program.<sup>227</sup>

One might expect that if claimants have been spending more money pursuing *uncompensated* cases, they likely have been spending more money pursuing *compensated* cases. But that is not the case. Perhaps surprisingly, the average amount of fees and costs awarded in compensated cases has not outpaced inflation over the past eighteen years:



One potential explanation for the different growth rates of awards in uncompensated and compensated cases is that, because longer dispositions cost more than shorter dispositions, unmeritorious claims take longer to resolve than meritorious claims. Thus, one might expect that uncompensated claims take longer to resolve because petitioners more frequently appeal uncompensated cases than the government appeals compensated cases. In other words, claimants spend the same amount of time and money in proceedings before special masters, but, unlike the government, claimants continue to fight adverse special master decisions on appeal, thereby extending the case disposition time and incurring additional costs in uncompensated cases that they do not incur in compensated cases.

This explanation makes sense when one considers the fact that the Act's current structure requires the government to be more selective than claimants when deciding which cases to appeal because the government

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227. See *Statistics Reports*, *supra* note 188, at tbl.3; *supra* note 224 and accompanying text.

228. See *Statistics Reports*, *supra* note 188, at tbl.3 (using data for compensated cases); *supra* note 224 and accompanying text.

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pays its own way for appealing a case.<sup>229</sup> But because of the Vaccine Act's structural moral hazard, claimants do not pay their own way and do not similarly evaluate the costs and risks of appealing an adverse decision.<sup>230</sup> So as Program proceedings become more adversarial, claimants and their attorneys are racking up larger bills in uncompensated cases, unconcerned with spending money to fight their cases on appeal.<sup>231</sup> The government does not have that luxury, and usually stops fighting a case after the special master awards compensation, thus keeping costs in compensated cases relatively stable and substantially lower than costs in uncompensated cases.<sup>232</sup>

#### *D. Lopsided Appellate Filings*

Other data indicate that this explanation is correct. Between 1995 and 2011, the Federal Circuit decided seventy-five Vaccine Act cases.<sup>233</sup> The claimants filed seventy (ninety-three percent) of those appeals.<sup>234</sup> Such disparity between the claimants' and government's proclivity to appeal continues even after the Federal Circuit enters judgment. After the circuit court decided those seventy-five cases, claimants moved for a rehearing or a rehearing en banc twelve times and filed thirteen petitions for certiorari.<sup>235</sup> The Secretary moved for a rehearing only three times and never filed a petition for certiorari.<sup>236</sup>

These party differences stand in stark contrast to traditional tort litigation where plaintiffs and defendants file appeals at roughly the same rate.<sup>237</sup> Admittedly, some disparity normally exists when the United States

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229. See *What You Need to Know About the National Vaccine Injury Compensation Program (VICP)*, HEALTH RESOURCES & SERVICES ADMIN. (U.S. Dep't of Health & Human Servs., Wash., D.C.), Feb. 2006, at 5, available at [ftp://ftp.hrsa.gov/vaccinecompensation/84521\\_Booklet.pdf](ftp://ftp.hrsa.gov/vaccinecompensation/84521_Booklet.pdf) (explaining that the Vaccine Program pays legal costs regardless of whether a claimant prevails if the claimant meets certain requirements).

230. See *supra* Part III.C.

231. See *supra* notes 187-89, 224-27 and accompanying text.

232. See *infra* notes 234-37 and accompanying text.

233. See *infra* Appendix.

234. See *infra* Appendix; cf. JOHNSON, DREW & MILETICH, *supra* note 55, at 23 (reporting that claimants filed 81% of the appeals filed in the U.S. Court of Federal Claims between 1990 and 1997).

235. See *infra* Appendix.

236. See *infra* Appendix.

237. See Thomas H. Cohen, *Appeals from General Civil Trials in 46 Large Counties, 2001-2005*, BUREAU JUST. STAT. (U.S. Dep't of Justice, Wash., D.C.), June 2006, at 4 & tbl.2, available

is a party because the federal government is a more cautious and calculated litigant than private parties.<sup>238</sup> But that fact alone cannot account for such lopsided numbers in the Vaccine Program. Here again, moral hazard best explains the data: the government must carefully evaluate whether to risk its limited resources filing an appeal,<sup>239</sup> but claimants are free from such burdens and are instead perversely incentivized to continue fighting their unsuccessful claims for as long as possible.<sup>240</sup>

## VI. SOLUTIONS

### A. Add Injuries to the Vaccine Table

As described above, when the Secretary added new vaccines to the Table without listing corresponding injuries, the percentage of off-Table cases in the Program changed from ten to ninety percent.<sup>241</sup> Most cases now involve complex theories of medical causation that require more evidence, more time, and more money to resolve than on-Table claims.<sup>242</sup> Indeed, “much of the slowdown in petition processing is attributed to delays granted to petitioners who need more time to build a case, which includes performing medical tests, determining the developmental needs of the child, and hiring expert witnesses.”<sup>243</sup> Those reasons for delay are not present when claimants can establish a *prima facie* case simply by showing they suffered an injury listed on the Table.<sup>244</sup>

Presumably, then, the trend will reverse if the Secretary adds new injuries to the Table: the number of off-Table cases will decrease and claimants will devote less time and money to establishing causation. And as the Table’s streamlining presumptions perform the “heavy lifting” for

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at <http://bjjs.ojp.usdoj.gov/content/pub/pdf/agctlc05.pdf> (“Among tort trials appealed, plaintiffs (53%) were slightly more likely to be appellants than defendants (47%).”).

238. Paul D. Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 Hous. L. Rev. 1101, 1102 (1974); see also Cohen, *supra* note 237, at 3 tbl.4.

239. Cf. Carrington, *supra* note 238, at 1102 (“[A]lmost without exception, the Justice Department appears to approach the decisions [of whether to appeal a case] as rational ones, to be made on the basis of careful analysis of the principles likely to control the outcome, with due regard for judicial sentiments likely to be evoked by the particular circumstances in dispute.”).

240. See *supra* Part III.

241. See *supra* note 95 and accompanying text.

242. Cf. Miller, *supra* note 130, at 262-64.

243. *Id.* at 262-63.

244. See *Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1274, 1290 (Fed. Cir. 2005) (stating that “the purpose of the Vaccine Act’s preponderance standard is to allow the finding of causation”).

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claimants,<sup>245</sup> the parties will have fewer incentives to litigate whether sufficient proof of causation exists. Proceedings in the Program, therefore, will become more expeditious and less contentious.

But the government should be careful before adding new injuries to the Table and memorializing in it a causal relationship between vaccines and harm. Forcing the Secretary to add new injuries to the Table could undermine the public's confidence in the safety of vaccines. One might argue, for example, that the Secretary has not added new injuries to the Table because no such injuries exist—that is, the Table already contains all adverse reactions that the scientific community recognizes as causally related to vaccines. Thus, the Secretary did not—and should not—add new presumptive injuries to the Table because doing so would inject junk science onto the Table and into the adjudicatory process. Put another way, neither the Secretary nor Congress should overstate the dangerousness of vaccines by including injuries on the Table that do not derive from reliable scientific evidence. Otherwise, the government could spark unwarranted public fear, which could lead to distrust of vaccines, decreased vaccination rates, and increased incidences of preventable diseases.<sup>246</sup>

This argument against amending the Table is persuasive, but it does not apply in those circumstances where the government has *already* concluded that vaccines cause injuries not listed on the Table; in those circumstances, any adverse public health consequences have already passed. In 1994, for example, the Institute of Medicine (IOM) found that “evidence favors acceptance of a causal relationship between . . . tetanus toxoids and Guillain-Barré syndrome,”<sup>247</sup> yet the Secretary consistently declines to add that

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245. Hodges v. Sec'y of Health & Human Servs., 9 F.3d 958, 961 (Fed. Cir. 1993).

246. Justice Breyer made a similar point when discussing the need for scientific accuracy in toxic substance cases:

[A] decision wrongly granting compensation, while of immediate benefit to the plaintiff worker, can . . . improperly force abandonment of the substance. This, if the decision is wrong, will improperly deprive the public of what can be far more important benefits—say those surrounding a drug that cures many while subjecting to less serious risk a few.

Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 25 (1998); see also Boxler, *supra* note 115, at 1328-34 (discussing the need for “accurate science-based jurisprudence” because “[a]ny legal decision involving an alleged vaccine injury has the potential to produce significant—and adverse—public health consequences”).

247. INST. OF MED., ADVERSE EVENTS ASSOCIATED WITH CHILDHOOD VACCINES: EVIDENCE BEARING ON CAUSALITY 16 (Kathleen R. Stratton, Cynthia J. Howe & Richard B. Johnston, Jr. eds., 1994). Guillain-Barré syndrome, also known as acute inflammatory demyelinating polyneuritis or

condition to the Table.<sup>248</sup> According to the Secretary, the refusal is “based to some extent on the level of risk in compensating an inordinate number of non-vaccine-related cases for the extremely rare vaccine-related case.”<sup>249</sup> In other words, the Secretary has not added Guillain-Barré syndrome to the Table because doing so might overcompensate claimants.

That result, however, is precisely what Congress intended for the Program.<sup>250</sup> “Congress designed the Vaccine Table Injury to be overinclusive . . . [and] recognized that some children whose injuries were not vaccine-related would recover through the Table’s presumption.”<sup>251</sup> One of the Table’s primary functions is to ensure that special masters resolve close cases in favor of petitioners.<sup>252</sup> That generosity inevitably means that some non-vaccine-related claims will benefit from the Table’s presumptions.<sup>253</sup> Congress intentionally sacrificed accuracy to accomplish efficiency, tilting the legal balance slightly in favor of claimants in an effort to achieve a streamlined case-resolution process.<sup>254</sup> By not amending the Table, the Secretary has moved the fulcrum.<sup>255</sup> The balance now favors contentiousness and formality instead of expediency and informality.<sup>256</sup> That shift is not only improper for injuries the government’s own scientists conclude are causally related to vaccines, it is also inconsistent with the alternative nature the Program.<sup>257</sup>

The Secretary should therefore adopt—or Congress should legislate—a *per se* rule that amends the Table when the Institute of Medicine acknowledges a causal link between an injury and a vaccine listed on the Table.<sup>258</sup> This rule would remove governmentally recognized harms from the litigious off-Table adjudicatory process and leave undisturbed the Secretary’s discretion to add other injuries to the Table for various scientific or policy reasons.<sup>259</sup>

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postinfectious neuritis, “is characterized by the rapid onset of flaccid motor weakness with depression of tendon reflexes and inflammatory demyelination of peripheral nerves.” *Id.* at 34.

248. See GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 15.

249. *Id.*

250. See *supra* notes 79-84 and accompanying text.

251. Shifflett v. Sec’y of Health & Human Servs., 30 Fed. Cl. 341, 345 (1994).

252. See *supra* note 82 and accompanying text.

253. See *Are Reforms Needed?*, *supra* note 82, at 10.

254. See GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 13.

255. See *Are Reforms Needed?*, *supra* note 82, at 10.

256. See *id.*

257. See GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 32.

258. Cf. Grey, *Plague of Causation*, *supra* note 89, at 408 (calling for the expanded use of educated scientific bodies like the IOM “to provide sufficient scientific input on causation” within the Vaccine Program).

259. See GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 5.

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This per se rule would also leave undisturbed the Secretary's ability to challenge petitions that are truly "non-vaccine related cases."<sup>260</sup> Even if claimants meet their *prima facie* burden by demonstrating that they suffered an on-Table injury, the government may nonetheless challenge compensation if it concludes that the Table has helped the claimant too much.<sup>261</sup> The Act expressly provides that special masters should deny compensation if the Secretary proves that an on-Table injury is "due to factors unrelated to the administration of the vaccine."<sup>262</sup>

Finally, the Secretary should periodically review Vaccine Act case law to learn what types of off-Table claims special masters are compensating.<sup>263</sup> If, for example, special masters are routinely siding with claimants alleging a particular type of injury not listed on the Table, then the Secretary should consider that tide of jurisprudence as strong evidence that a sufficiently *legal*—not necessarily *medical*—causal relationship exists for the injury to be included on the Table.<sup>264</sup> Or, at the very least, the government should settle those cases instead of contentiously putting claimants to their burden.<sup>265</sup> Indeed, many special masters routinely compensate cases alleging a causal relationship between the tetanus vaccine and Guillain-Barré syndrome,<sup>266</sup> which further dictates that the Secretary should add that injury to the Table.<sup>267</sup>

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260. *Id.* at 17.

261. *See id.* at 21.

262. 42 U.S.C. § 300aa-13(a)(1)(B) (2006); *see also* Knudsen *ex rel.* Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 547 (Fed. Cir. 1994).

263. See Whitney S. Waldenberg & Sarah E. Wallace, *When Science Is Silent: Examining Compensation of Vaccine-Related Injuries when Scientific Evidence of Causation Is Inconclusive*, 42 WAKE FOREST L. REV. 303, 322 (2007).

264. For example, only six percent of claims alleging certain demyelinating disorders from hepatitis B vaccine were compensated between 1995 and 2000, but since that time, over eighty percent of such claims have been compensated, which suggests that current special masters presume entitlement to compensation for those injuries. *See id.* at 321-22.

265. *See id.* at 305.

266. *Id.* at 314 n.83 (listing cases).

267. Several other special master decisions have accepted a causal relationship between Guillain-Barré syndrome and the hepatitis B, polio, and diphtheria-pertussis-tetanus vaccines, yet the Table does not list the condition as an adverse affect for any of the vaccines. *See id.*

## B. Eliminate the Moral Hazard

### 1. Restructuring Appellate Procedures

The perverse incentives described in Part III.C derive from the intersection of the Act's multiple levels of appellate review and its fee-shifting provision.<sup>268</sup> Both aspects of the statute are thus possible targets for reform to mitigate or eliminate the moral hazard that exists in the Program.<sup>269</sup>

To change the Act's appellate process, Congress could restrict the number of appeals available to a losing party. It could, for example, make special master decisions unreviewable. But that reform creates the obvious problems of unchecked partiality, corruption, and misconduct. Another option is to make the U.S. Court of Federal Claims the only level of appeal. That change would at least limit the length of the appellate review process, thereby reducing the costs and time spent appealing special master decisions.

Congress could also change the appellate process by heightening the standard of review applied to special master decisions, making it less likely that a losing party will prevail on appeal and (theoretically) dissuading petitions for review. The Federal Arbitration Act (FAA),<sup>270</sup> for example, encourages finality of arbitrator decisions by permitting judges to reverse a decision for only the most egregious errors, such as evident partiality, fraud, or corruption.<sup>271</sup> Echoing what Congress and the Federal Circuit have said about the finality and deference afforded to special master decisions,<sup>272</sup> many courts interpreting the FAA emphasize that judicial review of an arbitrator's judgment is so "exceedingly narrow"<sup>273</sup> that "perhaps it ought not be called 'review' at all."<sup>274</sup>

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268. See Baker, *supra* note 171, at 238.

269. *Id.*

270. 9 U.S.C. §§ 1-14 (2006).

271. *Id.* § 10(a).

272. See *supra* notes 128-30 and accompanying text.

273. Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673, 675 (3d Cir. 1982).

274. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994); see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("[C]ourts play only a limited role when asked to review the decision of an arbitrator."); Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277, 295-96 (3d Cir. 2010); Equitable Res., Inc. v. United Steel, Local 8-512, 621 F.3d 538, 545 (6th Cir. 2010) ("We must affirm the arbitrator's decision even if we believe that the arbitrator made serious, improvident or silly errors in resolving the merits of the dispute, which allows us to vacate only the most egregious arbitral awards." (citations and quotation omitted)); World Bus. Paradise, Inc. v. SunTrust Bank, No. 10-13119, 2010 U.S. App. LEXIS 24254, at \*2-3 (11th Cir. Nov. 23, 2010) ("The FAA presumes that arbitration awards will be

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The deference the FAA affords to arbitrator decisions is particularly appropriate because it would undermine the federal policy of encouraging arbitration if courts ultimately resolved the merits of arbitrated cases.<sup>275</sup> In other words, expanded judicial review of arbitral awards would “create hybrid, two-step procedures that waste public and private resources and are inconsistent with the FAA . . . goals and functions.”<sup>276</sup>

So too with the Vaccine Program. Its current structure undermines Congress’s goal of establishing a viable alternative to litigation because claimants can easily bypass a special master’s decision and ask an Article III judge to decide the case.<sup>277</sup> The Program’s institutional function is similarly destabilized. Instead of providing a generous, swift, and nonadversarial route to compensation, those injured by vaccines must instead suffer through years of a costly, uncertain, and contentious appellate review process.<sup>278</sup>

These two reforms—limiting the number of appeals and heightening the standard of review—would reduce the amount of resources spent challenging a special master decision. Yet they both fail to address the Program’s underlying structural moral hazard. Neither reform addresses the perverse incentives for claimants to enter the appellate process in the first place.<sup>279</sup>

The problem with the Program is not simply the *number* of courts that review special master decisions; appellate courts serve important functions like protecting rights and unifying the law. Nor is the problem with the *standard* that courts apply when conducting their review; the current abuse

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confirmed, and federal courts should defer to an arbitrator’s decision whenever possible.” (quotation and citation omitted)). *But cf.* Michael H. Leroy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 139 (2011) (suggesting that many federal courts of appeals actually deviate from arbitral finality and “overturn a high percentage” of certain arbitration awards).

275. *Misco*, 484 U.S. at 36.

276. Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 181-82 (2002); *see also* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003) (“Broad judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”); Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. 1013, 1014 (2010) (commenting that, if review of arbitrator awards is not limited, “the benefits of arbitration in terms of speed, cost, and finality may be lost because the parties will frequently appeal arbitral awards to the courts”).

277. Jessen v. Sec’y of Health & Human Servs., No. 94-1029V, 1997 U.S. Claims LEXIS 20, at \*16-17 (Fed. Cl. Jan. 17, 1997) (noting “the Program goal of keeping cases *out* of the tort system”).

278. *Id.* at \*21.

279. *See* Baker, *supra* note 171, at 238-39.

of discretion standard means that special master decisions are already “virtually unchallengeable on appeal.”<sup>280</sup> These two reforms are band aids, not cures. They merely contain the damage caused by the Act’s structural flaw; they do not heal the underlying ailment.

## 2. Amend Section 15(e)

The proper way to remedy the Act’s structural moral hazard is by mitigating the incentives that claimants have to file an appeal. Congress must shift some of the risks and costs of appealing a case onto claimants and their attorneys. Those transfers would reduce moral hazard by forcing claimants to absorb some of the pecuniary risk associated with seeking review of a special master decision denying compensation.

The law, however, should not move to the other extreme and require claimants to fund their own cases entirely. The Program must remain accessible to all people suffering from vaccine injuries. Any amendment to the Act must ensure that cost considerations do not prevent victims from entering the Program.

The same is true of claimants’ access to the appellate courts. If a special master decision was erroneous, then claimants should be able to obtain relief without bearing the burden of funding an appeal. Claimants should not be “trapped” by an adverse special master decision, which could cause dissatisfaction within the Program and lead to manifest injustice.<sup>281</sup> Any statutory remedy, therefore, must protect the right of claimants to challenge special master decisions while simultaneously eliminating the moral hazard that permits claimants to appeal without incurring any risk of loss.

To strike this balance, the Program could reimburse claimants for the fees and costs of pursuing an appeal only if the appeal is successful. This reform would essentially adopt a unilateral “loser-pays” policy.<sup>282</sup> When claimants lose an appeal, they pay their own expenses; when they win, the government reimburses their costs.

A pure “loser-pays” policy goes too far, however, because if indigent claimants have a legitimate challenge to a special master’s ruling, their willingness to pursue that argument should not be contingent upon their

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280. *Lampe v. Sec’y of Health & Human Servs.*, 219 F.3d 1357, 1362 (Fed. Cir. 2000).

281. Cf. *Ginsburg*, *supra* note 276, at 1014 (noting that, if review of arbitrator awards is too limited, “arbitrators might deliver poor-quality decisions that undermine the attractiveness of arbitration as a whole”).

282. For a comparison of the “American rule” cost regime, in which parties bear their own expenses irrespective of the outcome, and the “loser-pays rule,” in which losers compensate winners for their costs, see Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 791-95 (2011).

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attorney's ability to forecast success. Even the best attorneys and brightest scholars cannot always accurately predict what an appellate court will decide,<sup>283</sup> and very few (if any) special master decisions are *certain* to be overturned on appeal.<sup>284</sup> Nor is appellate review necessarily a bad thing. A decision from the Federal Circuit can resolve discrepancies in the law, even if doing so involves sustaining a decision denying compensation. The Vaccine Act should encourage some level of appellate activity.

A better rule is to make claimants bear some—but not all—of the financial risk of seeking review of an adverse special master decision. For example, the Act could establish a cap on the amount of fees available for conducting an appeal, which claimants could receive regardless of the ultimate case disposition. A cap, however, is an inflexible and arbitrary solution that could not respond to legitimate cost discrepancies for variations of attorney skill, experience, or preparation.<sup>285</sup> Nor could it provide extra payment for unusually burdensome representation in a particularly complex case. And caps always present the “unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee.”<sup>286</sup>

The best solution, therefore, is to amend the Vaccine Act to reimburse claimants for only *half* of the fees and costs expended when they pursue an ultimately *unsuccessful* appeal. This rule would not apply to cases in which the government seeks review of a special master decision—all fees and costs incurred while defending a decision awarding compensation would be reimbursable. This rule would also leave unchanged the fee-shifting rules for proceedings before special masters. Thus, the amended Act would not prevent any indigents from filing a petition for compensation in the Program and asking a special master to pass on its merits.

To effect this change, Congress should add the following language to section 15(e) of the Vaccine Act:

This subsection applies only to proceedings conducted before a special master. If the special master denies compensation, petitioners shall pay half of their own reasonably

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283. See generally Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009) (discussing why judicial decisionmaking is such a difficult object of empirical investigation and scholarly inquiry).

284. See *supra* notes 122-31 and accompanying text.

285. See American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 987-88 (2003).

286. *Id.* at 988.

expended fees and costs for all subsequent appeals *unless* the final reviewing court reverses the special master's decision. If the special master or any reviewing court awards compensation to a petitioner and the Secretary seeks review of that decision, this subsection shall apply.

This amendment shifts to claimants and their attorneys some financial burden of seeking review of a special master decision denying compensation. If the claimant ultimately prevails on appeal, however, all fees and costs incurred in *any* proceeding on the case—including appeals—are reimbursable. If the claimant ultimately loses, then any fees and costs incurred before a special master, and half of the fees and costs incurred on appeal, are reimbursable.

### C. Potential Objections

My proposed amendment to section 15(e) is subject to at least three criticisms. First, that it will encourage attorney misconduct; second, that it will backfire and actually increase the contentiousness of Program proceedings; and third, that shifting any costs onto claimants will disadvantage people who lack the resources to afford an attorney. This subsection discusses and rebuts each counterargument.

#### 1. This Will Encourage Excessive Billing

One might argue that amending the Act's fee-shifting provision to reimburse only half of the fees and costs incurred on appeal would create another type of perverse incentive: encouraging attorneys to bill unnecessary hours to guard against the possibility of "losing" half of their fees on an unsuccessful appeal. Put another way, counsel will hedge their bets and bill more hours than reasonably necessary to provide effective representation.

The proposed amendment, however, would leave unchanged an important safeguard against this potential attorney misconduct: section 15(e)(1)(A), which provides that special masters may award only "reasonable" attorneys' fees and costs.<sup>287</sup> A court scrutinizing an attorney's request for payment could thus reduce the award if it finds that the attorney billed excessive hours or incurred unnecessary costs. Special masters frequently reduce attorney requests for reimbursement for those exact reasons.<sup>288</sup> And of course, rules regulating professional conduct would

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287. 42 U.S.C. § 300aa-15(e)(1)(A) (2006) (emphasis added).

288. See, e.g., Doe v. Sec'y of Health & Human Servs., 2010 U.S. Claims LEXIS 47, at \*27-28 (Fed. Cl. Jan. 29, 2010) (awarding attorneys' fees for only 22.7 hours of the requested 77.8 hours spent producing a post-hearing brief that was "25 pages in length, more than half of which (specifically, thirteen pages) are block quotes taken directly from the transcript"); Stone v. Sec'y of

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remain in effect to deter and punish any particularly egregious attorney misbehavior.

## 2. This Could Backfire

Another counterargument is that, by decreasing claimants' incentives to appeal an adverse decision, the initial case disposition would become excessively important. Claimants will thus dedicate even more resources to obtain a beneficial special master decision, recognizing that they may have to fund part of the cost of appealing an adverse decision. And by injecting more resources into the proceedings before special masters, the parties will inevitably seek more discovery, file more motions, and present more expert testimony. In other words, my proposed amendment could backfire by making Program proceedings look even more like civil litigation.

This counterargument fails because it turns the programmatic benefit of finality on its head. Yes, the importance of special master decisions will increase because the amendment enhances the finality of their judgments. And yes, the amendment encourages claimants to put on their best evidence and make their strongest arguments as soon as possible. But that is the point, not the problem. The principal goal of amending the Act is to restore the Program's integrity as an *alternative* dispute resolution forum, which means increasing the importance and finality of judgments issued by that forum. Claimants undermine those goals when they circumvent the Program, advance their strongest arguments on appeal, and ask the Federal Circuit to resolve their case. If my proposed amendment transforms special masters into the final arbiter of vaccine injury claims, it will be a success, not a failure.

Regardless, it is unlikely that claimants will respond to the amendment by spending more time and money proving their cases to special masters. The standard of review applied to Program decisions is already very stringent,<sup>289</sup> and counsel within the Program certainly know that it is difficult

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Health & Human Servs., No. 04-1041V, 2010 U.S. Claims LEXIS 753 at \*2, \*32 (Fed. Cl. Sept. 8, 2010) (awarding \$131,614.84 for attorneys' fees and costs despite petitioners request for \$157,873.86); Masias v. Sec'y of Health & Human Servs., 2010 U.S. Claims LEXIS 209, at \*2 (Fed. Cl. Apr. 14, 2010) (denying petitioner's request for \$59,072.50 in fees and awarding \$25,851.40 because petitioner "sought compensation for his attorney at an unreasonably high hourly rate"); Mueller v. Sec'y of Health & Human Servs., No. 06-775V, 2010 U.S. Claims LEXIS 403, at \*17 (Fed. Cl. May 27, 2010) (reducing the amount of compensable attorney time by 52.8 hours because the amount requested was "excessive").

289. See *supra* notes 123-26 and accompanying text.

to convince the U.S. Court of Federal Claims and the Federal Circuit to reverse special master decisions.<sup>290</sup> Claimants are thus probably not withholding effort at the first stage of case adjudication. The potential for increased resource expenditures during proceedings before special masters is minimal, at most.

### 3. This Will Hurt Indigent Claimants

The final objection to my proposed amendment is that shifting some financial risk of filing an appeal back onto claimants would hurt indigent petitioners and undermine Congress's goal of ensuring that all people have access to legal counsel in the Program.<sup>291</sup>

Eliminating the perverse incentives for claimants to seek *appellate* review, however, does not affect their ability to *enter* the Program in the first place. Nor does it restrict the quality of legal representation that claimants receive during the *initial* adjudicatory process because all fees and costs incurred before special masters will remain reimbursable regardless of what the special master decides. Plus, if a special master commits reversible error, the amended section 15(e) does not transfer to claimants the costs of remedying that error because the Program will still compensate fees incurred during a successful appeal.<sup>292</sup>

It is also important to remember that even if the Act is amended as I propose here, the Program will remain a more claimant-friendly forum than the civil tort system where plaintiffs almost always pay their own attorneys' fees and costs, even if they prevail.<sup>293</sup>

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290. See Little, *supra* note 113, at 363-64 (explaining that, because the Act requires "the Court of Federal Claims to review [special master] decisions with substantial deference, the Federal Circuit is unlikely to provide compensation if the lower courts deny it").

291. See *supra* note 134.

292. See Hines v. Sec'y of Health & Human Servs., 26 Cl. Ct. 114 (1992) (holding that the special master had the authority to award attorneys' fees and costs that were incurred while making an appeal to the Court of Appeals for the Federal Circuit).

293. See Franck, *supra* note 282, at 792 (discussing the "American rule" for litigation-related fees and costs); see also Jeff Holth, Comment, *Civil Procedure: I Win, You Pay: Considerations of Efficiency and Fairness in Minnesota Appellate Litigation of Attorney's Fees*—T.A. Schifsky & Sons, Inc. v. Bahr Construction, LLC, 37 WM. MITCHELL L. REV. 267, 272-73 (2011). The Vaccine Act's claimant-friendly, fee-shifting regime partially explains why claimants rarely leave the Program and file traditional civil actions, which the Act permits after claimants have been in the Program for 420 days. See *supra* note 63; cf. GAO, VACCINE INJURY COMPENSATION, *supra* note 82, at 11 (reporting that no claimant had withdrawn a claim from the Program and filed suit in civil court).

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## VII. CONCLUSION

The Vaccine Act is structurally flawed. By providing claimants with nearly unlimited sums of money to appeal adverse special master decisions, the Program invites litigious posturing and tempts unsuccessful claimants to continue fighting in the appellate courts. These perverse incentives undermine the Program's function as an effective alternative forum for resolving disputes involving claims of vaccine injury.

When Congress passed the Vaccine Act in 1986, it made a commitment to people who assume the risk of vaccination: if you suffer an adverse reaction, the law will provide an informal adjudicatory process for you to obtain compensation "quickly, easily, and with certainty and generosity."<sup>294</sup> The government is not upholding its end of that social compact. Over the past twenty-five years, case dispositions in the Program have become increasingly slow, costly, and adversarial. Instead of being an effective alternative adjudicatory forum, the Program has morphed into a mere precursor to civil litigation in the federal courts—the very dispute resolution process that Congress wanted to replace.

The easiest way to restore some of the Program's integrity as a functional alternative to litigation is for special masters to prohibit parties from using tactics and adopting postures that are antithetical to quick, informal, and streamlined dispute resolution. Another easy fix is for the Secretary of Health and Human Services to add new injuries to the Vaccine Table, thereby moving additional claims onto a less contentious path to compensation. The best solution, however, is for Congress to reform the "free appeals" structure of the Program. By eliminating that source of moral hazard, and by requiring claimants to evaluate the pecuniary risks of appealing an adverse special master decision, proceedings in the Program will become more final, more legitimate, and more efficient. In other words, the Vaccine Program will begin to fulfill its purpose in the social compact.

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294. H.R. REP. NO. 99-908, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6344.

**APPENDIX: VACCINE PROGRAM CASES DECIDED BY THE U.S. COURT OF  
APPEALS FOR THE FEDERAL CIRCUIT, 1995-2011**

Case Name	Appellant	Decision	Victor	Motion for Reh'g?	Cert. Filed?
Porter v. Sec'y of Health & Human Servs., 663 F.3d 1242 (Fed. Cir. 2011).	Governme nt	Reversed and Remanded	Government	no	no
Rickett v. Sec'y of Health & Human Servs., No. 2011-5038, 2011 U.S. App. LEXIS 23126 (Fed. Cir. Nov. 18, 2011).	Claimant	Affirmed	Government	no	no
Lombardi v. Sec'y of Health & Human Servs., No. 2011-5004, 2011 U.S. App. LEXIS 18488 (Fed. Cir. Sept. 6, 2011).	Claimant	Affirmed	Government	no	no
Cloer v. Sec'y of Health & Human Servs., No. 2009-5052, 2011 U.S. App. LEXIS 16449	Claimant	Affirmed	Government	no	no

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(Fed. Cir. Aug. 5, 2011).					
Hall v. Sec'y of Health & Human Servs., 640 F.3d 1351 (Fed. Cir. 2011).	Claimant	Affirmed	Government	no	yes
McCollum v. Sec'y of Health & Human Servs., 412 F. App'x 302 (Fed. Cir. 2011).	Claimant	Affirmed	Government	no	no
Masias v. Sec'y of Health & Human Servs., 634 F.3d 1283 (Fed. Cir. 2011).	Claimant	Affirmed	Government	no	no
Davis v. Sec'y of Health & Human Servs., 409 F. App'x 342 (Fed. Cir. 2011).	Claimant	Affirmed	Government	no	no
Rodriguez v. Sec'y of Health & Human Servs., 632 F.3d 1381 (Fed. Cir. 2011).	Claimant	Affirmed	Government	yes	yes
Riggins v. Sec'y of Health & Human Servs.,	Claimant	Affirmed	Government	no	no

No. 2010-5078, 2011 U.S. App. LEXIS 162 (Fed. Cir. Jan. 4, 2011).					
Broekelschen v. Sec'y of Health & Human Servs., 618 F.3d 1339 (Fed. Cir. 2010).	Claimant	Affirmed	Government	yes	no
Cedillo v. Sec'y of Health & Human Servs., 617 F.3d 1328 (Fed. Cir. 2010).	Claimant	Affirmed	Government	no	no
Shaw v. Sec'y of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010).	Claimant	Reversed	Claimant	no	no
Hazlehurst v. Sec'y of Health & Human Servs., 604 F.3d 1343 (Fed. Cir. 2010).	Claimant	Affirmed	Government	no	no
Cloer v. Sec'y of Health & Human Servs., 603 F.3d 1341 (Fed. Cir. 2010).	Claimant	Reversed	Claimant	yes	no
Doe v. Sec'y of Health & Human Servs.,	Claimant	Affirmed	Government	no	yes

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601 F.3d 1349 (Fed. Cir. 2010).					
Wilkerson v. Sec'y of Health & Human Servs., 593 F.3d 1343 (Fed. Cir. 2010).	Claimant	Affirmed	Government	no	no
Moberly ex rel. Moberly v. Sec'y of Health & Human Servs., 592 F.3d 1315 (Fed. Cir. 2010).	Claimant	Affirmed	Government	yes	no
Andreu ex rel. Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367 (Fed. Cir. 2009).	Claimant	Reversed	Claimant	no	no
De Bazan v. Sec'y of Health & Human Servs., 539 F.3d 1347 (Fed. Cir. 2008).	Government	Reversed	Government	yes	no
Mojica v. Sec'y of Health & Human Servs., 287 F. App'x 103 (Fed. Cir.	Claimant	Affirmed	Government	yes	yes

2008).					
Zatuchni v. Sec'y of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008).	Government	Affirmed	Claimant	no	no
Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008).	Claimant	Affirmed in Part and Reversed in Part	Split (Mostly Gov't)	yes	no
Marks v. Sec'y of Health & Human Servs., 268 F. App'x 913 (Fed. Cir. 2007).	Claimant	Affirmed	Government	yes	yes
Walther v. Sec'y of Health & Human Servs., 485 F.3d 1146 (Fed. Cir. 2007).	Claimant	Reversed	Claimant	no	no
Markovich v. Sec'y of Health & Human Servs., 477 F.3d 1353 (Fed. Cir. 2007).	Claimant	Affirmed	Government	no	yes
Wiley v. Sec'y of Health & Human Servs., 211 F. App'x 960 (Fed. Cir. 2007).	Claimant	Affirmed	Government	no	no

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Aull v. Sec'y of Health & Human Servs., 462 F.3d 1338 (Fed. Cir. 2006).	Claimant	Affirmed	Government	no	no
Pafford v. Sec'y of Health & Human Servs., 451 F.3d 1352 (Fed. Cir. 2006).	Claimant	Affirmed	Government	yes	yes
Capizzano v. Sec'y of Health & Human Servs., 440 F.3d 1317 (Fed. Cir. 2006).	Claimant	Reversed	Claimant	no	no
Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274 (Fed. Cir. 2005).	Governme nt	Affirmed	Claimant	no	no
Baker v. Sec'y of Health & Human Servs., 112 F. App'x 35 (Fed. Cir. 2004).	Claimant	Affirmed	Government	no	no
Guillory v. Sec'y of Health & Human Servs., 104 F. App'x 712 (Fed. Cir.	Claimant	Affirmed	Government	no	no

2004).					
Mahaffey v. Sec'y of Health & Human Servs., 368 F.3d 1378 (Fed. Cir. 2004).	Claimant	Affirmed	Government	no	no
Brice v. Sec'y of Health & Human Servs., 358 F.3d 865 (Fed. Cir. 2004).	Claimant	Affirmed	Government	no	no
Hebern v. Sec'y of Health & Human Servs., 81 F. App'x 333 (Fed. Cir. 2003).	Claimant	Affirmed	Government	no	no
Hulbert v. Sec'y of Health & Human Servs., 35 F. App'x 899 (Fed. Cir. 2002).	Claimant	Affirmed	Government	no	no
Turner v. Sec'y of Health & Human Servs., 268 F.3d 1334 (Fed. Cir. 2001).	Claimant	Affirmed	Government	no	no
Helms v. Sec'y of Health & Human Servs., 10 F. App'x	Claimant	Affirmed	Government	yes	no

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934 (Fed. Cir. 2001).					
Chapman v. Sec'y of Health & Human Servs., 7 F. App'x 966 (Fed. Cir. 2001).	Claimant	Affirmed	Government	no	no
Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367 (Fed. Cir. 2001).	Claimant	Affirmed	Government	no	yes
Goetz v. Sec'y of Health & Human Servs., 4 F. App'x 827 (Fed. Cir. 2001).	Claimant	Affirmed	Government	no	no
Golub v. Sec'y of Health & Human Servs., No. 99-5161, 2000 U.S. App. LEXIS 24858 (Fed. Cir. Oct. 3, 2000).	Claimant	Reversed	Claimant	no	no
Lampe v. Sec'y of Health & Human Servs., 219 F.3d 1357 (Fed. Cir. 2000).	Claimant	Affirmed	Government	no	no

Vant Erve ex rel. Vant Erve v. Sec'y of Health & Human Servs., No. 99-5093, 2000 U.S. App. LEXIS 6907 (Fed. Cir. Apr. 18, 2000).	Claimant	Affirmed	Government	no	no
Jackson v. Sec'y of Health & Human Servs., No. 00-5020, 2000 U.S. App. LEXIS 2534 (Fed. Cir. Feb. 1, 2000).	Claimant	Affirmed	Government	no	no
O'Connell v. Sec'y of Health & Human Servs., No. 98-5134, 1999 U.S. App. LEXIS 28427 (Fed. Cir. Nov. 1, 1999).	Claimant	Affirmed	Government	yes	yes
Terran v. Sec'y of Health & Human Servs., 195 F.3d 1302 (Fed. Cir. 1999).	Claimant	Affirmed	Government	yes	yes
Suel v. Sec'y of Health & Human Servs., 192 F.3d 981 (Fed. Cir.	Government	Affirmed	Claimant	yes	no

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1999).					
Hanlon v. Sec'y of Health & Human Servs., 191 F.3d 1344 (Fed. Cir. 1999).	Claimant	Affirmed	Government	yes	yes
Lowry ex rel. Lowry v. Sec'y of Health & Human Servs., 189 F.3d 1378 (Fed. Cir. 1999).	Claimant	Reversed and Remanded	Claimant	no	no
McGinley v. Sec'y of Health & Human Servs., No. 98-5001, 1999 U.S. App. LEXIS 10980 (Fed. Cir. May 26, 1999).	Claimant	Affirmed	Government	no	no
Barnes v. Sec'y of Health & Human Servs., No. 98-5050, 1999 U.S. App. LEXIS 1095 (Fed. Cir. Jan. 28, 1999).	Claimant	Affirmed	Government	no	no
Shyface v. Sec'y of Health &	Claimant	Reversed	Claimant	no	no

Human Servs., 165 F.3d 1344 (Fed. Cir. 1999).					
Haggerty ex rel. Haggerty v. Sec'y of Health & Human Servs., No. 98-5049, 1998 U.S. App. LEXIS 33119 (Fed. Cir. 1998).	Claimant	Affirmed	Government	no	no
Giles v. Sec'y of Health & Human Servs., No. 97-5082, 1998 U.S. App. LEXIS 11828 (Fed. Cir. June 5, 1998).	Claimant	Affirmed	Government	no	no
Robles v. Sec'y of Health & Human Servs., No. 97-5144, 1998 U.S. App. LEXIS 9410 (Fed. Cir. May 7, 1998).	Claimant	Reversed and Remanded	Claimant	no	no
Snyder ex rel. Snyder v. Sec'y of Health & Human Servs., 117 F.3d 545 (Fed. Cir. 1997).	Claimant	Affirmed	Government	no	no

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Stroud v. Sec'y of Health & Human Servs., No. 97-5014, 1997 U.S. App. LEXIS 11117 (Fed. Cir. May 14, 1997).	Claimant	Affirmed	Government	no	no
Brown v. Sec'y of Health & Human Servs., No. 97-5010, 1997 U.S. App. LEXIS 7616 (Fed. Cir. Apr. 17, 1997).	Claimant	Affirmed	Government	no	no
Weddel v. Sec'y of Health & Human Servs., 100 F.3d 929 (Fed. Cir. 1996).	Claimant	Affirmed	Government	no	no
Johnson v. Sec'y of Health & Human Servs., No. 95-5152, 1996 U.S. App. LEXIS 28093 (Fed. Cir. Oct. 30, 1996).	Claimant	Affirmed	Government	no	no
*Black v. Sec'y of	Claimant	Affirmed	Government	no	no

Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996).					
*Black v. Sec'y of Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996).	Claimant	Affirmed	Government	no	no
*Black v. Sec'y of Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996).	Claimant	Reversed	Claimant	no	no
Hervey v. Sec'y of Health & Human Servs., 88 F.3d 1001 (Fed. Cir. 1996).	Claimant	Affirmed	Government	no	yes
Brown v. Sec'y of Health & Human Servs., No. 96-5068, 1996 U.S. App. LEXIS 14148 (Fed. Cir. June 12, 1996).	Claimant	Affirmed	Government	no	yes
Benenati v. Sec'y of Health & Human Servs., No. 96-5015, 1996 U.S.	Claimant	Affirmed	Government	no	no

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App. LEXIS 11372 (Fed. Cir. May 17, 1996).					
Whitecotton v. Sec'y of Health & Human Servs., 81 F.3d 1099 (Fed. Cir. 1996).	Claimant	Affirmed in Part, Reversed in Part, and Remanded	Split (Mostly Claimant)	yes	no
Salceda v. Sec'y of Health & Human Servs., 70 F.3d 608 (Fed. Cir. 1995).	Claimant	Affirmed	Government	no	no
Mowen v. Sec'y of Health & Human Servs., No. 95-5040, 1995 U.S. App. LEXIS 32279 (Fed. Cir. Nov. 17, 1995).	Claimant	Affirmed	Government	no	no
McAllister v. Sec'y of Health & Human Servs., 70 F.3d 1240 (Fed. Cir. 1995).	Claimant	Reversed and Remanded	Claimant	no	no
Martin ex rel. Martin v. Sec'y of Health &	Claimant	Affirmed	Government	no	no

Human Servs., 62 F.3d 1403 (Fed. Cir. 1995).					
Gilbert ex rel. Gilbert v. Sec'y of Health & Human Servs., 51 F.3d 254 (Fed. Cir. 1995).	Claimant	Affirmed	Government	no	no
Flowers v. Sec'y of Health & Human Servs., 49 F.3d 1558 (Fed. Cir. 1995).	Claimant	Affirmed	Government	no	no
* The Black opinion was a consolidated appeal involving three cases. To show the disposition of each case, Black has three separate entries on this Table.					