

FOREWORD

INNOVATIONS IN COMPLEX LITIGATION AND SETTLEMENT

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More than a year after his passing, the idea of a world without Francis McGovern still feels incomprehensible. As his colleague Duke Law professor Donald Beskind put it, “It’s hard to think about Francis in the past tense. In life he was an active verb. He used his energy and creativity to create action.”

As a beloved professor, as a renowned expert in alternative dispute resolution, and as an unparalleled special master, Francis’s energy was boundless, and his presence powerful. In any room in which he found himself, Francis seemed larger than life. In the classroom, students listened with awe as he recounted his fabulous “war stories” mediating some of the most important civil actions in the nation. In the courtroom, judges listened with respect as he innovated new ways to organize and address the claims of millions in sprawling mass tort cases. In communities struck by mass harm, families listened with appreciation as he proposed thoughtful solutions to some of the law’s most difficult problems.

And here we find ourselves once again, academics and practitioners alike, listening to the lessons Francis continues to teach through this volume. Those lessons are varied and plentiful, and they are offered here by a host of esteemed contributors Francis was proud to call his friends and colleagues.

Tributes to Francis begin the volume, by some of those who knew him best both professionally and personally. Elizabeth Cabraser and Robert Klonoff lay out Francis’s myriad roles and areas of influence, examining his leadership as a

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* Litigation Partner at Kirkland & Ellis. I enjoyed a personal and professional friendship with Francis McGovern for over 25 years, spanning many aggregated litigation matters, work on and with the Rules Committees, and countless mind-stretching meetings, delectable dinners, and truly enlivening conversations about things that matter.

** Levi Family Professor of Law and Judicial Studies, and Director of the Bolch Judicial Institute at Duke Law School. For the better part of 30 years, Francis and I were friends and worked closely together first when I was a judge and chair of the federal rules committees and then when I joined Francis on the Duke Law faculty.

*** Founding Partner of Seeger Weiss. I’ve know Francis for many years—initially by reputation and ultimately we worked together in the Opioid Litigation. We grew very close after Francis became interested in the Vioxx Litigation—a case I co-led and settled. We discussed litigation and settlement strategies and various settlement models from Vioxx and other cases. Francis and I began attending and speaking at conferences together and he often invited me to co-teach with him at the Duke Law Master of Judicial Studies Program.

facilitator, a scholar, and as a special master in the opioid MDL.¹ Judge Daniel Polster, who has presided over that case, and who appointed Francis as his special master, spotlights Francis's invaluable contributions.² Finally, Judge Vaughn R. Walker presents an intimate personal portrait of Francis, tracing the span of his life from undergraduate at Yale, to Vietnam, to his early legal career, and beyond.³ Though the two began as close friends, rather than as colleagues, it was "in teaching together," explains Judge Walker, "that I came fully to know Francis."⁴

The articles begin most fittingly with a piece co-written by Francis himself, in collaboration with Teddy Rave.⁵ Though Francis's death predates the submission to the journal, Professor Rave credits Francis with the concept for the article: a "hub and spoke" model of multidistrict litigation. Recognizing the elusiveness of global peace in "mega mass torts," the authors propose a case management model in which the Judicial Panel on Multidistrict Litigation (JPML)—acting on the recommendation of the MDL transferee judge (the hub)—remands certain cases to other federal judges (the spokes) for pretrial proceedings and bellwether trials.

In celebration of Francis as the pre-eminent "multi-claimant litigation and settlements" scholar, Lynn A. Baker and Charles Silver assess some of the normative arguments for and against private claims resolution facilities, a frequent topic of Francis's scholarship.⁶ Aspiring to live up to Francis's commitment to evidence-based solutions, Stephen B. Burbank and Sean Farhang present the first longitudinal picture of class certification in the U.S. Courts of Appeals.⁷ Next, Brian T. Fitzpatrick attempts to formalize and extend Francis's call for decentralization of fact finding in multidistrict litigation, arguing for the implementation of a judicial panel system.⁸

Following Professor Fitzpatrick, Myriam Gilles and Gary Friedman examine several challenges to the assumption that class action procedures are unavailable in mass tort cases, including Francis's innovative "negotiation class certification"

1. Elizabeth Cabraser & Robert Klonoff, *Francis McGovern: The Consummate Facilitator, Teacher, and Scholar*, 84 Law & Contemp. Probs., no. 2, 2021, at 1.

2. Dan Polster, *Francis McGovern: Special Master Par Excellence*, 84 Law & Contemp. Probs., no. 2, 2021, at 11.

3. Vaughn R. Walker, *Francis McGovern: A Personal Remembrance*, 84 Law & Contemp. Probs., no. 2, 2021, at 15.

4. *Id.* at 17.

5. D. Theodore Rave & Francis McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 Law & Contemp. Probs., no. 2, 2021, at 21.

6. Lynn A. Baker & Charles Silver, *In Defense of Private Claims Resolution Facilities*, 84 Law & Contemp. Probs., no. 2, 2021, at 45.

7. Stephen B. Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 Law & Contemp. Probs., no. 2, 2021, at 73.

8. Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 Law & Contemp. Probs., no. 2, 2021, at 107.

approach.⁹ Deborah R. Hensler offers an empirical research agenda inspired by Francis, designed to explore the dynamics of mass tort claiming, coordination of judicial management of mass torts, and mass claims resolution facility design.¹⁰

Samuel Issacharoff then examines the driving forces behind the changes in the scale and reach of class actions since the major reforms of Rule 23.¹¹ In honor of the “prominent and internationally respected scholar,” Richard Marcus explores the developments that contributed to the unique role Francis played as a “fixer” in mass tort litigation.¹² Troy A. McKenzie follows, examining when procedural forms of cooperation in resolution of mass claims provoke intense judicial skepticism.¹³ Finally, Judith Resnik’s article concludes the volume, revisiting Francis’s early insights into remedial innovation to explore more applications of his reconfigurations of party structure and “global peace.”¹⁴

The depth and variety of these pieces remind us that Francis’s essence is difficult to capture. He was not just one thing, and so this collection of articles is not just one thing, either. They also remind us that Francis’s learning and teaching was more than lifelong. We hope and expect that these thoughtful articles will extend Francis’s wisdom and insight forward for the next generation of scholars and lawyers. For the three of us, who knew, admired, and loved Francis as a friend, scholar, mediator, and colleague, as a joyful solver of hugely complex problems, this volume is a fitting tribute and fills us with gratitude for his life and legacy.

9. Myriam Gilles & Gary Friedman, *MDL Drano: Rule 23-Based Solutions to Mass Tort Buildup*, 84 *Law & Contemp. Probs.*, no. 2, 2021, at 121.

10. Deborah R. Hensler, *Improving Our Understanding of Mass Claims Evolution, Management, and Resolution: A Research Agenda in Honor of Francis McGovern*, 84 *Law & Contemp. Probs.*, no. 2, 2021, at 143.

11. Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 *Law & Contemp. Probs.*, no. 2, 2021, at 161.

12. Richard Marcus, *A Legend in His Own Time, and a Fixer for Mass Tort Litigation*, 84 *Law & Contemp. Probs.*, no. 2, 2021, at 183.

13. Troy A. McKenzie, *Internal and External Governance in Complex Litigation*, 84 *Law & Contemp. Probs.*, no. 2, 2021, at 207.

14. Judith Resnik, *Mature Aggregation and Angst: Reframing Complex Litigation by Echoing Francis McGovern’s Early Insights into Remedial Innovation*, 84 *Law & Contemp. Probs.*, no. 2, 2021, at 231.