

NEW DEVELOPMENTS IN TORT LITIGATION: PRESENTATION OF FRANCIS MCGOVERN*

FRANCIS MCGOVERN:

I'm going to give you something that I think is relatively unique. The idea that I'm talking about is called the "negotiation class,"¹ and I'm going to tell you how the idea developed because it's a really simple idea. Folks have been kicking themselves saying, "How come I didn't think of this?"

It's within the context of the opioid crisis we're seeing private courts morph into public courts. I'm a settlement guy. My role was almost always to try to settle cases. So, the question is, if you have a public court, how do you settle the case?

In the opioid cases, the defendants said, "We're not going to settle this case unless all of the plaintiffs agree. We're not going to pay money and then have to face additional lawsuits down the line." You want to get closure if you possibly can. The problem here is the plaintiffs are every city and county in the United States and every state in the United States: 34,000 cities and counties, and fifty states. How do you get closure from all of those folks?

That was the problem, and the idea came. I was on the southern coast of Sicily. Mark Lanier and Mike Gallagher gave me a call, asking how they

* Professor of Law, Duke University School of Law. Professor McGovern will be remembered as a pioneer for his work in alternative dispute resolution within the field of mass tort litigation. In addition to developing groundbreaking legal strategies and solutions in highly complex tort matters, and using his expertise as a means of mentoring and teaching young lawyers, Professor McGovern was a court appointed special master in nearly 100 cases, including those arising from Alabama's DDT toxic exposure, asbestos contamination, the Dalkon Shield contraceptive intrauterine device, silicone breast implants, Rhode Island's Station Nightclub fire, and the BP-Deepwater Horizon oil spill in the Gulf of Mexico, to name a few. Most recently, he served as one of three special masters assisting with thousands of federal lawsuits filed by cities and states against opioid manufacturers and others. Professor McGovern left a legacy we are honored to celebrate. He will be deeply missed by his friends and colleagues. We would further like to thank Professor McGovern's estate for permitting us to publish his remarks which unequivocally reflect his passion for his field.

1. See generally Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEXAS L. REV. 73 (2020).

could get involved in the cases and I started thinking about it. My wife went off to have, I think it was an avocado hairdo thing,² and so I had plenty of time while she washed the avocado out of her hair, to think about it.

And I went back to a case I did with Mark Davis in Kauai. It was a dam failure case brought by sugar cane growers on the island of Kauai, where it rains a lot. Every now and then it doesn't rain, and they need to have water, and so they built a dam up on a hillside using lava rock. It was cheap because they were just trying to put together temporary amounts of water, and then when it did rain, gravity would allow them to irrigate their sugar cane. You don't grow sugar cane anymore, you grow tourists. And some real estate developer decided, "Oh, I could have a lake up high in Kauai. Build homes around, raise the level of the lake." Naturally, it failed.

There were eight deaths, one in utero, and about 100 people that had property down on the hillside, ending in Bette Midler's pond. Better Midler had a freshwater pond. People would swim in the ocean, come back, and wash off the salt and water, but it was filled with yuck.

Mark Davis said, "Okay, I've got about eight deaths and I've got about 100 property owners. How should we settle this?" I said, "Well, let's get together." We worked out the eight deaths, but for the property owners I said, "Why don't we do this? Why don't we get all of them to agree how they're going to allocate the money and agree on a super majority vote once an offer comes around. If I can get all of them to agree to that, then when the time comes, you will have a greater bargaining power to be able to say to the defendants, 'I can deliver everybody. All I need is a super majority vote.'" We had a meeting in somebody's house. Everybody agreed, "Sounds great," and moved on.

So, there I am on the southern coast of Sicily and I'm thinking, "How do I get 34,000 cities and counties to agree?" I said, "Well, why don't we do the same thing, but put it in a class action?" Create a class action that allows this group of 34,000 cities and counties to negotiate as a group if they can agree in advance how they're going to allocate the money. Basically, there was agreement in the class notice: one-third based on MMEs (the "morphine milligram equivalent"), one-third based on the number of addicts, one-third per 100,000 MMEs per capita based on the number of deaths per 100,000. We'll divide it up for every city and county in the United States based on that formula, and we will agree to be bound by a 75% vote.

Once an offer comes in, this is how we're going to divide up the money, and this is how we're going to vote. Judge Polster said, "Yep, sounds like a class to me. We'll give it a try." Notice went out to 34,000. Guess how many

2. Katy McGovern recalls having an olive oil hair treatment that day.

opt-outs there were? About 500 opt-outs. So, now you have a group of cities and counties who can negotiate, and you can promise the defendants closure.

Now, there are lots of problems that I don't have time to go into. The big fear I have is—I may have created a monster here. That is to say, are there other circumstances where you could over-empower a group to be able to negotiate? But that's the history of where the idea came from.

Let me add one more comment. For years, I've been trying to figure out how best to deal with the MDL for defendants. In the 1970s, Dalkon Shield was consolidated, but it was for pretrial only. And then it came out and there were re-depositions. And along came [New York Federal District Judge] Jack Weinstein, who decided to resolve Agent Orange all at once and make a point to the federal judiciary—that is, if you get an MDL you have to settle it. And that's what Judge Polster said right at the beginning of opioids.³

So to me, if I were a defendant, I want to change that function. The role of the MDL judgment should actually be to select certain cases. You stay the litigation, you select certain cases, you set them for trial and then remand some cases in a strategic way, so the defendants have a legitimate opportunity to have their cases tried without the inundation of thousands of trials at the same time.

MARK BEHRENS:

I think that's what Judge Eduardo Robreno has done in the asbestos world.⁴

FRANCIS MCGOVERN:

And I was Special Master.

Judge Polster agreed to send some cases back, but I've never been able to get federal judges off of, "My job is to resolve the whole ball of wax. I'm a bad judge if I send cases back to my fellow Article III judges."

[Kansas Federal District Court] Judge Kathryn Vratil and I gave a talk at an MDL conference titled "Breaking Up Is Hard to Do." And we danced into the music, and talked about some kind of amicable separation, and we were trying to convince these judges that it's okay to remand cases. So I would argue to you, if you really want to do what I think the defendant should want, and [plaintiffs' lawyers] should want, is to have some actual cases

3. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019); see also Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938 (2019).

4. See Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013).

where you have a legitimate chance of winning on the merits. And in fact, the Roundup case was on causation only. You couldn't have gotten a better trial. The problem was it was in California for the—

MARK BEHRENS:

The Ninth Circuit.

FRANCIS MCGOVERN:

Well, and it was the California law about warnings. So, the problem there was it was sent to California, rather than being sent to another state. John?

JOHN BEISNER:

I just want to point out a take on that: the bellwether trial.

Years ago judges would bring you in and say, "Okay, we have this proceeding, let's start talking about settling." The defense would say, "Wait a minute, we have no facts. No discovery. We need to do something of substance in this case." And so, the bellwether trial emerged, and then unfortunately I think, it started to take on a life of its own.

I think an increasing number of defendants are considering the option of going into the MDL proceeding and simply saying, "There can't be trials in this MDL proceeding under the statute unless we agree, unless there's waiver. And we're not agreeing. Let's do a pre-trial discovery, set a date for remand and we'll have trials." I think that approach deals with the concern about unscrutinized claims coming in. Some are doing that, and those MDL proceedings are wrapping up more quickly.

FRANCIS MCGOVERN:

I would argue, John, that you want a strategic remand. That is, if we were to send 3,000 opioid cases back at the same time, you would be facing 3,000 trials, which is why Dow Corning went into bankruptcy.

JOHN BEISNER:

I'm not disagreeing with that part of it. But I have found a number of times, all of a sudden, the whole thing starts disappearing. When confronted with the possibility of trial—the ones who don't know the client, who haven't investigated the claims, and just got a name and filed a claim—they are gone.

FRANCIS MCGOVERN:

But Brian [Panish] should like that because then what it does, is it puts the trial lawyer in the forefront of selected cases.

BRIAN PANISH:

Well the issue becomes, and I'm dealing with this in California now in the wildfire cases or ranch cases, how do you select the bellwethers? Randomization? If a bad case gets selected, the aggregator that hasn't worked with the case and has no stake in the game, they just dismiss the case. So how do you select true bellwether cases?

SPEAKER:

Well I'm going to have Brian have the last word.