A NEW SYSTEM FOR MANAGING AND RESOLVING MONETARY CLAIMS*

James F. Ring**

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Abstract

This paper describes a new commitment mechanism that is being used to manage and resolve monetary claims in the real world. The paper distinguishes the mechanism from conventional methods, such as litigation and mediation, by analyzing those methods as bargaining mechanisms and exploring some of their inherent flaws. In contrast to litigation, arbitration, mediation, negotiation, and traditional sealed-bid arrangements, the new mechanism has features that (1) negate any incentive or excuse for either party to try to use it to bluff or to posture (or to try to posture through a refusal to use it); and (2) allow it to be initiated and used unilaterally by one party without the other party's cooperation or consent. In further contrast to conventional methods, self-interest obliges the initiating party to confidentially commit to a settlement that is reasonable and focal at the outset of the process, and self-interest obliges the other side to do so prior to a fixed deadline.

Key Words: Bargaining, Litigation, Settlement, Focal Coordination, Sealed-Bid Mechanisms, Mechanism Design.

** A fully operational online version of the mechanism described in this paper can be accessed, examined, tested, and used at https://www.fairoutcomes.com/run_fpm/home.pl*

*** James F. Ring (jring@fairoutcomes.com) is a partner at the Boston law firm of Chu, Ring & Hazel, LLP. He is also a principal of Fair Outcomes, Inc. (http://www.fairoutcomes.com), a company founded by a small group of game theorists, computer scientists, and practicing attorneys for the purpose of providing parties involved in real-world conflicts or difficult negotiations with access to game-theoretic bargaining mechanisms.* *He is deeply indebted to Steven J. Brams for his kind assistance in framing the analysis set forth in this paper, as well as to Thomas C. Schelling for inspiring and encouraging the author's work on the system described herein.*

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I. INTRODUCTION

STUDIES INDICATE THAT, in the United States, the vast majority of civil cases are ultimately resolved through a bargained solution prior to trial. (See, e.g., Spier, 1992, and Williams, 1982). But these same studies indicate that the vast majority of such settlements are not arrived at until the parties are within thirty days of trial (a stage that is generally not reached for a period of years).

One explanation that is frequently offered for this phenomenon is that litigation may be viewed as a mechanism that parties use to discover and exchange information relating to liability and damages, an exchange that is, in most cases, not completed for a period of years. Under this view, the completion of this informational exchange allows parties to ultimately arrive, on the eve of trial, at similar assessments as to what would constitute a fair outcome, thereby facilitating a bargained solution in the vast majority of cases. The costs, burdens, and delays associated with litigation are, under this view, a necessary evil – necessary in order to ensure that each party gets a full and fair opportunity to seek and secure such information during the course of the process. An alternative explanation attributes these problems in part, and to varying degrees, to what economists gently refer to as agency problems, e.g., to lawyers seeking to make money out of protracted conflict.

Each of these explanations is, at best, incomplete. As most parties familiar with the court system can attest, lawsuits are commenced, drag on, and do not settle until the eve of trial even in cases where (as is very often the case) all relevant information concerning liability and damages – as well as the approximate range within which the case ought to settle – is evident to the lawyers on both sides from the very outset. Such parties can also attest that cases drag on even when neither lawyer has any prospect of profiting from the delay.

An alternative explanation is implicit within the current paper. Rather than viewing litigation as a mechanism for informational exchange that allows parties to ultimately engage in successful, cooperative bargaining on the eve of trial, this paper takes as a given that, in the vast majority of cases, litigation itself may be understood as a manifestation of – and as a mechanism that parties can use to engage in – coercive, tacit, non-cooperative bargaining. Bargained solutions are necessarily delayed because each party understands that both parties have a strong incentive to posture, i.e., to be untruthful about their own assessment of what would constitute a fair or acceptable outcome. In such contexts, neither party views the positions taken by the other to be genuine, nor can either party persuade the other of the genuineness of its own position. As a result, neither party has any incentive to formulate or propose a reasonable settlement: its adversary can be relied upon to interpret such an offer as a signal of weakness, as a sign of a willingness to make further compromises, and as a starting point from which to seek further concessions, all to the prejudice of the offering side.

In the vernacular of real-world bargaining, each side wishes to avoid "leaving money on the table" by offering or accepting an outcome that is less favorable to it than some other outcome that its adversary might ultimately be willing to concede. Indeed, the pursuit of this goal is often subliminally understood to be an attorney's primary function and duty, even though it is, in the end, an illusory goal because neither party can ever know – even when a

case settles on the eve of trial – whether a given outcome was truly the most favorable outcome that its adversary was willing to grant. In any event, for so long as at least one party is – or is perceived to be – pursuing this goal, there is no basis for expecting a bargained solution to be achieved.

What is it about the eve of trial that causes parties to no longer be transfixed by the prospect of leaving money on the table and allows them, in the vast majority of cases, to suddenly arrive at a bargained solution? One explanation would be that, on the eve of trial, each party faces the prospect that, if a bargained solution is not achieved at that time, then the outcome will not be arrived at through bargaining at all. Instead, it will be arrived at by a process that involves elements of probability but also of chance, akin to a game of dice (except that – unlike in dice – the outcome may be characterized as justice; as foreseeable or even preordained). This puts the parties and their attorneys in a position where (i) the incentives, opportunities, and excuses for posturing become substantially diminished, and (ii) each party and each attorney is obliged to make a realistic assessment of the range of probable outcomes at trial, and of what might constitute a reasonable and achievable settlement. Each is then obliged to either offer or – if it is made available – to accept such a settlement in order to fend off potential recriminations, remorse, and legal exposure. It is submitted that these conditions are not simply the conditions that *prevail* when the vast majority of cases settle – these conditions are, in fact, the effective *cause* of the vast majority of settlements.

It is the premise of this paper that most cases will settle when, and only when, the parties find themselves in a position where it is apparent to each that reasonableness has become the most sensible strategy for each party in the pursuit of its own selfish interests. Using that premise as its starting point, this paper describes a mechanism whereby a party can, by simply constraining its own behavior, unilaterally and without fear of prejudice (i) place itself in a position where it becomes apparent that honesty and reasonableness have become its most sensible strategy, and thereby (ii) place the other party in an equivalent position, replicating the conditions that prevail on the eve of trial and facilitating a settlement. In the words of Schelling (1960, p. 160): "One constrains the [other's] choice by constraining one's own behavior."

The paper begins with a brief summary of the mechanism. This is followed by a discussion of the basic principles that give rise to its utility. The paper then sets forth a more detailed analysis of particular features of the mechanism and the manner in which they work in combination with one another, followed by a conclusion.

II. SUMMARY OF THE SYSTEM

THE MECHANISM THAT IS THE SUBJECT of this paper (hereinafter, the "System") is a computerized, asymmetrical escrow system that can be initiated and used by a party on either side of a claim for money, regardless of the size, nature, or current status of the claim. Unlike traditional dispute-resolution methods, a party does not need to seek or obtain the other side's consent or cooperation in order to initiate and use the System in a productive way.

The System is a measuring device. A party that initiates a use of the System (hereinafter, a "First Party," assumed to be female) can use it to determine whether a settlement that she deems to be acceptable is acceptable to the other side (hereinafter, a "Second Party," assumed to be male). It lets the First Party do this without having to reveal her proposed settlement amount to the Second Party unless and until it has already been agreed to by him (in which event the claim settles for that amount). The System does this by placing the Second Party in a position where he can use the System to make a similar determination in complete secrecy (unless a settlement is achieved), and at no cost. Self-interest obliges the Second Party to use the System to determine whether the First Party's proposed settlement falls within a range that the Second Party deems to be acceptable.

Unlike dispute-resolution methods such as litigation, arbitration, mediation, negotiation, and traditional sealed-bid arrangments, the System has features that negate any incentive for either party to try to use it to posture (or to try to posture through a refusal to use it). Self-interest obliges the First Party to confidentially commit to a reasonable settlement at the outset of the process, and self-interest obliges the Second Party to do so prior to a fixed deadline. The System involves a series of simple steps, each of which can be carried out online in the manner described below (the underlying rationale for these rules is described in further detail in subsequent sections of the paper).

Step 1: The First Party uses the System to specify, in confidence, an amount of money ("*x*"), providing the System with a binding proposal to settle the claim for *x* by a fixed deadline (for example, within thirty days). The value specified for *x* will not be disclosed by the System unless it determines that the Second Party has agreed to settle for *x* by the deadline. (This allows the First Party to propose a reasonable value for *x* without fear of prejudice if the matter does not settle for *x*.)

Step 2: The System provides the Second Party with an opportunity to confidentially specify an amount of money ("*y* ") and agree to settle for *x* if *x* is equal to or more favorable to the Second Party than *y*. If it is, then the matter settles for *x*. If not, then the Second Party can continue revising *y* up until the deadline. The System will not disclose any use or non-use that the Second Party makes of the System unless the matter settles for *x*. (In combination with other features, these features deprive the Second Party of any incentive or excuse for failing to use the System to propose a reasonable value for *y* prior to the deadline.)

Step 3: If the matter does not settle for *x*, then the System will offer a party that has specified a value for *x* or *y* an affidavit confirming that value (but not revealing any value specified by the other party), and attesting to the fact that the other party had lost an opportunity to settle for that amount at that time. (In combination with other features, this makes proposing a reasonable value the most sensible strategy for each party, regardless of whether the other party follows that strategy.)

The underlying principles that give rise to the System's utility are described in the section that follows.

III. ANALYTICAL BACKGROUND

WHEN TWO PARTIES ARE INVOLVED in a dispute with respect to an amount of money, game-theoretic studies suggest that both parties would be better off if either party could, without having to secure the other's consent, and without the other party's knowledge, deposit a confidential settlement proposal as escrow with an agent that would impose a settlement in the event that (a) each party deposited such a proposal, and (b) the escrow agent determined that the proposals matched or overlapped. For example, Babcock and Landeo (2004) describe a study wherein test subjects that had access to such a mechanism achieved settlements 69% of the time (as opposed to a 49% rate for other test subjects), settled at an earlier stage more than twice as often, and had litigation costs that were 37% lower. Moreover, these studies suggest that such a mechanism, if properly designed, does more than simply increase and accelerate settlements and reduce costs. It "generally leads to… payoffs that are more in line with the underlying merits of the case…." (Gertner and Miller, 1995, p. 28.) This is because the prospect that one's adversary might use the mechanism induces each party – out of self-interest – to reflect on what might constitute a reasonable settlement and propose it in order to demonstrate that it had not walked away from such an outcome.

These findings challenge the deeply ingrained notion that communicative bargaining plays an essential – or at least a necessary and beneficial – role in the resolution of conflict. The fact that a mechanism that serves to restrict communication can, both in theory and in experimental contexts, produce such results obliges parties that are interested in facilitating such settlements to consider the reasons why this is so. Towards that end a brief overview of the reasons why the System described in this paper serves to facilitate such settlements has been set forth below.

A. Focal Coordination

Consider a hypothetical case in which a failure to settle would not result in a trial but, rather, in the flip of a fair coin, with "heads" yielding a $10,000 award to the Plaintiff, and "tails" yielding an award of zero, with no other possible outcomes. Since each party would independently recognize that it had a 50% chance of winning or losing $10,000, the Defendant could not reasonably be expected to settle for any number higher than $5,000, and the Plaintiff could not reasonably be expected to settle for less. A settlement of $5,000 would constitute what Schelling (1960) refers to as a "focal point." Specifically, if we imposed rules under which the parties could not communicate and under which the case would not settle unless both parties placed sealed bids that matched or crossed into a black box by a fixed deadline, self-interest would oblige a party that wished to show that it had not walked away from a reasonable settlement to bid $5,000 by the deadline. A party that proposed a number more favorable to itself – even by a single dollar – would accomplish (and know that it had accomplished) the equivalent of proposing no number at all.

An important corollary is that altering the hypothetical by allowing for communication does not change the outcome. Either party can force its adversary – if the adversary wishes to be able to demonstrate that it had not walked away from a reasonable outcome – to deposit the focal number into the box prior to the deadline by simply refusing to communicate at all.

Something similar takes place in litigation. As was noted within the introduction, trials are less like a coin-flip game then they are like a game of dice: unlike a coin flip, a roll of dice can produce a variety of different outcomes. However, just as a party familiar with dice understands that certain outcomes are more likely than others (e.g., a roll of seven is much more likely than a roll of two or twelve), an experienced attorney can assess the relative likelihood of various outcomes emerging from a trial. He or she can identify a focal range (as distinct from a focal point) within which a given claim ought to settle given the risks and costs faced by each side. Lawyers on opposite sides of a case will often privately arrive at similar assessments of that range at a very early stage of the case, even though they may – in an effort to drive their adversary towards or beyond one end of that range, and avoid being driven in an adverse direction themselves – lie to each other about their actual assessments for a period of years. Yet the fact that opposing counsel are able to arrive at similar assessments of what would constitute a reasonable settlement range, and the ability of parties to ultimately achieve settlements within that range as they approach the eve of trial, is not subject to serious dispute. This is, in fact, what happens in the vast majority of cases. Once the parties arrive at a precipice such as the eve of trial, a party that is willing to commit to an outcome that is clearly within the focal range can, if it can find a way to cut off further communication (equivalent to disabling its phone or arranging to be away at sea until the first day of trial), effectively force the other side – if it wishes to settle – to settle for that amount.

B. Litigation, Settlement, and the Politics of Regret

The foregoing discussion describes what could be expected to happen in certain cases where either party wished to be able to demonstrate that it had not walked away from a reasonable settlement. The question of why either party might wish to be able to make such a demonstration before proceeding with a flip of the coin, a roll of the dice, or a trial on the merits is thus deserving of some consideration. The answer may be found in an aspect of human consciousness that distinguishes us from other forms of life on earth: we have the capacity to envision ourselves in the future looking back on actions that we took in the past (and to envision others doing the same with respect to the actions that we have taken). See, e.g., Dennett (1984). People generally try to order their affairs in a manner so as to avoid subsequent recriminations, remorse and regret. In the language of decision theory, rational parties seek to minimize maximum regret.

When faced with a situation such as the coin-flip game described above, if both parties propose to settle for $5,000 then neither will have any basis for regret, because each will have obtained an outcome that was reasonable in view of the involved risks and rewards (and the coin itself would never be flipped, with the result that the outcome would never be known). If, however, one party proposes $5,000 and the other does not (instead proposing no number, or a number more favorable to itself), then the party that proposed $5,000 will have no basis for regret regardless of the outcome of the coin flip. In contrast, the other party will (because of what its adversary secretly proposed) come to regret its failure to propose $5,000 if it loses the coin flip, while if it wins it will be deemed to have simply gotten lucky (rather than to have dealt with the situation in a prudent manner). As the coin tumbles through the air, only one party will have reason to tremble.

This serves to explain why a party faced with a situation as described above might wish to determine, prior to proceeding with the coin flip, whether its adversary was willing – or had proposed – to settle the matter for $5,000. In the words of Schopenhauer: "[T]here is for us no consolation so effective as the complete certainty of unalterable necessity.... No evil that befalls us pains us so much as does the thought that there were circumstances by which that evil might have been warded off." (Schopenhauer, 1818, at p. 228.)

C. Focal Solutions vs. Ideal Justice – The Fable of the Twins

As suggested by the coin-flip hypothetical, what is focal is what is reasonable in view of the risks and rewards faced by each side. However, what is reasonable is, in that sense, not always what either party would view as "just" or fair in an ideal sense. For example, consider a hypothetical case that would have attributes identical to our coin-flip game: a case in which two identical twins are on opposite sides of a claim for breach of contract in which one twin's alleged failure to give oral notice of some event to her sister would, if proven true, oblige her to pay her sister liquidated damages in the amount of $10,000. Assume that each twin understands that, if the matter does not settle and proceeds to trial, then the defendant twin will testify that she gave such notice to her sister, and the plaintiff twin will deny this, with neither side having any evidence other than their own testimony to offer in support of their respective positions. In such a case, the jury would be charged with determining which twin was lying (or which twin had met or failed to meet her burden of proof with respect to that issue), and the outcome of the case would turn entirely upon that determination.

By hypothesizing conflicting testimony from identical twins (each of whom may be presumed to appear equally credible), we posit a situation in which each faces a fifty-percent chance that she will not be believed, with the result that a settlement of $5,000 becomes focal. This situation, however, may appear to differ markedly from the situation presented in our original coin-flip hypothetical, because in this case each twin knows that one twin is lying, and knows which twin that is, and knows that there is only one possible outcome (which may be either zero or $10,000, depending upon who is lying) that could possibly be viewed as just or fair in an ideal world. Yet this would not change the reality that, if the case is going to settle, a settlement of $5,000 would constitute the reasonable and focal outcome. Conferring a $5,000 benefit upon one's evil twin is not an attractive prospect, but it is a rational alternative to running a fifty-percent chance of having to convey twice that amount. And this is especially so when you, as the good twin, run the risk of being declared to have been the evil one after a full blown trial, and having that declaration deemed just and reasonable, and perhaps even inevitable, by a trial judge and, perhaps, by a court of appeal.

It may be objected that any "justice system" worthy of that name should, instead, routinely produce a verdict in favor of the good twin, because nothing else could constitute "justice." But in truth, what a sovereign power offers to citizen-litigants is nothing more than a "fair trial' (in return for which the citizenry is deemed to have given up the right to resort to violence or to other unlawful means of coercion). What the justice system produces in the vast majority of cases is a settlement that falls within a focal range. Such outcomes may not satisfy someone's abstract concept of justice, but they are as close to justice as most litigants can realistically expect to get in the real world.

D. The Superficiality of Communication

Recall from the coin-flip hypothetical that a party can force an adversary that wishes to show that it had not walked away from a reasonable outcome to commit to a focal amount, regardless of whether the parties can communicate. This is because, even if the parties can communicate, neither would have any genuine interest in what the other had to say: the focal point would remain self-evident, no matter what either might wish to argue or claim.

It might be thought that, in situations where the focal solution fell within a range, rather than at some particular, self-evident point, each party might suddenly have more interest in hearing what the other had to say, as this might help them to identify a mutually acceptable settlement. However, the exact opposite is true: in such situations communication becomes even more futile, because – as was indicated above – each side will have, and will know that the other side has, an overwhelming incentive to lie about its assessment of the parameters of that range in an effort to induce its adversary to move in a desired direction. Unlike in the coin-flip hypothetical – where a party that said that $5,000 was focal would simply be stating the obvious – in cases involving a focal range it is generally prejudicial to disclose one's honest assessment of what would constitute an acceptable solution, because this may cause one's adversary (who would not credit the assessment as honest) to revise its own assessment in an adverse direction, and to harden its position. See, e.g., Schelling (1960) at pp. 34-35. Thus, until the eve of trial, most attorneys find communications with an adversary to be – if not overtly unpleasant – unremittingly unenlightening and nonproductive.

A contrary vision is sometimes advocated by proponents of integrative negotiation and/or mediation, who contend that communication between adversaries may generate empathy and an identification of shared interests, giving rise to reconciliation, Pareto-optimal outcomes, and/or win-win solutions. For present purposes it is sufficient to note that such arguments are, for the reasons outlined by Korobkin (2008), particularly unpersuasive where, as in the current paper, we are dealing with claims for money (rather than, say, trade-offs of jointly owned property). Parties involved in such claims are frequently willing – and always free – to convey what they view as a meaningless concession, such as a confidentiality clause, etc. But the basic nature of the dynamic will in most cases have no significant integrative potential and will remain, until the eve of trial, entirely non-collaborative.

In contexts in which no communication can be viewed as credible and in which an honest communication can be highly prejudicial, no meaningful communication can take place. This fairly describes the situation in which most litigants find themselves prior to the eve of trial. But this does not mean that litigants are unable to independently arrive at accurate, similar, or identical assessments of what would constitute a reasonable settlement range at a very early stage. Facilitating the ability of parties to independently arrive at such assessments is a central function (arguably the main function) of the common law. An attorney attempting to identify a focal range looks to the outcomes achieved in similar cases, as revealed by published decisions, advice from other lawyers, and that attorney's own body of experience. This explains why a properly designed escrow mechanism could be expected to produce settlements more in line with the underlying merits, with less cost and greater efficiency, than traditional, communicative bargaining.

E. Rationalizations, Excuses, and the Fear of Appearing Weak

It may be asked why, if such escrow mechanisms have such potential, they are not in wider use within the real world. Part of the answer is that – as is the case with mediation and virtually all other forms of dispute resolution – traditional sealed-bid systems are configured in a symmetrical manner and cannot be used by one party without the consent and cooperation of the other side. They require both parties to agree in advance to a set of rules that will govern the manner in which the sealed bids will be submitted and compared. As is the case with mediation, a party will be reluctant to offer to use such a system – and may decline such an offer by the other side – out of a fear that this may signify a desire or willingness to make concessions: "[An] adversary may infer that the offeror's case is weak. Therefore, neither party will suggest [such use], despite the fact that each would be better off if the [mechanism] was forced upon them." (Gertner and Miller, 1995, p. 38.) In addition, if and when the parties agree to use a traditional sealed-bid mechanism, the conventional rules and symmetrical configuration provide parties with rationalizations and excuses for failing to use them to make honest proposals, as discussed *infra* at pp. 11-13.

Of course, advocates of traditional sealed-bid systems will note that they can be and are often used effectively once the parties are ready, willing, and able to negotiate in good faith, such as on the eve of trial. But, as is the case with mediation, the fact that a dispute-resolution system facilitates settlements under such conditions does not demonstrate that the system has any real utility, because the vast majority of cases will at that point settle anyway, with or without the use of such a system. See, e.g., Alexander (1999), at pp. 31-36.

Thus, the more interesting question is whether such a mechanism could be configured in a manner so that it could be used effectively during an earlier, less cooperative stage, a configuration that would allow it to be initiated and used unilaterally by one party without having to seek or secure the other's consent, and with a set of rules that addressed the rationalizations, excuses, and concerns about signaling that interfere with the use of more traditional methods. That is the question addressed in the balance of this paper.

F. Unilateral Action and the Politics of Coercion

Within the context of any sort of conflict, it quickly becomes apparent that talk is cheap and that actions speak louder than words. There has, accordingly, been a historical demand for mechanisms that would allow a party involved in a conflict to advance its own interests through unilateral action (giving rise, for example, to the historical development of weaponry). But where the involved parties are both citizens of a sovereign state, a legal system imposed by that state severely limits the sorts of actions that may be taken by each party. Resorts to violence and criminal fraud are prohibited – a party seeking to coerce an adversary is effectively compelled to do so in an orderly, state-sanctioned way.

Thus, for example, in the United States, each party is permitted during the pre-trial stage to inflict heavy legal expenses and other costs upon the other, to extract arguably irrelevant factual information that the other would prefer to keep private, and to advance claims, defenses, arguments, and demands that extend to the very edge of frivolity. Yet,

while these sorts of actions consume enormous resources and inflict a great deal of wreckage and waste, they are rarely sufficient to coerce an adversary into committing to a reasonable settlement. This is evidenced by the fact that the vast majority of cases do not settle during that stage. Moreover, instead of serving to put an adversary in a position where it might envision itself in the future, looking back with regret on choices that it made during that stage, these sorts of actions tend to reinforce the notion that a party had no choice but to engage in such actions itself and to expend enormous resources preparing for a trial that was, from a statistical perspective, highly unlikely to ever take place.

Is it ever possible for a party, through unilateral action, to lawfully coerce an adversary into committing to a reasonable settlement at an early stage? The answer to this question may be found within the context of disputes over the disposition of jointly-owned property. Within such contexts, one party may unilaterally propose a value at which it is willing, up to a fixed deadline, to either buy-out the other owner's share in the property, or to sell its own share to that other owner. A party that initiates such a "Buy-Sell" proposal puts itself in a position where self-interest obliges it to propose what it considers to be a fair value (because it does not know whether it may be forced to buy or sell at that value). But by putting itself in that position, it effectively coerces its adversary into reflecting on what it considers to be a fair value and electing to buy or sell prior to the deadline. Buy-Sell arrangements have, justifiably, been referred to as the "ultimate dispute resolution mechanism" (see, e.g., Kittsteiner and De Frutos, 2004, note 2 at p.1), and some commentators have suggested that a lawyer's failure to put a client in a position to use such a mechanism may constitute legal malpractice. See, e.g., Brooks and Spier (2004), note 6 at p. 3. For present purposes, these arrangements serve to demonstrate that it is possible for a party involved in a conflict to engage in unilateral action that might be viewed as coercive but that is, at the same time, entirely lawful because it is demonstrably fair.

With these considerations in mind, we now turn to a consideration of specific features of the System described in Section II of this paper. In particular, we consider how those features, working in combination with one another, allow a party to take unilateral action to lawfully coerce an adversary into formulating and committing itself to a settlement that is reasonable and focal at a very early stage, to the benefit of each party and society as whole.

IV. Analysis of Specific Features of the System

In considering the various features of the System described in the current paper, it will be observed that many of these features serve to address the historical obstacles to the use of more traditional approaches to dispute resolution, such as mediation, negotiation, and symmetrical sealed-bid systems. For example, a First Party that initiates the use of the System is not signaling weakness – she has, in effect, simply tendered a "take-it-or-leave-it" proposal to her adversary (doing so in a highly credible manner). She will, in effect, be expressing complete indifference to any alternative outcomes that her adversary might wish to have her consider, as the System will not disclose any such alternative proposals to her.

Similarly, and in contrast to traditional approaches to dispute resolution, a party that is invited to utilize the System as a Second Party cannot justify a refusal to use the System – or

a failure to put forth a reasonable proposal within the context of that use – by citing any of the standard excuses or professed concerns that parties typically cite with respect to such a process. In particular, the structure of the System precludes the Second Party from rationally concluding, or from credibly arguing:

(1) that his participating in the process might send a signal of weakness, i.e., of a willingness to consider compromise or to reconsider his publicly stated position with respect to the dispute;

(2) that his failure to participate in the process, or to put forth a reasonable proposal, was justified by a concern that he might inadvertently propose, and thus wind up with, a resolution less favorable to him than the resolution proposed by the First Party; or

(3) that his failure to secure a resolution through the process was attributable to the fact that he made a proposal that he thought would be accepted, but that he simply "guessed wrong" and was then foreclosed from revising his proposal because the process came to an end.

Each of the foregoing points becomes further apparent when one considers the various features of the System and the manner in which those features interact with one another, as described below. (In considering those features it should also be noted that, once one party has initiated a use of the System, the administrator of the System will not permit either party to do so again with respect to that same claim over the other's objection.)

A. On the Confidentiality of the First Party's Proposal

The amount specified for *x* by the First Party is not disclosed to the Second Party unless the matter settles for *x* prior to the deadline**.** This feature allows the First Party to commit to a reasonable number without having to fear that, if the matter is not resolved, that number will simply become a starting point for demands for further concessions. Treating the First Party's proposal as confidential thus enhances her ability to put forth a reasonable proposal. See, e.g., Gertner and Miller (1995) at p. 6. By depriving her of an excuse for failing to put forth a reasonable proposal, confidentiality also serves to enhance the credibility of her proposal. This feature is, accordingly, beneficial to both parties and cannot be credibly cited by the Second Party as a justification for refusing to use the System.

B. On the First Party's Allowing the Second Party to Act in Confidence

By forswearing any right to know about any use that the Second Party may make of the System unless that use produces a settlement, the First Party deprives the Second Party of the first of the three possible excuses that he might otherwise try to cite for failing to respond to her initiation of the System. One excuse would be that, by agreeing to use such a system, or by being seen to use it, the Second Party might thereby be sending a signal of weakness, i.e., of a willingness to consider compromise or to reconsider his publicly stated position. For example, and as was noted above, if a party agrees to use mediation or a traditional sealed-bid system, then "his adversary may infer that [his] case is weak. Therefore, [he will not

agree to use such a system] despite the fact that [he] would be better off if [a sealed-bid system was somehow] forced upon [him].” (Gertner and Miller, 1995, p. 38.) This feature deprives the Second Party of such an excuse and, in combination with the System’s other features, effectively allows the System to be “forced upon” him, to the benefit of both parties.

C. On Settling the Matter on the Basis of the First Party’s Proposal (*x*) in Cases where *x* is More Favorable to the Second Party than *y*

Recall that, if the term proposed by the First Party (*x*) is equal to or more favorable to the Second Party than the term proposed by the Second Party (*y*), then the First Party’s proposed resolution, *x*, becomes the resolution and the claim will have been settled through the use of the System. This is in direct contrast to the arrangement employed in split-the-difference dispute-resolution systems, under which “[i]f the [system administrator] receives offers which cross – if the defendant offers more to settle than the plaintiff demands – the [administrator] imposes a settlement at the midpoint of the offers.” (Gertner and Miller, 1995, p. 1.) This contrast is attributable to the fact that a split-the-difference feature provides the Second Party with the second of the three excuses for failing to use a dispute-resolution system to submit a fair proposal – namely, a fear of losing surplus or, again, in the vernacular of real-world bargaining, of “leaving money on the table.” In mediation and traditional sealed-bid systems, this would occur if the Second Party inadvertently proposed an outcome that was less favorable to himself than what the First Party was ready and willing to grant.

Note that the First Party has, in initiating the use of the System, already arrived at a position where she is not transfixed by the prospect of losing some hypothetical surplus, i.e., a position akin to that of a party that initiates a Buy-Sell proposal, and the position that virtually all litigants eventually reach on the eve of trial. Having already arrived at that position, her primary goal in using the System is to try to bring the underlying conflict to an end on terms that she has defined as acceptable, while at the same time ensuring that, if no solution is achieved, her adversary will be the only party that will suffer prejudice as a result.

D. On Allowing the Second Party to Revise *y* if no Settlement is Achieved

Recall that, if the Second Party proposes a value for *y* such that no settlement is achieved on the basis of his proposal, then the System notifies the Second Party of that fact and invites him to confidentially propose an alternative value. This invitation is repeated on each such occasion up to a fixed deadline. This deprives the Second Party of the third and final excuse that he might claim to have for failing to submit a fair proposal in response to the First Party’s initiation of the System – namely, he cannot claim *ex post* that he would have submitted a different proposal had he known that the number that he specified for *y* would not produce a settlement.

This feature also effectively allows the Second Party to engage in a learning process with respect to the value of ***x*.** In particular, and importantly, *he cannot rule out the possibility that the First Party has proposed an outcome that is equal to or more favorable to him than what he himself considers to be reasonable unless he formulates and proposes a number that he considers to be reasonable* (i.e., *y*). He can then learn whether *x* is less

favorable to him than *y*. If it is, he can then take that information into account and, if he so wishes, revise his offer up to the fixed deadline. In considering whether and to what extent he should submit a revised value for *y*, he must take due account of the fact that, in formulating *x*, the First Party had a strong incentive to propose a value falling well within the range of what would be viewed as reasonable in view of the risks and costs faced by each side: specifically, at the time that the First Party initiated the use of the System, she was obliged to take due account of the fact that, if the Second Party proposed a value for *y* that was less favorable to her than *x, even by a single dollar,* then she would be ceding an affidavit to her adversary demonstrating that she had effectively walked away from such an outcome. Each party involved in a use of the System understands that both must take these sorts of considerations into account, as more fully described in the section that follows. Given these circumstances, the System's structure puts the Second Party in a position where, like the First Party, his most sensible strategy is to propose a value for *y* that is reasonable and focal.

E. On the Issuance of Affidavits in the Event that the Matter does not Settle for *x*

If the matter does not settle for *x* through the use of the System prior to the deadline, then the System will at that time offer the First Party an affidavit confirming the value specified for *x*, attesting to the opportunity and assurances provided by the System to the Second Party, and attesting to the fact that – as of the deadline – the Second Party had not entered data resulting in a settlement for *x* (without revealing anything else about any use or non-use of the System by the Second Party). In addition, if – but only if – the Second Party enters data prior to the deadline specifying a value for *y* that does not result in a settlement for *x*, then the System will at that time offer the Second Party an affidavit confirming the value specified for *y* and attesting to the fact that this did not produce a settlement because *y* was more favorable to the Second Party than *x* (without revealing *x*).

Thus, the System allows a party that has proposed a reasonable settlement to demonstrate, via an affidavit, that the other party had effectively walked away from that settlement. This, in turn, allows a party that has proposed a reasonable settlement to justify devoting its resources to pursuing something other than a voluntary agreement with the other side (such as litigation). In contrast, a party that fails to propose a reasonable value will be unable to infer or demonstrate anything of meaning, nor will such a party – in view of the System's constriction on communication – be able to conclude with any confidence that it had succeeded in conveying some sort of meaningful signal to the other side.

Moreover, in cases where a person that used or that was invited to use the System had a duty to other parties to arrive at a reasonable settlement if given an opportunity to do so (such as where that person was acting as an attorney or agent for someone else), such a person's failure to use the System to propose a reasonable settlement may cause evidence supporting a finding that he or she had breached that duty – in the form of an affidavit from the System – to be delivered into the hands of an adversary. A summary of these and other properties of the System, as they appear from the perspective of each party, has been set forth in the appendices that appear at the end of this paper.

V. SUMMARY AND CONCLUSION

POINTING A SHOTGUN or threatening to toss a hand grenade towards an adversary may be a highly effective move if one is attempting to bring a conflict to an end, but it is almost never a prudent one for members of the general public. If a party makes such a move and it comes to the attention of the local authorities, that party can expect to be locked up for a period of years.

Conversely, pursuing a lawsuit against an adversary may in some cases be a prudent and necessary move, but it is rarely – in and of itself – particularly productive. In the vast majority of cases, and for the reasons noted above, pursuing a lawsuit represents little more than a tedious maneuver that will result in both parties being locked up in the civil justice system for a period of years, until such time as the parties reach the eve of trial. At that point statistics suggest that the vast majority of parties will almost certainly end up settling with their adversary rather than proceeding through a trial. And empirical studies suggest that the outcome that the parties will ultimately find themselves willing to accept at that time will have little relation to what either party claimed it would insist upon, or considered to be fair or reasonable in an ideal sense, at the outset of the process. See, e.g., Korobkin (2009).

If and when a party reaches a point where it can credibly make the equivalent of a take-it-or-leave-it-proposal, it can effectively force an adversary that does not wish to be deemed to have walked away from a reasonable settlement to commit to accepting an outcome that is focal, i.e., that falls within the range of what an objective audience would consider to be reasonable in view of the risks and costs faced by each side. The problem generally does not lie in identifying such a settlement, but rather in finding a way in which to propose it with credibility and without precipitating demands for further concessions. Conflict generally cannot be brought to an end so long as one party has grounds for believing that further advantage might be gained by verbal or tacit bargaining. In that sense it is fair to say that the solution in many (and arguably in most) cases does not lie in traditional forms of verbal and tacit bargaining, but rather in finding a way in which to bring such bargaining to an end.

This paper is intended to suggest that it is possible for a party involved in a monetary claim to engage in unilateral action that is strategic, credible, and effective without having to face the prospect of a prison sentence or some other form of prejudice if the action does not produce a prompt resolution of the underlying claim. Initiating a use of the System described herein allows a party to advance her own interests regardless of how her adversary responds, and regardless of whether her adversary responds at all. Returning to the coin-flip and dice-rolling hypotheticals discussed above, she effectively places a number in a black box, engages a timing device to set a deadline, and then gets up and walks out of the room, leaving the door ajar for her adversary. If the case has not settled for that amount of money by the deadline then – so long as that amount fell well within the range of what an objective audience would view as reasonable – she will not incur any prejudice. Moreover, under those circumstances she will be forgiven, and will be able to forgive herself, for devoting her resources to litigation and – if it becomes necessary – for rolling the dice at trial.

J.F. Ring, Boston, January, 2012

Appendix I

Summary of the System from the Perspective of a Party that Initiates its Use

(a) A party can initiate and use the System at any time, without having to first enter into an interim agreement with her adversary, and without having to seek or secure the consent or cooperation of her adversary or the assistance of a court or other sovereign power.

(b) A party that initiates the use of the System is not signaling weakness – she has, in effect, simply tendered a "take-it-or-leave-it" proposal to her adversary (doing so in a highly credible manner). She will, in effect, be expressing complete indifference to any alternative outcomes that her adversary might wish to have her consider, as the System will not disclose any such alternative proposals to her.

(c) A party's initiation of the System places her adversary in a position where he is effectively compelled by self-interest to respond. He has no rational basis for failing to use it to determine whether his opponent's proposed outcome surpasses, or at least meets, an outcome that would be reasonable from his perspective. This is because her proposed outcome has been deposited as escrow and thus placed within his grasp, and any use or non-use that he may make of the System will not be disclosed to her or to anyone else unless it produces an outcome that both parties have defined as fully acceptable, which would fully resolve the underlying dispute.

(d) If the party that initiates the use of the System proposes an outcome that is reasonable and a settlement is not achieved, then she will have obtained something of significant strategic value: the System will provide her with an affidavit describing the System's features and the manner in which she used it, and attesting to the fact that her proposed outcome was not accepted, supporting a finding that her adversary had effectively walked away from a reasonable outcome without any justification or excuse. As with a buy-sell proposal that does not produce a sale, this will:

(1) allow her to justify, from that point forward, devoting her resources to pursuing something other than a voluntary agreement with her adversary (i.e., it would allow her to justify a devotion of resources to litigation);

(2) allow her to form alliances with third-parties who might have otherwise been reluctant to take sides; to sow dissension or equivocation between or among her adversary's allies and/or between her adversary and his bargaining agents, and to gain support from and quell dissent among her own allies or constituents; and

(3) allow her to establish that all expenses incurred by the parties following her use of the System were attributable to her adversary's failure to accept a reasonable outcome that she had fully placed within her adversary's grasp.

Appendix II

Summary of the System from the Perspective of a Party whose Opponent Initiates its Use

(a) From the perspective of a party on the receiving end of a use of the System, it will be apparent to him that his opponent had no rational incentive to propose an unreasonable outcome, as this would deprive her of the ability to obtain the strategic benefits described in paragraph (d)(1)-(3) of Appendix I of this paper and would, if he used the System and proposed a reasonable outcome, allow him to secure those strategic benefits for himself via an affidavit concerning his use of the System. This would be directly contrary to his opponent's self-interest.

(b) If he assumes that his opponent has, consistent with her self-interest, proposed a reasonable outcome, it is in his best interests to respond by using the System to propose a reasonable outcome, as this will prevent his opponent from obtaining a strategic gift. It would be against his self-interest for him to fail to do this.[1]

(c) Even if he assumes that his opponent is irrational and has, contrary to her own interests, proposed an unreasonable outcome, it would still be irrational for him to fail to use the System, because under those circumstances he could, by proposing a reasonable outcome, obtain those strategic benefits himself.

(d) He has no basis for believing that his use of the System might make him look weak, because his opponent will not know whether he used the System at all unless his use of the System produces an outcome that he has defined as fully acceptable, which would fully resolve the underlying dispute.

(e) He has no reasonable basis to be concerned that, if he used the System and proposed a given outcome, he might then find himself in a position where he would regret his proposal and want to propose a different outcome but be unable to do so. If he proposes an outcome that is *less* favorable to him than the one proposed by his opponent, he will obtain the more favorable outcome proposed by his opponent, and thus will have no basis for regret. If he proposes an outcome that is *more* favorable to him than the one proposed by his opponent, the System will, on each such occasion up to the deadline, automatically notify him of that fact and allow him to submit another proposal. If his use of the System does not produce a resolution of the underlying dispute, his final proposal would, if it was later shown to be less reasonable than his opponent's, be the only one that he might later come to regret.

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[1] For example, if the party on the receiving end of a use of the System is an attorney, he will not be able to rule out the possibility that an outcome that would be reasonable from his client's perspective has been placed within his grasp unless he uses the System. If his client's opponent has proposed such an outcome and he fails to use the System, or fails to use it in a reasonable manner, then (a) he will have caused evidence that could form the basis for a claim or finding of malpractice to fall into the hands of his adversary, and (b) he will not know whether he has caused such evidence to be delivered into the hands of his adversary unless and until she elects to reveal that evidence.

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