

IMPROVING OUR UNDERSTANDING OF MASS CLAIMS EVOLUTION, MANAGEMENT, AND RESOLUTION: A RESEARCH AGENDA IN HONOR OF FRANCIS MCGOVERN

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I INTRODUCTION

Over almost four decades of research, writing and teaching about mass tort litigation and complex litigation, I have been fortunate to learn from and become friends with many judges, practitioners, and academicians. Virtually every speech I have given, every paper I have written and every seminar I have taught, has benefited from their willingness to explain complicated legal doctrine to me and share their experience implementing these doctrines on the ground. Among all of these friends, Francis McGovern stands out: he was the first to advise me on where to begin my asbestos research, first to introduce me to others who could be helpful to that research, first to invite me to participate in an upcoming conference, and first to share his latest new ideas with me. Francis and I discussed Multidistrict Litigations (MDLs) before other civil procedure faculty seemed to know they existed, claims resolution facilities before other civil procedure faculty seemed to care about them, and managerial judging when other civil procedure faculty thought that was a bad idea. We talked about judicial case management while eating BBQ in Tuscaloosa, Alabama, and about designing administrative compensation facilities while walking on the Great Wall of China. When I think about mass torts, in my mind's eye, I see Francis nodding and murmuring "elasticity" to explain why there were so many asbestos lawsuits. In my memory's ear, I hear Francis telling my class "home cooking" as he explained attorneys' preference for one MDL transferee court over another. A year after Francis' death, I still cannot believe he is gone.

Francis McGovern was the rare law professor who practiced what he taught about, and the rare practitioner who wrote about the thoughts he drew from his practice. Over his lifetime, by my count, he published more than forty substantial articles in leading law reviews, on topics ranging from statutes of limitation to

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punitive damages, from mediating claims over water rights to mediating claims arising out of Iraq's invasion of Kuwait, from judicial case management to state-federal judicial cooperation, from class actions to MDLs to claims resolution facilities. Most of these articles described what Francis observed in practice and suggested explanations for the behavior of parties, lawyers and judges; many offered policy prescriptions; some offered normative analysis. From my conversations with practitioners and judges, I know these articles helped to shape contemporary mass litigation practice. They also provide a rich source of ideas for empirical research.

Thinking back over our long friendship, I think what drew Francis and me to each other was our mutual interest in how things really work — “the law in action” as contrasted with “the law on the books” — and our different but complementary ways of investigating real world legal problems. Francis' mode of inquiry was intuitive; as a policy analyst, mine requires systematic data collection and analysis. I can think of no better personal tribute to Francis than to outline an empirical research agenda to test systematically his ideas. From Francis' extensive scholarship, I have selected three themes that appear in multiple articles to explore in this Article: the dynamics of mass tort claiming, coordination of judicial management of mass torts, and mass claims resolution facility design. My suggestions below are tentative and intended to provoke thought. Developing implementable research designs to investigate these complex topics will require much more work.

II

“ELASTICITY,” SUPER-HIGHWAYS AND MATURE MASS TORTS

In the early history of mass torts, some tort scholars and court analysts argued that the notion that there was some special category of torts — “mass torts” — that merited a special sobriquet was incorrect. From a doctrinal perspective, they argued, all torts present the same types of questions to courts, albeit in different factual clothes. In mass tort litigation, there are just more cases arising from the same facts.¹ From his efforts to assist judges in resolving mass litigation, McGovern knew that this was not true. Mass torts are not just massive in numbers: hundreds or thousands of claims arising from the same factual and legal circumstances. They have other characteristics that present special challenges to courts and to the large corporate defendants that they target, and special opportunities to entrepreneurial plaintiff attorneys.

Among these characteristics is what McGovern labeled “elasticity”: the capacity to sweep into a litigation a much larger proportion of those exposed to an allegedly defective product or a catastrophic accident than occurs in an ordinary accidental injury lawsuit.² Asbestos was the quintessential example of

1. See Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1022 (1995) (commenting on this scholarship).

2. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1838 (1995).

an “elastic” mass tort: over many decades, millions of workers were exposed to asbestos-containing products manufactured by scores of companies, in numerous worksites owned and operated by different businesses. A large fraction of these workers became ill, some with fatal diseases. Whereas traditional tort doctrine had presented obstacles to workers seeking to hold liable product manufacturers, the introduction of strict liability offered a route over these obstacles. With so many potential claimants and so many defendants, litigation could quickly balloon—hence its “elasticity.”³ More significant to McGovern—because it became his life-long work—was that dispute resolution procedures developed to enable courts to quickly and relatively inexpensively manage and resolve mass torts could themselves attract litigation. When litigation is “elastic,” McGovern argued, efficient resolution entices potential claimants and more importantly, entrepreneurial lawyers, to file lawsuits. “Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam.” he wrote.⁴

Early in his career as a special master assisting judges to resolve mass torts, McGovern had argued that there comes a time in mass tort litigation when a significant fraction of mass claims has been litigated—with extensive document production and expert witness testimony, judicial decisions on threshold substantive legal issues, and some jury verdicts—that the shape of future litigation and resources required to resolve a particular mass tort become clear. Such “mature mass torts” were especially suited for some form of consolidated management and resolution, McGovern wrote—the types of court procedures that he was helping judges to fashion at the time.⁵ A decade later, he had discovered the soft underbelly of this strategy: in elastic mass tort litigation, there are seemingly ever more lawsuits to be filed, and methods to resolve the lawsuits efficiently will simply engender more of the same.

McGovern’s scholarship on elasticity, the super-highway phenomenon and mature mass torts drew on his experiences as a special master; his articles blended case studies of mass torts and astute analysis. *Resolving Mature Mass Torts* was written in the shadow of *Jenkins v. Raymark*,⁶ in which the Fifth Circuit upheld the certification of an issue class in asbestos litigation, and the A.H. Robins bankruptcy proceeding that resolved the Dalkon Shield litigation,⁷ both cases in

3. McGovern’s concept of elasticity was more multidimensional than my brief summary suggests. In *An Analysis of Mass Torts*, he described cycles of growth and contraction in individual mass tort litigations and used the term to cover different aspects of lawyers’ strategies, as well as these patterns. *Id.* at 1837. See also Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 605 (1997) (where McGovern provides a capsule of his theory of elasticity).

4. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, *supra* note 3 at 606. I recall McGovern also using the baseball stadium metaphor—“if you build it, they will come”—to describe this phenomenon, but I have not been able to find it in his published work.

5. Francis E. McGovern, *Resolving Mature Mass Torts*, 69 B.U. L. REV 659, 688 (1989) [hereinafter McGovern, *Resolving Mature Mass Torts*].

6. *Jenkins v. Raymark Indus.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff’d* 782 F. 2d 468 (5th Cir. 1986).

7. *In re A.H. Robins Co.*, 197 B.R. 530 (E.D. Va. 1988).

which McGovern was intimately involved. By the time McGovern had come to caution judges that aggregative procedures would create a “traffic jam” on the “super-highway” he could reference more than a dozen cases, including not just class actions and bankruptcies but also MDLs, and not just asbestos and Dalkon Shield but a host of other pharmaceutical product, medical device and catastrophic accident cases. McGovern did not serve as special master in all of these cases but he did assist individual judges in a significant number of them and became a frequent lecturer at judicial conferences, where he advised many more judges on how best to manage mass torts. Arguably, the growth of mass tort litigation in the 1990s attested to the success of courts—with McGovern’s assistance—in addressing the challenges of mass torts. They also attested to the response of potential claimants and plaintiff lawyers to procedures that facilitate access to the courts.

Fast forwarding to 2021, the themes of McGovern’s scholarship are still relevant. But we know little more than when he wrote his seminal articles about the proportion of those who use or are exposed to allegedly injurious products who file legal claims, in different factual circumstances—that is, “elasticity”—and whether and how claiming rates are related to court management strategies—that is, the “super-highway” phenomenon. What would be required to improve our understanding?

A. Measuring “Elasticity”

McGovern’s concept of “elasticity” derives from the notion of claim propensity. Previous empirical research reveals that among those who have justiciable claims, few will actually take action to bring those claims, and the likelihood of claiming varies across injury circumstances and among people.⁸ McGovern’s elasticity hypothesis states that claiming rates are higher in mass harm or mass loss circumstances than in ordinary circumstances and vary with characteristics of the harm, the alleged harm-doer and the victims.⁹ However,

8. See, e.g., PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK: THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK (1990); William Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1980–1982); Herbert M. Kritzer, *The Antecedents of Disputes: Complaining and Claiming* (September 27, 2011), 1 OÑATI SOCIO-LEGAL SERIES 3 (2011); Herbert M. Kritzer, *To Lawyer, or Not to Lawyer, is That the Question?* 5 J. EMPIRICAL LEGAL STUD. 875 (2008); Herbert M. Kritzer, Neil Vidmar & W.A. Bogart, *To Confront or Not Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC’Y REV. 875 (1991); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525 (1980–1981); DEBORAH R. HENSLER, M. SUSAN MARQUIS, ALLAN F. ABRAHAMSE, SANDRA H. BERRY, PATRICIA A. EBENER, ELIZABETH G. LEWIS, E. ALLAN LIND, ROBERT J. MACCOUN, WILLARD G. MANNING, JEANNETTE A. ROGOWSKI & MARY W. VAIANA, *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* (1991).

9. McGovern’s early writing on “elasticity” and the “super-highway” phenomenon used relatively neutral language to describe the hypothesized increase in claiming rates. See McGovern, *Resolving Mature Mass Torts Litigation*, *supra* note 5 at 688 (“[M]ature mass torts generate an overabundance of plaintiffs . . . including a substantial number of false positive claims.”). Others’ language is decidedly pejorative. See Nora Freeman Engstrom & Amos Espeland, *Lone Pine Orders: A Critical Examination*

previous systematic empirical research on claiming pertains to “ordinary” civil litigation: automobile accident cases, medical malpractice lawsuits, individual workplace discrimination claims, and the like.¹⁰ McGovern’s analysis relied on case studies, drawn from his personal experience and newspaper coverage.¹¹ What is missing is systematic data collection on a statistically representative sample of mass tort cases. To fill this gap and improve our understanding of claiming patterns in mass tort litigation, we could begin by assembling data on claiming rates for the population of mass tort cases that have been centralized by the Judicial Panel on Multidistrict Litigation (JPML) over the last decade. Although the JPML docket excludes state court cases, during this period a large fraction of corporate defendants faced with the potential for mass litigation has removed cases to federal court where the lawsuits are subject to the MDL process.¹²

From 2011–2020, the JPML granted 359 motions for centralization, in litigations that comprised 4,765 lawsuits at the time the motions were granted. Post-centralization, additional lawsuits were transferred as “tag-alongs” to the courts selected for centralization, with the result that by 2020, these MDLs comprised a total of 56,200 lawsuits (4,765 plus 51,435 tag-alongs).¹³

Not all MDL cases are mass torts as generally understood: the MDL docket is diverse with regard to case type. From 2011–2020, product liability, sales practices, and common disaster cases—the categories which most analysts consider mass torts—constituted about forty-four percent of the docket or about 100 cases in most years.¹⁴ Taking into account the addition and termination of

and Empirical Analysis, 168 U. PENN. L. REV 91, 97, 99 n.57 (2020) [hereinafter Engstrom & Espeland, *Lone Pine Orders*] (quoting practitioners referring to influxes of “junk” cases as a result of judicial management strategies).

10. See sources cited *supra* note 8.

11. See, e.g., McGovern, *An Analysis of Mass Torts for Judges*, *supra* note 2. See also Deborah R. Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1991) (presenting profiles of mass tort litigation, drawing on media reports).

12. In recent years, there has been a burst of scholarship, including empirical analysis, on MDLs. This scholarship focuses on the effects of judicial management of MDLs on the mode of disposition—settlements (mass and otherwise) and dispositive decisions by judges—not on its propensity to build a “super-highway” by incentivizing claiming. See, e.g., Engstrom & Espeland, *Lone Pine Orders*, *supra* note 9.

13. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS 2020, “Calendar Year Summary of JPML Activity,” https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf [https://perma.cc/ZQ3F-KS3A]. Arguably, the substantial number of “tag-along” cases that were filed after the JPML agreed to transfer mass lawsuits instantiate “elasticity.” See *id.*

14. See U.S. JUD. PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS REPORTS, 2011–2020, “Distribution of Pending MDLs by Type,” available by year at <https://www.jpml.uscourts.gov/statistics-info> [https://perma.cc/4UTC-ZQKZ]. Note that each year’s distribution of MDLs reflects cases previously transferred by JPML, cases transferred in the reported year, and cases that were terminated (and are therefore not included in the distribution graph). Given this fact, the stability of the distribution over the decade is remarkable. See *id.*

cases within the mass tort categories, this suggests a potential research population of mass torts of about 100 litigations.¹⁵

To calculate claiming rates for each of these mass tort litigations, we need to determine both the numerator—the total number of people or entities who filed lawsuits—and the denominator—the total number of people or entities who *might* have had a claim because they were injured or suffered a loss as a result of the product or event that gave rise to the litigation. The total case numbers reported by the JPML for each of the mass tort MDLs constitute the putative numerators, and the Panel's annual reports indicate their growth and decline over time. However, because plaintiff lawyers in mass tort litigation frequently stockpile inventories of claims, not all of which they will file formally in court but all of which they hope to include in negotiated settlements of the litigation, determining the actual number of claims will require interviewing the lawyers—or perhaps judicial assistants such as special masters or mediators—in the case. Not all of these claims (whether filed or not) necessarily have legal merit but for the purpose of calculating claiming rates this is not problematic because what we are trying to discover is what proportion of people who alleged that they were injured or suffered some other loss tried to claim, either of their own volition or at the urging of plaintiff lawyers.¹⁶

Determining the denominator for these mass torts is more challenging: we need to determine not only the number of products sold that could have given rise to injuries but the rate of injuries. At least a rough approximation of the number of products sold should be available from corporate financial reports: a large fraction, albeit not all, of the defendants are publicly traded and even where that is not the case, court documents may contain relevant estimates. The biggest challenge is likely to be determining how many of those who used the product might have had a cognizable legal claim. Often medical and other scientific research publications that spark product litigation include data on injury rates or risk that might serve as a basis for estimating the denominator. Using the claiming rates calculated in this rough fashion, we could attempt to test McGovern's hypothesis that the extent of claiming—"elasticity"—varies with certain case characteristics.¹⁷ MDL data on the growth in the number of claims associated with individual MDLs might also provide a picture of changes in claiming rates over time.

15. By "litigations" I mean families of lawsuits arising out of the same factual and legal circumstances.

16. The number of claimants on whose behalf lawsuits have not been filed is likely to be sensitive information, but often this number emerges in court documents or media coverage as the litigation moves toward a conclusion. As a fallback, the number of lawsuits can serve as a proxy for the numerator.

17. The involvement of certain plaintiff law firms may also correlate with elasticity. However, rather than *causing* elasticity, certain firms may be drawn to mass claims that are inherently more elastic because of the facts and law that give rise to them. Nonetheless, investigating the relationship between plaintiff law firm identity and claiming rates would be a worthwhile endeavor.

B. Investigating the “Super-Highway” Phenomenon

McGovern’s initial thinking on elasticity derived from thinking about asbestos litigation, where the characteristics of the injuries and claims created seemingly unlimited potential for long-running litigation. However, his focus quickly shifted to the connection between judicial case management strategies and claiming patterns.

Collecting and centralizing cases under the MDL statute is an obvious example of a case management strategy that may incentivize claiming and, indeed, over the last several decades, the MDL process has come to be seen—and criticized—as such.¹⁸ By comparing the number of claims filed in MDL transferee courts that are associated with mass torts, with the scale of mass torts in which the JPML denied motions for centralization, we could take a first step towards empirically testing the hypothesis that the MDL procedure itself is amplifying mass tort claiming. Assume that whether a potential mass tort will balloon or wither after its inception becomes obvious in most instances after a half-dozen years. By comparing the scale of litigation for mass torts in which JPML granted centralization with the scale of litigation for mass torts in which they denied centralization from 2011–2014, it should be possible to obtain a rough approximation of the consequence of MDL centralization over a relevant time period for these two groups of cases. The MDL docket provides data on the total number of formal filings for the centralized litigations; for the litigations in which centralization was denied, the primary sources will be media reports, blogs, and plaintiff attorney websites. An analysis of claiming rates in cases that were denied MDL centralization could further divide those cases according to whether they were centralized or certified as class actions in state courts, or were left to proceed individually.¹⁹

A finer grained analysis of the effects of judicial management strategies on mass tort claiming would investigate the consequences of variation among individual MDL transferee judges’ approaches. In recent years, MDL transferee judges’ orders have become publicly available from court websites, PACER and Bloomberg Law. Using these orders, other researchers have estimated the effects of certain judicial strategies, such as *Lone Pine* orders and fact sheets and

18. See, e.g., Announcement for the First Annual Mass Tort MDL Flash Points Conference, GEO. WASH. L., <https://www.law.gwu.edu/mdl-conference> [<https://perma.cc/K3LJ-4526>] (explaining the purpose of the conference as follows: “The importance of mega mass-tort MDLs is clear and cannot be overstated.”). The notion that MDLs are associated with hyper litigation derives from the observation that a substantial fraction of all civil lawsuits filed in federal courts are now associated with MDLs.

19. In 2000, I conducted a study along these lines that concluded “when collective resolution fails, mass litigation ceases, although some individual lawsuits may linger on.” Deborah Hensler, *The Role of Multi-districting In Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 903 (2001). In addition to investigating the role of the MDL process in sustaining mass litigation, the 2000 study examined whether putative mass torts were certified as class actions. After the *Amchem* and *Ortiz* decisions, the role of class actions in sustaining mass litigation has been much attenuated, although not entirely eliminated.

bellwether trials on disposition patterns, focusing on settlements and dismissals.²⁰ Adopting McGovern’s metaphor, we might think of these strategies as attempts to control “congestion” on the “super-highway,” by denying redress to some claimants and offering it to others in order to achieve “global peace.”²¹ Research on the effects of judicial strategies on claiming rates would complement this research by measuring the rates at which potential claimants arrive on the “super-highway.”²²

III

COORDINATING JUDICIAL MANAGEMENT OF MASS TORTS

Among the many aspects of judicial management of mass torts that interested McGovern was cooperation and coordination among courts, including state as well as federal courts. As is well-known to proceduralists and practitioners, the reach of the MDL statute does not extend to cases filed in state courts. In mass torts grounded on state law causes of action, plaintiff attorneys may file claims in state courts to gain home court advantages, and if they plead their cases to avoid diversity, they may defeat defendants’ desires to remove the cases to federal court and avoid being swept into an MDL.²³

20. See, e.g., Engstrom & Espeland, *Lone Pine Orders*, *supra* note 9. Engstrom & Espeland’s research population comprises all *Lone Pine* orders identified by a Westlaw search of published and unpublished orders, supplemented by information from a non-random set of attorneys, for the period 1986–2014. By their nature, *Lone Pine* orders do not trigger claiming; rather, in at least some mass litigation, they lead to termination of some or all claims. *Id.* at 110–11. Arguably, when a case is assigned to a judge known to favor such orders, this might preempt claims that would otherwise have been brought. Such a consequence, if it occurs, would be extremely difficult to measure. In practice, *Lone Pine* orders appear to be used for weeding out meritless cases at the beginning of litigation and towards the end of litigation—what Engstrom & Espeland term the “twilight phase” of litigation—when a settlement has been preliminarily negotiated but not yet finalized. Engstrom & Espeland found that twenty-five percent of the orders for which they were able to measure effects occurred at this late stage, likely, they suggest, to dissuade claimants from rejecting a proposed settlement by raising the costs of proceeding and lowering the likelihood of a positive outcome on remand. *Id.* at 111. For a strong statement of opposition to the use of *Lone Pine* orders to promote settlement and empirical evidence that they are used for this purpose in a significant fraction of MDL litigations, see generally Elizabeth Burch, *Nudges and Norms in Multidistrict Litigation*, 129 YALE L.J.F. 64 (2019).

21. The notion that when defendants’ goal in mass litigation is to achieve “global peace” is almost universally accepted, so much so that academicians have argued that defendants are willing to pay a “peace premium” to resolve such cases. See, e.g., Jay Tidmarsh, *The Negotiation Class Action*, COURTS LAW: JOTWELL (Nov. 13, 2019), <https://courtslaw.jotwell.com/the-negotiation-class-action/> [<https://perma.cc/7W7C-DDLW>] (commenting on McGovern and William Rubenstein’s proposal for a “negotiation class” and noting “the existence of a peace premium has become an article of faith in some academic circles, despite only a modicum of evidence that it might exist in the real world of aggregate-settlement.”); David Fioccola & Robert Baehr, *A Rule 23 Negotiation Class? Not So Fast!*, MORRISON & FOERSTER: CLASS DISMISSED (Nov. 5, 2020), <https://classdismissed.mofo.com/topics/A-Rule-23-Negotiation-Class-Not-So-Fast.html> [<https://perma.cc/2BR4-K5SX>] (describing McGovern & Rubenstein’s proposal for a Negotiation Class as an effort to create a mechanism for achieving “global peace”).

22. Professor Lynn Baker of University of Texas Law School and I are currently conducting a pilot test of this research approach.

23. On the reasons plaintiff attorneys may resist federal multidistrict litigation, see Paul Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 914–17

From the perspective of a defendant and of a policymaker seeking to maximize efficiency, developing strategies for coordinating state and federal decision-making in mass litigation is attractive. In early mass tort litigation, such coordination often took place at the behest of federal judges and plaintiff steering committees in federal litigation, with voluntary cooperation from attorneys litigating state cases.²⁴ By 1995, the *Manual for Complex Litigation (Third)* noted with undiluted approbation efforts by federal and state judges to coordinate activities, not just when state litigation related to a federal MDL was ongoing in a single court but in the more challenging situation of dispersed state court litigation.²⁵ By 2004, the drafters of the *Manual for Complex Litigation (Fourth)* had a more nuanced view of the consequences of federal-state judicial coordination, noting that its efficiency benefits could be accompanied by attorney gamesmanship, for example, when attorneys sought benefits for their clients by pressing for early trial dates in favored jurisdictions, and advising federal judges desirous of cooperation to be sensitive to state judges' need to preserve their jurisdictional authority.²⁶ While making suggestions for establishing joint committees comprising lawyers representing parties in related matters in state and federal courts to guide dispersed mass litigation, the Manual also encouraged the establishment of "information networks" for sharing information about the litigation's progress among all of the state and federal courts where cases were filed,²⁷ perhaps based on the perception that information-sharing is more likely than coordinating decision-making to be acceptable to judges concerned with preserving their own authority. Today, state-federal coordination in mass tort litigation appears to be pervasive, but there has been little systematic academic inquiry as to its extent, form, or consequences.

McGovern championed efforts by judges to work together to resolve mass torts. Interestingly, in his most widely-cited law review articles on the subject he wrote about "cooperation," rather than "coordination," perhaps signaling that he anticipated that a softer form of collaboration—one that did not require agreeing to national discovery orders, integrated trial schedules or joint hearings—would be more likely to meet with judges' approval than joint decision-making culminating in formal orders.²⁸ McGovern played a leading role

(2001) (explaining that plaintiffs' lawyers "shunned the federal system" in order to maintain client control, avoid delays, prevent cases from being subsumed into class actions, and avoid sharing fees).

24. *Id.* at 916–17.

25. FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION (THIRD) § 31.31 (1995); *see also* William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1700–33 (1992) (reporting on eleven mass tort litigations where such coordination took place, eight of which were mass disaster cases and two of which were state-based asbestos litigation).

26. FED. JUD. CTR. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.31 (2004).

27. *Id.*

28. Although the *Manual for Complex Litigation (Third)* and Schwarzer and others, *supra* note 25, both refer to "coordination," a leading manual of the same period, co-authored by the Federal Judicial Center, National Center for State Courts and State Justice Institute, used the descriptor "cooperation" instead. JAMES G. APPLE, PAULA L. HANNAFORD & G. THOMAS MUNSTERMAN, FED. JUD. CTR.,

in establishing the Special Committee of State Trial Court Judges on Asbestos Litigation in 1990, out of which grew the Mass Tort Litigation Committee (MTLC).²⁹ In *Rethinking Cooperation Among Judges in Mass Tort Litigation*,³⁰ he described, in some detail, judicial efforts at a national level during the 1990s to develop a comprehensive approach to then burgeoning asbestos litigation,³¹ and contemporaneously more geographically limited Silicone Gel Breast Implant Litigation. Addressing asbestos litigation, McGovern focused less on case-specific examples of judicial coordination across jurisdictions—appointing joint committees to organize litigation, sharing discovery orders, presiding over joint trials—than on approaches to aggregating cases for large-scale resolution. By contrast, his discussion of judicial cooperation in the breast implant litigation addressed common areas of coordination—shared interrogatories and depositions, common evidentiary rulings—but focused on the challenges of resolving that litigation, in which state proceedings continued while the MDL transferee judge was working with plaintiff and defense lawyers to craft a “global settlement.” To promote both pretrial coordination and global settlement of the breast implant litigation, McGovern had encouraged the establishment of a special committee of the MTLC, to which every state appointed a judicial representative. With McGovern as its adviser, the special committee met at

MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS, 1 (1997), <https://cdm16501.contentdm.oclc.org/digital/collection/federal/id/16> [<https://perma.cc/CP6F-SWB8>]. According to that Manual, then Chief Justice Warren Burger endorsed the idea of state-federal judicial cooperation in a 1970 address to the American Bar Association and called for the establishment of joint state-federal judicial councils to implement it. Although viewed then as ground-breaking, by 1980, such state-federal councils were apparently well-established, and by 1987 the Judicial Conference of the U.S. Courts had established a state-federal jurisdiction committee. *Id.* at 1–3. Supporters of state-federal judicial cooperation endorsed its use in a variety of cases, criminal as well as civil. But coordinating federal and state court activities was perceived as particularly helpful—perhaps even essential—in mass tort litigation. *See* Schwarzer et al., *supra* note 25, at 1700–33 (describing state-federal coordination in eleven mass tort litigations).

29. In 1994, the Judicial Conference of the U.S. Courts, Mass Tort Litigation Committee of the Conference of Chief Justices, National Judicial College, Federal Judicial Center, National Center for State Courts, and the State Justice Institute (an independent entity funded by the federal government to support the state court system) co-sponsored a National Conference on Mass Tort Litigation to discuss state and federal court cooperation in mass tort litigation. *See* ALEXANDER AIKMAN, NAT’L CTR. FOR STATE CTS., *MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES* 3–4 (1994), http://videosurvey.flcourts.org/gen_public/cmplx_lit/bin/reference/Mass%20Torts/KIS_MaTortManMasTortCa.pdf [<https://perma.cc/TBZ9-S6HV>]. Aikman described the Resource Book as a “model for state-federal court cooperation and coordination” and cited McGovern’s leadership in establishing both the earlier asbestos litigation committee and the later mass tort litigation committee: “The judges who called for the first meeting of the asbestos litigation state trial judges had a vision of what was needed and what might be. Francis McGovern breathed life into that vision and helped to fashion its actualization.”

30. 44 UCLA L. REV. 1851 (1997) [hereinafter McGovern, *Rethinking Cooperation*].

31. For a discussion of the trajectory of asbestos litigation in the 1990s and the challenges it presented to the civil justice system, *see generally* STEPHEN CARROLL, DEBORAH HENSLER, ALLAN ABRAHAMSE, JENNIFER GROSS, MICHELLE WHITE, SCOTT ASHWOOD & ELIZABETH SLOSS, RAND INST. FOR CIV. JUST., *ASBESTOS LITIGATION* (2002). Ultimately the effort to devise a national strategy for resolving asbestos litigation failed when the U.S. Supreme Court vacated the class certification in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

regular intervals to share information on the progress of breast implant cases in different courts and ways to improve coordination, and importantly, to decide on actions that individual state court judges might take to facilitate—or at least not impede—the effort to reach a global settlement in the MDL court.³²

McGovern did not see cooperation and coordination as unalloyed goods. *Rethinking Cooperation Among Judges in Mass Tort Litigation* identifies various normative concerns that judicial cooperation raises and notes that just as mass tort plaintiff and defense lawyers may use coordinated procedures to jockey for party advantage, judges may adopt or resist cooperative strategies to achieve what they view as optimal resolution of a mass litigation. Writing in 1997, McGovern warned that, rather than simply serving as neutral case managers, judges who adopted cooperative strategies might become “players” in mass tort litigation.³³ Three years later, this had become the dominant theme of his analysis of the consequences of judicial cooperation, as reflected in the opening sentence of *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*: “Judges are now players in the mass tort game.”³⁴

McGovern’s analysis of judges’ roles in mass tort litigation connected with the arguments of his previous writing on mass torts. “Mature” mass torts provided opportunities for efficiency gains from consolidation that attracted the federal judges who were first called upon to manage mass claims. “Elasticity” created the potential for judicial management decisions to build the “super-highway” that could defeat judicial efforts to produce global resolutions of some mass torts.³⁵ However, while his earlier writing (and special master practice) was generally optimistic about the prospects for managing mass tort litigation efficiently and fairly, by 2000, McGovern’s view on the prospects for effective management had soured. Writing in the shadow of *Amchem*³⁶ and *Ortiz*,³⁷ it seemed less likely to him that judges and lawyers would be able to craft global settlements. Whereas “cooperation” in the form of information sharing still had the potential to reduce expense and time to disposition, coordination of the sort that McGovern had promoted in the breast implant litigation was stumbling over

32. At McGovern’s invitation, I observed a meeting of the special breast implant MTLC committee at which the state court judges discussed delaying their trial schedules so as not to upset negotiations for a global settlement that were then underway in the MDL court. By the time of this discussion, state court juries had delivered outsized verdicts against breast implant manufacturers, and at least some of the judges at the meeting were concerned that additional high-dollar verdicts would present an obstacle to reaching a negotiated agreement that would offer plaintiffs considerably less. Ultimately, the proposed class action settlement failed when the number of putative class members was revealed to be much higher than both plaintiff and defense lawyers had contemplated.

33. McGovern, *Rethinking Cooperation*, *supra* note 30, at 1869.

34. 148 U. PA. L. REV. 1867, 1867 (2000) [hereinafter McGovern, *Toward a Cooperative Strategy*].

35. Among judges who were “more critical in the process leading to the outcome of mass torts than their lawyers or their clients,” McGovern named federal district court judges Carl Rubin, Jack Weinstein, Robert Parker and Tom Lambros. McGovern argued that the prominence of these judicial case managers characterized the contemporary era of mass torts, and contrasted with the prominence of judges in previous eras, who were celebrated for their opinion writing. *Id.* at 1868–70.

36. *Amchem Products v. Windsor*, 521 U.S. 591 (1997).

37. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

judges' (and parties') desires to pursue their own paths in their own jurisdictions. Efforts at the national level to promote cooperation of both sorts had foundered; the MTLC no longer existed.³⁸ Reaching for other solutions, McGovern outlined a set of managerial strategies that combined different modes of aggregation (for example, class actions and MDLs) and encouraged, or at least did not attempt to preclude, parallel actions in multiple state courts. Notwithstanding the title of the 2000 article, in this approach to managing and resolving mass torts, cooperation was no longer prioritized.³⁹ Instead, by facilitating the creation of a "marketplace" of outcomes, including state trial court verdicts, judges (and special masters) could create an environment that would encourage effective negotiation among parties. The revised approach to mass tort litigation would take into account defendants' desire for pre-trial decisions to help them assess their liability risk rather than pursue early aggregation and risk a flood of claims; it would also attempt to thread the needle between the conflicting interests of plaintiff firms with different business models.

Although *Toward A Cooperative Strategy for Federal and State Judges in Mass Tort Litigation* did not foresee the centrality of MDLs to today's mass tort litigation, twenty years onward McGovern's analysis seems remarkably prescient in its prediction that judges and practitioners would come to embrace multiple diverse approaches to managing and resolving mass torts, including parallel litigation in state and federal courts, *Daubert* hearings, bellwether trials and occasional class certification. Hardly a surprise, for McGovern proceeded to implement these ideas as a judicial adviser in two more decades of mass torts, culminating with his role as special master in the opioid litigation, which has seen the deployment in state and federal courts of virtually every approach to resolving mass torts that he proposed.

After 2000, McGovern's mass tort scholarship ceased to foreground judicial coordination, but it was always there as background. In *A Model Mass Tort: the PPA Experience*,⁴⁰ writing with federal MDL transferee Judge Barbara Rothstein, he described her coordination of *Daubert* hearings with eleven judges from seven states as an example of successful case management—indeed, a "model" for other judges to follow. And notwithstanding McGovern's seeming dismay in 1997 about the prospects for federal-state court coordination of mass tort litigation, available evidence suggests that coordination between federal MDL transferee judges and state court judges is relatively common.⁴¹ But despite

38. McGovern, *Toward A Cooperative Strategy*, *supra* note 34, at 1878–82.

39. *Id.*

40. Barbara Rothstein, Francis McGovern & Sarah Dion, *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 632–34 (2006).

41. A 2011 survey of MDL transferee judges by the Federal Judicial Center found that among MDL judges who were aware of parallel state court proceedings, sixty percent engaged in at least some collaboration, including coordinating schedules for pretrial hearings of various sorts; a sizeable minority jointly appointed lead counsel or special masters or conducted joint mediation and settlement conferences. See EMERY LEE, FED. JUD. CTR., SURVEY OF TRANSFEREE JUDGES IN MDL PROCEEDINGS REGARDING COORDINATION WITH PARALLEL STATE COURT PROCEEDINGS, 1–2

the burgeoning of academic interest in multi-district litigation, coordination has not attracted the same sort of attention that judicial settlement practices have drawn.⁴² We know the types of coordination that the *Manual for Complex Litigation* seemingly approves; we can infer from the available evidence that coordination takes place in a significant fraction of mass tort cases, but we do not know what distinguishes cases with parallel state and federal litigation in which coordination does and does not take place and more importantly, we have no systematic information about the consequences of coordination for plaintiffs and defendants.⁴³

(2011), <https://www.fjc.gov/sites/default/files/2012/LeeMDLFedSt.pdf> [<https://perma.cc/R68A-WBDS>]. In 2013, the Federal Judicial Center published a “pocket guide” for judges on coordinating federal-state litigation. FED. JUD. CTR., COORDINATING MULTIJURISDICTION LITIGATION: A POCKET GUIDE FOR JUDGES (2013), <https://www.fjc.gov/sites/default/files/2014/Coordinating-Multijurisdiction-Litigation-FJC-2013.pdf> [<https://perma.cc/KW43-LR29>]. A report on a 2016 survey of federal district court judges conducted for the Federal Judicial Conference identified areas in which federal judges have collaborated with state judges; one-third of the respondents said that judges in their district were currently “coordinating joint proceedings in related cases” or had done so in the past. JASON CANTONE, FED. JUD. CTR., REPORT ON FEDERAL-STATE COURT COOPERATION: A SURVEY OF FEDERAL DISTRICT COURT JUDGES 3 (2016), https://www.fjc.gov/sites/default/files/2017/Federal_State_Cooperation_Survey_2016_Cantone.pdf [<https://perma.cc/9X2J-YW2N>]. Another report published during the same period describes coordination of discovery in related federal and state court cases in New York. ROBERT GIUFFRA, JR. ET AL., N.Y. STATE-FED. JUD. CONF., REPORT ON THE COORDINATION OF DISCOVERY BETWEEN NEW YORK FEDERAL AND STATE COURTS (2016), <https://nys-fjc.ca2.uscourts.gov/reports/2016/NY%20State%20Federal%20Judicial%20Council%20Report%20on%20Discovery%20Coordination.pdf> [<https://perma.cc/YW9M-88K9>]. See also David Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court’s Decision Quartet*, 71 RUTGERS U. L. REV. 1, 51 (2018) (“When similar such cases remain in both state and federal courts, there has also now been at least two decades of experience with ad hoc coordination of such cases, with the state and federal judges agreeing to coordinate discovery and motion schedules, hear nearly identical motions in each other’s courtrooms together and work together to organize bellwether trials and other efforts toward a settlement of all or as many of the cases as possible.”).

42. An exception is Abbe Gluck’s 2017 article, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669. Gluck interviewed fifteen federal district court judges and five state court judges about their experience managing mass tort litigation.

43. Gluck’s federal judge interviewees described the different approaches they use to coordinate with state judge counterparts in parallel litigation, all of which are familiar to readers of the *Manual for Complex Litigation* (Fourth) and the various FJC publications on judicial cooperation. See *id.* at 1703. From Gluck’s description of the judges’ responses, coordination did not seem to raise procedural concerns. But both federal and state court judges worried about the ways in which federal MDLs may ignore or minimize substantive state law differences that have clear consequences for parties. And some federal judges were uncomfortable with what they viewed as uncertainty about the scope of their authority with regard to state-law based cases. *Id.* at 1704–06. Gluck’s focus on federalism may have encouraged her respondents to focus on such conflict of law issues. Earlier, McGovern interviewed ninety mass tort practitioners about their attitudes towards the MDL process. He found diverse reactions both to the approach of the JPML to deciding whether to centralize cases and if so, which judges they should assign them to and to the consequences of the MDL process for plaintiff lawyers who prefer to practice in state courts. The latter’s strongly negative views were associated with their loss of control over their clients’ cases and the reduction in their fees, when MDL transferor judges’ orders force these lawyers to contribute to plaintiff steering committee costs. See John Heyburn & Francis McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION, Spring 2012, at 26, 30.

Collecting information about the frequency, pattern, and outcomes of different types of federal-state judicial coordination in mass tort litigation would require combining coding of docket information and interviewing judges, judicial adjuncts, and counsel for plaintiffs, defendants, and perhaps other participants in the litigation. Such a study could start with the same sample of product liability mass torts selected for the research proposed in Part II, or a separately drawn sample of multi-districted litigation. To produce reliable data, a sufficiently large and randomly selected sample would be necessary. Answering the threshold question of whether there was parallel litigation in these litigations might require supplementing the MDL docket information with other online research, as an absence of references to state litigation in the federal docket could be an indicator of a lack of coordination rather than a lack of state court litigation. MDL dockets, however, should be reliable sources of information about coordination, if it occurred. Coding MDL judicial orders and related documents would produce information about the frequency of different types of coordination. Statistical analyses would investigate whether the frequency and types of coordination are correlated with key case characteristics, such as the scope of the litigation, nature of claims, party characteristics, and presence of judicial adjuncts. To explore the “repeat player” phenomenon that has been the subject of much of the recent academic discourse on multidistrict litigation, the identities of judges, special masters, mediators, and lead counsel would also be coded. By coding information about time to disposition, this phase of research could also provide a basis for testing assertions that, other things equal, coordination expedites resolution of mass torts involving parallel federal and state litigation and might suggest what types of coordination are most likely to speed resolution.

To investigate the consequences of different types of coordination beyond time to disposition would require interviewing both state and federal judges, special masters, mediators and other judicial advisers, defense counsel, and plaintiff lawyers with varying approaches to litigating mass torts. Rather than asking about attitudes and experiences regarding coordination generally, these interviews should inquire about the consequences of the specific activities identified by the coding process and should invite respondents to discuss a range of possible consequences including the substantive law that was applied to the cases, the degree of judicial supervision of any mass settlements that took place, and the influence of “repeat players” on outcomes for parties. The ultimate goal of the interviews would be to develop a better understanding of who benefits, and how much, from coordination. By learning what judges and practitioners think is the answer to this question, we might also develop a better understanding of why judges do or do not adopt different coordination strategies and why different practitioners support or oppose these strategies.⁴⁴

44. My discussion of coordination is wholly pragmatic, mirroring the general treatment of the subject in civil procedure scholarship. For an interesting theoretical analysis of judges’ incentives to coordinate activities in a different arena, see generally Bert Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1331 (2020) (presenting a game theoretic perspective on the issuing of national injunctions by

IV DESIGNING CLAIMS RESOLUTION FACILITIES

A third strand of McGovern's scholarship and practice addressed the allocation of compensation after dispute resolution. This aspect of his practice ranged beyond conventional mass tort litigation between personal injury victims and corporate defendants to include tort claims resolution in bankruptcy courts,⁴⁵ mass claims against financial institutions,⁴⁶ and in at least one instance, an international dispute involving state actors.⁴⁷ As always, this scholarship built on McGovern's practice, but in this instance it extended beyond his own professional experience, as he sought to connect the design of administrative compensation systems to the design of post-litigation distribution of settlement funds.⁴⁸ And, to a greater extent than McGovern's scholarship on managing mass torts, this scholarship connected practical observations on claims resolution strategies to basic social science research, particularly the work of procedural and distributive justice scholars. Reflecting McGovern's practice, the scholarship encompasses both discourse on macro-system design with reports of implementation success and failure, highlighting the nitty gritty of delivering dollars to claimants.⁴⁹

Over the course of the decade in which McGovern's scholarship focused on claims resolution facility design, he identified a variety of features for system designers to take into account. These included the size of the group to whom compensation will be offered, the amount of money available, the identity of the facility designer, the rules for determining the amounts of individual compensation and what he variously referred to as the "metaphor," "paradigm" or "narrative" that justifies the compensation scheme, which he argued should

multiple federal district courts during the Trump era). Collecting systematic information on coordination in parallel federal and state mass tort litigation along the lines that I propose might provide the basis for a theory-based analysis of judicial decision-making in this arena.

45. Francis McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AMN. L., 163 (2006) [hereinafter McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*].

46. Francis McGovern, *Second Generation Dispute System Design Issues in Managing Settlements*, 24 OHIO ST. J. DISP. RES. 1 (2008) [hereinafter McGovern, *Second Generation Dispute System Design Issues*]; Francis McGovern, *Distribution of Funds in Class Actions – Claims Administration*, 35 J. CORP. L. 1 (2009).

47. Francis McGovern, *Dispute Systems Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171 (2009). The UNCC was established in 1991 under the aegis of the U.N. to resolve claims for compensation for losses associated with Iraq's 1990 invasion of Kuwait. It paid the last claims in 2005. *Id.* at 172.

48. See generally Francis McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005) [hereinafter McGovern, *The What and Why of Claims Resolution Facilities*] (exploring claims resolution facilities as alternatives to litigation); James K. Sebenius, Ehud Eiran, Kenneth R. Feinberg, Michael Cernea & Francis McGovern, *Compensation Systems and Dispute Resolution Mechanisms: Beyond the Obvious*, 21 NEGOTIATION J. 231 (2005) (reporting on a panel discussion that included McGovern and convened to draw lessons from a wide variety of dispute resolution system designs to the Palestinian-Israeli conflict).

49. See generally McGovern, *The What and Why of Claims Resolution Facilities*, supra note 48. McGovern's work on claims resolution facilities is a good example of this point, exploring in detail the numerous variables, strategies, assets, and defects associated with such facilities.

shape the rules for determining compensation amounts.⁵⁰ He also identified different metrics for measuring claims resolution outcomes associated with these features, including efficiency (measured by administrative expense and time to claim resolution) and horizontal and vertical equity of compensation amounts.⁵¹ He also noted the practical challenge in facility design and implementation of creating systems that are not so complex as to impede legitimate claimants but not so lax as to permit fraudulent claims.⁵²

McGovern's analyses and recommendations regarding claims facilities reflected both his experience—what “worked” and did not work—and his intuitions about claimants' responses to different system designs. But rarely did it include systematic investigation of the links between design features and objective outcomes such as cost and time to resolution; nor did it include inquiry as to what *claimants* value about claims resolution procedures. The lack of information from claimants reflects a general hole in research on mass civil litigation; although socio-legal researchers have conducted surveys of plaintiffs and defendants with ordinary civil lawsuits, there have been few efforts to collect information about attitudes and perceptions of claimants or defendants in large-scale litigation.⁵³

Researchers interested in conducting systematic research on the consequences of claims resolution facility design and implementation have encountered two challenges: 1) information on the outcomes delivered by these facilities is generally shrouded in secrecy, and 2) without information identifying

50. Sebenius et al., *supra* note 48, at 243 (reporting McGovern's recommendations on the design of a program for Palestinian-Israeli reconciliation, drawing upon his mass tort experience). McGovern used these terms to refer to the justification for the program, which might be intended for disaster relief, war reparations, social welfare, tort compensation or resolution of contract disputes. Like Kenneth Feinberg, who also participated in this panel discussion, he emphasized the importance of perceived system legitimacy. *See id.*, at 237–38 (showing Feinberg's comments). *See also* McGovern, *The What and Why of Claims Resolution Facilities*, *supra* note 48, at 1365–66.

51. McGovern, *The What and Why of Claims Resolution Facilities*, *supra* note 48, at 1379–80. As McGovern noted, even when stakeholders agree on whether a facility should prioritize horizontal or vertical equity, they may disagree on how to operationalize the chosen norm. *See* McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, *supra* note 45, at 165–66.

52. *See generally* McGovern, *Second Generation Dispute System Design Issues*, *supra* note 46 (discussing two instances where McGovern was called in by judges to rectify problems in initial facility designs).

53. Hadfield's survey of victims of the 9/11 attacks is somewhat of an exception to this assertion. Her research, however, focused victims' perceptions of the choice between submitting claims to the VCF and pursuing individual litigation, rather than on experiences seeking compensation from the fund. *See generally* Gillian Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund*, 42 *LAW & SOC'Y REV.* 645 (2008). As Hadfield notes, the extensive socio-legal scholarship on claiming has focused primarily on potential claimants' understanding of whether they have justiciable claims and their decision to pursue (or not) such claims in the court system, not on their experiences seeking compensation within the system. *Id.* at 647. More recently, Donna Shestowsky has conducted longitudinal research surveying litigants' preferences, choices and evaluations of different dispute resolution procedures. Her research focuses on individual litigation and comparisons of negotiation, mediation, arbitration and trial. *See generally* Donna Shestowsky, *Great Expectations? Comparing Litigants' Attitudes Before and After Using Legal Procedures*, 44 *LAW & HUM. BEHAV.* 179 (2020).

mass tort litigants, it is impossible to select a representative sample to survey. Information about the amounts of money distributed by claims resolution facilities, the distribution of compensation amounts (for example, mean, medians, and quartiles), median and mean time to distribution, and administrative expenses should be publicly available for class action settlements, for which courts retain jurisdiction until the litigation is formally terminated. Parties have generally resisted making such data available, citing the necessity to protect claimant confidentiality, but it is possible to design procedures for retrieving and reporting the relevant aggregate data without compromising confidentiality. Given the many design decisions that must be made in order to establish a claims resolution facility and likelihood—as reflected in McGovern’s scholarship—that these decisions affect outcomes, the fact that to date these data have not been open to scrutiny should give us pause. Proposals to incorporate a provision in federal Rule 23 that would require access to these data for legitimate research purposes have not succeeded, but in 2018, the federal court for Northern District of California adopted a local rule that requires “post-distribution accounting,” including information on

[t]he total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys’ fees and costs, the attorneys’ fees in terms of percentage of the settlement fund, and the multiplier, if any.⁵⁴

Moreover, the Northern District of California requires that counsel proposing settlements provide similar information about distribution “for at least one of their comparable class action settlements.”⁵⁵ Adopting similar protocols for class action settlement approval in other district courts would provide a rich database for analysis of the relationships among design features of claims resolution facilities and key objective outcomes.

An important weakness of this proposal as an approach to providing objective information for systematic analysis of mass tort claims is, of course, that most mass tort litigation is not resolved in the form of class actions, and judges presiding over non-class litigation arguably do not have the authority to order the sort of information disclosure incorporated in the Northern District of California’s procedural guidance. Some judges might nonetheless use their discretionary powers under Rule 1 in the interest of promoting transparency; going forward, if Rule 23 were to be amended to include provisions for multi-district litigation as is currently under consideration, judges would arguably gain

54. *Procedural Guidance for Class Actions Settlements*, U.S. DIST. CT. N. DIST. OF CALIF. (Dec. 5, 2018), <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/> [https://perma.cc/4X2A-YS5J]. It is unclear whether any researchers have availed themselves of these data to date.

55. *Id.*

the power to impose post-distribution accounting rules akin to the Northern District's, and the resulting data could then be made available for legitimate research purposes.

The problem of how to identify mass tort litigants for the purpose of interviewing them about their attitudes and experiences regarding claims resolution would remain. One option would be for a court to appoint a third-party intermediary to contact litigants who have submitted claims to a claims resolution facility to seek their agreement to be interviewed. (As discussed above, this effort might be confined to class action settlements, but ideally would extend to non-class mass tort settlements.) The intermediary, operating under confidentiality rules, could then input email addresses in a survey software database, for the purpose of sending online surveys to these litigants. Most survey software includes protocols for anonymizing responses, so that the researchers would never receive identifying information nor be able to link identifying information to survey responses. In sum, although challenging, it would be possible to incorporate privacy protection protocols while permitting efforts to contact litigants to inquire about their attitudes and experiences regarding the claim resolution procedures and outcomes that affected them.

V

CONCLUSION: A RESEARCH AGENDA IN HONOR OF FRANCIS MCGOVERN

Conducting systematic empirical research on the multiple propositions that flow from Francis McGovern's scholarship on mass torts would be challenging. One would need to carefully operationalize the concepts he promulgated in order to test whether his inferences about their importance and consequences are supported. No single study or method would suffice; one would need to deploy both quantitative and qualitative approaches and use a variety of data, including docket information, in-person interviews and online surveys. Although some of Francis' hypotheses are worthy of being investigated using large-scale data analysis and econometric modeling, where feasible, qualitative case study research and interviews are more likely to yield useful results. Whether any of the studies I have sketched are feasible is uncertain, and all would be easier to design and implement were Francis still with us. But I like to think he would look down on our efforts and cheer us on.