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No Injury? No Class: Proof of Injury in Federal Antitrust Class Actions post-*Wal-Mart*

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Abstract

Over the past twenty years the Supreme Court of the United States has systematically limited the scope of federal class actions brought under Rule 23 of the Federal Rules of Civil Procedure. Importantly, in two landmark decisions, Wal-Mart Stores, Inc. v. Dukes *and* Comcast Corp. v. Behrend*, the Supreme Court cemented a heightened level of inquiry demanded by Rule 23, a stringent, "rigorous analysis."*

This Note analyses the effects of this heightened inquiry on federal antitrust class actions, particularly in situations where the plaintiffs' method of proving antitrust injury fails to do so for some of the putative class members. After the Introduction, Part II of this Note provides a brief overview of federal antitrust law and federal class action law, covering the goals and policies of each. Part III discusses the doctrinal effects of the landmark Supreme Court decisions in Wal-Mart *and* Comcast*. Part IV outlines the two standards applied by federal courts in the pre-*Wal-Mart *era to assess whether an antitrust plaintiff's method of proving injury met the requirements of Rule 23(b)(3). Part V of this Note analyzes these two standards and argues that*

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*the less stringent one did not survive the Supreme Court's new post-*Wal-Mart *"rigorous analysis." Part V then assesses the current state of a* de minimis *exception to the more stringent standard, analyzing the post-*Wal-Mart *federal appellate decisions discussing the exception. Finally, Part VI of this Note concludes and proposes a framework for assessing proof of class-wide antitrust injury to accompany the Supreme Court's new more exacting class certification standards.*

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I. Introduction

Imagine you are an average consumer (which you probably are). It is a normal weekday. You wake up and get out of bed. You brush your teeth, maybe drink a cup of coffee. Imagine that at some point while you prepare to begin your day, you decide to turn on the daily news. So, you flip to your favorite television channel. There, on the news, you see a report stating that the United States Department of Justice has opened an "antitrust investigation" into the manufacturer of a product that you purchase frequently in your day to day life. You hear that the

manufacturer allegedly engaged in "anticompetitive behavior" and that you as a consumer suffered from higher prices as a result. It's possible that you hardly understand what the report actually means but nonetheless you think to yourself, "I purchase that product all the time, can I really do anything to get money from that company?" While the answer to that question may theoretically be "yes," the challenges you must face to emerge victorious in your federal antitrust action may prove too tough to take on alone. You may need some help from a couple of friends, friends who also purchased the same product from the same company. But unfortunately, pooling resources can only get you so far—you will likely face other obstacles along the way.

The federal antitrust laws stand as the primary protection for the United States free market.[1] Antitrust and competition law allow for the proper functioning of the economy through prohibitions on anticompetitive behavior such as monopolies and cartels.[2] Specifically, the main goal of the American regime is preventing the improper abuse of market power, which commonly results in increased prices and negative effects on consumer welfare.[3] However, in order for this goal to be achieved, effective enforcement of the antitrust laws is key.[4] While the Department of Justice and Federal Trade Commission are the primary enforcers of federal antitrust laws, private individuals also fulfill a crucial role in their

1. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 502 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structure.").

2. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963) ("[C]ompetition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy."); Standard Oil Co. v. United States, 221 U.S. 1, 56–57 (1911) (discussing fears that monopoly would "restrain[] the free flow of commerce and tend[] to bring about the evils, such as enhancement of prices, which were considered to be against public policy").

3. *See infra* Part II.A (discussing the goals of the federal antitrust laws).

4. *See* Wayne D. Collins, *The Goals of Antitrust: Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2339–42 (2012) (recounting the early efforts of federal antitrust enforcement).

enforcement.[5] Through creating a private right of action, Congress empowered private parties to act as "private attorneys general"[6] and participate in antitrust enforcement.[7] However, many issues that decrease the efficacy of this crucial enforcement are inherent in private antitrust actions and generally cannot be overcome by a litigant acting alone.[8]

Federal class actions, governed by Federal Rule of Civil Procedure 23,[9] solve some of the common issues that plague antitrust actions.[10] This is because it is common for antitrust harms to be spread over a significant amount of consumers, with the actual harm suffered so miniscule that bringing an individual claim would be financially unwise.[11] The class mechanism operates in the context of private antitrust actions to provide a solution to these issues; however, class certification is subject to important restrictions contained in Rule 23(a) and 23(b).[12]

Proving injury resulting from the alleged antitrust violation is an essential element of a federal antitrust action. Accordingly, putative class plaintiffs must put forth a mechanism at the class

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5. *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 904– 05 (2008) (listing the benefits of private antitrust enforcement).

6. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

7. *See* Reiter v. Sonotone Corp., 422 U.S. 330, 343 (1979) (emphasizing the role of antitrust laws as a "consumer welfare prescription"); Lande & Davis, *supra* note 5, at 883 ("[P]rivate enforcement . . . serves to deter antitrust violations.").

8. *See* Lande & Davis, *supra* note 5, at 881–82 (discussing the issues that plague private antitrust enforcement).

9. FED. R. CIV. P. 23.

10. *See* Steven B. Pet, *Preserving Antitrust Class Actions: Rule 23(b)(3) Predominance and the Goals of Private Antitrust Enforcement*, 12 VA. L. & BUS. REV. 149, 150–52 (2017) (commenting that class action antitrust enforcement "advances Congress's two primary goals in passing Section 4 of the Clayton Act").

11. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 624 (D.C. Cir. 2019) (acknowledging the most common antitrust class action scenario).

12. *See* FED. R. CIV. P. 23(a) ("Prerequisites."); *id.* 23(b) (delineating additional rules to maintain a class action); *see also* Pet, *supra* note 10, at 156– 58 (discussing the benefits and restrictions the class action places on private antitrust plaintiffs).

certification stage that proves this injury.[13] Importantly, this mechanism for proving injury must not frustrate the predominance and superiority requirements of Rule 23(b)(3).[14] Historically, this mechanism for proving class-wide injury rarely frustrated the requirements of Rule 23(b)(3).[15] The requirements were "readily met in certain cases alleging . . . violations of the antitrust laws."[16] Consequently, many courts were willing to certify classes so long as "widespread injury to the class" was proven, even if some individual members of the putative class were found to be uninjured.[17]

However, in the past decade, multiple Supreme Court decisions drastically altered the landscape of federal class action law and limited a putative class' ability to achieve certification. Importantly, first in *Wal-Mart Stores, Inc. v. Dukes*,[18] and

13. *See Rail Freight III*, 934 F.3d at 623 ("To establish liability under [the Clayton Act], each plaintiff must prove not only an antitrust violation, but also an injury to its business or property and a causal relation between the two."); 15 U.S.C. § 15 (2018) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . .").

14. *See Rail Freight III*, at 623–24 ("The party seeking class certification must affirmatively demonstrate that the commonality and predominance requirements are satisfied." (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011))).

15. *See* Pet, *supra* note 10, at 156–57 (noting that "the predominance inquiry would only rarely bar class treatment for antitrust plaintiffs").

16. Amchem Prods. v. Windsor, 521 U.S. 591, 625 (1997).

17. *See* Meijer, Inc. v. Warner Chilcott Holdings Co., 246 F.R.D. 293, 310 (D.D.C. 2007) ("[T]he inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* NW Airlines Corp. Antitrust Litig., 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("The 'impact' element of an antitrust claim need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("Courts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* NASDAQ Mkt. Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has cause widespread injury to the class.").

18. 564 U.S. 338 (2011).

subsequently in *Comcast Corp. v. Behrend*,[19] the Court established and reaffirmed a heightened level of inquiry demanded by Rule 23, a stringent, "rigorous analysis."[20]

Following the principles set forth in *Wal-Mart* and *Comcast*, many courts have shifted away from the more lenient "widespread injury" standard and instituted a more stringent "common proof" standard instead.[21] This standard requires that injury be shown through "common proof" as to the entire class.[22] Under the "common proof" standard, courts so far are unwilling to certify classes that contain a large number of uninjured members.[23] However, these courts signal that even under this more stringent standard, a *de minimis* amount of uninjured class members possibly would not preclude certification.[24] This Note addresses whether a class action seeking damages under federal antitrust law can be certified by a federal district court under Rule 23(b)(3)[25] when the mechanism for proving class-wide injury fails to show that every single class member was injured by the alleged antitrust violations.

This Note proceeds as follows. Part II provides a brief overview of federal antitrust law and federal class action law, covering the goals and policies of each. Part III discusses the doctrinal effects of the landmark Supreme Court decisions in *Wal-Mart* and *Comcast* resulting in the shift towards a "rigorous

19. 569 U.S. 27 (2013).

20. *See Wal-Mart*, 564 U.S. at 351 ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."); *Comcast*, 569 U.S. at 33 (reiterating the "rigorous analysis" standard).

21. *See e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 624 (D.C. Cir. 2019) ("[P]laintiffs . . . must show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.").

22. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.").

23. *See infra* Part V.B (analyzing courts that apply the "common proof" standard).

24. *See Rail Freight III*, 934 F.3d at 624 (determining whether the *de minimis* exception would encompass a large number of uninjured class members).

25. FED. R. CIV. P. 23(b)(3).

analysis" at the class certification stage. Part IV outlines the two standards applied by courts in the pre-*Wal-Mart* era to assess whether an antitrust plaintiff's method of proving class-wide injury met the requirements of Rule 23(b)(3). Part IV emphasizes the differing results of each standard in regard to the presence of uninjured class members.

Part V of this Note analyzes these two standards and argues that the less stringent of those standards did not survive the Supreme Court's new post-*Wal-Mart* "rigorous analysis" approach to class certification. Part V then assesses the current state of a *de minimis* exception, recounting the post-*Comcast* appellate decisions discussing the exception. Finally, Part V assesses the factors that courts find applicable in finding an amount of uninjured class members to be *de minimis*. Part VI of this Note concludes and proposes a framework for assessing proof of class-wide antitrust injury to accompany the Supreme Court's new more exacting class certification standards.

II. Federal Antitrust Class Actions

A. Federal Antitrust Law

At the dawn of the twentieth century, the United States federal government undertook to protect against the accumulation and improper abuse of market power.[26] Beginning with the Sherman Act of 1890,[27] and continuing through the Clayton Act of 1914,[28] Congress continuously took steps to

26. *See* Collins, *supra* note 4, at 2339–42 (recounting the early history and emergence of federal antitrust and competition law); Barak Orbach, *The Goals of Antitrust: How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2262 (2013) ("Senator Sherman, the drafters of the Sherman Act, and other lawmakers unequivocally expressed a desire to fight trusts and combinations through legislation."); Rudolph J. Peritz, *Frontiers of Legal Thought I: A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 269–71 (1990) (describing the history and original principles underlying early antitrust regulation and enforcement); *see also* ABA SECTION OF ANTITRUST LAW, MARKET POWER HANDBOOK ix (2d ed. 2012) ("[A]t its core, antitrust policy is aimed at preventing firms from obtaining, maintaining, or utilizing market power.").

27. 26 Stat. 209 (codified in 15 U.S.C. §§ 1–7 (2018)).

28. Pub. L. No. 63-212, 38 Stat. 730 (codified in 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53 (2018)).

empower the government to curtail the rise and hegemony of monopolies and trusts in the United States.[29]

Drafted in the shadow of what was popularly known at the time as "ruinous," "destructive," or "excessive" competition,[30] the Sherman Act resolves that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal"[31] and further punishes "every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce."[32] In enacting the prohibitions contained in the Sherman Act, "Congress mandated competition as the lodestar by which all must be guided in ordering their business affairs."[33] The Sherman Act stands as an essential truss in the nation's free market structure.[34]

While federal antitrust law draws its authority from these statutes, the regime established by Congress is commonly understood as "little more than a congressional mandate to

29. *See* N. Pac. R.R. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); Standard Oil Co. v. United States, 221 U.S. 1, 56–57 (1911) (discussing fears that monopoly would "restrain[] the free flow of commerce and tend[] to bring about the evils, such as enhancement of prices, which were considered to be against public policy").

30. *See* Collins, *supra* note 4, at 2290 (recounting anticompetitive behavior that existed prior to the Sherman Act).

31. 15 U.S.C. § 1 (2018).

32. *Id.* § 2.

33. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 406 (1978).

34. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 502 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structure."); E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 4–5 (6th ed. 2014) ("Antitrust law . . . is a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange . . . ."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963) ("[C]ompetition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy."); Phila. Taxi Ass'n v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir. 2018) ("Competition is at the heart of the antitrust laws.").

develop a federal common law of competition."[35] The Sherman Act's natural susceptibility to common law interpretation rivals even that of the U.S. Constitution itself.[36] Consequently, the Supreme Court took it upon itself at an early stage to mold the contours of the emerging federal competition law through numerous decisions interpreting the bounds of the federal statutes.[37] For instance, although the Sherman Act's prohibition on "every contract . . . in restraint of trade or commerce"[38] seems all-encompassing, the Supreme Court construes it as "precluding only those contracts or combinations which 'unreasonably' restrain competition."[39] This construction of the statute became known as the "rule of reason."[40] The nature of the Sherman Act as an adaptable and flexible "charter of

35. Peritz, *supra* note 26, at 269; *see* Collins, *supra* note 4, at 2340 ("The appeal of the common law to the framers of the Sherman Act resided in . . . the fact that the law could be adjusted by the courts using the common law process continuously through time to cope with new, emerging business practices."); *Standard Oil*, 221 U.S. at 57–58 (noting that the "trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct" to best prevent "the wrongs which it had been the purpose to prevent from the beginning").

36. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

37. *See, e.g.*, *Standard Oil*, 221 U.S. at 59 ("Let us consider the language of the first and second sections, guided by the principle that where . . . had a well-known meaning at common law . . . they are presumed to have been used in that sense unless the context compels to the contrary."); United States v. Am. Tobacco Co., 221 U.S. 106, 179–80 (1911) (applying the "rule of reason" to construe the words "restraint of trade" so as not to "destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce"); Bd. of Trade v. United States, 246 U.S. 231, 238–39 (1918) (reading the "rule of reason" into the Sherman Act to determine that a restraint of trade must be unreasonable to trigger the Act).

38. 15 U.S.C. § 1 (2018).

39. N. Pac. R.R. v. United States, 356 U.S. 1, 5 (1958) (quoting *Bd. of Trade*, 246 U.S. at 238).

40. *See, e.g.*, Peritz, *supra* note 26, at 269–71 (describing the early disagreement between proponents of the "rule of reason" and the proponents of "literalism"); Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) ("[I]n every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied.").

freedom"[41] is one of its greatest attributes.[42] Accordingly, the enforcement and interpretation of the federal antitrust statutes are subject to constant contemporary revision.[43]

However, while the prohibitory sections of the Sherman Act took crucial steps toward empowering the federal government to protect the free market and specifically consumer welfare,[44] the private enforcement provisions of Section 7 of the Sherman Act and Section 4 of the Clayton Act empowered ordinary individuals to participate in the enforcement of the antitrust laws.[45] These provisions, collectively codified in 15 U.S.C. § 15(a), state that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit."[46] Multiple rationales justify private enforcement of the federal antitrust laws.[47] One important goal of private enforcement is for victims to recoup losses sustained as a result of illegal anticompetitive

41. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

42. *See* Collins, *supra* note 4, at 2340 ("The appeal of the common law to the framers of the Sherman Act resided in . . . the fact that the law could be adjusted by the courts using the common law process continuously through time to cope with new emerging business practices.").

43. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887, 899 (2007) ("Just as the common law adapts to modern understanding and greater experience, so too do the Sherman Act's prohibitions on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions.").

44. *See* Reiter v. Sonotone Corp., 422 U.S. 330, 343 (1979) (emphasizing that the antitrust laws are a "consumer welfare prescription"); Broadcom Corp. v. Qualcom, Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms.").

45. *See* Collins, *supra* note 4, at 2341–42 (recounting the legislative discussion regarding providing "an inducement to bring what were likely to be expensive risky law suits"); 21 Cong. Rec. 2569 (1890) (statement of Sen. Sherman) (expressing concern that even double damages are "too small" to induce private enforcement).

46. 15 U.S.C. § 15(a) (2018).

47. *See* Lande & Davis, *supra* note 5, at 881–83 (discussing "the purposes of private enforcement and private remedies").

behavior.[48] Moreover, private enforcement "prevent[s] wealth transfers from these victims to firms with market power."[49] Perhaps more importantly, private enforcement also serves to deter antitrust violations at the outset,[50] despite the relatively few cases that actually render a judgment against the defendant.[51] In granting a private right of action, Congress deputized antitrust victims to act as "private attorneys general,"[52] crucially supplanting the enforcement efforts of the government by encouraging private litigation in the public interest.[53]

To prevail on an antitrust claim, a civil antitrust plaintiff must establish three elements: an antitrust violation, causation, and impact or damage.[54] Accordingly, courts analyzing antitrust

48. *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1976) ("Treble-damages antitrust class actions . . . [were] conceived of primarily as a remedy for the people of the United States as individuals, especially consumers . . . ."); *Reiter*, 442 U.S. at 343 (noting that the civil remedy provision was passed "as a means of protecting consumers from overcharges resulting from price fixing").

49. Lande & Davis, *supra* note 5, at 882.

50. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977) (recognizing the goal of "deterring violators and depriving them of the fruits of their illegality" reflected in the antitrust laws); Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (refusing to interpret the antitrust laws to allow "those who violate [them] by price fixing or monopolizing [to] retain the fruits of their illegality because no one [would be] available who would bring suit against them").

51. *See* Lande & Davis, *supra* note 5, at 883 ("Antitrust verdicts that produce treble damages are rare, and we believe that few, if any, of the many antitrust cases that settle do so for more than single damages.").

52. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

53. *See Ill. Brick Co.*, 431 U.S. at 746 (recognizing the important "legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws" (quoting *Hawaii*, 405 U.S. at 262)); Lande & Davis, *supra* note 5, at 905 (emphasizing that private enforcement "often substitute[s] . . . federal and state action entirely when the government did not act at all or did not achieve meaningful results" and furthermore routinely "complement[s] governmental enforcement in many situations").

54. *See In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001) (outlining the "three required elements of an antitrust claim"); Cordes & Co. Fin. Servs., Inc. v. A. G. Edwards & Sons, 502 F.3d 91, 105 (2d Cir. 2007) ("The three required elements of an antitrust claim are (1) a violation of antitrust law; (2) injury and causation; and (3) damages . . . ."); 15

claims frequently break up the claim into three categories: "(1) a violation of the antitrust laws; (2) individual injury resulting from that violation; and (3) measurable damages."[55] Proving each element of an antitrust claim frequently requires large amounts of resources that are typically unavailable to the average consumer affected by anticompetitive behavior.[56] For the goals of private antitrust enforcement to be realized, individuals must be capable of amassing enough resources to challenge the large corporations that typically engage in violations of the antitrust laws.[57]

B. Antitrust Class Actions under Federal Law

The representative class action constitutes one of the most contentious weapons in the antitrust plaintiff's arsenal.[58] The class mechanism takes steps to rectify the imbalance of resources that commonly plague antitrust claims made on an

U.S.C. § 15 (2018) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . .").

55. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008).

56. *See* Lande & Davis, *supra* note 5, at 883 (noting the "difficulty of bringing suit" inherent in every private antitrust action).

57. *See id.* at 905 ("These private attorneys general . . . lawyers representing businesses, farmers, individuals, . . . often work thousands of hours and lay out millions of dollars in the course of prosecuting antitrust litigation . . . .").

58. *See* David Inkeles, *In re Deepwater Horizon and the Need to Clean Up Rule 23(b)(3) Certification Jurisprudence Through Legislation*, 23 J.L. & POL'Y 741, 750 (2015) (discussing the pleading requirements of Rule 23(b)(3) in the context of the presence of individual injuries and the need for legislative action in this sphere); Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 883, 890 (2015) (discussing the practical impacts of the Roberts Court's class-action jurisprudence on application of the requirements of Rule 23); Robert H. Klonoff, *The Future of Class Actions: The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 792 (2013) ("When (b)(3) was first introduced in 1966, it was considered 'the most controversial portion' of modern Rule 23.").

individual basis.[59] Additionally, although there exists a notable body of state level antitrust class action jurisprudence and legislative activity,[60] the federal courts retain exclusive jurisdiction over federal antitrust claims.[61] Consequently, the bulk of antitrust class actions take place under federal class action law governed by Rule 23 of the Federal Rules of Civil Procedure.[62]

In order to certify any kind of class action under federal law, the putative class of plaintiffs must "affirmatively satisfy" the mandatory requirements enumerated in Rule 23(a) as well as the applicable requirements of Rule 23(b).[63] Rule 23(a) outlines four prerequisites that must be satisfied by every federal class

59. *See* California v. Yamasaki, 442 U.S. 682, 701–02 (1979) ("[T]he Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."); Klonoff, *supra* note 58, at 731 (recognizing the class action device as a "revolutionary vehicle for achieving mass justice"); *see also* Pet, *supra* note 10, at 173 (discussing the benefits and criticisms of class actions in the antitrust context and scrutinizing Rule 23's heavy requirements).

60. *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 694–96 (2003) (analyzing and outlining the comparative advantages of the state and federal antitrust enforcement schemes); *see generally* ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK (2d ed. 2008).

61. *See* 15 U.S.C. § 4 (2018) ("The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act . . . .").

62. *See* FED. R. CIV. P. 23 ("Class actions."); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 855 (Jonathan I. Gleklen et al. eds., 7th ed. 2012) (noting that class actions under federal law represent the majority of antitrust class actions).

63. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013) ("[A] party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." (citing Wal-Mart Store, Inc. v. Dukes, 564 U.S. 338, 350 (2011))).

action: numerosity,[64] commonality,[65] typicality,[66] and adequacy of representation.[67]

Rule 23(b)(3) demands the satisfaction of two additional requirements: "predominance"[68] and "superiority."[69] Because the superiority requirement rarely serves as a bar to certification,[70] the predominance requirement stands as the primary hurdle which a putative plaintiff class must surmount to gain certification.[71] To satisfy the predominance requirement, a plaintiff class must prove that, in looking to the class as a whole, issues "common" to the class predominate over issues specific to individual class members.[72] In the context of Rule 23, "a common question is one that is capable of class-wide

64. *See* FED. R. CIV. P. 23(a)(1) (requiring that "the class is so *numerous* that joinder of all members is impracticable" (emphasis added)).

65. *See id.* (a)(2) (requiring that "there are questions of law or fact *common* to the class" (emphasis added)).

66. *See id.* (a)(3) (requiring that "the claims or defenses of the representatives are *typical* of the claims or defenses of the class" (emphasis added)).

67. *See id.* (a)(4) (requiring that "the representative parties will fairly and *adequately* protect the interests of the class" (emphasis added)).

68. *See id.* (b)(3) (requiring that "the questions of law or fact common to class members *predominate* over any questions affecting only individual members" (emphasis added)).

69. *See id.* (requiring that "a class action [be] *superior* to other available methods for fairly and efficiently adjudicating the controversy" (emphasis added)).

70. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 62, at 859 (discussing the superiority requirement).

71. *See* Pet, *supra* note 10, at 157–58 (acknowledging the "elaborate showing from plaintiffs" demanded by courts before finding predominance satisfied); Blades v. Monsanto Co., 400 F.3d 562, 574 (8th Cir. 2005) (affirming denial of class certification for failure to meet predominance); *In re* Asacol Antitrust Litig., 907 F.3d 42, 62 (1st Cir. 2018) (reversing the lower court and decertifying the class for failure to meet predominance); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 29–30 (1st Cir. 2008) (remanding the case to the lower court for reconsideration of the predominance requirement).

72. *See* FED. R. CIV. P. 23(b)(3) (requiring that the court find that "the questions of law or fact common to class members predominate over any questions affecting only individual members"); *see also Comcast*, 569 U.S. at 33 (reiterating the standard contained in the text of 23(b)(3)); *Asacol*, 907 F.3d at 51 ("[C]ommon issues must predominate over individual issues in order to certify a class.").

resolution,"[73] while an individual one is a question for which "members of the proposed class will need to present evidence that varies from member to member."[74]

While the goals of the class action mechanism rest in empowering the plaintiff class,[75] the aim of the predominance inquiry is to determine whether the aggregation of the claims of individual class members can be dealt with in a manner that is efficient and fair.[76] The predominance requirement assures that the class will be "sufficiently cohesive to warrant adjudication by representation."[77] Further, predominance requires courts to refrain from "attempt[ing] to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on [certain] issues."[78]

Prior to the Court's class action jurisprudence of the past two decades,[79] the Court readily admitted that predominance was typically easily satisfied in antitrust class actions.[80] However, the Supreme Court's recent jurisprudence reflects a

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73. *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 622 (D.C. Cir. 2019) (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)).

74. *Id.* (citing Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016)).

75. *See* Chelsey E. Turner, *Class Actions: How Easy are They to Bring, and Why?*, 22 SUFFOLK J. TRIAL & APP. ADV. 193, 196–97 (2017) (recounting the various policies underlying the class action mechanism).

76. *See* Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 470 (2013) (noting that the predominance requirement would reject "a case in which the asserted [common issue] . . . exhibits some fatal dissimilarity among class members that would make use of the class-action device inefficient or unfair"); *Asacol*, 907 F.3d at 51 ("Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues.").

77. *Amgen*, 568 U.S. at 470 (citing Amchem Prods. v. Windsor, 521 U.S. 591, 623 (1997)).

78. *Asacol*, 907 F.3d at 51–52.

79. *See infra* Part III (discussing the effects on the predominance requirement of the past two decades of Supreme Court jurisprudence).

80. *See* Amchem Prods. v. Windsor, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.").

fundamental adjustment to the predominance standard in the context of federal class actions.

III. The "Rigorous Analysis": Wal-Mart *and* Comcast

In the past decade, the Supreme Court heavily engaged in interpreting the contours of Rule 23.[81] The Court handed down numerous major decisions spanning almost every aspect of class action law during this period.[82] However, "much commentary regarding the Court's tolerance for class actions has turned on its decisions affecting class certification standards."[83] Beginning in 2011 with the landmark case of *Wal-Mart Stores, Inc. v. Dukes*,[84] and continuing in 2013 with *Comcast Corp. v. Behrend*,[85] the Court dramatically changed the landscape of federal class-action certification.[86] Specifically, this shift drastically heightened the standard that a putative plaintiff class must meet when attempting to achieve certification.[87] The Court adopted a "rigorous analysis" at the class certification

81. *See* Karlsgodt & Dow, *supra* note 58, at 884 (noting that in 2009 "the Court began to grant certiorari over a group of cases that are widely perceived as changing the landscape of class litigation"); John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463, 463 (2013) ("[The changes by the Supreme Court] so alter accepted paradigms that a class action attorney who retired in 2009 would be almost useless today.").

82. *See generally* Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66 (2013).

83. Karlsgodt & Dow, *supra* note 58, at 906.

84. 564 U.S. 338 (2011).

85. 569 U.S. 27 (2013).

86. *See* Karlsgodt & Dow, *supra* note 58, at 906 (noting the "seemingly severe limitations that [*Wal-Mart*] placed on plaintiffs' abilities to certify classes, followed by Comcast's even tighter squeeze"); Klonoff, *supra* note 58, at 778 (discussing the effects of *Wal-Mart* on Rule 23(b)(3) class actions).

87. *See Wal-Mart*, 564 U.S. at 342 ("We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2)."); *Comcast*, 569 U.S. at 29 ("We consider whether certification was appropriate under Federal Rule of Civil Procedure 23(b)(3).").

stage.[88] Importantly, this heightened analysis applied not only to the Court's understanding of the commonality requirement of Rule 23(a),[89] but also the predominance requirement of Rule 23(b)(3).[90]

A. Wal-Mart

The underlying suit in *Wal-Mart* concerned 1.5 million former and current female employees of Wal-Mart who alleged that managers in local stores systematically discriminated against women.[91] The crux of the plaintiffs' argument was that Wal-Mart's lack of a consistent policy on pay and promotion combined with an inherent "corporate culture" bias against women produced gender-based discrimination at the stores.[92] The plaintiffs alleged that Wal-Mart's pay and promotion practices "violat[ed] . . . Title VII of the Civil Rights Act of 1964."[93] Accordingly, the plaintiffs demanded "injunctive and declaratory relief, punitive damages, and backpay."[94] In support of their claim, the plaintiff class produced extensive data indicating that the "pay and promotion disparities at Wal-Mart could be explained only by gender discrimination" even when the expert "controlled for factors including . . . job performance,

88. *See Wal-Mart*, 564 U.S. at 350–51 ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."(citations omitted)); *Comcast*, 569 U.S. at 33 (same).

89. *See Wal-Mart*, 564 U.S. at 350–52 (heightening the standard of the commonality requirement).

90. *See Comcast*, 569 U.S. at 34 (extending the "same analytical principles" from *Wal-Mart* to Rule 23(b)(3)).

91. *See Wal-Mart*, 564 U.S. at 343 ("The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex . . . .").

92. *Id.* at 344 (describing the plaintiffs' claim that "local managers' discretion over pay and promotions [was] exercised disproportionately in favor of men").

93. *Id.* at 343.

94. *Id.* at 345.

length of time with the company, and the store where an employee worked."[95]

The plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(2),[96] which the district court granted,[97] and a divided en banc court of appeals substantially affirmed.[98] The Supreme Court then granted Wal-Mart's subsequent petition for certiorari on the issue of "whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[99] The Supreme Court answered the question in the negative, reversed the court of appeals,[100] and decertified the plaintiff class.[101] In a majority opinion by Justice Scalia, the Court ruled that the commonality requirement of Rule 23(a) was not satisfied because of the potentially differing questions underlying each putative class member's claims.[102]

In coming to its conclusion, the Court delineated a particularly stringent standard for commonality, stating that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[103] Importantly, the Court held that the "common contention . . . must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in

95. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 372 (2011) (Ginsburg, J., concurring in part and dissenting in part).

96. *See id.* at 345–46 (majority opinion) (noting that the putative class relied on Rule 23(b)(2)).

97. *Id.* at 347.

98. *Id.*

99. Wal-Mart Stores, Inc. v. Dukes, 562 U.S. 1091 (2010) (granting certiorari).

100. *See Wal-Mart*, 564 U.S. at 347 (describing the position of the district court and the court of appeals "that respondents' evidence of commonality was sufficient" to satisfy Rule 23(a)).

101. *Id.* at 367.

102. *See id.* at 352 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." (emphasis in original)).

103. *Id.* at 349–50 (citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

one stroke."[104] Further, and most impactful to the Court's shift at the class certification stage overall, the majority noted that "certification is proper only if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied . . . ."[105] This "rigorous analysis" will often "entail some overlap with the merits of the plaintiff's underlying claim."[106]

Although the "rigorous analysis" language was briefly mentioned by the Supreme Court previously,[107] *Wal-Mart* represented a clear shift in the Court's understanding of the commonality requirement away from the relatively light burden imposed by most lower courts at the class certification stage.[108] "[W]hat used to be a foregone conclusion now require[d] some analysis,"[109] as the Court spoke broadly about the standard that Rule 23 generally imposed on a putative plaintiff class.[110] "A party seeking class certification must affirmatively demonstrate his compliance with the Rule,"[111] signaling that litigants would not have to wait long before they witnessed a decision applying the "rigorous analysis" to the other parts of Rule 23.

B. Comcast

This application came just a year after *Wal-Mart*, when the Court heard arguments in another class certification case,

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104. *Id.* at 350.

105. *Id.* 350–51 (emphasis added).

106. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

107. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982) ("[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.").

108. *Compare* Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) (noting that because the commonality requirement "may be satisfied by a single common issue, it is easily met"), Hochstadt v. Bos. Sci. Corp. 708 F. Supp. 2d 95, 102 (D. Mass. 2010) ("The threshold of commonality is not a difficult one to meet."), *and* Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986) ("The threshold of commonality is not high." (internal quotations omitted)), *with Wal-Mart*, 564 U.S. at 355 (requiring that plaintiffs present "significant proof" that the commonality requirement was satisfied).

109. Karlsgodt & Dow, *supra* note 58, at 910.

110. *See Wal-Mart*, 564 U.S. at 350–51 (noting that "Rule 23 does not set forth a mere pleading standard" and is instead a "rigorous analysis").

111. *Id.* at 350.

Comcast. In *Comcast*, roughly two million Comcast customers sought damages for Comcast's alleged violation of antitrust laws.[112] The plaintiffs asserted that Comcast's anticompetitive behavior in the television market resulted in higher prices for consumers.[113] Further, the plaintiffs moved to certify a class under Federal Rule of Civil Procedure Rule 23(b)(3).[114]

The class plaintiffs put forth several theories to establish that Comcast's actions impacted and injured the putative class,[115] including that "Comcast's activities reduced the level of competition from 'overbuilders,' companies that build competing cable networks in areas where an incumbent cable company already operates."[116] The district court accepted the "overbuilder" theory of antitrust impact as "capable of class-wide proof,"[117] and certified the class, finding that "the damages resulting from overbuilder-deterrence impact could be calculated on a class-wide basis."[118] On appeal, Comcast challenged class certification, arguing that the class failed to satisfy the requirements of Rule 23(b)(3) as the method of proof "did not isolate damages resulting from any one theory of antitrust impact,"[119] and essentially "failed to disaggregate damages from the one accepted theory of harm (the overbuilder

112. Comcast Corp. v. Behrend, 569 U.S. 27, 30 (2013) ("The named plaintiffs . . . are subscribers to Comcast's cable-television services . . . [who] claim[] that [Comcast] entered into unlawful swap agreements, in violation of § 1 of the Sherman Act, and monopolized or attempted to monopolize services in the cluster, in violation of § 2.").

113. *See id.* ("[Comcast's] clustering scheme, [plaintiffs] contented, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels.").

114. *Id.*

115. *See id.* at 31 (summarizing the plaintiffs' "proposed four theories of antitrust impact").

116. *Id.*

117. *Id.*; *see* Behrend v. Comcast Corp., 264 F.R.D. 150, 174 (E.D. Pa. 2010) ("We conclude, with one caveat, that the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class.").

118. *Comcast*, 569 U.S. at 31.

119. *Id.* at 32.

theory) from the other (rejected) theories of harm."[120] The Third Circuit rejected Comcast's argument, finding that the attack on the plaintiffs' methodology was improper at the class certification stage.[121]

The Supreme Court, in another opinion by Justice Scalia (again writing for a five justice majority) reversed and decertified the class.[122] Justice Scalia began by repeating the broad characterizations of the inquiry mandated by Rule 23 that he had espoused in *Wal-Mart*.[123] The Court emphasized that Rule 23 is a "rigorous analysis" that a court must seriously engage in at the class certification stage,[124] reiterating that "such an analysis will frequently 'overlap with the merits of the plaintiff's underlying claim.'"[125] However, while in *Wal-Mart* Justice Scalia had his sights set on the requirements of Rule 23(a),[126] this time he settled with Rule 23(b)(3) in his crosshairs.[127] Justice Scalia declared that "[t]he same analytical principles [that govern Rule 23(a)] govern Rule 23(b)."[128] Even

120. Pet, *supra* note 10, at 163.

121. *See* Behrend v. Comcast Corp., 655 F.3d 182, 206 (3d Cir. 2011) ("At the class certification stage we do not require that plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement . . . .").

122. Comcast Corp. v. Behrend, 569 U.S. 27, 38 (2013) (reversing the lower courts and decertifying the class); *see id.* at 34 ("Respondents' class action was improperly certified under Rule 23(b)(3).").

123. *Id.* ("To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." (quoting Wal-Mart Stores, Inc. v. Dukes, 654 U.S. 338, 350 (2011))); *see id.* ("The Rule does not set forth a mere pleading standard." (internal quotations omitted)).

124. *See id.* ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." (internal quotations omitted)).

125. *Id.* at 33–34; *see id.* at 34 (recognizing that "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action").

126. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (discussing the requirements of Rule 23(a)).

127. *See Comcast*, 569 U.S. at 34–38 (applying the "rigorous analysis" of *Wal-Mart* to class certification under Rule 23(b)(3)).

128. *Id.* at 34.

further, "[r]ule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."[129]

Abiding by this "rigorous analysis," the Court engaged in an assessment of the underlying validity of the plaintiffs' method of damage calculations.[130] As a standard, the Court stated that in the context of an antitrust class action the putative plaintiff class' "calculation[s] need not be exact . . . but at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'"[131] Because "the model [did] not even attempt to do that, [the plaintiffs] cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[132] The Court rejected the interpretations of the lower courts, concluding that they would essentially "reduce 23(b)(3) to a nullity."[133]

The Supreme Court's decisions in *Wal-Mart* and *Comcast* collectively establish and reaffirm the current standard that Rule 23(b)(3) demands at class certification, the "rigorous analysis."[134] Pertinently, the Court seems to suggest that damages calculations must now be done prior to class certification and that district courts must delve into the merits of an expert's relevant calculating mechanism at the class certification stage, long before trial.[135] On its face, this may seem like a straightforward proclamation, but the question

129. *Id.* (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623–24 (1997)).

130. *See id.* at 35–37 (analyzing the plaintiffs' method of proving damages and determining whether it satisfied the requirements of Rule 23(b)(3)).

131. *Id.* at 35 (quoting ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 57, 62 (2d ed. 2010)).

132. *Id.*

133. *Id.* at 36; *see id.* ("Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." (emphasis in original)).

134. *See* Karlsgodt & Dow, *supra* note 58, at 914 (noting the Court's "helpful tone emphasizing the need for a rigorous analysis to ensure that the plaintiff can prove common issues through common evidence").

135. *See id.* at 915 ("The *Comcast* decision . . . seem[s] to suggest . . . that district courts are required to consider the merits of an expert at the class certification phase.").

remains: if a court is to engage in such a "rigorous analysis," how will a court know when a putative class has satisfied it in the context of antitrust injury?

IV. Antitrust Injury and Predominance

Aside from proving an actual violation of the antitrust laws,[136] establishing the injury element of an antitrust claim tends to be the critical issue of any successful antitrust class action.[137] Any plaintiff class must put forth a method of establishing injury that satisfies the predominance requirement of Rule 23(b)(3).[138] Establishing antitrust injury frequently involves voluminous testimony from an assertedly qualified expert.[139] And while the qualification of experts and their testimony frequently proves to be determinative in its own right on the issue of proving injury, the inquiry is one that is separate

136. *See* 15 U.S.C. §§ 1–2 (2018) (outlining the standards to constitute a violation of the federal antitrust laws).

137. *See, e.g.*, *id.* § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."); *see also* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 970 (2010) ("[T]he decision whether to certify a class in an antitrust case tends to turn on whether plaintiffs have proposed a method of proving class-wide injury, or "common impact," at the class certification stage."); *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 623 (D.C. Cir. 2019) ("To establish liability under [the Clayton Act], each plaintiff must prove not only an antitrust violation, but also an injury to its business or property and a causal relation between the two.").

138. *See Rail Freight III*, 934 F.3d at 622–23 ("The party seeking class certification must affirmatively demonstrate that the commonality and predominance requirements are satisfied." (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011))).

139. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d 14, 40–87 (D.D.C. 2017) (engaging in the complex inquiry of assessing the "relevance of all expert opinions and the reliability of the experts' methodology under Daubert"); *see also In re* Asacol Antitrust Litig., 907 F.3d 42, 46 (1st Cir. 2018) (relying on expert evidence provided from both parties regarding "the propriety of class certification").

from and must be undertaken prior to the class certification analysis.[140]

Following Supreme Court precedent that at the time limited the extent to which a court should inquire into merits issues at the class certification stage,[141] courts historically viewed the assessment of the plaintiff expert's method of proof of injury at the class certification stage to be an inappropriately premature assessment of the merits.[142] However, the "rigorous analysis" demanded by Rule 23 post-*Wal-Mart* and *Comcast* seemingly rejected this approach.[143]

Prior to the Supreme Court's decision in *Wal-Mart*, courts diverged in their application of the predominance standard to plaintiffs' proof of injury. Some courts held that injury need not be established as to every member of the class, so long as

140. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012) ("When an expert's report or testimony is critical to class certification, . . . a district court must make a conclusive ruling on any challenge to that expert's qualifications . . . before it may rule on a motion for class certification.").

141. *See* Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

142. *See, e.g.*, Behrend v. Comcast Corp., 655 F.3d 182, 206 (3d Cir. 2011) (limiting its inquiry at the class certification stage stating that "[the court] addresses only whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis" rather than "determining on the merits whether the method[] is a just and reasonable inference or speculative"); Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975) ("The Court made clear in [*Eisen*] that [the class certification] determination does not permit or require a preliminary inquiry into the merits."); *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403, 419 (S.D. Tex. 1999) ("In evaluating a motion for class certification, . . . the court does not have the authority to conduct a preliminary inquiry into the merits of the case, and hence the substantive allegations contained in the complaint are accepted as true." (citing *Eisen*, 417 U.S. at 177)).

143. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011) (recognizing that the "rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim"); Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013) (reiterating that the rigorous analysis "will frequently entail overlap with the merits of the plaintiff's underlying claim").

"widespread injury to the class" was proven.[144] Others adopted a more exacting test that required plaintiffs to put forth "common proof" that established injury as to every member of the class.[145]

Unsurprisingly, courts continue to struggle to come to a consensus on the applicable standard for this determination in the wake of *Wal-Mart* and *Comcast*.[146] While a few courts retain the less stringent standard, others have seen *Wal-Mart* and *Comcast* as reason to adopt the more stringent requirement that injury be shown through "common proof" as to the entire

144. *See* Meijer, Inc. v. Warner Chilcott Holdings, 246 F.R.D. 293, 310 (D.D.C. 2007) ("[T]he inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* Nw. Airlines Corp. Antitrust Litig., 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("The 'impact' element of an antitrust claim need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("Courts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* NASDAQ Mkt-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has cause widespread injury to the class.").

145. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) ("We have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class member defeats Rule 23(b)(3) predominance."); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008) (finding common proof necessary to show that "each member of the class was in fact injured" to support a finding of predominance).

146. *See generally* Chelsey E. Turner, *Class Actions: How Easy are They to Bring, and Why?*, 22 SUFFOLK J. TRIAL & APP. ADV. 193 (2017) (surveying the kinds of analyses that courts go through when determining whether a class should be certified); Elena Kamenir, *Seeking Antitrust Class Certification: The Role of Individual Damage Calculations in Meeting Class Action Predominance Requirements*, 23 GEO. MASON L. REV. 199 (2015) (discussing the requirements of Rule 23(b)(3) and whether different methods of damages calculations defeat the predominance requirement at the class certification stage).

class.[147] These dueling theories of the issue represent a schism in the judiciary's interpretation of the Supreme Court's recent class action jurisprudence.[148] The central question of debate: how stringent did the Supreme Court make the predominance standard in the context of antitrust class actions?[149] It seems that the more lenient standards for proving injury permissible in the pre-*Wal-Mart* era may not have survived under the new, more restricted conception of Rule 23.

The clearest identifiable stress point between the two contrasting certification standards remains the certification of classes that contain some (known or unknown) amount of uninjured putative class members.[150] If there is a new, more stringent, "common proof" requirement, does it allow for the existence of uninjured class members in a certified class?[151] This is a problem that will continue to plague the federal courts as "it is almost inevitable that [any] class will include some people

147. *See e.g.*, *Rail Freight III*, 934 F.3d at 624 ("[P]laintiffs . . . must show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.").

148. *Compare In re* Cathode Ray Tube Antitrust Litig., No. C-07-5944-SC, 2013 WL 5391159, at *7 (N.D. Cal. Sept. 19, 2013) (distinguishing *Comcast* as a case where "the plaintiffs' theory of damages did not map to their theory of liability so the plaintiffs [in Comcast] failed to show through common evidence that all class members had been harmed by the alleged conspiracy"), *with In re* High-Tech Emp. Antitrust Litig., 289 F.R.D. 555, 566 (N.D. Cal. 2013) ("[Q]uestions of impact in this case may call for individualized inquiries that predominate over common ones, [therefore] the Court finds that Plaintiffs must demonstrate a method for proving impact on a class-wide basis.").

149. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 623 (D.C. Cir. 2019) (analyzing the extent to which the "hard look required by Rule 23" should delve into the reliability of common evidence).

150. *See id.* at 624 (looking to conflicting "cases addressing the question of when, if ever, a class may include concededly uninjured members" in determining assess how many individual adjudications are too many for a court to allow certification under Rule 23).

151. *In re* Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018) (questioning whether it would "put the cart before the horse to read Rule 23 to require that a plaintiff demonstrate prior to class certification that each class member is injured"); *Rail Freight III*, 934 F.3d at 624 (recounting the plaintiffs' arguments that "predominance does not require common evidence extending to *all* class members" (emphasis in original)).

who have not been injured by the defendant's conduct."[152] Even further, it is common for the plaintiffs' method for proving impact itself to reveal that some of the putative class members remain uninjured by the defendant's antitrust violation.[153] In the face of this recurring scenario, it is essential that courts act uniformly in adopting a reliable standard that conforms with the principles set forth in the Supreme Court's decisions in *Wal-Mart* and *Comcast*.

However, the issue of uninjured class members cannot be solved through merely adopting the more stringent "common proof" standard.[154] Even after adopting this standard, courts recognize that it would seem impractical to require injury to every single putative class member such that the existence of a single uninjured class member would defeat predominance.[155] Is it truly necessary that the method of proof show injury to "every single member" of the putative class?[156] If not, then is there some amount of uninjured members that would be acceptable when certifying an antitrust class action?[157] This question leads courts consider a *de minimis* exception which would allow certification in the event of a *de minimis* amount of uninjured

152. Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010).

153. *See Rail Freight III*, 934 F.3d at 623 (noting that "the damages model . . . indicate[d] that 2,037 members of the proposed class" suffered no injury).

154. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 22 (1st Cir. 2015) ("In certifying a (b)(3) class there is an almost inevitable tension between excluding all non-injured parties from the defined class and including all injured parties in the defined class.").

155. *See, e.g.*, *id.* at 23 (noting the "obvious utility of allowing the inclusion of some uninjured class members in the certified class"); *Asacol*, 907 F.3d at 58 ("We also agree that it would put the cart before the horse, to read Rule 23 to require that a plaintiff demonstrate prior to class certification that each class member is injured.").

156. *See Rail Freight III*, 934 F.3d at 624 (analyzing the plaintiff's argument that "predominance does not require common evidence extending to all class members"); *Nexium*, 777 F.3d at 21 ("[I]t is difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification.").

157. *See Asacol*, 907 F.3d at 51 ("[T]he question thus becomes: Can a class be certified in this case even though injury-in-fact will be an individual issue, the resolution of which will vary among class members?").

class members.[158] However, even if one accepts the existence of the *de minimis* exception, the question becomes how many uninjured putative class members would be considered *de minimis* and how many uninjured members would prove too numerous to allow for the proper administration of justice.[159]

*V. Proving Antitrust Injury post-*Wal-Mart

This Part proceeds in three sections. First, it analyzes which of the two standards that courts have applied for proof of injury in antitrust class actions should be applied post-*Wal-Mart* and *Comcast*. It argues that the more stringent "common proof" standard will be adopted over the less stringent "widespread impact" standard. Second, this Part analyzes the *de minimis* exception as it applies to the "common proof" standard and reviews judicial analysis of the exception. Third, in the final section, this Part catalogues the considerations that courts should find applicable in determining whether the *de minimis* exception is satisfied.

A. Dueling Requirements: "Common Proof" vs "Widespread Injury"

In the post-*Walmart* era, courts recognize the Supreme Court's holding that Rule 23(b)(3)'s predominance requirement demands a "rigorous analysis" at the class certification stage.[160] This means that district courts are empowered to engage in significant review of the underlying merits of a class action,

158. *See Rail Freight III*, 934 F.3d at 624 (declining to expressly adopt the *de minimis* exception); *Nexium*, 777 F.3d at 25 ("We think that a certified class may include a *de minimis* number of potentially uninjured parties.").

159. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d 14, 135 (D.D.C. 2017) ("The next question is whether the number of uninjured shippers in the putative class can be considered *de minimis*."); *In re* Lidoderm Antitrust Litig., No. 14-md-02521, 2017 WL 679367, at *64 (N.D. Cal. 2017) (deciding whether the number of uninjured members could be considered *de minimis*).

160. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 626 (D.C. Cir. 2019) ("[C]onfronting such questions [of determining liability] is part-and-parcel of the 'hard look' required by *Wal-Mart* and *Comcast* . . . .").

even at the relatively early class certification stage.[161] This review applies not only to the requirements contained in Rule 23(a), as addressed in *Wal-Mart*,[162] but also the predominance requirement of 23(b)(3).[163] "If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."[164] It then follows, that *Wal-Mart* and *Comcast* seem to require a "rigorous analysis" that will often "overlap with the merits" of the method by which any putative class of plaintiffs seeks to establish the element of antitrust impact or injury.[165]

Multiple courts of appeals, both before and after *Wal-Mart*, embraced this inquisitive posture in the context of antitrust class actions and required that injury be established as to the entire class through "common proof" in order to satisfy the predominance requirement.[166] On the other hand, some courts

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161. *See id.* ("[The Supreme Court's jurisprudence] does not . . . permit district courts considering class certification to defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability.").

162. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("[The plaintiff] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." (emphasis in original)).

163. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2013) ("The same analytical principles [as Rule 23(a)] govern Rule 23(b).").

164. *Id.*; Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623–24 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied . . . the predominance criterion is far more demanding.").

165. *See Rail Freight III*, 934 F.3d at 626 ("The party seeking class certification must affirmatively demonstrate that the . . . predominance requirement[] is satisfied through . . . a rigorous analysis that will often overlap with the merits."); *see also Wal-Mart*, 564 U.S. at 350 (recognizing that certification is only proper after a "rigorous analysis" that the prerequisites of rule 23(a) are required).

166. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) ("We have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class member defeats Rule 23(b)(3) predominance."); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008) (finding common proof necessary to show that "each member of the class was

continue to certify classes without engaging in the heavy review authorized by the post-*Walmart* jurisprudence.[167] These courts merely required proof of "widespread injury to the class" to meet predominance.[168] The differences in these two standards amounts to essentially two different predominance requirements.

On one hand, the analysis involved in the "common proof" test imposes a restrictive requirement onto a putative plaintiff class.[169] The task for the plaintiffs at class certification is to demonstrate that "the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."[170] For a class to be certified, district courts must conduct a "rigorous assessment of

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in fact injured" to support a finding of predominance); *Rail Freight III*, 934 F.3d at 624 ("[P]laintiffs . . . must show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.").

167. *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) ("In conducting [the class certification] analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits.").

168. *See* Meijer, Inc. v. Warner Chilcott Holdings, 246 F.R.D. 293, 310 (D.D.C. 2007) ("[T]he inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* Nw. Airlines Corp. Antitrust Litig., 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("The 'impact' element of an antitrust claim need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("Courts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has cause widespread injury to the class.").

169. *See Rail Freight III*, 934 F.3d at 623 (discussing the demands placed upon the plaintiffs by Rule 23(b)(3)); *see also* Pet, *supra* note 10, at 160 (analyzing the "high burden" demanded by the In re *Hydrogen Peroxide* court's application of the "common proof" requirement).

170. *Hydrogen Peroxide*, 552 F.3d at 311–12; *see also* Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) ("For a class to be certified, plaintiffs need to demonstrate that common issues prevail as to the existence of . . . the fact of injury.").

the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial."[171] By this standard, the presence of individualized inquiries into antitrust injury or impact will defeat predominance and preclude certification.[172] Consequently, a putative plaintiff class seemingly will be unable to achieve class certification if its method for proving injury is unable to establish injury for every member of the class.[173]

On the other hand, the requirement of "widespread injury" to the class imposes a lighter burden upon a putative class of plaintiffs.[174] The presence of some individualized inquiries into impact and injury does not preclude certification.[175] The

171. *Hydrogen Peroxide*, 552 F.3d at 312.

172. *See New Motor Vehicles*, 522 F.3d at 20 ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof."); *Blades*, 400 F.3d at 566 ("If, to make a prima facie showing on a given questions, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question."); *Hydrogen Peroxide*, 552 F.3d at 311 (noting that "impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof"); *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 627 (D.C. Cir. 2019) ("Given the need for at least 2,037 individual determinations of injury and causation, the district court did not abuse its discretion in denying class certification on the ground that common issues do not predominate.").

173. *See Rail Freight III*, 934 F.3d at 623 ("Without common proof of injury and causation, section 4 plaintiffs cannot establish predominance."); *see also* Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) ("We have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class member defeats Rule 23(b)(3) predominance.").

174. *See Meijer*, 246 F.R.D. at 310 ("[T]he inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class.").

175. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) ("It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)."); Arreola v. Godinez, 546 F.3d 788, 801 (7th Cir. 2008) (recognizing that "the need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification" under Rule 23(b)(3)); *Cardizem*, 200 F.R.D. at 319 ("The fact that there may be some individualized questions pertaining to impact will not defeat class certification.").

plaintiff class need not show that impact or injury occurred *in fact*, merely that it was susceptible to proof on a "class-wide" basis.[176] Further, certification could be achieved through inference of "facts . . . which will tend to establish, perhaps circumstantially, that each class member was injured."[177] Rather than a heavy inquiry, the court engages in a more generalized analysis.[178] Following this standard, courts have been willing to certify classes even in cases where a number of putative class members remain uninjured.[179]

Despite being presented with this particular issue,[180] the Supreme Court has yet to specifically clarify which test should prevail.[181] However, the Court of Appeals for the District of Columbia Circuit in the *Rail Freight Antitrust Litigation* cases,[182] was recently presented with an opportunity to address the issue and apply the principles of *Wal-Mart* and *Comcast* to this context.[183] There, the plaintiffs' damages model indicated

176. *See Nw. Airlines*, 208 F.R.D. at 223 ("Plaintiffs need not show antitrust impact *in fact occurred* on a class-wide basis." (emphasis in original)); *NASDAQ*, 169 F.R.D. at 523 ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class.").

177. *NASDAQ*, 169 F.R.D. at 523.

178. *See id.* ("The impact element necessitates only an illustration of generalized inquiry."); *Nw. Airlines*, 208 F.R.D. at 223 (requiring only that injury be only "as a general matter amenable to common proof").

179. *See e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012) ("[I]f a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits.").

180. *See* Petition for Writ of Certiorari at i, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (No. 14-1146) (2016) (asking whether a class may be certified or maintained when a class consists of some number of uninjured class members).

181. *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1050 (2016) (finding that the issue was not "fairly presented by th[e] case").

182. *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight I*), 725 F.3d 244 (D.C. Cir. 2013); *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619 (D.C. Cir. 2019).

183. *See Rail Freight I*, 725 F.3d at 253–54 (looking to *Comcast* to inform the analysis in the matter before the court); *Rail Freight III*, 934 F.3d at 623

that 2,037 members of the putative class did not suffer an injury.[184] The *Rail Freight* court analyzed how the Supreme Court's recent class action jurisprudence changed the level of scrutiny for a class of plaintiffs in the federal courts.[185]

In its initial decision, just following the Supreme Court's decision in *Comcast*, the D.C. Circuit established that, "[t]he plaintiffs must show that they can prove, through common evidence, that all class members were in fact injured by the alleged antitrust conspiracy."[186] The court emphasized the more stringent standard, requiring that the common evidence establish injury as to the entire class.[187] Importantly, the *Rail Freight I* court took note of the profound restrictive effects of *Comcast* on the issues of predominance and antitrust injury.[188] It recounted pre-*Comcast* decisions in other circuits that permitted certification even when common proof injury was not available for every putative class member.[189] With these in mind, the court concluded that after *Comcast* it was "now clear, however, that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—it demands it."[190] The D.C. Circuit remanded

(looking to *Wal-Mart* and *Comcast* as two of the "three recent cases [that] address the contours of th[e] analysis").

184. *Rail Freight III*, 934 F.3d at 624.

185. *See id.* at 623 ("The parties dispute the extent to which a court, in conducting the 'hard look' required by Rule 23, should assess the reliability of common evidence.").

186. *Rail Freight I*, 725 F.3d at 252 (citing Amchem Prods. v. Windsor, 521 U.S. 591, 623–24 (1997)).

187. *See id.* ("[W]e do expect the common evidence to show all class members suffered *some* injury." (emphasis in original)).

188. *See id.* at 255 ("Before [*Comcast*], the case law was far more accommodating to class certification under Rule 23(b)(3).").

189. *See id.* (noting the "cases from other circuits suggesting that . . . 'class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct'" (quoting Mims v. Stewart Title Guar. Co., 590 F.3d 298, 308 (5th Cir. 2009); Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009))).

190. *Id.*

the case so that the lower court could engage in the "common proof" analysis required by Rule 23(b)(3).[191]

After the lower court denied class certification on remand,[192] the D.C. Circuit heard the matter again.[193] The *Rail Freight III* court affirmed the denial of class certification, reiterating the "common proof" standard,[194] and rejecting the "widespread impact" standard.[195] Without "common proof" of injury and causation, "[S]ection 4 plaintiffs cannot establish predominance."[196] In coming to this conclusion, the *Rail Freight III* court again recounted the three Supreme Court decisions most pertinent to its analysis, including *Wal-Mart* and *Comcast*.[197] The court justified its application of the "common proof" standard as a "rigorous analysis" of the plaintiff's method of proof:

> [The Supreme Court] does not, as the plaintiffs here contend, permit district courts considering class certification to defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability. To the contrary, confronting such questions is part-and-parcel of the hard look required by *Wal-Mart* and *Comcast*, as recognized even by those courts permitting a class to include some small number of concededly uninjured individuals.[198]

As reflected in the D.C. Circuit's analysis in the *Rail Freight Litigation*, the less stringent "widespread injury" standard does not fulfill the required "rigorous analysis" of *Wal-Mart* and

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191. *See id.* ("[W]e vacate the district court's class certification decision and remand the case to permit the district court to reconsider its decision in light of *Comcast Corp v. Behrend*.").

192. *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d 14, 145 (D.D.C. 2017).

193. *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619 (D.C. Cir. 2019).

194. *See id.* at 624 ("[P]laintiffs, to establish predominance, must show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.").

195. *Id.*

196. *Id.* at 623.

197. *Id.*

198. *Id.* at 626.

Comcast.[199] In contrast, the "common proof" standard allows the district court to properly engage in the analysis now required by Rule 23.[200] Additionally, the goal of the predominance requirement is to avoid inefficient or unfair aggregation of claims.[201] The more stringent "common proof" standard better serves this goal by taking into account whether individual inquiries into injury and impact would defeat predominance.[202]

Even more recently, the Court of Appeals for the Third Circuit reaffirmed its use of the "common proof" standard in the In re *Lamictal Direct Purchaser Antitrust Litigation*.[203] There, the Third Circuit emphasized the rigorous analysis necessary and rejected an impermissible "reli[ance] on averages" to show "common proof of injury" at the class certification stage.[204] The *Lamictal* court followed the much cited pre-*Wal-Mart* case, *In re Hydrogen Peroxide Antitrust*

199. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 35–36 (2013) (stating that under the widespread injury standard "any method of measurement is acceptable so long as it can be applied classwide, . . . reduc[ing] Rule 23(b)(3)'s requirement to a nullity").

200. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight I*), 725 F.3d 244, 253 (D.C. Cir. 2013) ("[I]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, . . . [i]f the damages model cannot withstand this scrutiny then, that is not just a merits issue.").

201. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 51 (1st Cir. 2018) ("The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not inefficient or unfair."); *see also id.* ("Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues.").

202. *See Rail Freight I*, 725 F.3d at 255 (observing that after *Comcast* the district court should "consider the damages model's flaw in its certification decision").

203. *See In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 191 (3d Cir. 2020) ("[I]t suffices if [the direct purchasers] show that injury is capable of *common proof* at trial." (emphasis added)).

204. *See id.* at 192–94 (vacating class certification and remanding "for the District Court to analyze the evidence and arguments" under the proper standard).

Litigation,[205] in coming to its conclusion.[206] *Hydrogen Peroxide* had been one of the first courts to announce the "common proof" standard in the context of antitrust class actions and was continuously followed by the Third Circuit over the years.[207] The *Lamictal* decision reaffirms the Third Circuit's commitment to the "common proof" standard and signals to other courts that the standard is the only way to properly conduct the rigorous analysis required at the class certification stage.

Moving forward with these principles in mind, it is likely that courts will follow the D.C. Circuit in *Rail Freight*, the Third Circuit in *Lamictal*, as well as other pre-*Comcast* courts,[208] in adopting the "common proof" standard.

B. Recognizing a De Minimis *Exception*

Once courts adopt the more stringent predominance analysis requiring "common proof" of injury in antitrust class actions, they still must face the frequently occurring problem of some amount of uninjured class members. In almost any class action, especially in the context of antitrust actions, it is possible—if not outright probable—that some number of class members will remain uninjured by the defendant's antitrust

205. 552 F.3d 305 (3d Cir. 2008).

206. *See Lamictal*, 957 F.3d at 191 (following the "longstanding rule announced in *Hydrogen Peroxide*, . . . that a putative class must demonstrate that its claims are capable of common proof at trial by a preponderance of the evidence").

207. *See Hydrogen Peroxide*, 552 F.3d at 311–12 ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."); *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 601 (3d Cir. 2012) ("A plaintiff must 'demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members.'" (quoting *Hydrogen Peroxide*, 552 F.3d at 311) (alteration in original))); *In re* Modafinil Antitrust Litig., 837 F.3d 238, 262–63 (3d Cir. 2016) ("The class should only be certified 'if such impact is . . . susceptible to proof at trial through available evidence common to the class.'" (quoting *Hydrogen Peroxide*, 522 F.3d at 325)).

208. *See In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008) (adopting the "common proof" standard); Blades v. Monsanto Co., 400 F.3d 562, 572 (8th Cir. 2005) (same).

violation.[209] This problem becomes exacerbated when it is clear at the class certification stage that some number of putative class members are, in fact, uninjured.[210] As a result, even in adopting the rigorous "common proof" test that will likely become the norm, courts must still determine how to resolve this seemingly frequent issue.[211] Some courts respond by adopting a *de minimis* exception, in which class certification would still be appropriate so long as the number of uninjured members is *de minimis*[212] or not a great many.[213] There is a small but informative sample of federal courts that have addressed the presence of the *de minimis* exception in the post-*Comcast* era.[214]

209. *See* Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) ("While it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown . . . this possibility does not preclude class certification.").

210. *See In re* Deepwater Horizon, 739 F.3d 790, 813 (5th Cir. 2014) ("[C]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct . . . the possibility that some may fail to prevail on their individual claims will not defeat class membership.").

211. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 51 (1st Cir. 2018) ("Can a class be certified in this case even though injury-in-fact will be an individual issue, the resolution of which will vary among class members?"); *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 623 (D.C. Cir. 2019) ("[T]he damages model . . . indicates that 2,037 members of the proposed class—or 12.7 percent—suffered only negative overcharges and thus no injury from any conspiracy.").

212. *See De Minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *de minimis* as a fact or thing "so insignificant that a court may overlook it in deciding an issue or case").

213. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 25 (1st Cir. 2015) (holding that "a certified class may include a de minimis number of potentially uninjured parties"); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012) ("[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant."); Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1137 (9th Cir. 2016) ("[A] fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class.").

214. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d 14, 133 (D.C. Cir. 2017) ("A number of other circuit and district courts have addressed the question of uninjured class members at class certification post-*Comcast* . . . .").

The Court of Appeals for the First Circuit first addressed the possibility of the *de minimis* exception in the *Nexium Antitrust Litigation*.[215] There, the district court certified a class of plaintiffs alleging that a pharmaceutical company engaged in certain anticompetitive behavior and thus the price of the drug Nexium was artificially inflated.[216] The defendants challenged certification on appeal, arguing that the "common proof" standard precluded certification when some of the class members did not suffer an injury due to the anticompetitive behavior, as was the case there.[217] The *Nexium* court rejected the defendant's argument and affirmed the lower court's grant of class certification, expressly adopting the *de minimis* exception.[218]

The *Nexium* court noted the recurring nature of the "tension" that courts face in certifying class actions.[219] "Excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying . . . a class defined in terms of legal injury."[220] Accordingly, the court concluded that it would be unreasonable to require plaintiffs to make a showing that "is simply not possible . . . at the class certification stage."[221] Further, the First Circuit found that rejecting a *de minimis* exception would "run counter to fundamental class action policies."[222] The purpose of class action law is to achieve efficiencies not found in repeated individual litigations about

215. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 22 (1st Cir. 2015) (questioning whether "the presence of uninjured class members at the preliminary stage should defeat class certification").

216. *Id.* at 13–14.

217. *Id.* at 14.

218. *Id.* at 25.

219. *See id.* at 22 ("In certifying a (b)(3) class there is an almost inevitable tension between excluding all non-injured parties from the defined class and including all injured parties in the defined class.").

220. *Id.*

221. *Id.*

222. *Id.*

the same matter.[223] Moreover, the primary class contemplated by Rule 23(b)(3) is the class in which a large number of individuals have suffered a relatively small amount of damages.[224] Absent a *de minimis* exception, it would be nearly impossible to certify a class consisting of "the very group that Rule 23(b)(3) was intended to protect."[225]

Subsequently, in the *In re Asacol Antitrust Litigation*,[226] the First Circuit again encountered the presence of uninjured putative class members, but this time in much larger numbers.[227] There, the district court certified the class and determined that the *Nexium* decision allowed for a finding that the requirements of Rule 23(b)(3) had been satisfied despite the large amount of uninjured class members.[228] This time around the First Circuit reversed and decertified the class,[229] disapproving of the lower court's reading of *Nexium*.[230] The *Asacol* court distinguished *Nexium* stating that *Asacol* was "a case in which any class member may be uninjured, and there [were] apparently thousands who in fact suffered no injury. The need to identify those individuals will predominate and render an adjudication unmanageable . . . ."[231] Importantly, however, and despite further limiting the scope of *Nexium* on grounds

223. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) ("[T]he Advisory Committee sought to cover cases in which a class action would achieve economies of time, effort, and expense . . . .").

224. *See Nexium*, 777 F.3d at 23 (noting the purpose of Rule 23(b)(3) as the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents to court at all").

225. *Id.*

226. 907 F.3d 42 (1st Cir. 2018).

227. *Id.* at 45–47; *see id.* at 51 ("Plaintiffs' class nevertheless includes consumers who would have continued to purchase a brand drug for various reasons, even if a cheaper, generic version had been available.").

228. *See id.* at 52 ("The district court in this case sought to track *Nexium*, finding that prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members.").

229. *Id.* at 58.

230. *See id.* at 53 (disagreeing with the district court that "*Nexium* blesse[d]" the class certification at issue).

231. *Id.* at 53–54.

discussed below,[232] the First Circuit signaled that it would still remain open to certifying classes in which a *de minimis* exception would apply.[233] Unfortunately for the putative class, this was not an instance in which the exception could be satisfied and consequently, in the court's opinion, the class was uncertifiable.[234]

The D.C. Circuit similarly discussed the *de minimis* exception in the *Rail Freight Antitrust Litigation*.[235] On remand from *Rail Freight I*, the district court interpreted the earlier appellate decision requiring "common proof" to allow for a *de minimis* exception.[236] The district court stated that a *de minimis* number of class members requiring individualized proof of injury and causation would not preclude a finding of predominance,[237] although it found that the particular circumstances there did not satisfy the requirements of the exception.[238] On appeal, the D.C. Circuit affirmed the lower court's ruling, while avoiding an express adoption of the *de*

232. *See infra* Part V.C (analyzing the *Asacol* court's rejection of *Nexium* based on the "winnowing mechanism" used in *Nexium*).

233. *See Asacol*, 907 F.3d at 53 ("Relatedly, this is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial.").

234. *See id.* at 53–54 (finding that the need to identify uninjured class members will "predominate" and render adjudication "unmanageable").

235. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 623–26 (D.C. Cir. 2019) (analyzing the problem presented by the "2,037 class members for whom [the plaintiffs'] damages model shows no injury").

236. *See id.* at 624 ("[T]he district court held that our opinion did not require common evidence of injury to all class members."); *see also In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d. 14, 135 (D.D.C. 2017) ("If the putative class includes only a *de minimis* number of uninjured members, then plaintiffs have satisfied the . . . standard for predominance and have demonstrated that they can prove class-wide injury through common evidence at trial.").

237. *See Rail Freight III*, 934 F.3d at 624 (recounting that the district court "agreed with the plaintiffs that common proof covering virtually all members of the proposed class" would be permissible for certification).

238. *Id.*

minimis exception.[239] The D.C. Circuit found that even "assum[ing] that the district court correctly recognized a de minimis exception,"[240] the number of uninjured class members was too numerous to meet the exception.[241] However, the *Rail Freight III* court suggested that a case in which fewer class members remained uninjured might well prompt the court to expressly adopt the exception.[242]

Finally, the Court of Appeals for the Ninth Circuit addressed the situation of uninjured class members in *Torres v. Mercer Canyons Inc.*[243] There, although the court did not expressly mention the *de minimis* exception, the Ninth Circuit adopted a standard that largely mirrors the *de minimis* exception.[244] In *Torres*, the defendant claimed that the presence of "certain 'non-injured' individuals" defeated predominance.[245] The *Torres* court concluded that "such fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class . . . ."[246] "[A] flaw that may defeat predominance [would be] the existence of large numbers of class members who were never *exposed* to the challenged conduct to begin with."[247] As "the district court is well situated to winnow out those non-injured members,"[248] the *Torres* court affirmed class certification.[249]

As reflected by these decisions post-*Comcast*, the *de minimis* exception has not been expressly adopted by many of

239. *See id.* ("For the sake of argument, we assume that the district court correctly recognized a de minimis exception to the general rule that . . . causation and injury must be 'capable of class-wide resolution.'" (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011))).

240. *Id.* at 625.

241. *Id.* at 625–26.

242. *See id.* at 627 (declining to create "the first such case" in which "thousands of class members testify").

243. 835 F.3d 1125 (9th Cir. 2016).

244. *See id.* at 1136–37 (allowing certification despite "the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members").

245. *Id.* at 1137.

246. *Id.*

247. *Id.* at 1136 (emphasis in original).

248. *Id.* at 1137.

249. *Id.* at 1142.

courts. This is largely due to the fact that many courts previously followed the less rigorous "widespread impact" test, which of course had no reason (or need) for a *de minimis* exception as it is built into the "widespread impact" test.[250] *De minimis* was encapsulated by the notion that only "a great many" uninjured class members would preclude class certification.[251] It is only now that the more rigorous "common proof" test dominates that a *de minimis* exception is relevant.[252] However, despite its unclear status currently, it is likely that the *de minimis* exception will be adopted by courts that apply the "common proof" test as there are clear benefits that the exception grants a court engaging in the rigorous analysis demanded in the post-*Walmart* era.[253] Similarly, the courts that had previously favored the less stringent "widespread" test will clearly favor the *de minimis* exception as it fits their previous jurisprudence better than demanding 100% of class members to prove injury on a common basis.[254] Consequently, the *de minimis* exception will become the norm circuit-wide when assessing predominance in the context of antitrust injury.

C. What is Considered De Minimis*?*

Although the *de minimis* exception will likely be adopted across the board, the question still remains as to how many uninjured members is too many? In other words, how must a

250. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d 14, 135 (D.D.C. 2017) (recognizing that the "all or virtually all" standard and the "de minimis" standard as "two sides of the same coin").

251. *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012) ("[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant.").

252. *See Rail Freight II*, 292 F. Supp. 3d at 134 (sifting through the relevant post-*Comcast* case law to determine whether a *de minimis* exception is necessary to be included in the analysis); *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 624 (D.C. Cir. 2019) (recognizing that the *de minimis* exception would not require "common evidence of injury to all class members").

253. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 23–24 (1st Cir. 2015) (noting the "obvious utility" and "efficiency" of the *de minimis* exception).

254. *See Rail Freight II*, 292 F. Supp. 3d at 134 (analyzing the effects of the *de minimis* exception in the context of "widespread impact").

court measure the quantity of problematic class members in order to determine whether the exception is satisfied? What are the limits of the *de minimis* exception?[255] Most courts recognizing the exception are hesitant to place a hard, clear outer bound on the exception.[256]

However, a few principles become apparent in reading discussions of the *de minimis* exception. First, the application of the *de minimis* exception must be structured in the context of the "common proof" standard and the predominance inquiry.[257] Courts look to various factors as relevant to determining whether the number of uninjured members is *de minimis* or instead would frustrate predominance.[258] Second, a "winnowing mechanism" used to determine which putative class members fall in the *de minimis* uninjured group is required.[259] Importantly, this "winnowing mechanism" must be protective of defendant's Seventh Amendment and Due Process rights.[260]

Primarily, what qualifies as a *de minimis* deviation "from a prescribed standard must, of course, be determined with reference to the purpose of the standard."[261] Thus, the *de minimis* exception to the "common proof" standard must be

255. *See Rail Freight III*, 934 F.3d at 624 ("[W]hen does the need for individualized proof of injury and causation destroy predominance?").

256. *See id.* (rejecting the approach of some courts which "arbitrarily imposed a six-percent upper limit on the percentage of uninjured parties who may be included in a certified class").

257. *See Nexium*, 777 F.3d at 30–31 (emphasizing the role of predominance in construing the *de minimis* exception).

258. *See Rail Freight II*, 292 F. Supp. 3d at 135–38 (analyzing whether the amount of uninjured class members in the matter was encompassed by the *de minimis* exception).

259. *See Nexium*, 777 F.3d at 19 ("At the class certification stage, the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured.").

260. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 52 (1st Cir. 2018) ("[A] class may be certified notwithstanding the need to adjudicate individual issues so long as the proposed adjudication will be both administratively feasible and protective of defendants' Seventh Amendment and Due Process rights.").

261. Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 232 (1992).

structured with the predominance inquiry in mind.[262] If an amount of uninjured class members is to be considered *de minimis*, the issues "common to [the] class" must still "predominate over any questions affecting only individual members."[263] Accordingly, the number of uninjured members must not be large enough to "render the class impractical or improper, or to cause noncommon issues to predominate."[264] If the putatively *de minimis* uninjured class members truly do not frustrate predominance then "the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered."[265]

In following this principle, courts look to various factors when determining whether any number of uninjured class members can be considered *de minimis*.[266] Assessing each factor, the district court seeks to determine whether the presence of the uninjured class members would defeat predominance.[267] First, although no court has adopted a hard and fast rule of percentages, the district courts that have found the *de minimis* exception satisfied suggest that 6 percent represents the upper bound of the de minimis exception.[268] Multiple courts have denied certification to classes with

262. *See Rail Freight III*, 934 F.3d at 626 (determining whether an amount of uninjured class members was *de minimis* in light of the predominance inquiry).

263. FED. R. CIV. P. 23(b)(3).

264. *In re* Nexium Antitrust Litig., 777 F.3d 9, 31 (1st Cir. 2015); *see Asacol*, 907 F.3d at 51 ("The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not inefficient or unfair.").

265. *Nexium*, 777 F.3d at 30 (quoting Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1270 (11th Cir. 2009)).

266. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight II*), 292 F. Supp. 3d 14, 135–40 (D.D.C. 2017) (looking to multiple factors to determine whether the number of uninjured class members was *de minimis*).

267. *See Nexium*, 777 F.3d at 31 (asking whether the number of uninjured class members causes "non-common issues to predominate").

268. *See In re* Lidoderm Antitrust Litig., No. 14-md-02521, 2017 WL 679367, at *12 (N.D. Cal. 2017) (finding the three uninjured class members *de minimis* in comparison (5.5 percent) to the class size of fifty-five); *Rail Freight II*, 292 F. Supp. 3d at 137 (noting that the few decisions "suggest that 5% to 6% constitutes the outer limits of a de minimis" exception).

uninjured members that account for more than this percentage.[269] Second, in addition to percentages, courts also look to the raw number of uninjured class members.[270] Thus far, only classes containing uninjured members amounting to single digits have ever achieved certification under the *de minimis* exception.[271]

Finally, even apart from determining whether the actual number of uninjured members is *de minimis* or not, courts must also determine whether the uninjured members can be identified and severed from the rest of the class members.[272] This is necessary as the class members uninjured by the defendant's antitrust violation cannot recover monetary damages.[273] Multiple courts have struggled to find an effective method of distinguishing between the uninjured and injured members.[274] The decision rests on balancing an "administratively feasible" method with the Seventh

269. *See In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 625 (D.C. Cir. 2019) (finding that a number of uninjured members constituting 12.7 percent of the class precluded a finding of predominance); *Asacol*, 907 F.3d at 50–52 (finding that a number of uninjured members constituting approximately 10 percent of the class to preclude a finding of predominance).

270. *See Rail Freight II*, 292 F. Supp. 3d at 137 ("Beyond percentages, the number of uninjured class members in relationship to the size of the class also may matter.").

271. *See Lidoderm*, 2017 WL 679367, at *12 (finding three uninjured class members to be *de minimis*).

272. *See Nexium*, 777 F.3d at 19 ("At the class certification stage, the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members.").

273. *See id.* ("[T]he payout of the amount for which the defendants were held liable must be limited to injured parties."); *Rail Freight III*, 934 F.3d at 623 ("To establish liability under [the Clayton Act], each plaintiff must prove not only an antitrust violation, but also an injury to its business or property as a casual relation between the two.").

274. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 51 (1st Cir. 2018) (noting the need to find a "winnowing mechanism"); *Rail Freight III*, 934 F.3d at 625 (determining whether an adequate "winnowing mechanism" existed such that class certification would not be precluded).

Amendment and Due Process rights of the defendants.[275] No decision to date illustrates what kind of method would be acceptable based on these considerations.[276] However, the First Circuit has discussed the matter and articulated the relevant factors of administrative feasibility and consciousness of Seventh Amendment and Due Process concerns.[277]

In its decision in the *Nexium Antitrust Litigation*, the First Circuit recognized that unrebutted affidavits filed by members of the plaintiff class could serve as a feasible method of separating the injured from uninjured.[278] There, AstraZeneca, the producer of Nexium, allegedly entered into noncompete agreements with three generic drug companies forestalling their marketing of generic forms of Nexium.[279] The putative class alleged that this anticompetitive behavior harmed the class by frustrating the production of a generic alternative, thus raising prices.[280] However, it was made clear through expert testimony that some percentage of the putative class members were not injured by the conspiracy because they would not have switched to the generic drug even if it had been available.[281]

As stated above, despite the presence of possibly uninjured class members the district court certified the plaintiff class.[282] Essential to certification was the existence of a "winnowing

275. *See Asacol*, 907 F.3d at 52 ("[A] class may be certified notwithstanding the need to adjudicate individual issues so long as the proposed adjudication will be both administratively feasible and protective of defendants' Seventh Amendment and Due Process rights.").

276. *See Rail Freight III*, 934 F.3d at 625 (rejecting rebuttable affidavits as an acceptable "winnowing mechanism" and discussing the standard a possible mechanism must satisfy).

277. *Asacol*, 907 F.3d at 52.

278. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 20 (1st Cir. 2015) ("[I]f such consumer testimony would be sufficient to establish injury in an individual suit, it follows that similar testimony in the form of an affidavit or declaration would be sufficient in a class action.").

279. *Id.* at 14.

280. *Id.*

281. *Id.* at 17.

282. *See id.* ("The district court below concluded that plaintiffs had sufficiently demonstrated a showing of adequacy of representation and predominance of common questions to the class to meet the requirements of class certification under Rules 23(a) and 23(b)(3).").

mechanism" suggested by the plaintiffs in order to determine which putative class members were uninjured.[283] Affirming the lower court,[284] the *Nexium* court stated clearly that "[t]he court may proceed with certification so long as [the winnowing] mechanism will be administratively feasible, and protective of defendants' Seventh Amendment and due process rights."[285] The First Circuit found that the winnowing mechanism of unrebutted affidavits by each class members was sufficient.[286]

Four years later, the First Circuit sharply limited the *Nexium* decision in the *Asacol Antitrust Litigation*.[287] *Asacol* presented a similar yet slightly distinct factual scenario.[288] In *Asacol* a putative class of plaintiffs sued a pharmaceutical company alleging that the company engaged in anticompetitive "product hopping."[289] "Product hopping" occurs when a pharmaceutical company switches out a popular brand-name product with a short patent-life for a substantially similar brand-name product with a long patent-life remaining.[290] This technique frustrates producers of generic products because a "reference brand name drug" is required for a generic to be introduced into the market.[291] However, similar to *Nexium*, it was revealed by expert testimony that over 10 percent of the class members were likely uninjured by the defendant's

283. *Id.* at 19.

284. *Id.* at 32 ("The district court did not abuse its discretion in certifying the [putative] class of plaintiffs.").

285. *Id.* at 19.

286. *See id.* at 21 ("[W]e have confidence that a mechanism would exist for establishing injury at the liability stage of this case, compliant with the requirements of the Seventh Amendment and due process." (citing Madison v. Chalmette Refining, LLC, 637 F.3d 551, 556 (5th Cir. 2011))).

287. *In re* Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018).

288. *Id.* at 45–47.

289. *Id.*

290. *See id.* at 46 ("[B]y pulling Asacol, [the pharmaceutical company] effectively prevented generic drugs that would have used Asacol as a reference drug from entering the market after the expiration of Asacol's patents.").

291. *See id.* ("[Defendant's] aim in pulling Asacol from the market and introducing Delzicol was to preclude the possibility of market entry of generic drugs . . . .").

behavior because they would not have switched to a generic alternative even if the "product hopping" had not occurred.[292]

In contrast to its decision in *Nexium*, the First Circuit held that unrebutted affidavits did not satisfy the two conditions required for establishing a winnowing mechanism.[293] The court emphasized that class certification could not ignore the basic and foundational principles contained in Due Process and the Seventh Amendment.[294] The *Asacol* court made clear, "the district court must at the time of certification offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues."[295] The plaintiff's attempt to use affidavits as a winnowing mechanism was sharply rejected.[296] The court looked to the fact that, unlike in *Nexium*, the defendant in *Asacol* sought to challenge the affidavits, thus requiring "individual trials because genuinely contested affidavits do not support summary judgment and are inadmissible."[297] There, the court made abundantly clear that it was not willing to sacrifice the defendant's substantive rights for the sake of certifying the putative class.[298]

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292. *See id.* at 47 (recounting that the district court presumed that "by the end of the relevant period, somewhere around 10% of the class members would have opted for [the brand name drug] even in the presence of [the generic]").

293. *See id.* at 53 ("A claims administrator's review of contested forms completed by consumers concerning an element of their claims would fail to be protective of defendants' Seventh Amendment and due process rights.").

294. *See id.* ("The fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act . . . ." (citing Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1048 (2016))).

295. *Id.* at 58; *see id.* at 55 ("Whether that opportunity precludes class certification turns on whether such challenges are reasonably plausible in a given case and whether the plaintiff cannot demonstrate that allowing for such challenges in a manner that protects the defendant's rights will be manageable and superior to the alternatives.").

296. *See id.* at 58 (finding that the "plaintiffs ha[d] plainly not enabled the district court to articulate" a plan that would satisfy the court's requirements).

297. *Id.*

298. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 56 (1st Cir. 2018) (recognizing that the court has "no license to create a Rule 23(b)(3) class in

VI. Conclusion

Effective enforcement of the federal antitrust laws is key to protecting the United States free market.[299] Absent a purposeful deterrent, potential market power abusers will remain unfettered in their actions, resulting in long-term negative effects on the American economy.[300] The goals of the Sherman Act simply cannot be achieved without the proper functioning of every aspect of antitrust enforcement. Accordingly, the "private attorneys general,"[301] must be able to efficiently bring claims against and challenge the resources of the powerful goliaths that frequently commit antitrust violations.[302] The class action mechanism serves to empower the antitrust plaintiff by allowing the large-scale aggregation of what normally amounts to relatively small individual claims.[303]

We have yet to witness the full effects of the Supreme Court's post-*Wal-Mart* jurisprudence, though it is clear that the days of "certify now, ask questions later," are over.[304] A putative

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every negative value case by either altering or reallocating substantive claims or departing from the rules of evidence").

299. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977) (recognizing the goal of "deterring violators and depriving them of the fruits of their illegality" reflected in the antitrust laws); N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 502 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structure.").

300. *See* Standard Oil Co. v. United States, 221 U.S. 1, 56–57 (1911) (discussing fears that monopoly would "restrain the free flow of commerce and tend to bring about the evils, such as enhancement of prices, which were considered to be against public policy").

301. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

302. *See Ill. Brick Co.*, 431 U.S. at 746 ("[T]he legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws." (quoting *Hawaii*, 405 U.S. at 262)).

303. *In re* Nexium Antitrust Litig., 777 F.3d 9, 23 (1st Cir. 2015) (noting the purpose of Rule 23(b)(3) as the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents to court at all"); California v. Yamasaki, 442 U.S. 682, 701–02 (1979) ("[T]he Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.").

304. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard."); Comcast Corp. v. Behrend,

class of antitrust plaintiffs must "affirmatively demonstrate" that its method of proving class-wide injury meets the requirements of Rule 23(b)(3).[305] It is not enough that the plaintiffs establish "widespread impact" to the class, as now "common proof" of injury as to the entire class is required.[306] But even under this more stringent standard, it is impractical for courts to require 100 percent of the class members to prove injury at the class certification stage.[307] Consequently, the *de minimis* exception will function as an escape hatch to allow certification when the number of potentially uninjured class members does not frustrate predominance.[308] So long as common questions continue to predominate over individualized ones, the presence of a *de minimis* amount of uninjured class members will not preclude certification.[309] Further, it is key that the "winnowing mechanism" used to sever uninjured class

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569 U.S. 27, 33 (2013) ("[I]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question . . . .").

305. *See Wal-Mart*, 564 U.S. at 350 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . ."); *Comcast*, 569 U.S. at 33 (requiring the party to "affirmatively demonstrate" compliance with Rule 23); *In re* Rail Freight Fuel Surcharge Antitrust Litig. (*Rail Freight III*), 934 F.3d 619, 624 (D.C. Cir. 2019) (requiring "common affirmative evidence . . . that a conspiracy did in fact injure" the class members).

306. *See Rail Freight III*, 934 F.3d at 623 ("Without common proof of injury and causation, section 4 plaintiffs cannot establish predominance." (citing *Comcast*, 569 U.S. at 36–38)).

307. *See Nexium*, 777 F.3d at 22 ("[I]t is simply not possible to entirely separate the injured from the uninjured at the class certification stage."); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) ("While it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown . . . this possibility does not preclude class certification.").

308. *See Rail Freight III*, 934 F.3d at 624 (questioning whether "common proof covering virtually all members of the proposed class, and leaving only a de minimis number of cases requiring individualized proof of injury . . . would be enough to show predominance"); Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 232 (1992) (stating that a *de minimis* deviation "from a prescribed standard must, of course, be determined with reference to the purpose of the standard").

309. *See Nexium*, 777 F.3d at 30 ("[I]f common issues truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on substance or quantity of evidence offered." (internal quotations omitted)).

members be "administratively feasible" and protective of the defendant's Seventh Amendment and Due Process rights.

The "common proof" standard combined with the *de minimis* exception strikes an important balance between the goals of *Wal-Mart*'s "rigorous analysis" and the goals of antitrust enforcement. While the "common proof" standard allows courts to fully engage with the plaintiffs' method of proving class-wide injury,[310] the *de minimis* exception provides for certification in the cases most essential to private antitrust enforcement: instances of relatively minute injuries spread over a large number of individuals.[311] Adhering to this balance through proper administration of the *de minimis* exception will solve the uncertainty currently plaguing the antitrust class action bar. In turn, the "private attorneys general," tasked with aiding in antitrust enforcement, will truly be able to fulfill their role in protecting the free market of the United States.

310. *See Rail Freight III*, 934 F.3d at 626 ("[C]onfronting such questions is part-and-parcel of the 'hard look' required by *Wal-Mart* and *Comcast* . . . .").

311. *See Nexium*, 777 F.3d at 22 ("[T]he Advisory Committee sought to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situation." (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997))).