

# IN MEMORIAM: PROFESSOR FRANCIS MCGOVERN

## FRANCIS MCGOVERN: THE CONSUMMATE FACILITATOR, TEACHER, AND SCHOLAR

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### I

#### INTRODUCTION

In the field of complex civil litigation, there are some who focus entirely on litigating or mediating cases, showing no interest in teaching or scholarship. There are others who concentrate entirely on the academic side of law, and who almost never step into a courtroom. It is rare for someone to straddle the line between the two, and even rarer for someone to achieve preeminence in both. But that is exactly what Francis McGovern achieved during his rich and productive career. His real-world work impacted his scholarship and teaching, and his deep thinking in the academy yielded innovative approaches that he put into practice in real cases. Perhaps the best example of this synergy was the National Prescription Opiate Litigation,<sup>1</sup> a multidistrict litigation (MDL) case in which McGovern was serving as a special master at the time of his death. As discussed below, in an effort to facilitate a global settlement, he devised a creative new class action concept and simultaneously wrote a law review article (with Harvard Law Professor Bill Rubenstein) analyzing that concept.<sup>2</sup> The concept ultimately did not survive appellate review.

In this tribute, we first discuss McGovern's important contributions to major cases—as a special master, mediator, or arbitrator. We then discuss his academic

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1. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019) (MDL No. 2804), *rev'd and remanded*, 976 F.3d 667 (6th Cir. 2020), *reh. en banc denied* Dec. 30, 2020.

2. See generally Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020) (arguing for a new form of class certification called negotiation class certification).

impact as a teacher and scholar. Finally, we discuss the confluence of these aspects in the National Prescription Opiate Litigation.

## II

### MCGOVERN THE FACILITATOR

McGovern's active role in facilitating resolutions in major civil litigation is unparalleled. A winner of the American College of Civil Trial Mediators' Lifetime Achievement Award,<sup>3</sup> McGovern served as a mediator, arbitrator, or special master in more than 100 complex cases, involving mass torts, antitrust, securities, civil rights, and numerous other subject areas.<sup>4</sup> His cases include some of the most highly publicized mass tort cases of modern times, including the Dalkon-Shield, Breast Implant, DDT, Deepwater Horizon, Asbestos, and National Prescription Opiate Litigations.<sup>5</sup> For example, McGovern achieved a comprehensive settlement of lawsuits stemming from the February 2003 fire at a West Warwick, Rhode Island nightclub, in which 100 people died and 200 others were injured.<sup>6</sup> McGovern met with every victim and devised a point system for compensating all of them. In total, his approach resulted in the distribution of \$176 million. In the nightclub fire resolution, he did this work pro bono.<sup>7</sup>

Ms. Cabraser recalls that her first MDL experience with Francis McGovern was in the 1992 landmark *In re: Silicone Gel Breast Implant Litigation*, MDL No. 926, assigned to Transferee Judge Sam C. Pointer, Jr., in the Northern District of Alabama. At its outset, the Breast Implant Litigation was notoriously contentious on the plaintiffs' side, as various groups, or "slates" of plaintiffs' lawyers vied for leadership and control of the litigation. From the outset, these groups were divided in their different approaches to the litigation between two competing, almost warring camps: advocates for non-class, individual trials and potentially early remands back to transferor courts on the one hand; and advocates for a class action approach on the other. Even before the centralization of the litigation as an MDL, each cadre sought exclusive leadership of the litigation.

The 1992 hearing on the Breast Implant Litigation before the Judicial Panel on Multidistrict Litigation (JPML) also had been especially raucous. In this earlier era of JPML arguments, presentations by counsel were not necessarily

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3. *Francis McGovern*, AM. COLL. OF CIV. TRIAL MEDIATORS (2020), <http://www.acctm.org/fmcgovern/> [<https://perma.cc/K5NC-83QL>].

4. *Francis McGovern*, EXPERTFILE.COM (2020), <https://expertfile.com/experts/francis.mcgovern/francis-mcgovern> [<https://perma.cc/4YSL-28D8>].

5. *Duke Law Mourns Francis McGovern, Preeminent Expert in ADR, Resolving Mass Tort Claims*, DUKE L. (Feb. 19, 2020), <https://law.duke.edu/news/duke-law-mourns-francis-mcgovern-preeminent-expert-adr-resolving-mass-tort-claims> [<https://perma.cc/FRR5-JWZ8>] [hereinafter Duke University School of Law Tribute].

6. Katie Mulvaney, *Special Master in Station Fire Cases Dies at 75*, PROVIDENCE J. (Feb. 20, 2020), <https://www.providencejournal.com/news/20200220/special-master-in-station-fire-cases-dies-at-75> [<https://perma.cc/K8X6-GG95>].

7. *Id.*

limited to the modern norm of one to three minutes in length. As Ms. Cabraser recalls, the Breast Implant Litigation arguments consumed over two hours of the Panel's time. The vitriolic clash advocacy for districts and judges was so extreme and divisive that the Panel did what it can technically do under 28 U.S.C. § 1407, but which it rarely does. It centralized all of the Breast Implant Litigation cases in the one district in which none were pending, before Judge Pointer: a noted proceduralist and author of an early edition of the *Manual on Complex Litigation*, who had previously been assigned to none of the cases. If this was a punishment, it was a notably constructive, as well as a just, one.

Judge Pointer had a wiser approach in mind; he retained Francis McGovern as his special master to advise the Court on appointments to the coveted leadership positions. Francis did not choose one group over the other. Instead, he personally interviewed each of the applicant attorneys and created a combined leadership structure that included advocates of each litigation approach. He then, through diplomacy and persistence, assured that these short-term “frenemies” actually were able to function as a cooperative whole. It was a uniquely transformative experience for the plaintiffs' lawyers involved. The litigation course of MDL No. 926 included and exemplified both approaches to litigation: the development of individual cases for trial, and a series of class action settlements. With McGovern's facilitation, the class action settlements with major implants manufacturers were approved and implemented within approximately two years of the convening of the MDL, save for the resolution with major defendant Dow Corning. The latter resolution required utilization of a bankruptcy reorganization which was, as noted later in this Article, another area of McGovern expertise.

Ms. Cabraser recalls that as a result of the Panel's Transfer Order, she, along with all of us, as plaintiffs' lawyers, journeyed to Birmingham, Alabama, as strangers, where we were immediately confronted with Francis McGovern, in his character as a quintessential Southern gentleman. We were astonished. We were also swiftly charmed. Francis' personality was inherently implausible, yet utterly authentic. He was a one-man study in contradictions. He was genuinely interested in everyone, from all parts of the country, and from all walks of life. He was the ultimate paradox: an egalitarian aristocrat.

Francis was not a mere facilitator; he was both more strategic, more determined, and more hands-on than that term implies. He could fairly be dubbed “The Great Convener.” In any case in which Francis was involved at the behest of a court, he left no meeting to chance. He was unmoved by scheduling difficulties. When necessary (and this happened more than once in the Breast Implant Litigation) he would physically escort less-than-eager counsel to his chosen venue for settlement discussions; ideally to a remote location from which escape would be impractical.

At one point, in a (successful) quest to obtain a resolution with a major defendant—a goal which, Special Master McGovern determined, required intensive and uninterrupted negotiations—he loaded us participants onto a bus

and deposited us at a remote resort oddly termed a “yacht club,” as it was far from any known body of water. As Ms. Cabraser recalls, the parties’ negotiating teams were literally prisoners of McGovern—albeit in warmly hospitable sequestration.

Free from distraction, the deal got done, and an agreement was drafted (after several days) on the spot. Had smart phones been indispensable appurtenances (or even in existence) in 1994, they surely would have been confiscated, except for necessary communication to clients to obtain settlement authority.

A contemporary version of this technique was deployed by Francis in the National Prescription Opiate Litigation, discussed in this Article and elsewhere in this Issue. Given the nature of the participants—representatives of Attorneys General (AG), Tribes, and over a dozen major defendants; as well as a Plaintiffs’ Executive Committee representing thousands of cities and counties with cases filed in the MDL—getting the needed counsel on a bus or other conveyance and ferrying them to an obscure locale could not work.

But when Francis called a meeting, people came. The conferences were large and many, with different meetings focusing on different issues, from structure and procedure to crash courses in public health presented by experts. Special Master McGovern devised and deployed a plan and process, at the MDL court’s request, which included entities, such as the AGs, whose cases were in other courts.

The Great Convener was making progress when his life was unexpectedly cut short, in a shock to the system that this MDL had become. Those of us involved in the National Prescription Opiate Litigation are committed to continuing and completing the process, but we profoundly miss Francis, as a deeply mourned friend, and as the guide on whom we had come to rely. Francis had a plan. We must guess at what it was, and, inspired by his determination, make one of our own.

The experience of interacting with Francis McGovern taught all of us profound and unforgettable lessons: that the law depends on people for its development and enforcement, that the law is an essentially human endeavor, and that respect and understanding for others is essential to its operation. Francis was a hospitable Southerner and was particularly generous in his intellectual hospitality, drawing each side in to his vision of case management, and ultimately, resolution. He modeled in his conduct the ideal of how everyone involved in the adversary process of civil litigation should treat each other, not simply because it was a desirable ideal, but because it was effective in focusing on the real issues, avoiding distraction with petty disputes, and ultimately reaching a considered understanding of the merits of a case that is essential to negotiating and presenting a fair settlement. The experience of Ms. Cabraser (and many others) in the Breast Implants Litigation was repeated over and over again as Francis McGovern’s own career as special master to MDL courts advanced.

It takes a special kind of person to be an effective mediator in highly contentious, high-profile litigation. Above all, one must be able to listen to all

points of view with kindness and empathy. McGovern definitely was able to do that. As his *Washington Post* obituary noted, “[he] never treated anyone with disrespect or raised his voice; he was encouraging, engaged, gracious, and genuinely interested in others.”<sup>8</sup>

Francis had that rare ability to make everyone with whom he interacted feel truly seen, heard, and understood. His interest in all points of view, and all sides of any controversy, was genuine. He was a gifted translator of litigators’ posturing into coherent positions. He brought opposing sides together—or at least closer—by finding and articulating the essential merits of each position, and the legitimate interests embedded (and sometimes hidden) in a stump speech, and explaining each side to the other. Promoting understanding, and advancing toward agreement, was his stock in trade.

Francis McGovern’s diplomatic and conciliatory approach was not a symptom of uncertainty. To the contrary: as a Yale University tribute aptly noted, “he was relentless and would never give up.”<sup>9</sup> Both of us saw all of these admirable qualities on display in all of our interactions with McGovern.

### III

#### MCGOVERN THE SCHOLAR AND TEACHER

Francis McGovern was revered by his students and colleagues. Although based primarily at Duke Law School, he also held long-standing teaching positions at the University of California Berkeley School of Law and at Stanford Law School.<sup>10</sup> In addition, McGovern lectured on complex litigation throughout the world, and he also regularly taught a training seminar for judges.<sup>11</sup> From the outset of his career, McGovern recognized that he could be most effective as a teacher and scholar if he incorporated his court cases into his teaching and scholarship.

At Duke Law, McGovern taught courses in Alternative Dispute Resolution, Mass Torts, and Legal Strategy.<sup>12</sup> Former Duke Law School Dean David F. Levi remembers McGovern as “one of a kind” who was “focused on moving the field forward, solving seemingly intractable problems.”<sup>13</sup> At the University of California, Hastings College of the Law, McGovern taught innovative courses such as Using Artificial Intelligence in Legal Practice and Litigation Finance.<sup>14</sup> A

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8. *Francis McGovern II - Obituary*, LEGACY.COM (Feb. 23, 2020), <https://www.legacy.com/obituaries/washingtonpost/obituary.aspx?n=francis-mcgovern&pid=195492267&fhid=20296> [https://perma.cc/82S4-RAMQ].

9. *Francis McGovern*, YALE67.ORG (2020), <https://yale67.org/francis-mcgovern/> [https://perma.cc/4FT2-P5A7].

10. Duke University School of Law Tribute, *supra* note 5.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Remembrance: Professor Francis McGovern*, UC HASTINGS L. (Feb. 17, 2020), <https://www.uchastings.edu/2020/02/17/remembrance-francis-mcgovern/> [https://perma.cc/Q7WW-JT98].

fellow Hastings law professor, Rick Marcus, described McGovern as a true “legend.”<sup>15</sup>

At Berkeley Law, Francis McGovern graciously co-taught a series of Complex Litigation and Multidistrict Litigation seminars with Ms. Cabraser, adroitly utilizing her practitioner’s accounts as a foil for what were essentially master classes in McGovern’s own complex litigation case management and resolution strategies. These strategies were informed not only by his encyclopedic (and largely firsthand) knowledge of MDLs as they have evolved from the 1980s onward, but by his insider accounts of what did, and did not, “work” in complex litigation case management, and why.

As a scholar, McGovern authored numerous books and articles on ADR, mass torts, litigation techniques, and a number of other civil litigation topics. His writings have been repeatedly cited by the Supreme Court,<sup>16</sup> the federal courts of appeal,<sup>17</sup> federal district courts,<sup>18</sup> U.S. bankruptcy courts,<sup>19</sup> and numerous state appellate courts.<sup>20</sup> Likewise, he has been cited repeatedly by other scholars. A search on HeinOnline reveals that McGovern has been cited 1,068 times in scholarly publications (not including books) and ninety-one times by various courts.

Perhaps his best-known contribution as a scholar is his 1989 articulation of the lifecycle of a mass tort, culminating in the stage of a “mature mass tort.”<sup>21</sup> As McGovern explained the concept:

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15. *Id.*

16. See *CTS Corp. v. Waldburger*, 573 U.S. 1, 14 (2014) (citing McGovern’s work *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981), to define the terms ‘statute of limitations’ and ‘statute of repose’); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 822 (1999) (citing McGovern’s work *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) regarding the treatment of asbestos claims by plaintiff’s lawyers).

17. See, e.g., *Fed. Deposit Ins. Corp. v. First Horizon Asset Sec., Inc.*, 821 F.3d 372, 376 (2d Cir. 2016); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747–48 nn.25–26 (5th Cir. 1996); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986); *Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 401 (5th Cir. 1984); *Weeks v. Remington Arms Co.*, 733 F.2d 1485, 1487 n.2 (11th Cir. 1984); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 145 (6th Cir. 1983).

18. See, e.g., *Dunlavy v. Takeda Pharmaceuticals Am., Inc.*, No. 6:12-CV-1162, 2012 WL 3715456, 6 n.14 (D. La. Aug. 23, 2012); *Bridgewaters v. Toro Co.*, 819 F. Supp. 1002, 1009 (D. Utah 1993); *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 762 F. Supp. 566, 570 n.1 (S.D.N.Y. 1991), *aff’d in part, rev’d in part*, 4 F.3d 1049 (2d Cir. 1993); *White ex rel. White v. Winnebago Indus., Inc.*, 718 F. Supp. 1429, 1431 (D. Iowa 1989); *Crouch v. Gen. Elec. Co.*, 699 F. Supp. 585, 591 n.5 (D. Miss. 1988); *Habenicht v. Sturm, Ruger & Co.*, 660 F. Supp. 52 (D. Conn. 1986).

19. See, e.g., *In re Blanchard*, 241 B.R. 461, 465 n.6 (Bankr. S.D. Cal. 1999); *In re Dow Corning Corp.*, 211 B.R. 545, 576 (Bankr. E.D. Mich. 1997).

20. See, e.g., *Duran v. Henderson*, 71 S.W.3d 833, 837 n.2 (Tex. App. 2002); *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 768 (2000); *Sanborn v. Greenwald*, 664 A.2d 803, 811 (1995); *Whigham v. Shands Teaching Hosp. & Clinics, Inc.*, 613 So. 2d 110, 111–12 (Fla. Dist. Ct. App. 1993).

21. See Francis E. McGovern, *Toward A Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1882–83, 1886, 1893 (2000); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 607, 609 (1997); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1855, 1860 (1997); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843–44

A mass tort reaches maturity when there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' intentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.<sup>22</sup>

Both courts and commentators have discussed why the notion of a mature mass tort is essential to managing and resolving mass tort cases. As one federal bankruptcy judge has explained: "If enough judicial decisions or jury determinations strongly predominate for one side's position, it may prompt the other side to abandon or alter its opposing position, thereby facilitating settlement."<sup>23</sup> Similarly, as Professor S. Todd Brown explains: "After a tort matures, parties tend to focus on settlement according to established precedent and practice rather than continued litigation."<sup>24</sup>

McGovern's concept of a mature mass tort has been relied on by a number of courts in adjudicating mass tort cases. For example, in *Castano v. American Tobacco Co.*,<sup>25</sup> the Fifth Circuit reviewed a district court decision certifying a nationwide class of cigarette smokers. In reversing the certification order, the appellate court cited McGovern and held that the tort theory ("addiction as injury") was not a mature theory because there had been no "prior track record of trials" that would enable the district court to assess the predominance and superiority requirements of Rule 23(b)(3).<sup>26</sup> In *In re Bristol-Myers Squibb Co.*,<sup>27</sup> the Texas Supreme Court relied on McGovern's mature mass tort concept in noting that "[a] court confronted with the task of setting cases for trial should assess the developmental stage of the mass tort."<sup>28</sup> The court, again citing to McGovern, concluded that, unlike the Asbestos Litigation, the Breast Implant Litigation was not yet mature because the various types of claims were unknown, and that "courts [therefore] should proceed with . . . caution in consolidating claims" to avoid injustice, prejudice, and confusion.<sup>29</sup> Similarly, in *In re E. I. Du Pont De Nemours & Co. C-8 Personal Injury Litigation*,<sup>30</sup> the district court held that the mass tort C-8 chemical exposure was mature because the exposure was specific, the defendant was known and did not contest the release of the chemical, and there had been four trials and one appeal. Thus, the court ruled that "[c]onsolidated multi-plaintiff trials" were appropriate, efficient, and fair.<sup>31</sup>

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(1995); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660, 688–94 (1989).

22. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843 (1995).

23. *In re Dow Corning Corp.*, 211 B.R. 545, 576 (Bankr. E.D. Mich. 1997) (citing McGovern, *supra* note 22, at 1841–43).

24. S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 395 (2013).

25. 84 F.3d 734 (5th Cir. 1996).

26. *Id.* at 746–47, 747 n.25 (citing McGovern, *supra* note 22, at 1834–45).

27. 975 S.W.2d 601, 603 (Tex. 1998).

28. *Id.*

29. *Id.* at 603–605 (citing McGovern, *supra* note 22 at 1843).

30. Civil Action 2:13-MD-2433, 2019 WL 2088768, at \*20 (S.D. Ohio May 13, 2019).

31. *Id.*

Another proposition for which McGovern is frequently cited is that the creation of a mass tort will itself encourage myriad new filings. As McGovern noted: “If you build a superhighway, there will be a traffic jam.”<sup>32</sup> Numerous commentators have agreed with McGovern on this point.<sup>33</sup> McGovern is also well known, as Professor Issacharoff notes in this Issue, for developing the notion that a global settlement can yield a “peace premium” for the claimants involved in such a settlement.<sup>34</sup>

#### IV

#### MCGOVERN THE STRADDLER

When Judge Daniel Polster was assigned by the JPML to oversee the myriad suits brought by cities and counties against drug manufacturers and distributors in the National Prescription Opiate Litigation, no one was surprised when he selected McGovern to serve as a special master.<sup>35</sup> Early on in the MDL, Judge Polster expressed his desire to achieve a global settlement. From the outset, many defendants expressed concern that they did not want to devote substantial time to settlement negotiations, only to have many of the key plaintiffs opt out of any settlement ultimately reached. Defendants wanted a resolution that would achieve global peace.<sup>36</sup>

Soon after his appointment as special master, McGovern convened a small group—including various attorneys involved in the MDL and scholars in the field of aggregate litigation—to explore possible devices for such a settlement. Both of us were involved in this process from the outset, as was Harvard Law Professor Bill Rubenstein. It was extraordinary to witness McGovern’s creative mind at work. He examined a wide variety of possibilities, including a mandatory class action under Rule 23(b)(1)(A) and Rule 23(b)(2), as well as a Rule 23(b)(3) settlement class, but concluded for various reasons that a new approach under Rule 23 was needed for the opioids litigation. McGovern concluded that it was necessary to create a device that allowed for a supermajority of cities and counties to bind the entire group, except for those who opted out of such an approach at

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32. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

33. See, e.g., Victor E. Schwartz, *A Letter to the Nation’s Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 3 (2012); Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, (2012); Susan Hayes Stephan, *Blowing the Whistle on Justice As Sport: 100 Years of Playing A Non-Zero Sum Game*, 30 HAMLIN L. REV. 587, 592 (2007); Dominica C. Anderson, Esq. & Kathryn L. Martin, Esq., *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 16 (2004).

34. See Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 Law & Contemp. Probs., no. 3, at 1, 22 n.54 (citing Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1894 (2000)).

35. Appointment Order at 1, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, (N.D. Ohio Jan. 11, 2018), Doc. No. 69.

36. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 536–37 (N.D. Ohio 2019), *rev’d and remanded*, 976 F.3d 667 (6th Cir. 2020), *reh. en banc denied* Dec. 30, 2020.

the outset. In looking for guidance, he found analogies in the American Law Institute's *Principles of the Law of Aggregate Litigation*,<sup>37</sup> and in Section 524(g) of the Bankruptcy Code.<sup>38</sup> McGovern's vision was that the court would certify a Negotiation Class that would allow a supermajority to bind the entire class to any settlement ultimately reached, except for those who opted out of the Negotiation Class itself, subject to judicial review to ensure that the settlement was fair, reasonable, and adequate. At the time the Negotiation Class was certified, class members would know the allocation metrics and formula that would be used to calculate their share of any settlement that was ultimately reached.

As McGovern was developing the Negotiation Class concept for use in the opioids litigation, he and Professor Rubenstein were simultaneously working on a scholarly work setting forth the concept of a Negotiation Class and the legal and practical justifications for it. That article, entitled *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*,<sup>39</sup> is almost certain to be required reading in most Complex Litigation courses.

Ultimately, class counsel endorsed McGovern's idea and persuaded Judge Polster to certify a Negotiation Class. A panel of the Sixth Circuit reversed, however, in a sharply divided opinion. The majority held that a Negotiation Class was incompatible with Rule 23 because the rule did not explicitly authorize such a class.<sup>40</sup> By contrast, the dissent argued that "th[e] emergence of a negotiation class simply follows the incremental development of settlement class actions," and the court "ought not disturb the relationship between the innovative experiments of district courts and the subsequent codification of those developments in the revisions of the class action rule."<sup>41</sup> Plaintiffs moved for rehearing en banc, which was denied on December 30, 2020.

Even though the concept of a Negotiation Class did not ultimately survive appellate scrutiny, the allocation formula adopted by Judge Polster as part of the Negotiation Class procedure has been the model for ongoing settlement discussions in the MDL and for settlement discussions in the related bankruptcy proceeding involving Purdue Pharma.<sup>42</sup> Moreover, Judge Polster and McGovern have given the Federal Civil Rules Advisory Committee food for thought on a possible amendment to Rule 23 to explicitly include Negotiation Classes within the text of Rule 23.

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37. AM. L. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010).

38. McGovern & Rubenstein, *supra* note 2, at 113 ("In the specialized world of asbestos bankruptcy trusts, the law creates a class of current tort claimants and requires that the plan be put to a vote of that class and be approved by 'at least 75% of those voting.'").

39. McGovern & Rubenstein, *supra* note 2.

40. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 676–77 (6th Cir. 2020).

41. *Id.* at 685.

42. *In re Purdue Pharma Inc.* 7:2019-bk-23648 (Bankr. S.D. NY. 2019); City & Cty. of San Francisco v. Purdue Pharma L.P., No. 3:18-CV-07591-CRB, 2020 WL 5816488, at \*13 (N.D. Cal. Sept. 30, 2020).

## V

## CONCLUSION

Francis McGovern will be missed by the judiciary, the bar, and the academy. He was a genuinely nice guy whose impact in complex litigation, both in actual cases and in the academy, has been substantial and historic.

We are fortunate indeed to have been the beneficiaries of Francis McGovern's scholarly insights, strategic proposals, and procedural innovations. His absence is especially acute now, as COVID-19 has necessitated remote litigation. Francis was a gatherer and a convener. He would have initially been as dismayed as all of us by the inability to meet in person, to interact in real space and time. We strive to imagine the solutions to this barrier that we are confident he would have designed, and this is one of the challenges he leaves us.

Meanwhile, now and going forward, all practice areas can learn from what Francis McGovern taught judges and practitioners in complex litigation: there must be diplomacy as well as war, and that respect for, and credibility with, one's opponents are as essential to success as advocacy for one's own cause.