

NOTE

A LITIGATION ASSOCIATION MODEL TO AGGREGATE MASS TORT CLAIMS FOR ADJUDICATION

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INTRODUCTION

THE American judicial system does not adequately accommodate the individual victims of mass torts. Monetary and personal costs for an individual mass tort claimant are high. The complex legal and factual matters involved often result in expensive litigation and significant delay. Individualized litigation also burdens the judiciary—the tens or hundreds of thousands of claims that may result from a single mass tort threaten to overwhelm the judicial system.

Aggregation of claims may ease the burden of mass tort litigation for both the courts and the parties, but existing aggregation tools have limits. In the federal system, the constraints imposed by Federal Rule of Civil Procedure 23, whose drafters never intended its application to the aggregation of mass tort claims, hampers the most powerful aggregation tool, the class action. Although the Civil Rules Advisory Committee has considered easing Rule 23's restrictions on class-action suits, it has not implemented changes addressing the complicated problems presented by mass torts.

This Note will argue that it is possible to achieve many of the benefits of class action without using Rule 23 in its current or amended form. Instead, combining existing associational standing doctrine with statistical sampling methodology produces a more effective means of pursuing claims on an aggregated basis: Prior to

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filing a suit, potential plaintiffs would form an unincorporated association to pursue the claims of its members. The association would then file suit, with its standing to seek relief governed not by Rule 23 but by associational standing doctrine.

Part I will discuss the problems that mass torts pose to the judicial system. While recognizing class-action aggregation's potential benefits, Part I will conclude that those benefits are not readily achievable under the current Rule 23. With significant reform of the Rule unlikely, aggregation of claims should be pursued outside the context of Rule 23.

Part II thus will propose aggregation of claims through association. It will argue that departure from Rule 23's procedural requirements is justified as a historical matter. Procedural protections may be necessary when representative litigation is based on a perceived shared interest. But where representation is based on consent, as it is in this Note's proposal, those additional protections are not necessary. Part II will argue that aggregation through association is not only unobjectionable in its departure from Rule 23, but it is also preferable to class action for mass tort claims. Aggregation through association offers the possibility of cost savings, increases procedural fairness, and may overcome the choice of law problems that burden mass tort class actions.

Part III will begin to provide the doctrinal framework for this Note's proposal. It will survey current associational standing doctrine in the federal system and will examine the nature of the requirements of the *Hunt v. Washington State Apple Advertising Commission*¹ test as they pertain to the proposal put forth in Part II. Although the first two prongs of that test are derived from the Constitution, the third prong—which poses the most significant obstacle to this Note's proposal—is only a prudential limitation based on convenience and efficiency.

Part IV then will argue that statistical sampling is a means of overcoming that prudential limitation. Because of the comparative novelty of statistical sampling in the mass torts context, Part IV first will examine several cases in which courts have employed sampling methodology. It then will examine and respond to the arguments of sampling's opponents. Part IV will conclude that, in

¹ 432 U.S. 333 (1977).

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addition to the traditional responses of sampling's proponents, sampling would be particularly effective in the association context.

This Note will adopt the federal system as its arena, crafting a model suited to that system for three reasons. First, in the majority of states with class-action rules, those rules are modeled on Federal Rule of Civil Procedure 23.² As a result, the limitations on rule-based representative litigation discussed in Part I are likely to exist in the state systems as well as the federal system.

Second, a number of states have expressly adopted the federal associational standing test.³ This Note's model may apply even in those states that have not adopted the federal test because standing requirements in state courts are often less stringent than in federal courts.⁴

Third, suits filed in state court may be removable to federal court on diversity of citizenship grounds.⁵ The Class Action Fair-

² Robert H. Klonoff & Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation* 439 (2000).

³ See, e.g., *Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 783 So. 2d 792, 795 (Ala. 2000); *Bhd. of Teamsters & Auto Truck Drivers, Local No. 70 v. Cal. Unemployment Ins. Appeals Bd.*, 236 Cal. Rptr. 78, 82 (Ct. App. 1987); *Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo. Ct. App. 1984); *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 421 n.18 (D.C. 1983); *Aldridge v. Ga. Hospitality & Travel Ass'n*, 304 S.E.2d 708, 710 (Ga. 1983); *312 Educ. Ass'n v. U.S.D. No. 312*, 47 P.3d 383, 386-87 (Kan. 2002); *La. Associated Gen. Contractors, Inc. v. Louisiana*, 669 So. 2d 1185, 1190-91 (La. 1996); *Associated Subcontractors of Mass., Inc. v. Univ. of Mass. Bldg. Auth.*, 810 N.E.2d 1214, 1218-19 (Mass. 2004); *Miss. Manufactured Hous. Ass'n v. Bd. of Aldermen of Canton*, 870 So. 2d 1189, 1192-93 (Miss. 2004); *Boody v. Giambra*, 744 N.Y.S.2d 803, 807 (Sup. Ct. 2002); *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 552 S.E.2d 220, 225-26 (N.C. Ct. App. 2001); *Ohio Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 509 N.E.2d 1263, 1266 (Ohio 1987); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993); *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 45 P.3d 186, 189 (Wash. 2002).

⁴ *Dalworth Oil Co. v. Fina Oil & Chem. Co.*, 758 F. Supp. 410, 411 (N.D. Tex. 1991).

⁵ If a suit is removed to federal court on diversity grounds, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny may require a court to look to state law for whether an association has standing to sue in a representative capacity. *Erie* requires federal courts in diversity cases to apply federal procedural law and state substantive law. Some opinions indicate that an association's representative standing is a question of state substantive law. See, e.g., *Ass'n of Merger Dealers, LLC v. Tosco Corp.*, 167 F. Supp. 2d 65, 72 (D.D.C. 2001) (applying state law to questions of standing of limited liability company to bring a representative action in diversity). Other opinions, however, suggest that federal law entirely determines an association's representative standing. See, e.g., *DDFA of S. Fla., Inc. v. Dunkin' Donuts, Inc.*, No. 00-7455-CIV, 2002 WL 1187207, at *6 (S.D. Fla. May 22, 2002) (holding, in a diversity

ness Act of 2005 (“CAFA”),⁶ signed into law on February 18, 2005, may make it easier for a defendant to remove to federal court a suit brought by an unincorporated association. Prior to that date, it was well established that the citizenship of an unincorporated association was the citizenship of each of its members.⁷ Diversity as to each of the association’s members and the defendants was therefore required before a claim could be filed in or removed to federal court. Under CAFA, “an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.”⁸ This would simplify the removal to federal courts of suits brought pursuant to this Note’s proposal in state courts by unincorporated associations if such suits fall within the statutorily-defined scope of “mass action.”⁹

suit brought by an incorporated association, that the *Hunt* test for associational standing would apply because “standing in federal court is determined *entirely* by Article III and depends in no degree on whether standing exists under state law.” (quoting *Dalworth*, 758 F. Supp. at 411 (citing *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985))).

A related issue in diversity suits arises under Federal Rule of Civil Procedure 17(b), which states that the capacity of an unincorporated association to sue is determined by the law of the state in which the district court sits. Thus, even if the standing of the association is procedural, such that federal law applies in diversity suits, state law may nevertheless be relevant to the capacity question. See *Tosco*, 167 F. Supp. 2d at 71 n.12 (noting that where state law does not speak to the capacity of an association to sue in a representative capacity, the related law of an association’s standing to sue in a representative capacity may be instructive).

⁶Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

⁷See Walter W. Jones, Jr., Annotation, Determination of Citizenship of Unincorporated Associations, for Federal Diversity of Citizenship Purposes, in Actions By or Against Such Associations, 14 A.L.R. Fed. 849 (2005) (collecting cases).

⁸28 U.S.C.A. § 1332(d)(1) (West 2005).

⁹“Mass action” is defined as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact” if certain amount-in-controversy requirements are satisfied. *Id.* § 1332(d)(11)(B). It remains debatable whether a claim brought by an association on behalf of its members would fall within the scope of this definition, particularly in light of some legislative history that suggests that what CAFA’s sponsors contemplated were individual claims joined within a single complaint or a consolidated complaint that brings together multiple individually filed actions and in which the plaintiffs are named. See, e.g., 151 Cong. Rec. H723, H727, H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

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Thus, because of the possibility for removal to federal courts of state suits proceeding pursuant to this Note's proposal, and because a large number of states have adopted the federal class action and associational standing rules, this Note will focus on the federal system.

I. MASS TORTS

A. Mass Torts Defined

As a general matter, "mass tort" describes an action involving a large number of claims of personal injury or property damage caused by exposure to a product or substance (or a set of similar products or substances).¹⁰ Mass torts are often divided into two categories: single event and dispersed.¹¹ Single-event mass torts are those in which a single occurrence generates a knowable group of individual victims and in which there is a "set of facts fixed in time and place, and a somehow manageable choice of law."¹² Dispersed mass torts generally involve a "prolonged course of conduct [that] produces effects that may span periods of years or even decades, generating unknown and perhaps unpredictable numbers of claimants who suffer a wide variety of injuries that range from trifling to serious or fatal."¹³ The significance of the distinction lies not in the nature of the cause of the tort but in the nature of its effects: the "crucial point is not whether the underlying tort itself is a single event, but whether its consequences are dispersed."¹⁴

¹⁰ See Manual for Complex Litigation (Fourth) § 22.1 (2004).

¹¹ See Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 *Ariz. L. Rev.* 923, 946 (1998) [hereinafter Cooper, *Future of Class Actions*]; Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. Rev.* 13, 22 (1996) [hereinafter Cooper, *Challenges to the Rulemaking Process*].

¹² See Cooper, *Future of Class Actions*, supra note 11, at 946.

¹³ Cooper, *Challenges to the Rulemaking Process*, supra note 11, at 22; see also Manual For Complex Litigation (Fourth), supra note 10, § 22.1, at 344.

¹⁴ Advisory Comm. on Civil Rules and the Working Group on Mass Torts, *Report on Mass Tort Litigation*, 187 *F.R.D.* 293, 302 (1999) [hereinafter Report on Mass Torts]. In this Note, "mass tort" refers to those torts with dispersed effects. While this Note primarily addresses the problems attending this type of mass tort, the proposal this Note offers is applicable with equal, if not greater, appropriateness to mass torts that have concentrated effects.

B. Problems Accompanying Mass Torts

A complete description of the problems associated with mass torts is beyond the scope of this Note. It is enough to demonstrate that mass torts create significant problems for the judicial system, which the system has yet to solve, and which likely will persist in the future. Professor Willging notes, “[i]f the volume of potential cases is the root cause of mass torts litigation problems, mass production appears to be the root cause of that volume.”¹⁵ Mass production combines with mass marketing to increase the population’s exposure to potentially harmful products.¹⁶ These factors in turn combine with advances in medical science that permit the discovery of links between injuries and products or substances, as well as increased awareness of the possibility of harm. All of this suggests that mass tort litigation is not a fleeting phenomenon.¹⁷ Thus, as Professors Hensler and Peterson note, “[u]nless there is a dramatic change in substantive law or an equally dramatic change in our legal institutions, mass tort litigation is probably here to stay.”¹⁸

Mass torts threaten to overwhelm the judicial system with the number of claims involved.¹⁹ The “numbers problem”²⁰ is compounded by the fact that many mass torts, because they involve complex legal and factual issues, are expensive to litigate.²¹ The

¹⁵ Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 337 (1999) [hereinafter Willging, *Problems and Proposals*].

¹⁶ See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *Brook. L. Rev.* 961, 1013 (1993).

¹⁷ *Id.*

¹⁸ Report on Mass Torts, *supra* note 14, at 300.

¹⁹ See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86, 107 (E.D.N.Y. 2002) (indicating that the case involves potentially millions of claimants), vacated and remanded on other grounds, 407 F.3d 125 (2d Cir. 2005).

²⁰ Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *Stan. L. Rev.* 815, 826 (1992); Laurens Walker & John Monahan, *Sampling Damages*, 83 *Iowa L. Rev.* 545, 546 (1998).

²¹ The costs of individual adjudication may in fact be prohibitively high. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 *Ind. L.J.* 561, 563–64 (1987); see also David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev.* 933–34 (1998) (“Limits not only on individual resources, but on public resources as well may mean that the possibility of litigation by each victim of a mass tort, leading to a reasonably prompt disposition of

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number of potential claimants and the complexity of the issues often involved may raise transaction costs in mass torts higher than in ordinary torts.²² Moreover, delay is a common feature of mass tort litigation. Resolution of cases may take years, in some cases effectively precluding plaintiffs from any meaningful recovery.²³ For example, in *Cimino v. Raymark Industries, Inc.*, Judge Parker noted that 448 plaintiff class members had died waiting for their claims to be heard.²⁴ These problems often coalesce to make the “just, speedy, and inexpensive determination of every action”²⁵ difficult, if not impossible.

C. Class-Action Aggregation

Claim aggregation, however, “offers promise of ‘a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a “mass tort.””²⁶ Perhaps for this reason, attempts to resolve torts in the aggregate have dramatically increased in number in recent years.²⁷ Aggregation can be accomplished in a number of ways, through both formal and informal

each such case, represents more a dream than a reality for many members of the class.”).

²² See e.g., Report on Mass Torts, *supra* note 14, at 308–09 (noting that empirical evidence suggests that, at least in the early stages of asbestos litigation, the cost of adjudication was high: less than half of every dollar spent on the litigation went to compensate victims); see also Cooper, Future of Class Actions, *supra* note 11, at 932 (noting that the transaction costs in individual adjudication and nonclass aggregation of mass torts are “staggering”); Hensler & Peterson, *supra* note 16, at 1031 (“Transaction costs [in mass torts]—chiefly, legal fees—dwarf the amounts paid to injured claimants.”).

²³ See Judge Paul V. Niemeyer, Introduction to 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at ix, xi (1997), at <http://www.uscourts.gov/rules/WorkingPapers-Vol1.pdf> [hereinafter Working Papers].

²⁴ 751 F. Supp. 649, 651 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

²⁵ Fed. R. Civ. P. 1.

²⁶ Edward H. Cooper, Aggregation and Settlement of Mass Torts, 148 U. Pa. L. Rev. 1943, 1949 (2000) [hereinafter Cooper, Aggregation & Settlement] (quoting Cooper, Future of Class Actions, *supra* note 11, at 947); see also Cooper, Challenges to the Rulemaking Process, *supra* note 11, at 25 (“In the real world, individual litigation of all asbestos claims will not occur. If they are to be decided by courts, as they must be for want of any alternative, some expediting device must be found. Aggregation seems to be the answer . . .”).

²⁷ Niemeyer, Introduction to 1 Working Papers, *supra* note 23, at x.

procedures.²⁸ Nonclass methods of aggregation, however, generally are unable to provide meaningful solutions to the problems that accompany mass torts.²⁹

Class action has the potential to be a more effective aggregation tool. Judge Jack B. Weinstein has called the class action the most effective means of dealing with mass torts.³⁰ In fact, most attempts to aggregate mass tort claims occur through Rule 23.³¹ This may be somewhat surprising. The Advisory Committee Notes accompanying the 1966 version of Rule 23, on which the current Rule is modeled, stated:

²⁸ See generally Judith Resnick, From "Cases" to "Litigation," 54 *Law & Contemp. Probs.* 5, 22–46 (1991). For example, the Federal Rules of Civil Procedure provide a number of methods, aside from Rule 23, to achieve some degree of aggregation. Rule 42(a) permits a court to consolidate claims involving a common question of law or fact and to order a joint hearing or trial of any or all of the matters at issue in the actions. The rule is limited to intradistrict consolidation, however; cases pending in other districts are beyond its scope. Fed. R. Civ. P. 42(a). Other rule-based methods of "aggregation" include Rule 20 (Permissive Party Joinder), Rule 22 (Interpleader), Rule 24 (Intervention), and Rule 53 (Masters). See Resnick, *supra*, at 26–27. The federal multidistrict litigation ("MDL") process provides for interdistrict coordination or consolidation of cases involving one or more common questions of fact. 28 U.S.C. § 1407(a) (2000). But the statute permits consolidation only for pretrial matters; after pretrial proceedings are concluded, the Judicial Panel on Multidistrict Litigation must remand each action to the district from which it was transferred. *Id.* Moreover, it applies only to those actions pending in federal courts. Both consolidation and the MDL process are limited by the fact that they apply only to cases that have been filed.

Bankruptcy law offers another means of aggregation. It provides for an automatic stay of all pending or threatened litigation against the filing company, 11 U.S.C. § 362 (2000), and provides for the aggregation of claims in the bankruptcy court. Yet bankruptcy too may have its limits. The opportunity to aggregate claims through bankruptcy "becomes available only when a defendant (or its creditor) files for bankruptcy. Additionally, when the bankrupt is only one of several defendants, a bankruptcy proceeding involving only that defendant will not result in significant aggregation." William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 *Tex. L. Rev.* 1529, 1535 (1995).

Informal procedures include assignment of cases to a single judge, after which the judge may order joint discovery and other coordination proceedings, as well as "lawyer-based processing" whereby lawyers collect an inventory of plaintiffs and coordinate activity through such tools as filing a master complaint. See Resnick, *supra*, at 36–39.

²⁹ See Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 131 (1995); Cooper, *Future of Class Actions*, *supra* note 11, at 932.

³⁰ Weinstein, *supra* note 29, at 132.

³¹ 1 Working Papers, *supra* note 23, at xi.

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A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.³²

In the 1960s and 1970s courts relied on this statement in rejecting plaintiffs’ requests for class certification in mass tort cases.³³ In the late 1970s, however, as mass torts began pressuring the judiciary, some federal courts displayed an increasing willingness to certify mass tort classes.³⁴ The 1980s ushered in “the era of mass personal injury litigation,”³⁵ and the pressure such actions exerted on the judiciary became greater. As a result of this deluge, Judge Weinstein, who wrote the article on which the 1966 Advisory Committee partly based its conclusion that Rule 23 was not suited to mass torts, later concluded that the Rule had to accommodate a society in which mass injury was a reality:

I did not know about all the people who were out there on the streets of our nation hurting, and I did not fully understand that our technology and our science are organized on a national and international scale. The people are hurt on an individual scale. The whole technology and the whole society that we face call out for a way of dealing with these problems.³⁶

Nevertheless, in the 1990s the pendulum began to swing back in the other direction as some courts indicated a renewed hostility to mass tort classes.³⁷ This swing reflects the uncomfortable position that mass torts occupy in the Rule 23 framework: The class action remains one of the most powerful aggregation tools available to

³² Fed. R. Civ. P. 23 advisory committee’s note on 1966 amendment.

³³ Klonoff & Bilich, *supra* note 2, at 767.

³⁴ *Id.*

³⁵ Hensler & Peterson, *supra* note 16, at 961; see also John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1356 (1995).

³⁶ *The Future of Class Actions in Mass Tort Cases: A Roundtable Discussion*, 66 *Fordham L. Rev.* 1657, 1670 (1998).

³⁷ Klonoff & Bilich, *supra* note 2, at 773.

parties and to courts, but the present Rule was never intended to accommodate mass torts.

It is thus not surprising that calls to reform Rule 23 accompanied the rise of mass tort litigation. For example, in December 1977, the United States Department of Justice's Office for Improvements in the Administration of Justice released for public comment a proposal to reform Rule 23.³⁸ The proposal both prompted Congressional bills to reform the Rule and led the American Bar Association's Section of Litigation, in cooperation with the American Bar Foundation, to appoint the Special Committee on Class Action Improvements.³⁹ That committee eventually proposed, among other reforms, collapsing the three subsection (b) categories into one category founded on the superiority of the class action over other available methods for trying the action, an inquiry informed by consideration of a number of enumerated factors.⁴⁰

Similarly, in 1991, prompted by its Ad Hoc Committee on Asbestos Litigation, the Judicial Conference requested that the Standing Committee on Rules of Practice and Procedure have its Advisory Committee on Civil Rules study whether Rule 23 should be amended to better accommodate mass torts.⁴¹ The Advisory Committee drafted a set of proposed amendments to Rule 23 that were based primarily on the report of the American Bar Association's Special Committee on Class Action Improvements.⁴² After two preliminary drafts, in February 1996 the Advisory Committee proposed a "comprehensive revision" draft that abandoned the proposal to collapse the subsection (b) categories.⁴³ Nevertheless,

³⁸ See Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 196 (1986).

³⁹ See *id.*

⁴⁰ See *id.* at 200-01.

⁴¹ Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 80 (1996) [hereinafter Willging et al., *Empirical Analysis*] (quoting Ad Hoc Comm. on Asbestos Litig. of the Judicial Conference of the United States, *Ad Hoc Committee on Asbestos Litigation Report* 37-38 (1991)).

⁴² *Id.*; see also 1 Working Papers, *supra* note 23, at 3-11 (containing the text of the November 1992 draft proposed amendments to Rule 23); Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195 (1986) (American Bar Association report).

⁴³ See 1 Working Papers, *supra* note 23, at 55-84.

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the draft contained some significant new features, one of which warrants particular attention here.

The comprehensive revision draft added a new subdivision (b)(4) that would have permitted a court to certify a class action where the prerequisites of subdivision (a) were satisfied and where “permissive joinder should be accomplished by allowing putative members to elect to be included in a class.”⁴⁴ Any judgment in an action certified under the proposed (b)(4) opt-in provision would have bound only those persons who had elected to be included in the class.⁴⁵ The Advisory Committee Note accompanying the draft stated that the opt-in category might have been particularly well-suited to help solve some of the problems mass tort actions pose to the judicial system.⁴⁶ For example, consent may alleviate problems associated with class definition.⁴⁷ Similarly, the law chosen to govern the dispute and the terms for compensating counsel could be prescribed up front.⁴⁸ And, as the Advisory Committee Note states, “[p]erhaps most important, an opt-in class provides a means more effective than the now familiar opt-out class to sort out those who prefer to pursue their claims in individual litigation.”⁴⁹

Notwithstanding these potential benefits, the proposal was not published for comment. Instead, it was eventually dropped without any direct review as part of the decision to proceed with only a lim-

⁴⁴ The proposed (b)(4) section provided that a class action could be certified if:
(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:
(A) the nature of the controversy and the relief sought;
(B) the extent and nature of the members’ injuries or liability;
(C) potential conflicts of interest among members;
(D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and
(E) the inefficiency or impracticality of separate actions to resolve the controversy

¹ Working Papers, *supra* note 23, at 57–58.

⁴⁵ *Id.* at 61.

⁴⁶ *Id.* at 76–77.

⁴⁷ *Id.* at 76.

⁴⁸ *Id.*

⁴⁹ *Id.* at 76–77; see also Cooper, Challenges to the Rulemaking Process, *supra* note 11, at 34 (noting the possibility that opt-in classes could solve problems that are beyond the reach of the Enabling Act).

ited set of changes to the Rule.⁵⁰ This could be explained in a number of ways. For example, the fact that “any modification of the familiar Rule 23(b) structure must overcome powerful arguments for holding to the present course”⁵¹ might explain the preference for limited change over more sweeping reform. In the context of mass tort actions, it may be true that the only “safe observation . . . is that the fast-developing world of ongoing practice has not yet generated lessons that provide a secure foundation for confident rulemaking.”⁵² And the absence of any firm ground on which to base reform proposals may counsel in favor of moderation: “[I]f there is room to improve, there also is room to confuse, weaken, or even do great harm There is no imperative to act once a problem is studied, no shame in inaction.”⁵³ Thus, it may be preferable to afford courts more time to experiment within the current strictures of the Rule while leaving the Rule relatively unchanged.

Indeed, Professor Edward Cooper points out that acting today might mean foregoing benefits tomorrow: “Seizing the opportunity to make modest improvements today will surely mean that Rule 23 will not be revisited for many years. If more significant or better improvements might be made in five years, or ten, it likely would be better to defer present action.”⁵⁴ Yet this might be a big “if.” An additional reason for the reluctance to change the Rule is the nature of the rulemaking process and the perceived uses of representative litigation. Professor Stephen Yeazell notes:

So long as representative litigation is seen exclusively as a tool of empowerment, as an instrument of the plaintiffs’ bar, both civil discussion and rational consideration of its shape will remain impossible, for each proposed change inevitably increases or reduces the power of a definable group of parties. Under such circumstance the fate of reform proposals is predictable: stalemate. One can see this point in the admirably inclusive discussions conducted by the civil rules advisory committee over the past few

⁵⁰ Cooper, *Future of Class Actions*, *supra* note 11, at 935.

⁵¹ *Id.* at 936.

⁵² *Id.* at 946; see also Cooper, *Challenges to the Rulemaking Process*, *supra* note 11, at 23 (noting that aggregating mass tort litigation is still in its infancy and the ramifications of judicial improvisations will not be known for years).

⁵³ Cooper, *Challenges to the Rulemaking Process*, *supra* note 11, at 14.

⁵⁴ *Id.*

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years. With virtually every interested segment of the bar, bench and academia represented, the only clear message that emerged was: don't change anything very much.⁵⁵

Ultimately, the Advisory Committee "step[s] cautiously"⁵⁶ and reform comes, if at all, slowly. One might question whether the more significant reforms of tomorrow will ever be achieved.

II. INNOVATION OUTSIDE THE EXISTING FRAMEWORK

A. *A Litigation Association Model*

Judge Kaplan (then Professor Kaplan and Reporter to the Civil Rules Advisory Committee) noted that "it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23. The area for inventiveness and discretion in this revised tool is undoubtedly enormous."⁵⁷ But it may not be big enough to accommodate mass tort claims. As the Report on Mass Torts notes, they "pose problems never anticipated by the present mechanisms for resolving torts [and thus] strain existing procedural mechanisms and judicial capabilities."⁵⁸ Proposals for reforming Rule 23, such as the opt-in procedure in the February 1996 draft amendments, offer the prospect of increasing the judiciary's capability of handling mass torts. But because of the limitations of the rulemaking process it remains largely unclear whether the purported—and potentially considerable⁵⁹—benefits of such a reform would exist in practice.

It may thus prove useful to look outside of Rule 23 and its rule-making framework for a method of achieving some of the same benefits of the opt-in procedure and other reforms, a method that does not depend on agreement between competing bars. More-

⁵⁵ Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 *Ariz. L. Rev.* 687, 703–04 (1997) [hereinafter Yeazell, *Past & Future*].

⁵⁶ 1 Working Papers, *supra* note 23, at ix. With respect to mass torts, there is a minority view that this is the proper state of affairs because "there is a system evolving that satisfactorily addresses the major problems with mass torts." Willging, *Problems and Proposals*, *supra* note 15, at 333.

⁵⁷ Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 *F.R.D.* 39, 52 (1968).

⁵⁸ See Report on Mass Torts, *supra* note 14, at 301.

⁵⁹ Cooper, *Aggregation & Settlement*, *supra* note 26, at 1949.

over, it might be desirable to explore a new means of resolving mass torts that leaves the present Rule 23 intact because mass torts do not pose a single set of problems to which a single set of solutions can be applied.⁶⁰ Rather than reshape existing tools, it might be useful to add a new one.

This Note proposes that mass tort claimants organize in the form of an unincorporated association before filing any lawsuit. The association's express purpose would be to seek relief on behalf of its members for claims arising from an alleged mass tort. Its organizing members, with the assistance of counsel, would prescribe the association's decisionmaking processes and internal rules and structure upfront. Once a sufficient number of claimants had consented to membership, the association would file a lawsuit on its members' behalf. Standing to do so would be based on associational standing doctrine. To overcome prudential limitations to associational standing, this Note proposes that the association employ statistical sampling methods, similar to those that some courts have already employed in trying mass torts within the class-action framework, to present its claim.

*B. Consent Versus Interest: The Relative Needs for
Procedural Protections*

Although this proposal avoids the frustrating limitations that Rule 23 imposes on mass torts, one objection to this proposal is that the procedural requirements of Rule 23, designed to ensure adequacy of representation, are also inapplicable.⁶¹

This criticism may be supported by the fact that this Note's proposal is similar to the opt-in provision that was included in the February 1996 draft of proposed changes to Rule 23. Because the Advisory Committee on Civil Rules contemplated that a court would find that Rule 23(a)'s prerequisites to class certification were satisfied and that it would weigh certain additional enumerated consid-

⁶⁰ See Report on Mass Torts, *supra* note 14, at 307.

⁶¹ One might ask whether a federal court has the authority to certify a class action *sua sponte* in those situations where it believes class treatment is warranted. Where a party does not request class-action treatment, a court cannot convert an action into a class action on its own motion. See 7B Charles Alan Wright et al., *Federal Practice and Procedure* §1785 (2d ed. 1986).

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erations before certifying a (b)(4) opt-in class,⁶² one might argue that these prerequisites and other considerations should be facets of the present scheme as well.

Similarly, then-Judge Ginsburg expressed reluctance in *Telecommunications Research & Action Center v. Allnet Communications Services, Inc.* to allowing an organization to bring a damages action on behalf of its members using associational standing in lieu of class action.⁶³ The organization identified only a handful of its members as having a concrete stake in the outcome of the litigation, and it sought associational standing rather than class action because associational standing saved certain costs, including the cost of having to provide notice to its members.⁶⁴ Because the organization represented the interests of only a few of its members, the court was concerned that the organization would avoid an inquiry into whether it would fairly and adequately protect the interests of the majority of its members. For this reason, class action was the more appropriate form of action.⁶⁵

⁶² See 1 Working Papers *supra* note 23, at 57–58.

⁶³ 806 F.2d 1093 (D.C. Cir. 1986).

⁶⁴ *Id.* at 1096.

⁶⁵ *Id.* An additional criticism might derive from the Court's opinion in *International Union, United Automobile Workers of America v. Brock*: "While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital." 477 U.S. 274, 289 (1986). Because this Note's proposal would permit an association standing to sue on behalf of its members without a preexisting reservoir of expertise and capital, one might argue that it is an attempt to squeeze what is in fact a class action into an associational standing mold.

The United States Court of Appeals for the Seventh Circuit considered this issue following *Brock* and concluded that it is wrong to deny an association standing on the ground that it lacks the resources or expertise to pursue the litigation:

The *Hunt* test does not contain a requirement that an association maintain a certain level of expertise with regard to the subject matter of the litigation, nor does it require an association to have a certain amount of resources. To the extent the Supreme Court mentioned associations' expertise and resources in [*Brock*], it did so in recognition of the fact that because preexisting associations have access to some level of expertise and resources they present more attractive vehicles for representational litigation than class actions.

Retired Chi. Police Ass'n v. City of Chicago, 76 F.3d 856, 863 (7th Cir. 1996). The Seventh Circuit concluded not only that it did not believe that the Court had imposed an additional requirement in *Brock*, but that "we see no merit in adding such a requirement." *Id.* Moreover, the Court has expressly accepted the associational standing of an organization that was created for the purpose of pursuing litigation for its members. See *Pennell v. City of San Jose*, 485 U.S. 1, 7 n.3 (1988).

As is argued in this Section, however, Rule 23's procedural protections grew out of a shift in representative litigation from consent-based representation to interest-based representation. Satisfaction of Rule 23's procedural protections serves as a proxy for consent in modern class-action litigation. This Section draws largely upon Professor Yeazell's history of representative litigation to argue that where representation is based on actual consent, those protections are not necessary. This Note's proposal is thus not a subversive end-run around Rule 23; rather it is based on a different concept of representation.

Professor Yeazell's historical examination of representative group litigation suggests that the procedural protections in Rule 23 exist to restrain representative litigation that is justified only by the otherwise "infinitely expandable" concept of shared interest.⁶⁶ He writes that one theory for representative suits that justifies what appears to be a departure from the ethos of individualized litigation is based on a conception of representation as an extension of individualism rather than an exception to it.⁶⁷ One can *choose* a representative. And once one accepts the idea of representation through consensual aggregation as an exception to the prevailing notion that only the holder of legal rights should control his suit, then nonconsensual representation becomes a possibility.⁶⁸ But what is the basis for permitting nonconsensual representative suits to exist as anything more than a theoretical possibility? Professor Yeazell suggests that interest may provide the justification: "One way of constructing the missing link is by a concept of interest that detaches representation from consent without requiring us to characterize the class as incompetent or ill-served. That concept lies at the heart of the modern class action"⁶⁹ In the history of representative litigation, however, it is a relatively modern concept.

Professor Yeazell traces representative litigation's origins to the twelfth century. Medieval representative litigation was very differ-

⁶⁶ See generally Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987) [hereinafter Yeazell, *Medieval Group Litigation*].

⁶⁷ *Id.* at 14.

⁶⁸ See *id.* at 14–15.

⁶⁹ *Id.*; see also John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *Notre Dame L. Rev.* 1419, 1420 (2003) ("There is no consent and no agency relationship in a class action, and as a consequence interest representation is the only justification for conceiving class actions as representative lawsuits.").

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ent from its modern counterpart; the social context in which it took place largely defined its form.⁷⁰ Because of the pervasiveness of groups in society, courts entertained suits by and against such groups without examining the propriety of the groups' appearance on behalf of their individual members.⁷¹ The standing of groups or communities of interest was simply not an issue in medieval group litigation.

In this setting, representation was justified by convention.⁷² Although "convention contains a much weaker element of consent than would explicit agreement or a vote, . . . a volitional element is nevertheless present" in the fact that what developed into convention began as consensual conduct.⁷³ Courts thus could rely upon convention for the selection of a representative, for example, without having to scrutinize the representative's qualifications themselves. In a society organized around preexisting communities of interest, social practices developed into convention that justified group representation. But as society changed, that justification lost its force.

Medieval group litigation ended with the emerging regime of individualism that accompanied the Renaissance in the sixteenth and seventeenth centuries.⁷⁴ Some of medieval society's groups achieved substantial power, and as the grant theory of the corporation emerged, the state permitted them to incorporate.⁷⁵ With incorporation came the privilege to sue and be sued.⁷⁶ Yet not all groups were able to incorporate. Courts generally denied these groups the right to appear before them, except under special circumstances. In crafting exceptions to this general prohibition, "[i]n Chancery, the court with jurisdiction over exceptions, sixteenth- and seventeenth-century lawyers flirted with the idea of what we would now call representative litigation. The two essential ingredients were the definition of an appropriate group and the guidelines for litigative representation."⁷⁷ The chancellors focused their atten-

⁷⁰ See Yeazell, *Medieval Group Litigation*, supra note 66, at 39.

⁷¹ *Id.*

⁷² See *id.* at 284–85.

⁷³ *Id.*

⁷⁴ See *id.* at 290.

⁷⁵ See *id.* at 273; Yeazell, *Past & Future*, supra note 55, at 690.

⁷⁶ See Yeazell, *Past & Future*, supra note 55, at 690.

⁷⁷ Yeazell, *Medieval Group Litigation*, supra note 66, at 275.

tion on the second ingredient, specifically on individual assent to representation by the group.⁷⁸

The requirement of actual consent was relatively short-lived, however, as Chancery grappled with justifications for other forms of representative litigation. Consent would be possible for defined groups with known constituencies—the holdovers from medieval society that were not able to incorporate. But as the nature of the groups changed again, the justification had to change once more as well. Professor Yeazell points to *Chancey v. May*⁷⁹ as providing the modern justification for “detach[ing] group litigation from the specific groups that had shaped its early modern outlines.”⁸⁰ In *Chancey*, Chancery permitted shareholders of the Temple Brass Works to sue in a representative capacity. Thus, “[i]n moving from villagers to shareholders, Chancery was prepared to put aside consent and to rely on interest as the index of representation.”⁸¹ The move became complete in *Adair v. New River Co.*⁸² when the court permitted a group to appear in representative capacity notwithstanding the fact that not all of its members were known and consent from some therefore could not be sought.⁸³ As Professor Yeazell notes, “[i]nterest had to suffice or nothing would.”⁸⁴ Yet interest is an “indefinitely expandable concept,”⁸⁵ and thus the problem became whether it would be possible to articulate meaningful bounds to that concept, rendering it both practicable and less threatening.⁸⁶ In light of this history, the procedural protections included in the modern class-action rule may be seen as practical attempts to effectuate this constraint.⁸⁷

⁷⁸ Id. at 275–76.

⁷⁹ (1722) 24 Eng. Rep. 268 (Ch.).

⁸⁰ Yeazell, *Medieval Group Litigation*, supra note 66, at 277.

⁸¹ Id.

⁸² (1805) 32 Eng. Rep. 1153 (Ch.).

⁸³ See Yeazell, *Medieval Group Litigation*, supra note 66, at 277.

⁸⁴ Id.

⁸⁵ Id. at 288.

⁸⁶ Id. at 289.

⁸⁷ Cf. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 401–02 (2000) (noting that the predominance and superiority requirements of Rule 23(b)(3) are pragmatic requirements that help assure that the economies of time and expense that the (b)(3) class action was hoped to achieve could be sought without opening the class device to overwhelming use).

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If this is correct, representative litigation can be arrayed along a spectrum ranging from consent to interest.⁸⁸ When the justification for litigation on behalf of a group is tethered to a particular group, whether through convention or consent, the need for additional protection of members' interests is not very pressing. When the justification is based on something that lacks readily identifiable boundaries, such as interest, additional protections may be necessary. As Professor Yeazell notes, any purely consent-based justification for representation of a group poses significant problems both in terms of communication between the representative and the constituents and in how to treat minority interests.⁸⁹ Because of such potential difficulties in purely consent-based representation, representatives may drift from making decisions based on consent to making decisions based on a perceived shared interest.⁹⁰ As a result, many groups must rely on approximations of consent rather than actual consent, such as in the form of ex post ratification of a representative's decisions.⁹¹ But the potential for a representative to drift may be lessened when the group is organized around a narrowly circumscribed purpose. Moreover, the potential may be further lessened by carefully delineating the powers of the representa-

⁸⁸ Judge Weinstein suggests that this distinction between consent and interest is perhaps the most important difference between early group litigation and today's modern mass torts class action: "[U]nlike its current function of joining diverse parties sharing only a common interest in particular litigation, the numerous parties brought together by Chancery class suits had existed as social groups independently of the litigation." Weinstein, *supra* note 29, at 132. In those early cases

representation of the class was explicit, with class members electing their representatives and chancellors requiring the consent of the group before the action could be brought. Members of these groups shared permanent bonds of status These social and economic bonds meant that parties could apply pressure to resolve a dispute aside from litigation and that litigation would not destroy preexisting obligations.

Id. (footnote omitted). In contrast, Professor Robert G. Bone suggests that representative litigation, at least from the eighteenth century forward, is better characterized by the distinction between personal and impersonal rights and duties, as opposed to consent-based and interest-based theories of representation. See generally Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 *B.U. L. Rev.* 213 (1990).

⁸⁹ Yeazell, *Medieval Group Litigation*, *supra* note 66, at 283.

⁹⁰ See *id.*

⁹¹ See *id.*

tive and by resolving certain issues before prospective members join the group.⁹²

This historical narrative has descriptive appeal insofar as it highlights a possible reason for the different contemporary standards for representation through associational standing and representation through class action. Because association contains a stronger element of consent than interest representation, we need not apply to associational standing the additional procedural safeguards applicable under Rule 23 interest-based class representation. *Hunt v. Washington State Apple Advertising Commission*⁹³ and its progeny, described in Part III, suffice.

It is possible, however, that it is not the distinction between consent and interest that justifies the different treatment of class action and associational standing, but the nature of the legal rights implicated in the forms of representative litigation.⁹⁴ Historically, representative suits were brought by groups that existed prior to the litigation and the nature of the rights and interests litigated were general to the group. Professor Bone indicates that this idea of a general, impersonal right was a prerequisite to eighteenth- and nineteenth-century chancery courts hearing a representative suit under multiplicity of suits jurisdiction.⁹⁵

The emerging liberal order of seventeenth- and eighteenth-century England provided for groups and representative suits in two ways: “by recognizing baseline rights and obligations attaching to legally defined classes, and by facilitating voluntary forms of association.”⁹⁶ Voluntary association contained elements of individuality in the form of consent to “arrangements of mutual interdependence.”⁹⁷ Yet these individual elements did not necessarily fit nicely within the existing framework for representative litigation:

⁹² For example, an association that is organized for the purpose of seeking relief on behalf of its members in connection with a particular tort will limit the scope of the areas in which the association, acting through its decisionmaking body, can act. Similarly, certain decisions, such as specifying the substantive law that will apply to the claims, can be made *ex ante* as part of organizing such a group, further limiting the discretion vested in the organization.

⁹³ 432 U.S. 333 (1977).

⁹⁴ See generally Bone, *supra* note 88.

⁹⁵ *Id.* at 236–37.

⁹⁶ *Id.* at 254.

⁹⁷ *Id.* at 255.

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The group elements often prompted courts to see the optimal remedy in terms of a groupwide resolution of the controversy, with the result that equity took jurisdiction in order to enter a decree for all group members. The individual elements, however, pushed in favor of valuing individual participation, prompting equity to prefer joinder of all group members as formal parties. When group members could not all be joined, the group and individual features were brought into tension The representative suit doctrine arose to mediate this tension and the resulting procedural forms reflected the relative mix of group and individual elements.⁹⁸

In representative suits in voluntary association cases chancellors thus imposed the requirement that “[t]he relief sought had to be ‘in its nature beneficial to all,’ with benefit frequently assessed by reference to imputed goals.”⁹⁹ The requirement was not necessary in the impersonal general right cases; they “posed no such risk because the remedy purported to define objective legal incidents of class membership.”¹⁰⁰

Professor Bone notes that the first modern class-action rule was drafted at a time when the prevalence of the rights-based jurisprudence of the nineteenth and early twentieth centuries was declining and pragmatism was gaining acceptance; he also notes that the 1966 rule was drafted to be even more sensitive to pragmatic considerations.¹⁰¹ But he suggests that the personal/impersonal dichotomy may nevertheless be seen in the modern Rule, at least in its notice and opt-out provisions applicable to (b)(3) actions.¹⁰² Notice and opt-out rights reflect a recognition that (b)(3) permits relief that may be personal, rather than impersonal; they thus provide the opportunity for members of a class with questionable homogeneity to exit the class and proceed with an individual action that might be better suited to the personal nature of the relief sought.¹⁰³

This account may provide a historical justification for the argument that relief that is by its nature individual is not appropriate in

⁹⁸ *Id.*

⁹⁹ *Id.* at 256 n.103 (citing *Gray v. Chaplin*, (1825) 57 Eng. Rep. 348, 350 (Ch.)).

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 287–91.

¹⁰² *Id.* at 296–97.

¹⁰³ See *id.* at 296–98.

representative group litigation in the absence of increased procedural protections, such as notice and opt-out rights. Yet the argument proves too much: It would render the third prong of the *Hunt* test something more than a prudential constraint on judges. As noted below, that prong states that associational standing is not appropriate if the claim asserted or the relief requested requires the participation of individual members of the association.¹⁰⁴ But the requirement exists not because individual participation is indicative of personal rights, but because of concerns about judicial convenience and administrative efficiency. Whereas the interest/consent position has both theoretical and descriptive force, it is difficult to square the personal/impersonal position with contemporary class action and associational standing doctrine. Moreover, although Professor Bone states that “[t]he *central* point of continuity in representative suit history has been the search for ‘impersonal’ forms of litigation . . . [that] support only weak normative claims to individual participation and thus facilitate classwide adjudication,”¹⁰⁵ in the context of mass torts where individual adjudication may not be a feasible means of seeking redress, one might question the force of the normative claim to individual participation.

The argument that the procedural protections of Rule 23 should apply to this Note’s proposal thus has questionable force; the proposal is premised on consent. Then-Judge Ginsburg’s concern in *Telecommunications Research & Action Center*, that the organization did not truly represent the interests of a majority of its members, will not arise in actions brought pursuant to this Note’s proposal. Individuals would consent to membership in an organization not for a general purpose or to pursue a general interest but with an express purpose of pursuing a limited goal; the representation is evidenced by membership.

C. Benefits of Aggregation Through Association

Not only is this Note’s proposal historically justified in its departure from Rule 23, but aggregation of mass tort claims through as-

¹⁰⁴ See *infra* Section III.C.

¹⁰⁵ *Id.* at 218.

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sociation may in fact be preferable to class action.¹⁰⁶ As a general matter, aggregation of mass tort claims benefits both individuals and the judicial system in a way that individualized adjudication cannot. Aggregation through association overcomes some of the remaining problems to which aggregation through class action often succumbs, while continuing to offer many of the benefits typically associated with aggregation in general. This Section argues that from a cost perspective, from a procedural fairness perspective, and as a means of coping with choice of law problems, aggregation through association is preferable to class action even if both methods otherwise adequately aggregate mass tort claims.

i. Cost

Aggregation through association has the potential to reduce the costs of litigation to both the judicial system and litigants. First and most obvious are the savings that aggregation makes possible when the alternative is individual trials. Trying each mass tort claim separately requires parties and the courts “to reinvent the wheel for each claim.”¹⁰⁷ Moreover, individual cases often take a long time to reach a resolution, sometimes not concluding until after the plaintiff has died.¹⁰⁸ The length of such trials alone adds unnecessary transaction costs to the litigation.¹⁰⁹

Class action offers some efficiencies that may reduce delay and transaction costs. But because class-action aggregation occurs through the judicial process, courts and parties must nevertheless spend time and money litigating the Rule 23 certification issue. By taking the aggregation process out of the judicial system, the cost to the courts and the parties may decrease. An association still must satisfy the *Hunt* test’s requirements for representative stand-

¹⁰⁶ This Note proceeds on the acceptability of sampling, and some commentators argue that sampling overcomes a number of the problems associated with the mass tort class action. Thus, one might argue that this Note’s proposal is superfluous; if sampling is accepted, the class action can live up to its potential and alternative methods of aggregation are no longer necessary. Sampling alone, however, cannot provide the benefits discussed below, which arise from the relationship between sampling and associational standing.

¹⁰⁷ Rosenberg, *supra* note 21, at 563.

¹⁰⁸ See, e.g., Hensler & Peterson, *supra* note 16, at 963, 1031.

¹⁰⁹ *Id.*

ing.¹¹⁰ And although the question of whether an association that brings a damages action modeled on this Note's proposal satisfies the third prong of that test might be contested in early attempts to employ the proposal, the lower threshold for associational standing suggests that disputes over this issue are likely to be less protracted and costly than disputes under Rule 23.

A reasonable rejoinder may be that notwithstanding the cost savings that might be possible for the judicial system and perhaps defendants, the costs to potential claimants of aggregating claims through association prior to filing an action are prohibitively high. Professor Yeazell notes that among the barriers to pre-litigation coordination in some cases is the likelihood that those who might otherwise join together do not know that others are similarly situated; even if one person suspects that there might be others who are similarly situated, she might not be able to locate them.¹¹¹ Even if claimants could locate one another, coordination in advance of litigation would be difficult and, where the value of the claims is small, there would be no incentive to try to overcome these barriers.¹¹²

Yet mass tort claims tend not to be small, and one might reasonably presume that there is thus a sufficient incentive to overcome whatever barriers to aggregation may exist. Additionally, the likelihood of transparency is greater in the mass tort context than it is in the dispersed small claim setting—the nature of the claim makes it more likely that potential claimants will know that others are similarly situated. Moreover, claimants will have the assistance of the plaintiffs' bar when aggregating to identify and organize potential association members, a task that Professor Willging notes the plaintiff's bar has effectively accomplished in mass torts: "Given contemporary mechanisms for recruiting clients by advertising or by screening programs established by unions or consumer organizations, attorneys can routinely build an inventory of cases involving a specific product."¹¹³ The "aggressive, well-organized,

¹¹⁰ See *infra* Part III.

¹¹¹ See Yeazell, *Medieval Group Litigation*, *supra* note 66, at 10.

¹¹² See *id.*

¹¹³ Willging, *Problems and Proposals*, *supra* note 15, at 337.

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and relatively well-financed plaintiffs' class action bar"¹¹⁴ could also direct its efforts to helping form a litigation association.

Moreover, although this Note's proposal requires that an association's organizing members incur certain expenses prior to filing a claim, those expenses might be offset by the cost savings, as compared with class action, that may arise during litigation. For example, Rule 23(c)(2)(B) requires that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."¹¹⁵ The general rule is that the class representatives bear the cost of providing this notice.¹¹⁶ The organizing members' pre-litigation cost of forming an association may thus be largely offset by the cost savings accompanying the lack of a formal notice requirement.¹¹⁷ Additionally, post-filing savings may result from not having to litigate class certification.¹¹⁸ Ultimately, the pre-filing costs associated with this Note's proposal are likely to be less than the costs of proceeding via class action.

ii. Procedural Fairness

This Note's proposal is also preferable to class action from a procedural fairness perspective. The more control over the litiga-

¹¹⁴ Yeazell, *Past & Future*, supra note 55, at 699–700.

¹¹⁵ Fed. R. Civ. P. 23(c)(2)(B).

¹¹⁶ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (holding that the "usual rule is that a plaintiff must initially bear the cost of notice to the class"). Although in practice defendants may sometimes share in the cost of providing notice of certification of a (b)(3) class, the cost to plaintiff class representatives may nevertheless be significant. See Willging et al., *Empirical Analysis*, supra note 41, at 129–30.

¹¹⁷ The costs of notice extend beyond the (b)(3) class action. See, e.g., Fed. R. Civ. P. 23(c)(2)(A) (permitting a court to direct notice in (b)(1) and (b)(2) actions); Fed. R. Civ. P. 23(e)(1)(B) (requiring a court to direct notice in a reasonable manner as to any proposed settlement, voluntary dismissal, or compromise).

¹¹⁸ The degree to which defendants oppose class certification depends in part on the form of class certified; where a Rule 23(b)(1) non-opt-out class is sought, defendants might be less inclined to oppose class certification because it offers a means of achieving global peace. It is likely that defendants would more vigorously oppose Rule 23(b)(3) opt-out actions, however, because resolution of the class claim does not resolve all other outstanding claims. Moreover, even if claimants' costs do not decrease, or even if they increase somewhat, under this Note's proposal, this might be a desirable outcome. Shifting the costs of aggregation to claimants prior to filing might serve as a check on filing baseless suits.

tion and the greater the opportunities to participate in the adjudicative process, the more likely participants will see that process as fair.¹¹⁹ In addition to the procedural fairness issues implicated by increased transaction costs and delay under class action, “the distance between attorneys and clients [in class actions] results in less client opportunity to participate in the litigation, whether through an individually retained plaintiffs’ attorney or personally as a class member.”¹²⁰ Although aggregating through association cannot increase individual participation in an action to the extent that individual adjudication would, it does increase it as compared to the class action, largely because aggregation through association is premised in the first instance on consent to membership in the association.

Similarly, attorneys tend to control mass tort litigation, a reality that Professor Bone says results in “wasteful strategic maneuvering as each lawyer jockeys for a position in the litigation that will assure her a maximum fee.”¹²¹ From a procedural fairness perspective, it also diminishes the individual’s sense of, and actual, control over the litigation, consequently also diminishing her sense of fairness in the process.¹²² Lawyer control is particularly pronounced in class action. Just as aggregation through association may increase individual participation in the process, it may conversely decrease lawyer control of the litigation. In addition to the increased monitoring by association members that might accompany a greater sense of ownership over their claims, from the attorney’s perspective, the client is no longer the class representative proceeding on behalf of an amorphous group of persons who are believed to share similar interests. Instead, the client is the association, whose members are known and whose standing is based on the consent of its members. This state of affairs may decrease the ability of an otherwise self-interested attorney and self-interested representative

¹¹⁹ Saks & Blanck, *supra* note 20, at 838.

¹²⁰ Willging, *Problems and Proposals*, *supra* note 15, at 345.

¹²¹ Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 *Rev. Litig.* 79, 104–05 (1994).

¹²² Cf. Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 *Va. L. Rev.* 1401, 1402 (1979) (concluding from empirical research that parties view adversarial, “disputant-controlled procedures” as fairer than “nonadversary decisionmaker-controlled procedures”).

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plaintiff to act contrary to the interests of the claimants they purport to represent.

iii. Choice of Law

Choice of law problems may be the most substantial barriers to certification of a dispersed mass tort class that spans multiple jurisdictions. Rule 23(b)(3) requires as a prerequisite to certification that common questions of law or fact predominate over individual issues and that the class action be manageable.¹²³ A number of courts have refused to certify class actions because the prospect of applying multiple states' laws to a mass tort renders the proposed class action unmanageable.¹²⁴

Manageability and predominance are not prerequisites to associational standing. Upon first reflection it may appear that a court before which a suit modeled on this Note's proposal is pending may thus have to confront the difficult choice of law questions that might warrant a class action's dismissal. But the third prong of the *Hunt* test may erect a barrier to a litigation association's suit similar to manageability and predominance. That prong requires that neither the claim asserted nor the relief requested require the participation of individual members of the association.¹²⁵ Statistical sampling, this Note argues, provides a means to overcome individualization problems with respect to the elements of individual association members' claims, but this solution is complicated significantly if the substantive laws of many different states apply. Because, as it will be seen, the third prong is a prudential limitation on courts, the presence of significant choice of law problems may counsel against sampling and, because of the resulting necessity of individual participation, against standing.

A litigation association, however, may largely overcome the choice of law problems that have hampered aggregation by class action. An association may condition membership on prospective members' agreement to abide by the association's choice of law—

¹²³ Fed. R. Civ. P. 23(b)(3).

¹²⁴ See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that because the claim would have to "be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 743–44, 749–52 (5th Cir. 1996).

¹²⁵ See also discussion *infra* Section III.C.

presumably that of the state in which it is organized and in which the suit will be filed—to govern its claims. The benefit is thus similar to that which is believed possible in an opt-in class action: A judge can certify a suit as a class action and specify what law governs the dispute; the claimants who opt in to that suit acquiesce to application of the specified substantive law.¹²⁶

It may be the case that the association members' consent to a prescribed law alone is sufficient to overcome the choice of law problem as between the states that may otherwise claim an interest in the members' claims. A slightly more detailed analysis of the choice of law issue leads to the same conclusion. Whether a court's application of a single state's law to an action is proper depends both on the constitutionality of applying the law of a single state to the particular suit and on the forum state's conflicts of law rules. In *Philips Petroleum Co. v. Shutts*, the United States Supreme Court held that a court may constitutionally apply the substantive law of a single state in an action only if the state has a "significant contact or significant aggregation of contacts" creating state interests such that choice of its law is neither arbitrary nor unfair.¹²⁷ This "modest restriction[]"¹²⁸ on the application of forum law is likely satisfied if members of the association are domiciled in the forum and may also be satisfied if the litigation association is organized in the forum state.

Although the constitutional element is a necessary precondition to a court's application of the law of a single state to an action, the forum state's conflicts of law rules will ultimately determine the appropriateness in the matter. These rules apply both to actions filed in state court and to diversity actions pending in federal court. Federal courts apply federal procedural law and state substantive

¹²⁶ See 1 Working Papers, *supra* note 23, at 76; Cooper, *Challenges to the Rulemaking Process*, *supra* note 11, at 34; see also Ian Gallacher, *Representative Litigation in Maryland: The Past, Present, and Future of the Class Action Rule in State Court*, 58 Md. L. Rev. 1510, 1623 n.560 (1999) ("[N]otice could conceivably be crafted in such a way as to insure that class members were made aware that the case would proceed under the law of the court's forum state, and that by sending a notice to the court, the class member consented to have his or her case not only tried as part of the class, but also tried under the forum state's law.")

¹²⁷ 472 U.S. 797, 821–22 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

¹²⁸ *Id.* at 818.

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law in diversity cases.¹²⁹ Where more than one state has an interest in the litigation, and there is a conflict between the states' substantive laws, a district court must apply the choice of law rules of the jurisdiction in which it sits.¹³⁰ Although the choice of law rules vary among the states, a majority of states have adopted choice of law rules that generally focus on balancing the relevant states' respective interests.¹³¹ The state in which the association is formed, at least insofar as members of the association are domiciled there, may thus have a comparatively strong interest in having its laws applied to the matter.¹³²

A court may of course be skeptical of an attempt by claimants to manufacture an interest for a state solely by choosing to form an association in that state. This concern may be lessened, however, if the association demonstrates that some of its members are domiciled in that state. Such a demonstration may be sufficient to rebut any suspicion of pretext insofar as it indicates that the state has an interest equal to that of other states in which members are domiciled. From an interest analysis perspective, however, it is the additional interest that accrues to the state in which the association is formed that may be significant in balancing respective states' interests. That comparatively strong interest may be sufficient, at least as between the states that can claim an interest in the members' claims, to overcome the choice of law problem that hampers class action. It may also be sufficient to overcome any barriers erected by the third prong of the *Hunt* test.

The next Part examines associational standing doctrine and argues that the only barrier it erects to this proposal is prudential: Courts often deny an association representative standing if the claim or relief asserted would require significant individual participation in the suit by the association's members. Because the limitation is founded on concerns about efficiency and administrative

¹²⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹³⁰ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

¹³¹ Ryan Patrick Phair, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. Chi. L. Rev. 835, 840 (2000).

¹³² Cf. *Ass'n of Merger Dealers, LLC v. Tosco Corp.*, 167 F. Supp. 2d 65, 74–75 (D.D.C. 2001) (noting that, in suits involving incorporated organizations, the substantive law of the state of incorporation will often govern, as "the state of incorporation has a strong interest . . . for the obvious reason that the corporation exists under its laws").

convenience, however, it might be overcome by a device that significantly reduces the level of individual participation necessary to try the suit.

III. ASSOCIATIONAL STANDING: THE *HUNT* TEST

Standing to sue in federal courts is circumscribed by both constitutional limitations and prudential considerations.¹³³ The constitutional limitations are framed by Article III of the United States Constitution, which restricts federal courts to adjudication of cases or controversies.¹³⁴ Thus the constitutional inquiry is “whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant.”¹³⁵ At a minimum, this requires a plaintiff to show that there is “(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.”¹³⁶

In addition to the constitutional limitations on standing, courts have articulated several self-imposed prudential restrictions on the exercise of federal jurisdiction. These include the general prohibition on a litigant raising another person’s legal rights.¹³⁷ Because this limitation is prudential, however, it “may be relaxed in appropriate circumstances.”¹³⁸ These circumstances include those cases in which a plaintiff association seeks to redress injury to its members, even without demonstrating injury to the association itself, if the factors for associational standing articulated by the Supreme Court in *Hunt v. Washington State Apple Advertising Commission*¹³⁹ are satisfied. After presenting an overview of current associational standing doctrine, this Part examines the *Hunt* test’s factors individually, with an emphasis on those elements that most directly relate to the proposal for collective adjudication outlined above.

¹³³ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

¹³⁴ U.S. Const. art. III, § 2.

¹³⁵ *Warth*, 422 U.S. at 498.

¹³⁶ *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996).

¹³⁷ See *Allen v. Wright*, 468 U.S. 737, 751 (1984); 13 Charles Alan Wright et al., *Federal Practice & Procedure* § 3531.9 (1984).

¹³⁸ 13 Wright et al., *supra* note 137, § 3531.9.

¹³⁹ 432 U.S. 333, 343 (1977).

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The Court first explicitly recognized an association's standing to bring a suit on behalf of its members in *Warth v. Seldin*.¹⁴⁰ The *Warth* Court cautioned, however, that "the possibility of such representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy."¹⁴¹ As a result, an association seeking to represent the interests of its members must

allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.¹⁴²

The Court refined the requirements for associational standing two years later in *Hunt*. *Hunt* involved a constitutional challenge by the Washington State Apple Advertising Commission (the "Commission") to a North Carolina statute that required "all closed containers of apples sold, offered for sale, or shipped into the State to bear 'no grade other than the applicable U.S. grade or standard.'"¹⁴³ The Commission, composed of thirteen nominated and elected Washington apple growers and dealers, was established to promote and protect the state's apple industry.¹⁴⁴ North Carolina argued that the Commission lacked standing to maintain the action, either on its own behalf or on behalf of the Commission's members.¹⁴⁵ The Court found that the Commission had standing to pursue its action in a representative capacity and, in its analysis, articulated a three-part test for associational standing:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are ger-

¹⁴⁰ 422 U.S. at 511.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Hunt*, 432 U.S. at 335.

¹⁴⁴ *Id.* at 336-37.

¹⁴⁵ *Id.* at 341.

mane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.¹⁴⁶

The Court recognized that the Commission was a state agency in which membership was compelled and thus not the type of voluntary membership organization on which it had previously conferred representational standing. It nevertheless found that because the growers and dealers that constituted the Commission "possess all of the indicia of membership in an organization[,] . . . [i]n a very real sense . . . the [State] Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests."¹⁴⁷ Finally, the Court noted that because the Commission itself might suffer a decline in the commissions it collected to support itself, there existed a "financial nexus between the interests of the Commission and its constituents [that] coalesces with the other factors . . . to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'"¹⁴⁸

Following the Court's articulation of the test for associational standing in *Hunt*, at least three questions remained open. First, the *Warth* Court suggested that what would become the first and, possibly, third prongs of the *Hunt* test were properly grounded in the Constitution and thus by implication not subject to abrogation. *Hunt* was silent on this issue. Second, the *Warth* Court left open the possibility that what would become the third prong of the *Hunt* test might be satisfied notwithstanding the fact that the claim asserted or the relief requested required the participation of something short of "each injured party." Finally, *Hunt* may have at least negatively implied that associational standing required a concomitant injury to the association that results in a nexus of the association's and its members' interests. The Supreme Court and the lower federal courts have addressed these issues as they have added substance to the three prongs of the *Hunt* test. Their re-

¹⁴⁶ *Id.* at 343; see also *Int'l Union, UAW v. Brock*, 477 U.S. 274, 282 (1986) (reaffirming the three-part *Hunt* test).

¹⁴⁷ *Hunt*, 432 U.S. at 344-45.

¹⁴⁸ *Id.* at 345 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

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sponses to these issues are discussed below as each of the *Hunt* test's prongs is considered in more detail.

A. Association's Members Must Have Standing to Sue in Their Own Right

Associational standing is itself an exception to the prudential limitation on standing that generally precludes a party from asserting a third person's claim. But the three requirements for associational standing are neither all necessarily prudential nor all necessarily constitutional in origin. As noted above, the *Warth* Court indicated that what would become the first and, possibly, third prongs of the *Hunt* test were grounded in the Constitution. Yet the Court did not explicitly clarify the nature of the associational standing requirements until *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, decided in 1996.¹⁴⁹ In that opinion, the Court determined that the requirement that an association's members must have standing to sue in their own right is the "most direct address to Article III standing, [and] can only be seen as itself an Article III necessity for an association's representative suit."¹⁵⁰

Of course, implied in the first prong is a requirement that those on whose behalf the association pursues a claim must be "members" of the association. As a practical matter, courts have held that this requires not actual voluntary participation in the association, but that the "members" possess indicia of membership.¹⁵¹ These indicia include, for example, that the "members" elect from among themselves those persons to serve on the association's governing body and that they finance the association's activities.¹⁵² No definitive set of indicia, however, appears to control. Rather, con-

¹⁴⁹ 517 U.S. 544, (1996).

¹⁵⁰ *Id.* at 555.

¹⁵¹ See *Hunt*, 432 U.S. at 344–45 (noting that although the apple growers and dealers were not members of the Commission, they possessed all of the indicia of membership in an organization).

¹⁵² *Id.* at 344; see also *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 828–29 (5th Cir. 1997) (reiterating that what is required to demonstrate membership to satisfy the first prong of the *Hunt* test is a showing that the "members" possess the indicia of membership and adding that, in addition to financial support and election to the governing body, whether the members voluntarily associate themselves and whether individual members testify as to membership might inform the inquiry).

sistent with the constitutional nature of the first prong, membership is a substantive inquiry¹⁵³ that is based on whether the “members” possess enough of the indicia of membership “that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a ‘personal stake in the outcome of the controversy.’”¹⁵⁴

This first prong of the *Hunt* test has not otherwise been the subject of much controversy or analysis.¹⁵⁵ The standing of an association’s member is evaluated as if he or she had brought the suit directly,¹⁵⁶ and courts have indicated that the requirement is met even if only one of the association’s members is shown to have standing in his or her own right.¹⁵⁷

*B. The Interests the Association Seeks to Protect Must Be
Germane to the Association’s Purpose*

Although the Court has not held the second prong to be grounded in the Constitution, it has implied that this prong might be something more rigid than a prudential requirement. The second prong is,

at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member’s [sic] claim raises an assurance that the association’s litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant’s natural adversary.¹⁵⁸

It is presumed that where the interests that the association seeks to protect are germane to its purpose, it will naturally “represent

¹⁵³ *Hunt*, 432 U.S. at 345 (noting that “it would exalt form over substance” to differentiate between the Commission and a traditional trade association).

¹⁵⁴ *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977)).

¹⁵⁵ 13 *Wright et al.*, supra note 137, § 3531.9.

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., *United Food and Commercial Workers Union Local 751*, 517 U.S. at 555 (noting that the first prong of the *Hunt* test requires an association suing in its representative capacity to “include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association”); 13 *Wright et al.*, supra note 137, § 3531.9.

¹⁵⁸ *United Food and Commercial Workers Union Local 751*, 517 U.S. at 555–56.

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well the parallel interests of its members.”¹⁵⁹ Similarly, it may be presumed that the members are willing to be represented within the scope of the organization’s concerns.¹⁶⁰ The Court stated in *International Union, United Automobile Workers of America v. Brock* that “the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.”¹⁶¹ The Court thus clarified that there is no need for an association to demonstrate a concomitant injury to itself, and thus a separate nexus of association and member interests, for associational standing to be proper. Rather, “[t]he very forces that cause individuals to band together in an association will . . . provide some guarantee that the association will work to promote their interests.”¹⁶²

Nevertheless, it may be proper for a court to examine an association’s nature in addition to examining its purpose because some forms of organization may more adequately protect members’ interests than other forms.¹⁶³ Associational standing suits typically involve actions brought by pre-existing, voluntary membership associations. But associational standing is not limited to such groups. Indeed, *Hunt* itself involved an organization in which membership for the state’s apple growers and dealers was not voluntary. Moreover, the Court has found that the second prong of the *Hunt* test may be satisfied by an association that is formed with the sole purpose of representing its members’ interests in connection with a lawsuit.¹⁶⁴ A court’s inquiry into the nature of the organization thus appears unconcerned with form as an independent matter; rather, the nature of an association is significant only insofar as it may be indicative of a problem with the adequacy of the association’s representation of its members.

¹⁵⁹ 13 Wright et al., supra note 137, § 3531.9, at 615.

¹⁶⁰ Id.

¹⁶¹ 477 U.S. at 290.

¹⁶² Id. Membership in a union is often compelled in a fashion similar to that required of the apple growers and dealers in *Hunt*. 432 U.S. at 345. Yet the *Brock* Court found that the union satisfied the requirements for associational standing to represent its members, notwithstanding the fact that it alleged no injury to itself. 477 U.S. at 290.

¹⁶³ 13 Wright et al., supra note 137, § 3531.9.

¹⁶⁴ Pennell v. City of San Jose, 485 U.S. 1, 7 n.3 (1988).

C. Neither the Claim Asserted nor the Relief Requested Can Require the Participation of Individual Members of the Association

The third prong of the *Hunt* test is often the most substantial barrier to associational standing.¹⁶⁵ Under this prong, “neither the claim asserted nor the relief requested [can] require[] the participation of individual members in the lawsuit.”¹⁶⁶ The *Hunt* Court’s formulation of the requirement suggests that any suit in which the claim or relief requires the participation of individual members of the association will not support associational standing. Yet a number of courts have held that the participation by some members of the association does not preclude associational standing under this prong of the *Hunt* test.¹⁶⁷ For example, in *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, the United States Court of Appeals for the Third Circuit found that the *Hunt* Court’s articulation of the requirement was a paraphrase of the Court’s earlier language in *Warth*: “[S]o long as the nature of the claim and of the relief sought does not make the individual participation of *each* injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members.”¹⁶⁸ The Third Circuit thus found that an association that can establish its claims with “limited individual participation” does not offend the third prong of the *Hunt* test.¹⁶⁹ Even in light of such pronouncements, it remains unclear exactly how much individual participation will be permitted within the strictures of the *Hunt* test. What is clear, however, is that participation by every member of an association will usually be a bar to associational standing.

¹⁶⁵ See 1 Lawrence H. Tribe, *American Constitutional Law* 452 (3d ed. 2000).

¹⁶⁶ *Hunt*, 432 U.S. at 343.

¹⁶⁷ See, e.g., *Pa. Psychiatric Soc’y v. Green Spring Health Serv., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002); *Retired Chi. Police Ass’n v. City of Chicago*, 7 F.3d 584, 601–02 (7th Cir. 1993) (“We can discern no indication in *Warth*, *Hunt*, or *Brock* that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association.”); *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 89–90 (3d Cir. 1991); *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, 199 F. Supp. 2d 40, 49 (W.D.N.Y. 2002); see also *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003) (“Whether the [association] has standing to sue depends on whether the claims against [defendant] require individualized proof from *each* [association] member.” (emphasis added)).

¹⁶⁸ *Warth*, 422 U.S. at 511 (emphasis added).

¹⁶⁹ *Pa. Psychiatric Soc’y*, 280 F.3d at 286.

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But such participation is often required when the relief requested is in the form of damages. Indeed, the nature of the relief requested is an important factor in determining whether associational standing is appropriate. As the *Warth* Court stated:

If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.¹⁷⁰

The Court then distinguished instances in which an association seeks damages: “[W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof.”¹⁷¹ Because “damages claims usually require significant individual participation, which fatally undercuts a request for associational standing,”¹⁷² as a practical matter, the third prong of the *Hunt* test has largely limited associational standing to claims for prospective relief. Indeed, a number of courts have noted that no federal court has held that an association has standing to pursue damages claims on behalf of its members.¹⁷³

¹⁷⁰ *Warth*, 422 U.S. at 515.

¹⁷¹ *Id.* at 515–16.

¹⁷² *Pa. Psychiatric Soc’y*, 280 F.3d at 284.

¹⁷³ See, e.g., *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (stating that neither the Supreme Court nor any appellate court has permitted an association standing to pursue damages on behalf of its members); *Telecomm. Research & Action Ctr. v. Allnet Communication Servs.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) (“[L]ower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization’s members.”); *Legal Aid Soc’y v. City of New York*, 114 F. Supp. 2d 204, 214 (S.D.N.Y. 2000) (“Pursuant to this third prong, however ‘no federal court has allowed an association standing to seek monetary relief on behalf of its members.’” (quoting *United Union of Roofers No. 40 v. Ins. Corp.*, 919 F.2d 1398, 1400 (9th Cir. 1990))). Nevertheless, the Court did find that an association may have standing to seek damages on behalf of its members in *United Food and Commercial Workers Union Local 751*, 517 U.S. at 558. Moreover, at least one district court has found that an association may have standing to seek damages on behalf of its members. See *Pa. Indep. Waste Haulers Ass’n v. Waste Sys. Auth. of E. Montgomery County*, No. CIV. A. 99-1782, 2000 WL 254310, at *3 (E.D. Pa. Mar. 7, 2000) (“[Defendant] seems to

Such pronouncements are largely accurate. But in *United Food and Commercial Workers Union Local 751* the Court opened the door for exceptions to the general prohibition on associations seeking damages.¹⁷⁴ In *United Food and Commercial Workers Union Local 751*, a union brought an action against its members' employer seeking damages in the form of back pay for its members.¹⁷⁵ The suit was brought pursuant to the Worker Adjustment and Retraining Notification ("WARN") Act, which obligated the employer to provide workers or their union sixty days' advance notice prior to closing a plant or beginning significant layoffs.¹⁷⁶ The Court first found that the WARN Act enables unions to sue for back pay on behalf of their members. It then proceeded to examine whether the union had standing to bring its suit: specifically the Court examined the nature—constitutional or prudential—of the requirements of the *Hunt* test.¹⁷⁷ The Court found that the first prong of the *Hunt* test is of a constitutional nature and thus is an absolute, non-derogable limitation on standing.¹⁷⁸ Similarly, the Court found that the second prong of the *Hunt* test was complementary to the first and protects interests similar to those that the first protects, but the Court stopped short of holding that it too was an absolute and constitutionally mandated requirement.¹⁷⁹

contend that individual participation precludes associational standing whenever an organization seeks damages on behalf of its members A proper reading of a string of United States Supreme Court cases referenced above provides that such a blanket conclusion is not proper." The *Pennsylvania Independent Waste Haulers Ass'n* court concluded, however, that there was nothing in the claim for damages that would require the participation of individual members of the association and that any individualized information that the defendant needed to defend itself could be obtained through discovery. *Id.*; cf. *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 199 F. Supp. 2d 40, 49 (W.D.N.Y. 2002) (noting that "[j]udgments as to prudential standing are vested in the trial court's sound discretion since they involve 'judicially self-imposed limit[s] on the exercise of federal jurisdiction, not a constitutional mandate'" and that the testimony of a number of individually named plaintiffs who are members of the plaintiff association would likely suffice to provide the evidence to support the claim for declaratory and injunctive relief).

¹⁷⁴ 517 U.S. at 557.

¹⁷⁵ *Id.* at 547.

¹⁷⁶ *Id.* at 545–46.

¹⁷⁷ *Id.* at 551.

¹⁷⁸ *Id.* at 555.

¹⁷⁹ *Id.* at 555–56.

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The Court was clear, however, that the third prong of the *Hunt* test is a prudential limitation on the exercise of federal jurisdiction. “[O]nce an association has satisfied *Hunt*’s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more.”¹⁸⁰ The third prong is thus “best seen as focusing on . . . matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.”¹⁸¹ And as a prudential limitation Congress may abrogate the prong, as it did through the WARN Act, thus permitting an organization such as the union in *United Food and Commercial Workers Union Local 751* associational standing despite a claim or relief that requires individualized participation that might otherwise preclude standing under the *Hunt* test.¹⁸²

Because of the prudential nature of the third prong of the *Hunt* test—a judicially self-imposed limitation that focuses on matters of administrative convenience and efficiency—judges, as much as Congress, may abrogate it.¹⁸³ One reading of the *United Food and Commercial Workers Union Local 751* opinion, however, may suggest that this is not the case: “In light of our conclusion that in the WARN Act Congress has abrogated the third prong of the associational standing test, we need not decide here whether, absent congressional action, the third prong would bar a ‘simplified’ claim for damages” such as that advanced by the plaintiff union.¹⁸⁴ But the statement should not be read to imply that a court is without power to abrogate a prudential limitation at all. Rather, the Court simply noted that it did not have to determine whether the simplified damages claim overcame concerns of efficiency and convenience;

¹⁸⁰ *Id.* at 556.

¹⁸¹ *Id.* at 557.

¹⁸² See, e.g., *id.* at 558.

¹⁸³ See, e.g., *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, 199 F. Supp. 2d 40, 49 (W.D.N.Y. 2002) (“Judgments as to prudential standing are vested in the trial court’s sound discretion . . .”); *Pa. Indep. Waste Haulers Ass’n v. Waste Sys. Auth. of E. Montgomery County*, No. CIV. A. 99-1782, 2000 WL 254310, at *3 (E.D. Pa. Mar. 7, 2000) (noting that because “the third prong of the *Hunt* test is not constitutionally mandated, and has been ruled to exist for purposes of administrative convenience and efficiency once the first two prongs are satisfied,” the association survived the *Hunt* test, but noting also that the court did not believe that the claim for damages would in fact require the individual participation of the association’s members).

¹⁸⁴ 517 U.S. at 554 n.5.

such a reading is more consistent with the prudential nature of the limitation.

In the absence of congressional abrogation, is there a procedure by which an association may substantially reduce the level of its members' individual participation that would overcome efficiency and convenience concerns and thus warrant judicial abrogation of the third prong of the *Hunt* test? The next Part takes up this inquiry.

IV. SAMPLING

A. *Statistical Sampling as a Means of Overcoming the Individualization Hurdle*

In the mass tort context, where potential plaintiffs number in the hundreds of thousands, the cost of presenting individualized evidence often precludes trying cases.¹⁸⁵ Courts and commentators have thus explored means of employing statistical sampling to overcome the numbers problem in trying mass torts.¹⁸⁶

Sample surveys measure only a portion of the objects, individuals, or social units within a delimited population, but when done properly, the survey results accurately reflect that population as a whole.¹⁸⁷ Although forty years ago it was unclear whether sample surveys constituted an acceptable form of evidence,¹⁸⁸ they are today "a well-accepted alternative for the trial judge facing crippling discovery and evidentiary costs."¹⁸⁹ Both courts and commentators have demonstrated that sample surveys offer a means of overcoming the prohibitively high costs of trying mass tort cases.

For example, responding to the decades-long battle over liability for asbestos-related injury, Judge Parker employed sampling methodology to try *Cimino v. Raymark Industries, Inc.*¹⁹⁰ In a three-phase trial, Judge Parker tried the claims of a class consisting of

¹⁸⁵ *In re Simon II Litig.*, 211 F.R.D. 86, 147 (E.D.N.Y. 2002), vacated and remanded on other grounds, 407 F.3d 125 (2d Cir. 2005).

¹⁸⁶ Saks & Blanck, *supra* note 20, at 826; Walker & Monahan, *supra* note 20, at 546.

¹⁸⁷ Shari Seidman Diamond, Reference Guide on Survey Research, *in* Reference Manual on Scientific Evidence 229, 231–32 (2d ed. 2000).

¹⁸⁸ *Id.* at 233. For a summary of the path that survey methodology followed to acceptance, see Walker & Monahan, *supra* note 20, at 557–61.

¹⁸⁹ *In re Simon II Litig.*, 211 F.R.D. at 149 (citing sources).

¹⁹⁰ 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

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2298 members allegedly harmed as the result of exposure to defendants' insulating products that contained asbestos.¹⁹¹ In the damages phase of the trial, the court divided the class members into five disease categories based on their claimed injuries. From each category, the court randomly selected a number of individual claims, totaling 160, for trial on damages. The court decided that each plaintiff whose case was tried would receive the damages that the jury awarded and that the remaining plaintiffs in each disease category would receive the average of the sampled cases within that category.¹⁹² The United States Court of Appeals for the Fifth Circuit eventually rejected Judge Parker's trial plan as inconsistent with Texas law and the Seventh Amendment because it did not entail an individualized inquiry into each class member's actual damages.¹⁹³

Similarly, in *In re Estate of Marcos*, Judge Real permitted the jury to consider a random sample of compensatory damage claims from a class of 9541 plaintiffs alleging injuries sustained at the hands of the state during the presidency of Ferdinand Marcos.¹⁹⁴ Judge Real was assisted in the case by an expert in the field of inferential statistics who formulated a plan whereby only 137 randomly selected claims would have to be examined in order to achieve a 95% statistical confidence level.¹⁹⁵ Judge Real appointed a Special Master to assist in implementing that plan—to supervise the depositions of the 137 claimants and to make recommendations on compensatory damages for both the deponents and the remaining class members.¹⁹⁶ The Special Master found six of the 137 claims to be invalid and thus extrapolated a 4.37% invalidity rate to the remaining class claims.¹⁹⁷ The Special Master presented his findings to the jury, and based upon his recommendations and the deposition transcripts, the jury awarded damages of approximately \$766 million. On appeal, the United States Court of Appeals for the Ninth Circuit found that Judge Real's use of statistical sampling—

¹⁹¹ Id. at 652–53.

¹⁹² Id. at 653.

¹⁹³ *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319–21 (5th Cir. 1998).

¹⁹⁴ 910 F. Supp. 1460, 1462 (D. Haw. 1995), *aff'd sub nom. Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

¹⁹⁵ Id. at 1464–65.

¹⁹⁶ Id. at 1465.

¹⁹⁷ *Hilao v. Estate of Marcos*, 103 F.3d 767, 783 (9th Cir. 1996).

specifically, extrapolation of the invalidity rate to the class—was appropriate.¹⁹⁸ The court noted that the procedure was justified because “the time and judicial resources required to try the nearly 10,000 claims in this case would [have] alone [otherwise] ma[de] resolution of Hilao’s claims impossible.”¹⁹⁹

More recently, Judge Weinstein made various forms of sampled evidence an integral part of his trial plan in *In re Simon II Litigation*, certifying a nationwide non-opt-out class action pursuant to Federal Rule of Civil Procedure 23(b)(1)(B) comprising all persons who smoked defendants’ cigarettes and who were diagnosed with certain enumerated diseases within the class period.²⁰⁰ As part of his trial plan, Judge Weinstein anticipated the presentation of statistical proof of both causation and damages. Specifically, Judge Weinstein anticipated that plaintiffs would, and explicitly permitted plaintiffs to, present various types of statistical analyses to support their claims, including: expert testimony based on statistical analyses supporting the claim that defendants’ misrepresentations affected members of the plaintiff class;²⁰¹ statistical evidence of the effect of defendants’ misleading statements on smoking behavior;²⁰² and surveys reflecting the effect of defendants’ misrepresentations on the population as a whole.²⁰³ Judge Weinstein responded to defendants’ objections to plaintiffs’ use of aggregate proof by noting that mass torts could not be tried at all if courts were to require plaintiffs to present individual proof from each purported class member.²⁰⁴ Sampling and statistical extrapolations were not only appropriate, but also well-suited to mass tort actions because they provided a cost-effective, accurate means of trying such actions in the face of overwhelming discovery and evidentiary costs.²⁰⁵ Judge Weinstein thus noted that “[g]reater reliance on statistical methods is required by the profound evolution in our economic communication and data compilation and retrieval systems in recent dec-

¹⁹⁸ Id. at 787.

¹⁹⁹ Id. at 786.

²⁰⁰ 211 F.R.D. 86, 99–100 (E.D.N.Y. 2002), vacated and remanded on other grounds, 407 F.3d 125 (2d Cir. 2005).

²⁰¹ Id. at 126–27.

²⁰² Id. at 128.

²⁰³ Id. at 130.

²⁰⁴ Id. at 147.

²⁰⁵ Id.

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ades. . . . Modern adjudicatory tools must be adapted to allow the fair, efficient, effective and responsive resolution of the claims of these injured masses.”²⁰⁶

Scholars too have recognized both the need for this adaptation and the potential for survey methodology to provide the means by which to accomplish such adaptation. For example, Professors Saks and Blanck propose a method of statistical sampling in mass tort cases based on a refinement of the procedure adopted in *Cimino* whereby sampled cases that are drawn from subgroups of a class are tried and the jury results are extrapolated to the populations from which the subgroups are drawn.²⁰⁷

Professors Walker and Monahan go a step further and offer a model of sampling damages that, “without apology,” abandons entirely any pretense of individualization, utilizing the results of statistical samples as the only mechanism of proof.²⁰⁸ This proposed model begins with a court certifying a class based on a motion for class certification that describes the plan to conduct a survey, which the court would presumably take into account in determining whether the class is manageable.²⁰⁹ The class of plaintiffs would be co-extensive with the population to be surveyed. Second, the class representative would employ an expert to conduct the survey. Third, the class representative would ask the court to admit the survey results and, applying the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²¹⁰ the court would rule on admissibility. If the survey were admitted, its results would be presented by expert testimony to the jury.²¹¹ Significantly, such a proposal need not be limited to damages; all elements of a tort claim are amenable to sampling.²¹² For instance, Professors Walker and

²⁰⁶ Id. at 151.

²⁰⁷ See generally Saks & Blanck, *supra* note 20.

²⁰⁸ Walker & Monahan, *supra* note 20, at 561.

²⁰⁹ Id. at 563.

²¹⁰ 509 U.S. 579 (1993).

²¹¹ Walker & Monahan, *supra* note 20, at 563–64.

²¹² See *In re Simon II Litig.*, 211 F.R.D. at 150 (“Surveys and sampling techniques have been admitted in a large variety of actions to establish causation so long as they accord with *Daubert* and Rule 702 of the Federal Rules of Evidence.” Indeed, “[t]he use of statistical evidence and methods in the American justice system to establish liability and damages is appropriate, particularly in mass injury cases such as this one.”); *Blue Cross & Blue Shield of N.J. v. Philip Morris USA, Inc.*, 133 F. Supp. 2d

Monahan note that parties routinely use statistical sampling in trademark cases to demonstrate harm because of the likelihood of confusion.²¹³ Similarly, they note that causation in toxic tort cases is now often demonstrated with sampled data in the form of epidemiological studies.²¹⁴

B. The Constitutionality of Sampling

Sampling is not without its critics. Defendants²¹⁵ in mass tort cases routinely object to the use of sampled evidence on due process and Seventh Amendment grounds. Lying just beneath the surface of these claims is a conception of the civil justice system that is focused on the individual litigant. As Professor Rosenberg remarks, "Nowhere do class actions seem a more alien force than in the torts system, which epitomizes the individual justice tradition."²¹⁶ Yet Professors Saks and Blanck argue that the centrality of the individual in the justice system is illusory. They note that an individual verdict in a suit by a single plaintiff against a single defendant is itself only a sample from a wider population of possible outcomes.²¹⁷ For this reason, and because widely held beliefs about traditional individualized litigation also prove largely illusory, they recommend abandoning this conception.²¹⁸ Similarly, Professors Walker and Monahan argue that the only way to solve the numbers problem in mass torts is to "abandon[] any pretense of individual adjudication."²¹⁹ The argument has particular appeal when adherence to the traditional conception of the civil justice system may mean that mass torts are not tried at all.²²⁰ Nevertheless, the more

162, 172 (E.D.N.Y. 2001) ("Statistical proof is available for every element of a claim in a mass tort action.").

²¹³ Laurens Walker & John Monahan, *Sampling Liability*, 85 Va. L. Rev. 329, 340 (1999).

²¹⁴ *Id.* (citing cases); see also *In re Simon II Litig.*, 211 F.R.D. at 150.

²¹⁵ I focus solely on defendants here because the proposal discussed in this Note is premised on plaintiff consent and voluntary membership in an association.

²¹⁶ David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561, 562 (1987).

²¹⁷ Saks & Blanck, *supra* note 20, at 834 ("The fact that we normally obtain only one award from one trial of each case obscures the population of possible awards from which that one was drawn.").

²¹⁸ See *id.* at 839–41.

²¹⁹ Walker & Monahan, *supra* note 20, at 546.

²²⁰ See *supra* Part I.

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specific constitutional objections that spring from this conception require consideration.

Sampling in mass torts does not offend due process. In a suit between private parties, to determine whether a procedure employed by one party violates due process a court must balance: the private interest that is affected by the procedure; the risk of erroneous deprivation and the probable value of additional or alternative safeguards; the interest of the party seeking the procedure; and any ancillary interest the government may have in providing the procedure.²²¹ Principal attention must be paid to the interest of the party seeking the procedure.²²² In *Connecticut v. Doebr*, the Court indicated that if a plaintiff can show some exigent circumstance requiring use of the challenged procedure, such a showing might be enough to overcome any objection based on due process.²²³ The Ninth Circuit found that such exigent circumstances exist in a mass tort case such as that presented in *Hilao*, shielding sampling from invalidation on due process grounds because “adversarial resolution of each class member’s claim would pose insurmountable practical hurdles.”²²⁴ Coupled with this substantial interest was the ancillary interest of the judiciary in avoiding the burden that thousands of individual actions would impose.²²⁵ Balanced against these interests was the defendant’s interest in the total amount of damages for which it would be liable; but individual adjudication of the claims, were that possible, would likely result in greater liability than was imposed under the trial plan adopted by Judge Real.²²⁶

²²¹ *Connecticut v. Doebr*, 501 U.S. 1, 11 (1991).

²²² *Id.*

²²³ Saks & Blanck, *supra* note 20, at 828.

²²⁴ *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (1996).

²²⁵ *Id.* at 786–87.

²²⁶ *Id.* at 786. This could not be said of the trial plan adopted by the court in *Cimino* because of the differences between the two cases in the timing of the aggregation and the information provided to the juries. In *Hilao*, the jury was informed before it made its decisions that its damage awards would be used as the basis for determining an aggregated amount of compensatory damages and it was provided with the Special Master’s recommendation as to a total damages award. See *Hilao*, 103 F.3d at 767. In *Cimino*, however, the jury was not aware that its decisions would be the basis of awards for extrapolation plaintiffs. Walker & Monahan, *supra* note 20, at 553. Rather, the court, after the jury made its decisions, simply awarded to those plaintiffs whose claims were not tried the average award of the sampled cases within the relevant disease category. *Cimino v. Raymark Indus.*, 751 F. Supp 649, 653 (E.D. Tex. 1990), *rev’d*, 151 F.3d 297 (5th Cir. 1998). Professors Walker and Monahan argue that this is

Judge Weinstein similarly found that consideration of the private interests involved in a mass tort case counsels in favor of using statistical methods, notwithstanding defendants' due process objections.²²⁷ Judge Weinstein noted that, although the defendants' interest in not paying damages in excess of what their alleged misconduct caused would be furthered by permitting them to confront each plaintiff class member, "[p]ractical considerations temper the weight of [that] interest."²²⁸ Those considerations included the fact that the costs imposed would effectively force the plaintiffs to abandon their claims altogether, that statistical sampling offers the possibility of reaching a more accurate outcome than individualized adjudication, that the public would bear much of the additional costs that individual adjudication would impose, and that a consolidated trial with full presentation of individual evidence would be unmanageable.²²⁹

Defendants likewise object to the use of sampled evidence on the ground that it abridges their Seventh Amendment right to a

an important difference, potentially bearing on the constitutionality of the sampling methods. Walker & Monahan, *supra* note 20, at 551–53. Whereas the *Cimino* jury was "blindfolded," the *Hilao* jury was not. *Id.* at 552. The latter may thus have accounted for the impact on the defendant, and Judge Real may thus have been correct in noting that individual trials would have resulted in greater liability for the defendant. *Id.* at 552–53.

²²⁷ *In re Simon II Litig.*, 211 F.R.D. at 153; see also Saks & Blanck, *supra* note 20, at 832. But see *Blue Cross & Blue Shield of N.J. v. Philip Morris USA, Inc.*, 344 F.3d 211, 225, 227–28 (2d Cir. 2003) (finding that defendant's due process objection to plaintiff's use of statistical proof was without merit where, unlike a class action or a subrogation claim, the claim was for direct injuries). On May 6, 2005, the United States Court of Appeals for the Second Circuit vacated Judge Weinstein's certification order on the ground that there was no evidence before the district court by which it could determine the existence of a limited fund; the court explicitly declined to address the propriety of using statistical sampling. *In re Simon II Litig.*, 407 F.3d 125, 126 (2d Cir. 2005).

²²⁸ *In re Simon II Litig.*, 211 F.R.D. at 153.

²²⁹ *Id.* at 153–54. Whether or not one believes that sampling offends procedural due process may depend on how one characterizes the defendant's interest. For example, the right may be characterized not as the interest in total liability that the defendant may face, but rather the "procedural due process right either to defend or prosecute[] th[at] property interest." R. Joseph Barton, Note, Utilizing Statistics and Bellwether Trials in Mass Torts: What do the Constitution and Federal Rules of Civil Procedure Permit?, 8 *Wm. & Mary Bill Rts. J.* 199, 222 (1999). Thus, "[a]lthough the defendant may challenge the reliability of the particular method of extrapolation by the statistical expert, the defendant has no real opportunity to demonstrate the dissimilarity of any particular non-bellwether plaintiff's claims." *Id.* at 223.

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jury trial by excluding individualized evidence from the jury. Such an argument requires reading the Seventh Amendment to impose an inflexible limitation on methods of proof parties may use. As Judge Weinstein has colorfully noted, “Requiring such a horse and buggy interpretation for trials in a computer-guided-rocket age seems somewhat far-fetched. Courts cannot ignore and deny themselves what the rest of the world relies upon in fact-finding.”²³⁰ The Seventh Amendment imposes no such limitation: “New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right.”²³¹ A court is thus within its broad authority in managing a trial to permit the introduction of sampled evidence so long as it does not infringe on the fundamental requirement that the basic institution of the jury trial be preserved. Those courts that have considered the question have found that properly conducted sample surveys do not threaten that institution.²³² Indeed, to find otherwise would call into doubt the constitutionality of any representative litigation in which the claims of those who are represented are not put directly before the jury.

C. The Synergy of Sampling and Association

Sampling is thus a practical and constitutional means of trying mass torts within the class context. But it also offers a means of freeing mass torts from the strictures of Rule 23. Statistical sampling allows significant reduction, if not elimination, of individual participation in group litigation. As a consequence, it may enable

²³⁰ *In re Simon II Litig.*, 211 F.R.D. at 154–55.

²³¹ *Id.* at 155 (quoting *In re Peterson*, 253 U.S. 300, 309–10 (1920)) (footnote omitted). The Seventh Amendment “was designed to preserve the basic institution of the jury trial in only its most fundamental elements, not the great mass of procedural forms and details.” *Id.* (quoting *Galloway v. United States*, 319 U.S. 372, 392 (1943)).

²³² See, e.g., *Blue Cross & Blue Shield of N.J. v. Phillip Morris USA, Inc.*, 344 F.3d 211, 225–27 (2d Cir. 2003); *In re Simon II Litig.*, 211 F.R.D. at 154–58. Although the Fifth Circuit in *Cimino* found that the trial plan did not contain a litigated determination of damages consistent with the Seventh Amendment, it did so because the jury did not determine the damages of the class as a whole, but rather considered only the damages of certain members of the class after which the court extrapolated damages for the remaining members. *Cimino v. Raymark Indus.*, 151 F.3d 297, 320 (5th Cir. 1998).

courts to alleviate efficiency and convenience concerns, thereby removing the barrier to damages actions imposed by the third prong of the *Hunt* test. Rather than proceed through class action, plaintiffs can organize an association with the purpose of seeking relief based on a common cause of action prior to filing a complaint. The association then can proceed with a damages action on behalf of its members.

Objections to statistical sampling are likely to persist in the class-action context. Those objections, however, may lose much of their force in the associational standing context, which for the reasons discussed below may be particularly well-suited to sampling. Indeed, there is a synergy between statistical sampling and associational standing: statistical sampling helps overcome the prudential limitations to associational standing, the association context helps overcome common objections to statistical sampling, and together they can provide a new vehicle for aggregating mass tort claims for adjudication.

Before highlighting the benefits that the association context provides to sampling, it is necessary to examine whether the shift from class-action aggregation to aggregation through association sacrifices any of sampling's benefits. First, although the class action is frequently an integral part of sampling proposals in the mass tort context, the class action is not a necessary element to the arguments defending sampling. Rather, the class action serves the practical purpose of an aggregation device—a means of delimiting the population from which the sample is taken. Voluntary grouping through association can serve the same purpose.

Second, the constitutional argument against sampling in the association context may at first appear stronger than it is in the class-action context because Federal Rule of Civil Procedure 23(b)(3), under which most mass tort actions are certified,²³³ ensures that the

²³³ Weinstein, *supra* note 29, at 135. But see *In re Simon II Litig.*, 211 F.R.D. at 99–100 (certifying a non-opt-out class pursuant to Federal Rule of Civil Procedure 23(b)(1)(B)). The possibility that members might opt out of a 23(b)(3) class and thus render the sample unrepresentative of the population counsels in favor of prohibiting opting out after the sample is drawn. Cf. Saks & Blanks, *supra* note 20, at 841 (noting that in aggregation based on consolidation, new cases will not be permitted to be added and individual settlement must be prohibited after a sample is taken in order to ensure that the sample is representative of the population). The same problem is pre-

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persons constituting the class share common facts or questions of law that predominate over any unique questions of law or fact.²³⁴ A measure of homogeneity in the population from which a sample is drawn is thus ensured, as is a minimum level of accuracy for the sample. Commentators suggest that surveyors can maximize the accuracy of a statistical survey by using stratified samples.²³⁵ The class context provides a means for accomplishing this through subclassing under Federal Rule of Civil Procedure 23(c)(4). From a due process standpoint, the less accurate the sample, the greater the risk to the opposing party of erroneous deprivation.

Yet there is no reason to believe that a voluntary association would lack the homogeneity that the requirements of Rule 23(b)(3) may ensure. Indeed, a voluntary association may provide greater homogeneity than a judicially certified class insofar as it provides for greater ex ante control over membership. To the extent that an association's members are aware both that their claims will be tried on an aggregated basis through sampled evidence and that homogeneity breeds accuracy, thereby weakening any objection to that evidence, the association's members have an interest in ensuring that their claims are sufficiently common and that the association's claims are maintainable. At the very least, to satisfy the *Hunt* test's first requirement, members must demonstrate both standing in their own right and a live claim against the defendant—they will thus at least share that common ground. But more importantly, because those who elect to join a litigation association will be accepting an "averaged" determination of their claims, they have an interest in ensuring that their claims are similar. Those with claims stronger than the average may elect not to join the association, instead proceeding with their claims individually, and those with claims that are significantly weaker than average may be prohibited from joining the association.

Such attributes of associational standing also answer the strongest criticisms of sampling and other aggregative methods. These criticisms are based on the methods' departure from the traditional

sented if members are permitted to leave an association after a sample has been taken. This problem too might be solved by precluding exit after the sample is taken.

²³⁴ See Fed. R. Civ. P. 23(b)(3).

²³⁵ See, e.g., Saks & Blanck, *supra* note 20, at 844–46; Walker & Monahan, *supra* note 213, at 346–47.

centrality of the individual in adjudication.²³⁶ The criticism is strongest in the case of non-opt-out classes in which the marginal claimants may suffer significant overcompensation or undercompensation from an aggregated verdict. Those claimants at the extremes are least-well represented by the aggregated procedure. From a process-oriented perspective, aggregation through voluntary association has a greater degree of individual participation than does class action and, consequently, statistical sampling might be less objectionable in that setting. Moreover, because of its ex ante self-policing elements, the concern about overcompensation and undercompensation of marginal claimants is substantially lessened in the association context; those claimants will likely either exclude themselves from the association or be prevented from joining.

Finally, one of the first steps in designing a survey is to identify the target population.²³⁷ According to Professor Diamond, definition and identification of the relevant population “is crucial because there may be systematic differences in the responses of members of the population and nonmembers.”²³⁸ Associational standing simplifies this task insofar as the relevant population is delimited by membership in the association. As Professor Diamond notes, “[t]he surveyor’s job generally is easier if a complete list of every eligible member of the population is available . . . so that the sampling frame lists the identity of all members of the target population.”²³⁹ Of course some class actions will similarly provide a delimited population from which to draw a sample. In *Cimino*, for example, Judge Parker certified a class pursuant to Federal Rule of Civil Procedure 23(b)(3) consisting of those plaintiffs who had individual cases pending before the Eastern District of Texas. The population in that instance was thus known with practically the same completeness as in the association context.²⁴⁰

²³⁶ See supra notes 138–157 and accompanying text; see also Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 *Vand. L. Rev.* 561, 617–18 (1993).

²³⁷ Diamond, supra note 187, at 239.

²³⁸ *Id.* at 240.

²³⁹ *Id.*

²⁴⁰ Cf. Saks & Blanck, supra note 20, at 841 n.171 (noting that “[a]ll asbestos cases and all the parties that form the relevant population in a particular court’s jurisdiction

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This will not always be the case, however, because a class need not comprise only those persons who have filed an individual action. Thus, a voluntary membership association simplifies the surveyor's job even in those cases where a class action may not.²⁴¹

CONCLUSION

This Note's proposal benefits from the fact that its predicates are few and already in existence—associational standing has been long accepted, and statistical sampling, although a comparatively recent phenomenon in mass torts, has a strong pedigree in other areas of the law to which commentators point to justify its more frequent use.²⁴² It offers a possible partial solution to the problems of aggregating and adjudicating mass torts. Ultimately, parties and courts are free to explore its potential without having first to await any amendment to existing rules as a solution to the problems of mass tort litigation.

are literally known by name” and that “[m]ass torts [thus] represent a sampling theorist's dream”).

²⁴¹ One might question whether survey methods are appropriate in the association context in light of the fact that an association's members self-select to be a part of that association and thus may not be representative of the broader population of those eligible to be members of the association. But this criticism ignores the fact that the relevant population is the association's members, not the population of all those who might be eligible for membership in the association.

²⁴² See, e.g., Walker & Monahan, *supra* note 20, at 557–61.