NOTE

THE PROPRIETY AND INEVITABILITY OF NETTING IN ANTITRUST CLASS ACTIONS

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How to define "antitrust injury" is an issue that has been the source of much debate among judges, lawyers, and academics alike. Specifically, a disagreement exists as to whether participation in a single transaction, which a defendant has allegedly tainted via anticompetitive behavior, is sufficient to constitute antitrust injury. Complicating this area of jurisprudential and doctrinal uncertainty are cases in which a plaintiff who has alleged injury as a result of anticompetitive conduct later reaped offsetting gains resulting from that very same conduct. The disagreements regarding the role of these net beneficiaries, and the netting process necessary to identify them, in antitrust suits implicate matters that extend far beyond legal theory. This Note outlines the multitude of ways in which the foregoing consequences manifest. It then highlights the propriety of a contextual approach in which courts are more willing to engage in nuanced and substantive class certification analyses that balance the interests of the litigants and the goals of the antitrust laws. The Note uses financial markets, and variations among the instruments therein, as a specific instantiation of these principles and a context in which a nuanced approach is especially compelling. It concludes by demonstrating that, regardless of whether a court incorporates netting into its definition of antitrust injury, it will have to contend with netting principles during the class–certification process.

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I. INTRODUCTION

The Sherman Act and Clayton Act are integral to ensuring that commercial markets are devoid of anticompetitive conduct that harms the proper functioning of said markets and the participants therein.[1] To bolster the authority that the Sherman Act gave to government entities to enforce the antitrust laws, the Clayton Act significantly expanded the scope

[1] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968); Ratliff v. Burney, 505 F. Supp. 105, 108 (W.D.N.C. 1981); Signode Steel Strapping Co. v. FTC, 132 F.2d 48, 53 (4th Cir. 1942).

of such enforcement powers by granting private parties who are able to demonstrate injury as a result of anticompetitive behavior the right to bring suit and potentially receive treble damages.[2] Although the Clayton Act makes it far less likely that those engaging in conduct that harms competition will evade liability, it also raises the specter of an opposing problem: that private parties will not only bring meritorious suits, but also those lacking merit so as to win substantial payouts.[3] This is a particularly troublesome possibility in the context of antitrust class actions, which carry with them potential treble damages awards to an entire class of plaintiffs, thereby giving members of a certified class substantial leverage to induce the defendant to accept a settlement.[4] Such statutory gamesmanship is not new to the American legal landscape,[5] and it is thus imperative that there exist sufficient guardrails to filter out frivolous lawsuits while simultaneously allowing for those with a legitimate basis to proceed.

Despite the foregoing, the procedural requirements necessary to sustain an antitrust class action have proven effective

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[2] HERBERT HOVENKAMP & PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶103c & n.100 (5th ed. 2022) (ebook).

[3] *See* S. Snack Foods, Inc. v. J & J Snack Foods Corp., 79 F.R.D. 678, 682 (D.N.J. 1978); *cf. In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 102 (D.C. Cir. 2002) (noting that, as a general matter, granting class certification "can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims").

[4] *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001) ("[D]enying or granting class certification . . . may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants[.]").

[5] *See* Elliott Weiss & John Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2079–88 (1995) (detailing the belief among many critics that plaintiffs' attorneys brought frivolous securities class actions so as to extract lucrative settlements). Relatedly, some have contended that the foregoing suspicions materially contributed to the passage of the Private Securities Litigation Reform Act. *See* MELVIN A. EISENBERG & JAMES D. COX, BUSINESS ORGANIZATIONS: CASES AND MATERIALS 83 (12th ed. 2019).

at removing unmeritorious suits from the docket. In order to survive, an antitrust class action must demonstrate that the class members have constitutional standing, statutory standing, and the requisite characteristics for class certification.[6] Although the constitutional requirement that federal courts may only hear "cases and controversies" is a relatively low threshold, there is a lack of consensus as to whether the same is true for antitrust standing and class certification.[7] In particular, courts disagree about the definition of the "antitrust injury" necessary to establish antitrust standing, particularly with regard to plaintiffs who engaged in transactions in which the defendant employed anticompetitive practices, but who were nonetheless net beneficiaries thereof.[8] How to define antitrust injury is a question that likely implicates not only antitrust standing, but also the ability of the class to demonstrate that its members have issues that predominate over those of an individual nature.[9] Furthermore, regardless of whether a court, in an antitrust injury analysis, considers the fact that some plaintiffs were net beneficiaries, the adequacy analysis in antitrust class actions implicates the same concerns as those which would be present if the court had considered such so-called "netting."[10] As is the case with the proper

[6] Gelboim v. Bank of Am. Corp., 823 F.3d 759, 770 (2d Cir. 2016); *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 458 (S.D.N.Y. 2018). Some courts, before looking to Federal Rule of Civil Procedure 23, evaluate whether a class has "class standing." *See* 299 F. Supp. 3d at 458.

[7] *Compare LIBOR-Based Litig.*, 299 F. Supp. 3d at 593 (holding that the standard for demonstrating Article III injury is distinct from, and less onerous than, that for *antitrust* injury), *with* Astrazeneca AB v. UFCW (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 27 (1st Cir. 2015) (defining antitrust injury in a way that the *LIBOR* court views as overly permissive and too closely resembling the Article III injury analysis).

[8] *See LIBOR-Based Litig.*, 299 F. Supp. 3d at 593; *In re* Nexium Antitrust Litig., 777 F.3d at 27.

[9] United Food & Commer. Workers Unions and Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (*In re* Asacol Antitrust Litig.), 907 F.3d 42, 51–58 (1st Cir. 2018).

[10] Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1190 (11th Cir. 2003) ("To our knowledge, no circuit has approved of class certification

definition of antitrust injury, courts disagree about whether, and to what extent, the presence of plaintiffs who were net beneficiaries affects class certification.[11] Given the considerable damages often at stake in antitrust class actions, it is imperative to resolve the foregoing issues in a sensible way that adequately balances the goals of the antitrust laws and the interests of plaintiffs and defendants.

This Note argues that, contrary to the approach that some courts have espoused, courts should favor the adoption of the net harm standard for antitrust injury. This approach, at a minimum, is appropriate in a number of antitrust contexts. In advancing this proposition, the Note demonstrates that this screening mechanism is consonant with the prescriptions of the Federal Rules of Civil Procedure (FRCP) and prevailing jurisprudential guidelines, as well as the need to balance the interests of all litigants and advance statutory aims. As this Note demonstrates, however, a court's decision with respect to netting's pertinence to antitrust injury is ultimately likely irrelevant, as the procedural dictates of certifying antitrust classes necessitate a consideration of net harm at some point in that process.

Part II of this Note lays out the statutory and doctrinal foundations upon which antitrust law rests. It will discuss cases through which the Supreme Court gradually erected a framework for evaluating private actions that plaintiffs bring under §4 of the Clayton Act. The Part will focus on the compelling format of the class action as a means of bringing antitrust treble damages claims. It will also analyze the requisite elements to sustain a class action and the various demonstrations of standing—of the constitutional and antitrust varieties—which are necessary components of that same threshold matter.

Part III will delve more deeply into the uncertainty surrounding the definition of "antitrust injury" and how a given interpretation of that concept can materially affect an antitrust class action's prospect of success. Specifically, the Part

where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class.").

[11] *Id.*

will outline the lack of clarity as to whether "antitrust injury" includes a conception of netting, and how that uncertainty shapes the adequacy and predominance elements necessary to attain class certification in certain FRCP 23(b)(3) suits, including those of an antitrust nature.

Part IV will demonstrate that, despite some compelling reasons to the contrary, there are more persuasive grounds to favor the use of the netting standard for antitrust injury, particularly in certain contexts. This approach accords not only with antitrust and class certification doctrines, but also serves to advance the goals of the antitrust laws. Yet, courts will most likely have to engage in a netting analysis, notwithstanding their approach to defining antitrust injury, due to prevailing doctrines pertaining to the adequacy and predominance elements of the class certification process. Although this Part concludes with a suggestion of possible means of navigating the foregoing areas of doctrinal uncertainty, it does not assess their relative merits, as that is an endeavor beyond the scope of this Note.

Part V will show that the foregoing analyses bear relevance to contemporary commercial environments. Indeed, financial markets, and the differences among the instruments in those markets, bespeak contextual applications of antitrust principles that comport with the underlying nature of allegedly collusive behavior. Specifically, this Part compares and contrasts the bid-ask spreads through which market makers earn a fee with the benchmark rates that form price components of various financial instruments. Salient to this evaluation is the contention that, unlike the latter, the former is highly analogous to a discrete price for a given good or service, thereby rendering a bid-ask spread susceptible to a conventional antitrust analysis. Conversely, this Part contends, a benchmark rate is a far more complicated datum regarding which a more nuanced application of antitrust principles is warranted. The Part concludes by demonstrating that, even in the context of financial markets, netting will be relevant to the certification of an antitrust class, irrespective of a court's decision to espouse or eschew the net harm standard for antitrust injury.

II. THE STATUTORY AND DOCTRINAL LANDSCAPE

An understanding—albeit cursory—of the history and aims of the federal antitrust laws is necessary to engage in the analytical endeavor that is the focus of this Note. The Sherman Act and the Clayton Act serve the same preventative role against anticompetitive and monopolistic behavior that harms consumers and diminishes market efficiency. There are nonetheless important differences between the two statutes, especially with respect to plaintiffs' pleading and evidentiary standards. These differences, in turn, are manifest in the class action context.

A. Legal History

Congress passed the Sherman Act in 1890 in the wake of an unprecedented rise of corporations, i.e., trusts, and the competition-defeating dominance that these large entities wielded. The legislation "federalize[d]" the existing uncoordinated quilt of state laws that governed such areas, in an attempt to mitigate the harmful effects on markets and citizens from anticompetitive and monopolistic behavior.[12] Yet many found the Sherman Act to be significantly deficient, and in 1914 Congress passed the Clayton Act and Federal Trade Commission Act. Congress passed the former statute to improve the shortcomings of the Sherman Act by, among other measures, specifying what constitutes anticompetitive conduct, allowing plaintiffs to target anticompetitive behavior in its incipiency, and lowering the burdens for private actions that the Sherman Act had sanctioned.[13]

[12] HOVENKAMP & AREEDA, *supra* note 2, ¶101.

[13] EARL W. KINTNER, JOSEPH P. BAUER, WILLIAM H. PAGE & JOHN E. LOPATKA, FEDERAL ANTITRUST LAW §§ 18.2, 18.9 (3d ed. 2021). Congress has, over the ensuing decades, amended antitrust legislation with statutes such as the Robinson-Patman Act of 1936, which allowed small businesses to bring suit under the Clayton Act.

B. The Clayton Act and Class Actions

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained[.]"[14] Although, on the surface, this statute does not seem to impose many limitations on bringing private antitrust suits for treble damages, federal courts have gradually imposed boundaries on the scope of such actions. There are thus many elements in an evaluation of whether a plaintiff has so-called "antitrust standing." In order to have standing to bring an antitrust action, a plaintiff must allege: (1) injury-in-fact by reason of the antitrust violation (i.e., causation); (2) that the injury is not unduly remote from the violation; (3) "antitrust injury;" and (4) cognizable and reasonably quantifiable damages.[15] Perhaps the most uncertain,[16] confusing,[17] and contentious[18] aspect of § 4 jurisprudence is the Supreme Court's requirement that the plaintiff's injury be an "antitrust injury," which the

[14] Clayton Antitrust Act of 1914 § 4, 15 U.S.C. § 15(a) (2009).

[15] Stephen V. Bomse & Scott A. Westrich, *Both Sides Now: Buyer Damage Claims in Antitrust Actions Involving "Two-Sided" Markets*, 2005 COLUM. BUS. L. REV. 643, 647 (2005). The first two of these additional four elements are the causation standard, which in this context means that the defendant's conduct was, at a minimum, reasonably foreseeably likely to injure the plaintiff and was a material cause of the plaintiff's injury. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 114 n.9 (1969); Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967). While the presence of a violation is not itself sufficient to bring damages, and while the courts insist on greater proof of the fact of injury, they are willing to accept weaker proof of the quantum of damage. HOVENKAMP & AREEDA, *supra* note 2, ¶ 340a1. Some circuit courts of appeals have combined all of the above elements, except for that of antitrust injury, into an "efficient enforcer" test. *See* Gelboim v. Bank of Am. Corp., 823 F.3d 759, 772 (2d Cir. 2016).

[16] KENNETH EWING, STEPTOE & JOHNSON LLP, PRIVATE ANTI-TRUST REMEDIES UNDER US LAW, 1 PLC CROSS-BORDER COMPETITION HANDBOOK 88 (2006/07), https://www.steptoe.com/a/web/1731/2804.pdf [https://perma.cc/2WMC-EMBS].

[17] HOVENKAMP & AREEDA, *supra* note 2, ¶ 337a n.4, ¶ 337c.

[18] Robert D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1541 (1989).

Court defines as an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[19] Litigants must routinely navigate this often-confusing doctrinal landscape in antitrust class actions, in addition to satisfying the Article III "case or controversy" requirement[20] and demonstrating the prerequisites for class certification.

Class actions are uniquely suited to the private enforcement of antitrust laws.[21] Indeed, the class action is the dominant form of private antitrust enforcement in the United States, and in recent decades, practitioners have brought such suits on behalf of clients with increasing frequency.[22] The class action's inherent virtues in many ways advance the goals of antitrust laws. In addition to combining many claims into a single proceeding, the class action also allows those with legitimate claims that are otherwise too costly to pursue to receive a fair hearing. These so-called "negative value" suits not only provide redress for those who have suffered an injury as a result of anticompetitive conduct, but also serve as a deterrent to those market participants which would otherwise be willing to violate such laws on a small scale so as to avoid legal liability.[23] Yet, concomitant with these benefits are the deleterious aspects of antitrust class actions. The large payouts that successful class action plaintiffs stand to gain attract, to a greater degree than would be the case in individual suits, plaintiffs (or their lawyers) who seek to engage in gamesmanship that allows them to extract the biggest payouts

[19] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[20] HOVENKAMP & AREEDA, *supra* note 2, ¶ 335.

[21] *See In re* Vitamins Antitrust Litig., 209 F.R.D. 251, 258 (D.D.C. 2002).

[22] Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2150 (2014); Amit Bindra, *Antitrust Class Action Litigation Post* Wal-Mart v. Dukes*: More of the Same*, 13 J. BUS. & SEC. L. 201, 202 (2013); NAT'L LEGAL RSCH. GRP., FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS, § 174 (July 2022).

[23] Bindra, *supra* note 22, at 204.

possible.[24] This dynamic raises the prospect of an increase in frivolous suits that nonetheless enable the extraction of settlements due to defendants' strong aversions to risking large damages awards should such cases have adverse results.[25] The result might be an overdeterrence that makes market participants overly cautious, thereby lessening, rather than increasing, market competition.[26]

Given the foregoing, it is no surprise that certification of a class is "often the defining moment" in a class action since it carries with it the potential to put so much pressure on the defendants to settle that it sounds the "death knell" of the litigation.[27] Accordingly, the legal battle between plaintiffs and defendants over a court's decision to certify a class is often highly contentious.[28] Most antitrust class actions are those of the FRCP 23(b)(3) variety such that plaintiffs must demonstrate—in addition to standing—the numerosity, commonality, typicality, and adequacy requirements of FRCP 23(a)(1-4),

[24] *See* Richard A. Epstein, *Class Actions: The Need for a Hard Second Look*, 4 CIV. JUST. REP. 1 (Mar. 2002). This is not to say that all antitrust plaintiffs' lawyers have such motives.

[25] HOVENKAMP & AREEDA, *supra* note 2, ¶ 331.

[26] *See* Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394 (7th Cir. 1993).

[27] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001) ("[D]enying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)[.]"). *See also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of [post-certification] discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."). *See also In re* Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869, 725 F.3d 244, 250 (D.C. Cir. 2013) ("The decision to certify [an antitrust class has the potential to place] . . . 'substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims.'") (quoting *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 102 (D.C. Cir. 2002)).

[28] Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351, 2356 (2006); *cf.* A.B.A., CONSUMER PROTECTION LAW DEVELOPMENTS II(D)(2)(a)(2) (2nd ed. 2016) (noting that, in class actions seeking monetary damages under the Telephone Consumer Protection Act of 1991, class certification is a contentious matter.)

as well as the additional superiority and predominance elements of Rule 23(b)(3).[29] Thus, the uncertainty surrounding the precise meaning of "antitrust injury" is, given the interpretive discretion accompanying such uncertainty, a ripe issue upon which both plaintiffs and defendants can construct their class certification arguments.[30] In particular, the prospect of a court defining antitrust injury in a way that renders many members of a proposed class uninjured, as well as the possibility that the often-individual nature of such injuries will defeat a finding of predominance and superiority, implicates many of the essential elements of successful class certification.[31] Furthermore, the complex and in-depth analysis that is often necessary to resolve issues surrounding antitrust injury risks coming into conflict with the general proscription against evaluating the merits of a claim in the certification stage of a class action.[32] The next Part will examine in greater depth the ways in which the issue of antitrust injury can be dispositive in determining the outcome of an antitrust class action.

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[29] FED. R. CIV P. 23(a–b); *See* Amy Dudash, *Hydrogen Peroxide: The Third Circuit Comes Clean about the Rule 23 Class Action Certification Standard*, 55 VILL. L. REV. 985, 989 (2010).

[30] *See* Richard L. Stone & Poopak Nourafchan, *Use of Class Actions is on the Rise; Key to Class Certification in Antitrust Cases is Establishing Impact or Fact Damage through Common Proof*, NAT'L L.J., (Mar. 24, 2003) https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/690stonenlj030324_pdf.pdf [https://perma.cc/K5UG-ZSSZ].

[31] *See* Dudash, *supra* note 29, at 989; *see also In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 305 (E.D. Mich. 2001) ("[I]t is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation.") (quoting Gulfstream III Assocs. v. Gulfstream Aero. Corp., 995 F.2d 425, 437 (3d Cir.1993)); *cf.* Prezant v. De Angelis, 636 A.2d 915, 923 (Del. 1994) ("The adequacy of the class representative has a constitutional dimension.").

[32] *See* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 110 ("[D]isentangling class certification from merits discovery has proved challenging.").

III. "INJURY" AND THE ANTITRUST CLASS ACTION

The definition of "antitrust injury" that a court adopts can shape the procedural, strategic, and substantive elements of a class action. This inquiry implicates not only the core of antitrust standing, but also the adequacy of representative parties, and the predominance of common issues in the plaintiffs' claims. The resolution of these doctrinal ambiguities can be dispositive in the prospect of a suit succeeding, not only with respect to the merits of the claim, but also in extracting a settlement from the defendant.[33]

A. Antitrust Injury

In order for a federal court to have jurisdiction to even hear a case, the plaintiff must demonstrate, at the pleading stage, that there exists a "controversy."[34] This so-called "constitutional" or "Article III" standing requirement is a hurdle that looks to whether the plaintiff has alleged an "injury-in-fact," and applies to all claims over which a federal court can exercise subject matter jurisdiction. Serving a similar gatekeeping function is the requirement that plaintiffs have statutory standing, i.e., they must be "within the class of plaintiffs whom Congress has authorized to" bring suit under the statute in question.[35] Courts use the phrase "antitrust standing" to refer to statutory standing in antitrust suits, which requires, among other elements, that the plaintiff allege "antitrust injury."[36]

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[33] *See* Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good[.]").

[34] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016).

[35] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014); *accord* United States v. $8,221.877.16 in U.S. Currency, 330 F.3d 141, 150 n.9 (3d Cir. 2003) ("Statutory standing is a threshold issue that determines whether a party is properly before the court.").

[36] *See* Bomse & Westrich, *supra* note 15, at 644.

Complicating the picture is the view in many circuits that the distinction between constitutional and antitrust standing allows for the "injury-in-fact" of the former to be incapable of "sustaining a valid cause of action" while still satisfying the standards for constitutional standing.[37] Such an approach yields the prospect of an even more confusing doctrinal landscape in which a court must engage in numerous evaluations of the same factor—injury—in the distinct contexts of the respective forms of necessary standing, under different evaluative criteria.[38] Even among those courts which hold that an injury-in-fact need not be capable of sustaining a cause of action, there is little doubt that engaging in even a single transaction with which anticompetitive conduct has interfered is sufficient to satisfy the relatively-low threshold for Article III standing.[39] Such a consensus is absent among *all* courts, however, with respect to "antitrust injury."[40]

The Supreme Court has defined "antitrust injury" as an "injury of the type the antitrust laws were intended to

[37] *See* Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d. Cir. 2006) ("[A]n injury-in-fact differs from a 'legal interest'; an injury-in-fact need not be capable of sustaining a valid cause of action under applicable tort law."); Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010) (holding that the credible threat of suffering a legally-actionable harm in the *future* constitutes an injury-in-fact); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007) ("As many of our sister circuits have noted, the injury-in-fact requirement can be satisfied by a threat of future harm."); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) ("[T]hreatened rather than actual injury can satisfy Article III standing requirements."); Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1993) ("That this injury is couched in terms of future impairment rather than past impairment is of no moment" as to whether there has been injury-in-fact.).

[38] *See In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 593 (S.D.N.Y. 2018) (speculating that circuit precedent likely infers that the "injury" of constitutional standing does not necessarily satisfy the "injury" of antitrust standing).

[39] *See*, *e.g.*, Gelboim v. Bank of Am. Corp., 823 F.3d 759, 770 (2d Cir. 2016); *see also* LIBOR-Based Litig., 299 F. Supp. 3d at 593; Linda S. Mullenix, *Complex Litigation: Antitrust Class Standing*, 30 NAT'L. LAW J., 13 (June 23, 2008).

[40] Mullenix, *supra* note 39.

prevent and that flows from that which makes defendants' acts unlawful."[41] Nonetheless, doctrinal confusion persists regarding the proper interpretation of the foregoing standard. Indeed, "the critical question is whether 'injury' in the antitrust context may be established through a single overcharge or whether 'injury' includes some conception of netting."[42] Whereas some courts steadfastly contend that "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset[,]"[43] others are "skeptical . . . that a single impacted payment is sufficient to establish antitrust injury[.]"[44] The answer to this question not only implicates the meritoriousness of plaintiffs' complaints on a substantive level, but also has consequences for the satisfaction of certain procedural requirements in antitrust class actions.[45]

B. Adequacy

The netting inquiry that is the subject of debate in the "antitrust injury" context is potentially relevant to the class–action context as well, particularly with regard to adequacy.

[41] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[42] *LIBOR-Based Litig.*, 299 F. Supp. 3d at 593.

[43] Astrazeneca AB v. UFCW (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 27 (1st Cir. 2015)*; accord In re* Zetia (Ezetimibe) Antitrust Litig., No. 2:18-MD-2836, 2020 WL 5778756, at *17 (E.D. Va. 2020), R. & R. adopted, No. 2:18MD2836, 2021 WL 3704727 (E.D. Va. Aug. 14, 2021) ("The overwhelming weight of authority rejects Defendants' position."); *In re* Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 WL 6573118, at *14 (D.N.J. Oct. 30, 2018) (holding damages which a plaintiff later recovers "irrelevant to the question of impact"); *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2017 U.S. Dist. LEXIS 170676, at *56 (D. Mass. Oct. 16, 2017) (ruling that even if class members were later reimbursed for a portion of their alleged overcharge they "still experienced antitrust injury in the form of an overcharge, although the amount of damages may require adjustment"); *In re* Lidoderm Antitrust Litig., No. 14-md-2521, 2017 WL 679367, at *21–23 (N.D. Cal. Feb. 21 2017) (observing that class members were "injured as of the date they paid the overcharges'").

[44] *LIBOR-Based Litig.*, 299 F. Supp 3d at 594.

[45] See *infra* Sections III.B–C.

Among the threshold procedural elements that plaintiffs must satisfy in order to obtain class certification is a demonstration that the plaintiffs which represent the class and litigate its claims are adequate representatives of the absent class members.[46] The adequacy inquiry centers on the ascertainment of whether the representative parties are able to fairly and sufficiently protect the interest of the class and its members, and it involves an investigation as to the "competency of class counsel and [the presence of] conflicts of interest."[47] Should the representative plaintiffs have interests that are antagonistic to those of other class members, those plaintiffs would be inadequate representatives, thereby defeating class certification.[48] Yet, in order to have those dispositive effects, those conflicting interests must be "fundamental."[49] A conflict is "fundamental" when it speaks to the heart of issues in question "or where . . . some plaintiffs claim to have been harmed by the same conduct that benefited other members of the class."[50]

Given the salience of antagonistic interests in the adequacy context, it is no surprise that "most" circuit courts of appeals have held that plaintiffs are not adequate representatives of the class if they "benefit[ted] from the same acts alleged to be harmful to other members of the class."[51] This is

46 FED. R. CIV. P. 23(a)(4).

47 *Id.*; *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

48 Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000).

49 Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp. L.P., 247 F.R.D. 156, 177 (C.D. Cal. 2007).

50 *Id.*

51 *Id.* (quoting Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000)). The District Court takes its conviction even further, contending that, to its knowledge, "no circuit approves of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class, let alone where some *named* plaintiffs derive such a benefit." *Allied Orthopedic Appliances*, 247 F.R.D. at 177. *See also* Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1190 (11th Cir. 2003). It is important to note that driving the Valley Drug court's conclusion regarding adequacy and net beneficiaries was the fact that the demand of the product in question was

because those class members who allegedly suffered net injury would have the incentive to maximize, as much as possible, the extent and scope of the defendant's conduct. Yet, if that same conduct was, on net, beneficial to other members of the class, then such plaintiffs would have the incentive to minimize, to the greatest degree possible, the magnitude of that very conduct so as to reduce, or even eliminate, the apparent lack of actionable injury.[52]

There are, however, dissenters from this seeming consensus regarding the adequacy, or lack thereof, of class representatives who were net beneficiaries of the same conduct that resulted in net injury for other class members, or vice versa.[53] Indeed, some courts have interpreted Supreme Court precedent as establishing a special standard for the adequacy determination in *antitrust* class actions. They find this precedent to stand for the proposition that, since the overcharge itself is the cognizable harm, plaintiffs can recover if they were the subject of an overcharge, regardless of whether they experienced a net harm or net benefit.[54]

inelastic such that even a drop in its price would not lead to elevated levels of sales.

[52] *See In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 539 (S.D.N.Y. 2018) ("[N]amed plaintiffs with opposite net trading positions will have directly conflicting incentives to establish not only the existence but also the magnitude of any manipulation that occurred on those dates . . . the proposed class [thus] fails to meet Rule 23(a)(4)'s adequacy of representation requirement."). *See also id.* at 590.

[53] *See* Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd., 247 F.R.D. 253, 266 (D. Mass. 2008) (noting that "Courts have been divided on [the] persuasiveness" of Valley Drug's holding regarding adequacy and the presence of class members who benefitted, as well as class members who suffered injury, on net, as a result of the same conduct).

[54] *In re* Wellbutrin SR Direct Purchaser Litig., No. 04-5525, U.S. Dist. LEXIS 36719, at *25 (E.D. Pa. May 2, 2008) (citing Ill. Brick Co. v. Illinois, 431 U.S. 720, 724–25 (1977) and Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) as supporting the notion that, with respect to adequacy analyses and intraclass conflicts, "any economic benefits the wholesalers experienced in the past are legally irrelevant."). In *Valley Drug*, the 11th circuit did not ignore the potential problems that *Illinois Brick* and *Hanover Shoe* posed to its holding, instead contending that those cases applied only to standing and damages determinations, and were inapplicable

C. Predominance

The predominance inquiry bears an especially close relationship to the underlying legal cause of action. In class actions in which plaintiffs seek monetary damages, in addition to satisfying the threshold requirements of Rule 23(a), plaintiffs must demonstrate that their claims share common issues of law or fact that predominate over those of an individual nature, and that the class action is superior to other forms of pursuing the plaintiffs' actionable claims.[55] Therefore, in an antitrust class action, a court must consider whether common issues predominate with respect to each element of an antitrust claim, in short: antitrust violation, antitrust injury, and damages.[56] This search for common issues is "far more demanding than the commonality requirement of Rule 23(a)."[57]

Although, at the class certification stage, plaintiffs need not demonstrate the extent of their injuries in order to satisfy predominance, they must nonetheless "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."[58] Unsurprisingly, then, a particularly contentious aspect of the predominance analysis pertains to whether plaintiffs have sufficient issues in common in demonstrating antitrust injury. This becomes salient when the prospect of uninjured class members makes it less likely that plaintiffs can use common evidence to show common injuries, and more difficult for defendants to challenge such alleged injuries.[59]

to the adequacy analysis that Fed. R. Civ. P. 23(a)(4) requires. *See* 350 F.3d at 1192.

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

56 *In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001).

57 Amchem Prod., Inc., v. Windsor, 521 U.S. 591, 623–24 (1997).

58 *In re* Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305, 311–12 (3d 2008).

59 *See* United Food & Commer. Workers Unions & Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (*In re* Asacol Antitrust Litig.), 907 F.3d 42, 58 (1st Cir. 2018); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d. Cir. 2008). Some courts are more focused on the impact of

The issue is particularly pressing in the context of antitrust class actions, in which a central component of the underlying claim is itself a certain type of injury.[60] Indeed, failing to screen a proposed class for uninjured members would allow for the perversion of an elemental principle of class actions: that such proceedings are aggregations of individual claims and not alternative vehicles for individual plaintiffs to bring suit.[61] Furthermore, it is incumbent upon a district court "to make findings about predominance . . . *before* [certifying] the class."[62] A failure to do so is a "delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert,"[63] which is a frightening prospect given the ease with which experts can give manipulative and misleading testimony. Although the Supreme Court has outlined criteria with which to judge the credibility of expert witnesses,[64] there nonetheless remains a real risk that expert testimony can taint the certification process. This is especially the case given the judiciary's relatively ill-suited position to preside over so-called "*Daubert* Inquir[ies]"[65] in which they judge the merits of each side in a "battle of the experts" between plaintiffs' and defense's expert witnesses.[66] Thus, as

putatively uninjured class members on the class' Article III standing vis-a-vis the requirement that a class "be defined in such a way that anyone within it would have standing." *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 593 (S.D.N.Y. 2018) (quoting Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)). *See also* Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 779 (8th Cir. 2013) (citing *Denney* and seemingly adopting its Article III–centric analysis of putatively uninjured class members and the connection thereof to class certification).

60 *In re Asacol*, 907 F.3d at 58; *In re Hydrogen Peroxide*, 522 F.3d at 311.

61 *In re Asacol*, 907 F.3d at 56.

62 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011) (emphasis added).

63 West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

64 *See* Amorgianos v. Amtrak, 303 F.3d 256, 266 (2002).

65 *Id*.

66 *See*, *e.g.*, Mathew G. Gibson, *Exceptional Efficiencies: A Valuable Defense for Healthcare Mergers*, 122 COLUM. L. REV. 1957, 1984–87, 1995 (2022) (examining the uncertainty surrounding the adjudication of battles of the experts in the context of healthcare antitrust suits).

with adequacy, the potential presence of uninjured class members can be dispositive in a predominance inquiry.

Relevant jurisprudence makes clear that, in many of the circuits, it is permissible for a class to have a *de minimis* proportion of uninjured members.[67] What constitutes a *de minimis* proportion, however, is a source of much debate among those circuits. There has certainly been some guidance on the matter, and it seems that a class consisting of somewhere between five and six percent uninjured plaintiffs is the upper bound of the *de minimis* classification.[68] It is important, however, to take note of the few courts that depart from the foregoing majority approach. For example, the Ninth Circuit Court of Appeals, in a recent opinion, reversed an earlier holding and ruled that a class containing more than a *de minimis* proportion of uninjured plaintiffs does not, in and of itself, defeat predominance.[69] Similarly, other courts have ruled that the lack of common evidence with which to demonstrate individual damages claims, though a factor that militates against a finding of predominance, is not, by itself, sufficient to do so.[70]

[67] *In re* Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869, 934 F.3d 619, 624–25 (D.C. Cir. 2019); Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016).

[68] *In re* Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 137 (D.C. Cir. 2017) (citing *In re* Lidoderm Antitrust Litig., 2017 U.S. Dist. LEXIS 24097, at *66 (N.D. Cal. 2017); *In re* Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 179 (D. Mass. 2013); Vista Healthplan, Inc. v. Cephalon. Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, at *65 (E.D. Pa. 2015)). The court thus ruled that a class, 12.7% of which consisted of uninjured plaintiffs, did not satisfy predominance. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d at 138. *See also* United Food & Commer. Workers Unions & Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (*In re* Asacol Antitrust Litig.), 907 F.3d 42, 45, 58 (1st Cir. 2018) (reversing the certification of a class on the basis that ten percent thereof had not suffered an injury).

[69] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022).

[70] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 595 (S.D.N.Y. 2018).

IV. TO NET, OR NOT TO NET?

It is clear that the definition of "antitrust injury" that a court adopts can dispositively alter the trajectory of an antitrust class action. For the following reasons, a conception of antitrust injury that looks to net harm is, overall, the proper one. Yet despite the stakes that the foregoing matter implicates, courts will nonetheless have to contend with net injury no matter which definition of antitrust injury they adopt.

A. In Defense of the Irrelevancy of Offsetting Benefits to Antitrust Injury

One can certainly make a convincing case that incorporating the net harm standard into the definition of antitrust injury is inappropriate, especially prior to class certification, at which point the merits of a claim are not the subject of judicial scrutiny. To do so would place an unduly onerous burden on antitrust plaintiffs, thereby making it more difficult for such litigants to vindicate their claims against companies that have indeed run afoul of antitrust laws in the United States. Such a prospect may seem especially troubling given that some observers contend that there is an increasing concentration of market power in a select few large technology companies.[71] Doctrinally, there are reasons to be wary of defining antitrust injury through the net harm lens, as well as reasons to believe that courts would be skeptical of arguments that sought to defeat class certification on the basis of a class containing net beneficiaries of the conduct at issue. These bases are rooted in

[71] COUNCIL OF ECON. ADVISERS, ISSUE BRIEF: BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf [https://perma.cc/xv5s-h7p6]; Lina M. Kahn, *The End of Antitrust History Revisited,* 133 HARV. L. REV. 1655, 1663 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)).

the functions that antitrust law serves, as well as procedural doctrines that are trans-substantive across all class actions.[72]

1. The Goals of Antitrust Law

To include a consideration of offsetting benefits in defining antitrust injury, one might argue, would unduly interfere with the ability of private defendants to, as the drafters of antitrust laws intended, play a sufficiently integral role in the enforcement of such statutes.[73] The popular conception of private antitrust plaintiffs is that they balance the statutory objectives of deterring potentially anticompetitive conduct and allowing injured parties to receive recompense for injuries that they suffered as a result of such conduct.[74] One could make the case that it would be unduly difficult for private plaintiffs to fill that role were courts to limit the definition of antitrust injury to net injury. Indeed, a myopic interpretation of antitrust injury that makes it more difficult to bring antitrust suits supersedes any disagreements about the role of private antitrust suits in the statutory scheme, since it would implicate private antitrust suits regardless of their role in the enforcement regime.[75] It is therefore easy to see why, regardless of whether one promotes deterrence or compensation as the primary goal of private antitrust actions, many would take

[72] *See supra* Section III.B. *See also In re* Delta/AirTran Baggage Fee Antitrust Litig., 317 F.R.D. 675, 696 (N.D. Ga. 2016). *See also LIBOR-Based Litig.*, 299 F. Supp. 3d at 590.

[73] *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (citing Pfizer Inc. v. India, 434 U.S. 308, 312 (1978)) (concluding that, in drafting the antitrust laws, "Congress sought to create a private enforcement mechanism[.]").

[74] William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1451 (1985). The Supreme Court has consistently affirmed this sentiment. *See, e.g.*, Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 n.10 (1982) ("Congress created the treble-damages remedy . . . [to] encourag[e] private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (citing Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979)).

[75] *See, e.g.*, Page, *supra* note 74, at 1451–52.

issue with the consideration of net harm in the antitrust standing analysis. The more difficult it is to establish standing—a result which would naturally flow from applying a net harm standard for antitrust injury—the less likely it is for plaintiffs' suits to succeed, or even survive.[76] There would thus be a concern that this heightened standard would lead to excessive declines in the frequency and potency of private antitrust suits that have been integral in policing anticompetitive behavior.[77]

It is unsurprising, then, that prevailing judicial doctrines impose a far more accommodating standard for demonstrating antitrust injury during class pre-certification than for substantiating the alleged quantum of damages following a plaintiff–friendly disposition of the question of liability.[78] Courts have recognized that "plaintiffs often cannot prove the amount of damages suffered as confidently as they can prove the fact of injury[]"[79] and that "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."[80] Indeed, "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to

[76] *See In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 524 (S.D.N.Y. 1996).

[77] *See* Am. Soc'y of Mech. Eng'rs, Inc. 456 U.S. at 572 n.10 ("Congress created the treble-damages remedy . . . [to] encourag[e] *private* challenges to antitrust violations[, thereby]. . . significant[ly] supplement[ing] . . . the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979)); *cf.* Gelboim v. Bank of Am. Corp., 823 F.3d 759, 774 (2d Cir. 2016) ("Whatever economic justification particular price-fixing agreements may be thought to have . . . They are . . . banned because of their actual or *potential* threat to the central nervous system of the economy.") (emphasis in original) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940)).

[78] HOVENKAMP & AREEDA, *supra* note 2, ¶ 340a.

[79] Roger D. Blair & William H. Page, *Resale Price Maintenance and the Private Antitrust Plaintiff*, 83 Wash. U.L.Q. 657, 672 (2005).

[80] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981).

complain that they cannot be measured with the same exactness and precision as would otherwise be possible."[81]

2. Class Action Procedures

There are also legitimate reasons as to why an antitrust class would likely prevail, particularly with respect to adequacy and predominance, in a court's consideration of the class' motion for certification, regardless of whether that class contains net beneficiaries of the conduct at issue. Indeed, although there would exist *some* conflicts of interest among class members who were net beneficiaries of, and those who suffered net injury from, the same conduct, it is not universally the case that such conflicts are sufficient to defeat adequacy or predominance. Although there is a great number of courts which would hold such conflicts to be sufficiently fundamental, there are courts that disagree with that position.[82]

In a broader sense, many courts take issue with what they see as an inappropriate consideration of the merits of a claim at the pleading stage.[83] Despite recent changes in class action jurisprudence guiding this procedural element,[84] these critics note that the prevailing standard directs courts to look at the *plausibility*, and not the merits, of a class action claim when making evaluations thereof at the pleading stage.[85]

B. Why Offsetting Benefits are Relevant to Antitrust Injury

Despite any arguments to the contrary, however compelling, courts should be more willing to analyze antitrust injury with reference to net harm. The concept of using net harm as

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[81] Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 379 (1927).

[82] *See supra*, Section III.B. *See also In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 590 (S.D.N.Y. 2018).

[83] *See, e.g.*, Estrada v. Bashas' Inc., No. CV-02-00591-PHX-RCB, 2014 U.S. Dist. LEXIS 44544, at *15–*16 (D. Ariz. Apr. 1, 2014).

[84] *See infra* note 111.

[85] *See In re* High-Tech Emp. Antitrust Litig., 289 F.R.D. 555, 567 (N.D. Ca l. 2013) (citing examples of courts with this perspective).

a standard for antitrust injury is not novel, as even in antitrust class actions courts espouse such an approach despite the fact that net harm is at the center of damages calculations in such cases. Indeed, damages and injuries are, across many areas of law, concepts with an inextricable link that arguably bespeaks the use of the same standards when evaluating each component in the antitrust context. In addition, implementing the net harm standard as an evaluative basis for antitrust injury advances the optimal deterrence that seems to have been, and continues to be, the intended primary aim of antitrust laws. Even for those who contend that antitrust damages serve a primarily compensatory function, the aforementioned link between injuries and damages, which is even stronger in the compensatory context, makes a compelling case for using the net harm standard for antitrust injury.

From a practical point of view, there are indications that the sheer frequency of antitrust class actions, given the immense scope and duration of such suits, has in recent years inundated federal district courts thereby engendering judicial inefficiencies. Adjacent to this consideration is the fact that class certification often serves as the "death knell" of a class action, placing particular pressure on defendants to settle thereafter. Moreover, despite the sincerity of those who harbor them, concerns regarding the adoption of a more demanding approach to defining antitrust injury seem to be overstated. The practical realities of litigating class actions of all types suggest that, from a procedural perspective, relatively recent jurisprudential developments sanction, and in some instances encourage, the consideration of some merits issues prior to class certification.

Interestingly enough, despite the foregoing debates, courts will need to implement principles pertaining to netting harms against benefits when evaluating proposed antitrust classes, regardless of whether they do so with respect to defining antitrust injury. Yet, there is a number of potential solutions to the foregoing issues other than adopting the net harm standard that some courts use for antitrust injury. Their relative merits, however, are beyond the scope of this Note.

1. Doctrinal Consistency and Statutory Goals

It is important to note that using net harm to inform antitrust injury is not a novel concept. In fact, in many contexts, courts have embraced exactly such an approach. Nor is it an unprecedented means of defining injury in other similar actions. Indeed, given the close relationship between injury and damages across many areas of law, there is a reasonable basis for contending that, just as antitrust damages may only reflect net harm, so too should antitrust injury. Moreover, the use of the net harm standard in defining antitrust injury in many ways serves to advance the intent undergirding the antitrust laws, regardless of whether one believes that deterrence or compensation is the primary goal thereof.

Supreme Court jurisprudence makes clear that, for injuries of an economic character, damages "shall be equal to the injury" and that "[t]he latter is the standard by which the former is to be measured."[86] Indeed, since antitrust damages are of an undoubtedly-economic character, it reasonably follows that they may only reflect the net harm that a plaintiff suffers as a result of anticompetitive behavior.[87] So too is the concept of antitrust injury a "legal construction that has an economic foundation."[88] Therefore, it appears that courts should use antitrust injuries to measure damages since "[a]ntitrust injury analysis is a necessary first approximation" thereof.[89] As such, because "an antitrust damage assessment cannot be divorced from . . . the rationale for liability and [its] internal logic," a plaintiff whose offsetting "benefit equaled or

[86] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Wicker v. Hoppock, 73 U.S. 94, 99 (1867)).

[87] Roger D. Blair & William H. Page, Speculative Antitrust Damages, 70 WASH. L. REV. 423, 424 (1995). *See also* L.A. Mem'l Coliseum Comm'n. v. Nat'l Football League, 791 F.2d 1356, 1366–68 (9th Cir. 1986.) ("An antitrust plaintiff may recover only to the 'net' extent of its injury."). *See also* Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 563 (S.D.N.Y. 2017).

[88] HOVENKAMP & AREEDA, *supra* note 2, at ¶ 391.

[89] Page, *supra* note 74, at 1461–62.

exceeded" the injury did not suffer net harm "and hence is not eligible for [Clayton Act] section 4 benefits."[90]

At a minimum, there are certainly instances in which netting guides the antitrust injury inquiry. Indeed, decisions by a variety of courts make clear that the "[]relevance of offset[ing benefits to antitrust injury] stems directly from the nature of an overcharge[.]"[91] Although there are contexts in which courts have deemed offsetting benefits irrelevant to antitrust injury,[92] there are also instances in which the opposite is true. A particularly salient example of the latter is the "tying" antitrust suit; these actions involve accusations that a dominant market player tied a consumer's purchase of a primary product with the concomitant purchase of a secondary product that the same company sells but which the consumer would not otherwise have purchased. With respect to these suits, many courts have held that, in order to demonstrate injury, a plaintiff must show that it suffered a net economic loss from the sum of the prices of the tied products relative to market prices.[93] Albeit in the summary judgement phase of the litigation, the Supreme Court held that a conspiracy to

90 Phillip Areeda, *Antitrust Violations without Damage Recoveries*, 89 HARV. L. REV. 1127, 1138–39 (1976).

91 *In re* Delta/AirTran Baggage Fee Antitrust Litig., 317 F.R.D. 675, 685 (N.D. Ga. 2016) (citing Astrazeneca AB v. UFCW *(In re* Nexium Antitrust Litig.), 777 F.3d 9, 27 (1st Cir. 2015)). For an opposing perspective on the relevance of offsetting benefits to the context that the foregoing cases implicate—an overcharge—*see In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 594 (S.D.N.Y. 2018) ("[W]e are skeptical of *In re Nexium*'s holding that a single impacted payment is sufficient to establish antitrust injury, both as a general matter and as specifically applied to this action.").

92 *In re Delta/AirTran*, 317 F.R.D. at 685.

93 HOVENKAMP & AREEDA, *supra* note 2, at ¶ 340c1 (citing Collins v. Int'l Dairy Queen, 59 F. Supp. 2d 1312 (M.D. Ga. 1999); then citing Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied*, 459 U.S. 857 (1982) ("[I]njury resulting from a tie-in must be shown by establishing that. . . .plaintiff indeed suffered net economic harm[.]"); and then citing Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 712 (11th Cir. 1984)). *See also* Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 218, 226–27 (1983). *See also* Page, *supra* note 74, at 1482 ("[A] tie cannot cause antitrust injury to competitors[.]").

manipulate prices "would . . . violate the Sherman Act, but it could not injure respondents[, who] stand to gain from any conspiracy to raise the market price."[94]

To use antitrust injury as a metric for damages also advances the goals which the drafters of the antitrust laws hoped to further, irrespective of whether one believes that the intention behind such laws is deterrence or the compensation of injured parties. Those in the former camp tend to couch their claims in economic terms, contending that "the primary purpose of . . . antitrust injury [is] to keep damages . . . related to the . . . costs of violations in order to avoid overdeterrence" and promote market efficiency.[95] This theory of "optimal deterrence" holds that the salient function of antitrust law is to "maximize economic efficiency . . . by . . . preserv[ing] . . . competitive markets."[96] Those of the latter persuasion see the private antitrust remedy as a tool by which injured parties can receive compensation for the injuries they sustained as a result of anticompetitive conduct. Accordingly, those in this group contend, although private antitrust damages have "an important role in . . . deterring wrongdoing," their principal function is to serve as a compensatory remedy, as is clear by the fact that they are "available only to injured parties."[97] For those who believe that antitrust remedies are primarily deterrent, linking antitrust injury to net harm furthers that role by ensuring that there are sufficient barriers to bringing a private antitrust suit so as to prevent inefficient overdeterrence. Moreover, given the close link between injury and remedies, the position that antitrust damages are primarily

[94] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582–83 (1986).

[95] Page, *supra* note 74, at 1463. *See also* Blair & Page, *supra* note 79, at 668 ("The doctrine [of antitrust standing] has an economic rationale[,] restrict[ing] the universe of compensable claims to those that form a part of the optimal penalty, and . . . concentrat[ing] the right to recover in those who can most efficiently identify the antitrust violation and seek redress.").

[96] Page, *supra* note 74, at 1451. *Cf.* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269–70 (1992) (framing the wisdom of requiring a proximate causal link between antitrust injury and damages in terms of deterrence).

[97] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–86 (1977).

compensatory reflections of net harm lends itself to the conclusion that antitrust injury should also reflect such a compensatory nature, even if proof thereof is subject to lesser evidentiary requirements.[98]

2. Practical Realities

Viewing the definition of antitrust injury through the lens of statutory goals implicates the practical realities of antitrust class actions, which themselves suggest the prudence of placing further barriers to bringing such suits than currently exist. Indeed, a look at certain data helps to clarify the strain that the sheer scope and duration of antitrust class actions place on the federal judiciary. A rather sizeable portion of all antitrust class actions that reached a settlement from 2009 to 2021 took over three years from the date of filing to do so; the percentage of all antitrust class actions that took over five years to settle was also large.[99] The mean time for an antitrust case to go from filing to settlement has similarly risen precipitously during the same period.[100] So too has the median time from filing an antitrust class action to settling it remained elevated in recent years, especially relative to other federal class actions.[101] Over the last several decades, this yawning gap has increased each year.[102] Concurrently, plaintiffs' attorneys have raised the costs of representation,[103] and the

98 *See* HOVENKAMP & AREEDA, *supra* note 2, at ¶ 340a.

99 JOSHUA DAVIS, UC HASTINGS COLL. OF THE L. & ROSE KOHLES CLARK, HUNTINGTON NAT'L. BANK, 2021 ANTITRUST ANNUAL REPORT: CLASS ACTIONS IN FEDERAL COURT 8 fig. 4 (2021). 87% took at least 3 years from the date of filing to settlement, and 54% of all antitrust cases took at least 5 years.

100 *Id.* There was a 40% increase in that figure during the period in question.

101 Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L. J. 1315, 1349 (2022). The median time from filing to settlement in antitrust class actions was 4.41 years between 2005 and 2020, 44.16 months longer than medians across all other federal civil actions. Bartholomew interprets this data, among others, as suggesting a need to make it *easier*, rather than more difficult, to bring class actions.

102 *Id.* at 1350.

103 *Id.* at 1351 fig. K. From 2005 to 2020, the average attorneys' fees per settlement grew at an annual rate of 13%.

median antitrust settlement payout reached a recent high in 2021.[104]

These contemporary trends among antitrust class actions are potentially concerning, all the more so in light of the inherent risk for perverse incentives to prompt plaintiffs to bring class actions, and the increased leverage that class certification gives to a class in extracting a settlement. Indeed, some commentators have argued that the mandate for treble damages in private antitrust actions might incentivize parties to *seek out* firms which they believe are acting in an anticompetitive manner, since the expected damages outweigh the costs that those parties would suffer as a result of exposure to that anticompetitive behavior.[105] Adjacent to this concern is that which stems from the increased leverage that class certification provides a class. Such increased leverage will further incentivize plaintiffs to bring antitrust class actions so as to extract a settlement, regardless of the claims' merits.[106] Some have also contended that to make the standards for class certification unduly permissive would violate § 2027(b) of the Rules Enabling Act by imprudently certifying classes and giving the resulting leverage to classes that are not otherwise deserving thereof.[107]

Adopting a net harm standard for antitrust injury would not subvert the intended functions of the antitrust laws. Moreover, for a court to consider certain factors that a net harm analysis might necessitate is entirely consonant with recent class action procedural jurisprudence. At a basic level, to deny certification to a class with both net beneficiaries and those who suffered net harm would not foreclose the option for those

104 DAVIS & KOHLLES, *supra* note 99, at 13 fig. 9. The median figure of $16 million per settlement was the highest among the years dating back to 2009.

105 *See, e.g.*, William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L & ECON. 405, 430 (1985).

106 See cases cited *supra* note 27.

107 Kelly J. Bozanic, *Striking an Efficient Balance: Making Sense of Antitrust Standing in Class Action Certification Motions,* 16–17 (Soc. Sci. Rsch. Network Elec. Paper Collection, Penn State Legal Stud. Rsch. Paper No. 17-2010), https://ssrn.com/abstract=1556016 [https://perma.cc/R69T-YYB3].

who suffered net harm to bring a separate suit, either individually or as a class, and thereby serve as private attorneys general.[108] Indeed, "[f]ewer plaintiffs with more at stake would be more likely to sue than a larger number of plaintiffs with less at stake."[109] There is also reason to doubt those who contend that to ascertain, at the certification stage, whether a plaintiff suffered net harm would require an inappropriate consideration of the merits of the plaintiffs' claims. Recent jurisprudential developments pertaining to the procedural elements of class certification offer support for the notion that, when necessary, a court may consider matters that speak to the merits of a claim when deciding whether to certify a class. Although courts cannot "engage in free-ranging merits inquiries at the certification stage,"[110] they must nonetheless conduct a "rigorous analysis . . . [which] will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'"[111] There thus seems to be some validity to the District Court for the Southern District of New York's (SDNY) skepticism of other courts' holdings "that a single impacted payment is sufficient to establish antitrust injury."[112]

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[108] *See* Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1194 (11th Cir. 2003). There is also reason to doubt the presupposition that to adopt a net harm standard for antitrust injury would necessarily preclude class certification. *See In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 595 (S.D.N.Y. 2018) (concluding that, even if such a standard for net harm were adopted, it would not defeat predominance).

[109] Joshua P. Davis & David F. Sorensen, *Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug*, 39 U.S.F. L. Rev. 141, 146 (2004). *See also* Bozanic, *supra* note 107, at 12 n.66.

[110] Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466 (2013).

[111] Comcast Corp. v. Behrend, 569 U.S. 27, 33-34 (2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)). *See also In re* Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869, 934 F.3d 619, 626 (D.C. Cir. 2019) ("[D]istrict courts considering class certification [may not] defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability.").

[112] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 594 (S.D.N.Y. 2018).

C. The Persistent Relevance of Netting

That a court has, in evaluating antitrust injury, decided to forego the adoption of the net harm standard does not necessarily permit that court to disregard netting considerations before certifying a class. Antitrust standing, although it does not require a plaintiff to produce evidence of the precise quantum of damages, nonetheless demands that a plaintiff provide a degree of indication thereof. So too in an adequacy analysis, regardless of how a court defines antitrust injury, do many courts still evaluate whether a class with net beneficiaries and those who suffered net harm have conflicting interests, in which case the representative plaintiffs would be inadequate.

Defining "antitrust injury" is an element of the antitrust standing analysis, a component of which is a showing that the plaintiff has suffered a cognizable injury and "some indication of the amount of damage."[113] There is general agreement that, although a damages award should reflect net harm, at the pleading stage, a plaintiff, especially in the antitrust context, need not demonstrate the precise amount in allegedly-deserved damages to satisfy the requirement.[114] However, at the same time, a plaintiff cannot engage in "guesswork" to provide an indication of damages, and must instead use relevant data to provide a "just and reasonable estimate" thereof.[115] It would appear, then, that in order to provide a "just and reasonable" estimate of a damages figure that contemplates net injury, many, if not all, plaintiffs must engage in at least *some* calculations of net harm in order to give a sufficient indication of damages.

So too do some courts adopt more nuanced approaches to analyzing the adequacy of representative plaintiffs that, in

113 Terrel v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir. 1974).

114 *See* Minpeco, S.A. v. Conticommodity Serv. Inc., 676 F. Supp. 486, 490–91 (S.D.N.Y. 1987); *see also In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 2017 U.S. Dist. LEXIS 170676, at *56–57 (D. Mass. Oct. 16, 2017); *see also* Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003).

115 *Bell Atl. Corp.*, 339 F.3d at 303 (quoting Eleven Line, Inc. v. North Texas State Soccer Ass'n, 213 F.3d 198, 206–08 (5th Cir. 2000)).

some instances, do not focus on antitrust injury at all. Indeed, SDNY has held that, although a class' inclusion of those who took conflicting trading positions was sufficient to establish the presence of a conflict among class members, such a conflict was not so *fundamental* as to defeat adequacy of representation.[116] Similarly, the Court of Appeals for the 11th Circuit has held that "net economic gain [cannot] be ignored or overlooked by a court when determining whether Rule 23 has been satisfied[,]" and remanded a case for discovery on whether some class members were net beneficiaries.[117] Furthermore, it is apposite to note that this approach to analyzing adequacy is not unique to the antitrust context.[118]

Answering questions pertaining to netting is a rather involved endeavor. Therefore, in light of the seemingly inescapable need to evaluate net harm in antitrust class certification proceedings, it is appropriate to recognize some devices that offer promise in facilitating courts' informed navigation of these issues. Among them is the pre-certification, "downstream discovery" that some scholars embrace and which the Court of Appeals for the 11th Circuit implemented in order to

116 *LIBOR-Based Litig.*, 299 F. Supp. 3d at 590. The court later indicated that, had the antitrust plaintiffs seeking class certification in that case (known as "*LIBOR VII*") been on opposite sides of the same trades, it would have found there to be a fundamental conflict among class members. *Id.*; *see also In re* Foreign Exch. Benchmark Rates Antitrust Litig., 407 F. Supp. 3d 422, 439 (S.D.N.Y. 2019) ("[The oppositional trading positions taken by the Named Plaintiffs and class members would create fundamental conflicts that preclude class certification.").

117 Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1187, 93 (11th Cir. 2003); *see also In re* Delta/AirTran Baggage Fee Antitrust Litig., 317 F.R.D. 675, 684–685 (N.D. Ga. 2016). In both of the foregoing cases, the courts found net harm to be germane to the adequacy analysis, but irrelevant to establishing antitrust injury.

118 *See* Bieneman v. City of Chic., 864 F.2d 463, 465 (7th Cir. 1988) (denying certification, in a case sounding in takings and state tort law, of a class of all landowners near an airport because, while plaintiffs alleged that the airport's proximity decreased the value of their land, other landowners tremendously benefitted from such proximity); *see also LIBOR-Based Litig.*, 299 F. Supp. 3d at 551 (employing the same net harm standard for analyzing the adequacy of class representatives in a class action involving allegations of Commodity Exchange Act violations).

ascertain whether, and to what extent, there existed net beneficiaries, in the class; courts which find net harm to be the standard for antitrust injury could make use of the same tool.[119] After all, class certification is a "litigation within the litigation"[120] in which a separate discovery might be appropriate. Others, noting the relative similarities between antitrust and securities fraud theories of liability,[121] have suggested that, as in cases involving the latter, there should be a rebuttable presumption, or the opportunity to give rebuttable testimony, that the plaintiffs suffered net harm.[122] The relative merits of these instruments, however, are beyond the scope of this Note.

V. FINANCIAL MARKETS: A CASE STUDY

Financial markets offer a particularly compelling context in which to examine the foregoing matters. Financial markets often involve dynamics that are typical of other areas of

[119] Valley Drug Co., 350 F.3d at 1195; 317 F.R.D. at 684–85; Stone & Nourafchan, *supra* note 30, at 3; Bozanic, *supra* note 107, at 14.

[120] Bozanic *supra* note 107, at 14 (quoting H. Laddie Montague, Managing Principal, Berger & Montague, P.C., Address to Penn State U., Dickinson Sch. of L. (Apr. 6, 2009)).

[121] *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188–89 (3d Cir. 2001); Jane Getker Parks, *Contribution among Antitrust Defendants*, 33 VAND. L. REV. 979, 986 (1980). *Cf.* Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1057 (E.D.N.Y. 2006) (identifying RICO, antitrust, and securities fraud actions as creatures of "the common law of fraud and deceit"); *cf.* Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CALIF. L. REV. 1587, 1642 n. 319 (1993) ("[T]he common law for securities fraud has often followed the lead of antitrust adjudication."); *cf.* Stanton Wheeler, David Weisburd, Elin Waring, Nancy Bode, *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, 343 (1988) (grouping antitrust and securities fraud offenses together on the basis that each involves complex behavior that is patterned and repetitive and that each consists of several people acting in an organized conspiracy).

[122] *See* Astrazeneca AB v. United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 20 (1st Cir. 2015); *cf. In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 249 (E.D.N.Y. 1998) ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action[.]").

commerce, where participants bid on a product and then ask a higher price from consumers, thereby profiting on what is known as the "bid-ask spread."[123] However, participation in financial markets can also take the form of providing a platform upon which both buyers and sellers can transact, or the provision of information that other participants find useful for pricing certain products. This variety of models for participation in financial markets has implications for the application of antitrust laws to entities and products in that space. As such, courts must be particularly attuned to the nature of an antitrust defendant's alleged conduct in financial markets in order to distill the appropriate doctrinal approach, an endeavor that is complicated by the often-complex nature of those areas. Judicial application of antitrust law and precedent in this area is therefore a rather substantive instantiation of the need to engage in context-specific analyses involving the definition of antitrust injury and the relevance of netting thereto. Furthermore, the potential for intraclass conflicts, regardless of whether net harm is the standard for antitrust injury, that implicate the adequacy of representation is especially pronounced with respect to the platforms and pricing data that many participants in financial markets provide. So too are the stakes in these matters usually large, thereby heightening the risk that class certification will sound the death knell of the litigation, or that the denial thereof will deprive those with meritorious claims of legal recourse for their legitimate injuries.

A. The Bid-Ask Spread as a Price

Much like retailers serve as market makers by bringing products to market and giving consumers the opportunity to purchase them, so too are there intermediaries in financial

[123] Andrew Bloomenthal, *Market Maker Definition: What it Means and How They Make Money*, INVESTOPEDIA (Dec. 17, 2023), https://www.investopedia.com/terms/m/marketmaker.asp#:~:text=Market%20makers%20earn%20a%20profit%20through%20the%20spread%20between%20the,risk%20of%20holding%20the%20assets [https://perma.cc/5NJT-WDPJ].

markets who execute the same function. "Market makers" is the precise term for these entities in financial markets and, just like retailers in more traditional markets, they also earn a profit by bidding on products at a certain price and then asking consumers to pay a higher price for those products.[124] This so-called "bid-ask spread," then, is essentially a price that these market makers charge for their services, and which varies among the products that they offer.[125] As in the conventional retail context, the wider the spread, the worse it is for both producer—which must sell its product to the market maker for less—and the consumer—who must pay the market maker more for the product. Market makers thus compete with one another by offering narrower bid-ask spreads to attract both producers and consumers.[126] Therefore, in antitrust suits involving allegations of bid-ask spread manipulation, those who are wary of universally applying the net harm standard to antitrust injury have a strong case that, in such suits, net harm should be irrelevant to antitrust injury. This is because the nature of the overcharge that would result from manipulating the bid-ask spread would be akin to "a more conventional antitrust case [in which] an inflated price [that] impacts immediately only the sales occurring at that price (or at prices based on that price)."[127]

Despite the foregoing, it is interesting to note that the net harm standard would be relevant to instances in which parties allegedly manipulated bid-ask spreads so as to *narrow* them, in which case those on each side of the spread would be *beneficiaries* of defendants' conduct. However, since a "narrow spread" is, among other factors, "strongly indicat[ive] . . . [of]

124 *Id.*

125 Simmtech Co. v. Barclays Bank PLC (*In re* Foreign Exch. Benchmark Rates Antitrust Litig.), 74 F. Supp. 3d 581, 594–95 (S.D.N.Y. 2015) ("[T]he Fix, [i.e., the bid-ask spread in foreign exchange transactions,] . . . is a price.").

126 *Id.* at 587 ("While 'dealers are incentivized to quote wider bid-ask spreads,' competition among them 'narrows bid-ask spreads'.").

127 *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 593 (S.D.N.Y. 2018) (contrasting LIBOR, a benchmark rate that is a component in the price of many *other* instruments, with a pharmaceutical product that consumers purchase at a specific price).

an efficient market[,]" such a thought-provoking hypothetical is beyond the scope of this Note.[128]

1. The Unique Benchmark Rate

In contrast to a bid-ask spread, a benchmark serves as a datum that market participants use to fashion the terms of their interactions. A common input into pricing or setting the terms of transactions in financial markets is a measure, that is, a benchmark, that gives market participants a sense of the terms and prices that the largest financial institutions in global markets experience. Before its recent retirement, the London Interbank Offering Rate (LIBOR) was a daily benchmark that was a composite of the rates at which certain systemically integral banks estimated they could borrow funds. LIBOR was "the primary benchmark for short term interest rates globally," and commonly served as a measure to which market participants pegged spreads, as well as other fixed and variable pricing components of financial instruments. LIBOR "affected the pricing of trillions of dollars' worth of financial transactions."[129] Therefore, unlike prices in conventional antitrust cases,[130] the single decision of determining LIBOR "necessarily diffuses to numerous instruments[,]"[131] thereby making it far more difficult to isolate the effects "of a change in LIBOR . . . in the same way [that] the overcharge of a typical price-fixed product such as a book[]"[132] would be. Consequently, unlike in those involving LIBOR, in antitrust cases involving traditional prices, "subsequent offsetting undercharges on subsequent purchases result from transactions

128 Billhofer v. Flamel Techs., S.A., 281 F.R.D. 150, 160 (S.D.N.Y. 2012).

129 *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666, 679 (S.D.N.Y. 2013) (quoting OTC Am. Compl. ¶ 44–45).

130 Bloomenthal, *supra* note 123.

131 *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 593 (S.D.N.Y. 2018).

132 *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 11 MDL 2262, 2016 U.S. Dist. LEXIS 175929, at *53 (S.D.N.Y. Dec. 20, 2016).

occurring at a subsequently set price."[133] In addition, a benchmark such as LIBOR is unique in the sense that, even if collusive activity artificially suppressed LIBOR, it is not clear that market participants would be harmed, since other relevant metrics such as the price of a financial instrument would, in certain circumstances, absorb whatever interest-rate variations the collusion had caused.[134]

Therefore, when assessing antitrust injury, it would make sense to treat the alleged manipulation of LIBOR differently than the alleged manipulation of bid-ask spreads. Given the sheer ubiquity of a benchmark such as LIBOR as a factor in pricing trillions of dollars of financial instruments, any attempt to litigate antitrust claims against alleged manipulators would have to have limiting principles so that damages are reasonably estimable and in proportion to the harm that defendants caused.[135] So too would a lack of limiting principles pose systemic risks by forcing "courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries."[136] Moreover, it would be "unjustified by the general interest in deterring injurious conduct, since directly injured victims can . . . be counted on to vindicate the law as private attorneys general, without any of

[133] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 593–94 (S.D.N.Y. 2018).

[134] This is due to the fact that the short-term interest rates for which LIBOR served as a benchmark vary inversely with the market prices of the instruments that incorporated those short-term rates. For example, if banks colluded to suppress LIBOR, then the prices of any instruments that used LIBOR to set their interest rates would, at least according to theory, rise proportionally as a result. This proposition, however, is only valid insofar as the suppression remains constant over the life of the financial instrument in question, since any changes in the degree of suppression *after* one purchased that instrument, but *before* it matured, would correspondingly alter its market price. *See In re* LIBOR-Based Fin. Instruments Antitrust Litig., 11 MDL 2262, 2016 U.S. Dist. LEXIS 175929, at *53–*54 (S.D.N.Y. Dec. 20, 2016).

[135] *Id.* at *46.

[136] Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269 (1992).

the problems attendant upon suits by plaintiffs injured more remotely."[137]

The bid–ask spread and the benchmark are thus substantively different. Whereas benchmark figures are the result of an "endeavor wherein *otherwise–competing* banks agree[] to submit *estimates* of their borrowing costs[,]"[138] the bid-ask spread is the result of "actual transactions [among parties who] are supposed to be perpetually competing by offering independently determined bid–ask spreads."[139] The contrast between the ways in which antitrust law should treat the alleged manipulation of bid-ask spreads and that of benchmarks thus derives from their differing natures.

B. Netting Endures

Indeed, as in other antitrust contexts, the adoption of the net harm standard in defining antitrust injury implicates certain complications with respect to the adequacy of representative plaintiffs and the predominance of issues common to the class over those of an individual nature.[140] Moreover, the general principle that netting remains relevant to the certification of an antitrust class regardless of how a court defines antitrust injury, applies equally, if not more forcefully, in the context of financial markets. This is the result of directional

137 *Id.* at 269–70.

138 *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666, 688 (S.D.N.Y. 2013) (emphasis added). Although the Court of Appeals for the Second Circuit later reversed the District Court's conclusions in this matter, it did so not on the basis of the latter's mischaracterization of the fundamental workings of the benchmark-setting process, but rather its mischaracterization of that endeavor as cooperative, and thus incapable of involving anticompetitive behavior. Gelboim v. Bank of Am. Corp., 823 F.3d 759, 775 (2d Cir. 2016).

139 Simmtech Co. v. Barclays Bank PLC (*In re* Foreign Exch. Benchmark Rates Antitrust Litig.), 74 F. Supp. 3d 581, 596 (S.D.N.Y. 2015). This Note's exploration of bid–ask spreads and benchmark rates is admittedly rudimentary and glosses over many of the intricacies that can complicate the superficial picture presented here. However, those complexities are beyond the scope of this Note, and a simplifying approach helps to demonstrate the salient points of this Note.

140 *See supra* Sections III.B–C.

considerations with respect to the plaintiffs' conduct and temporal factors pertaining to the defendant's conduct. Whereas the manipulation of a bid-ask spread harms both the seller and the purchaser with whom the market maker interacts, the manipulation of a benchmark affects instruments that parties trade in opposition to one another. These complications involve netting and implicate the satisfaction of the procedural prerequisites for class certification.

1. Adequacy

The contextual application of antitrust laws with regard to financial markets demonstrates the utility of netting principles in navigating the procedural mandates of class certification. If a court adopts the net harm standard for antitrust injury then, as is the case with other antitrust actions, there would be reasonable suspicion that the class contains both injured and uninjured class members, engendering conflicts of interest among class members sufficient to defeat adequacy.[141] Yet, such netting remains pertinent to evaluating the adequacy of the representative plaintiffs irrespective of how a court defines antitrust injury.

As with determining antitrust injury, an evaluation of the adequacy of representative plaintiffs in a case involving allegations of bid-ask spread manipulation should be relatively straightforward.[142] This is due to the fact that anticompetitive manipulation that artificially widens the spread harms parties on both sides of that spread, each of which essentially pays a price—either through under-compensation or overcharge—for currencies that are divorced from the forces of supply and demand.[143] There are thus aligned incentives for

141 *See supra* Section III.B.

142 *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 13 Civ. 7789, 2016 U.S. Dist. LEXIS 128237, at *38 (S.D.N.Y. Sept. 20, 2016) ("Unlike . . . LIBOR[, which] may . . . only [be] a component of [a] price . . . this case [involving the alleged manipulation of the bid-ask spread for foreign exchange spot prices] is more straightforward.").

143 Consolidated Amended Class Action Complaint at 58, *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581 (S.D.N.Y. 2015), (No. 1:13–cv–07789) ("The relationship between [market makers]

those on either side of a trade involving an allegedly manipulated bid-ask spread such that it is likely that the representative plaintiffs in an antitrust class action of implicating that matter will not have any disqualifying conflicts.

The same, however, is not true in antitrust class actions involving the alleged manipulation of a benchmark rate. Analyses of the adequacy of class representatives in both antitrust and nonantitrust class actions are illustrative of the principles that should guide that endeavor. It is the reality that, unlike with a simple bid-ask spread, the manipulation of a benchmark is a *component* in pricing other instruments, rather than a price that an intermediary charges to both sides of a transaction which, for certain instruments, is an inherently zero-sum enterprise.[144] As a result, an instrument whose price had incorporated a manipulated benchmark would provide a basis, using an options contract as an example, for both the party taking the long position, as well as the party taking the short position. Given the implications regarding antitrust injury and damages, a plaintiff who profited from that option would have an incentive to minimize the alleged degree of defendants' manipulation on the day on which the option expired, whereas a plaintiff who was on the losing side would have the conflicting incentive to maximize such manipulation on that day. Thus, with regard to a class action based in the Commodities Exchange Act, "named plaintiffs with opposite net

and their customers is the same as the relationship between any merchant selling goods to consumers in a marketplace . . . based on fundamental forces of supply and demand . . . . [Market makers'] collusive conduct [can] warp[] the interplay of supply and demand and cause . . . [s]pot [r]ate[s] to be manipulated.)". *Cf.* Merced Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122, 133 (S.D.N.Y. 2016) (ruling that a defendant whose electricity rates resulting from the defendant's artificial inflation of prices, "instead of [prices resulting from] the forces of supply and demand," had sufficiently alleged antitrust injury.).

144 Futures and options, for example, involve one party profiting at the expense of the counterparty. Will Kenton, *Zero–Sum Game Definition in Finance, With Example*, INVESTOPEDIA (Aug. 16, 2022), https://www.investopedia.com/terms/z/zero-sumgame.asp#:~:text=In%20financial%20markets%2C%20futures%20and,is%20transferred%20to%20another%20investor [https://perma.cc/EFM8-W8AV].

trading positions will have directly conflicting incentives to establish not only the existence but also the magnitude of any manipulation that occurred on those dates."[145] The same principles apply to an antitrust action that alleges the same collusive manipulation. Unlike the foregoing "[e]xchange action, any diverging incentives within [an antitrust class would be] . . . necessarily limited by . . . [alleged] suppression [which was] one-directional [in] nature."[146] Although conflicts of this sort are not per se sufficient to defeat adequacy,[147] they should give even those courts which had not adopted the net harm standard for antitrust injury a reason to analyze certain antitrust allegations through the net harm lens.

2. Predominance

The potential membership of net beneficiaries in an antitrust class is, as with adequacy, particularly germane to the predominance of common issues in the context of a class action that directly implicates financial markets. This is true irrespective of how a court chooses to define antitrust injury.

A net harm standard for antitrust injury would be particularly problematic for antitrust classes whose members were on opposite sides of the trades that defendants' allegedly collusive conduct had tainted. Indeed, given that the adoption of that standard would likely lead to a class containing both injured and uninjured members, it would, in turn, involve the problem of whether, and to what extent, a class may contain uninjured members. While there is some disagreement regarding the precise threshold of the ratio of injured to uninjured class members that would defeat predominance, there is a general consensus that such a threshold does exist.[148]

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145 *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 539 (S.D.N.Y. 2018).

146 *Id.* at 590.

147 *See id.* at 551, 590 (finding that classes that had alleged benchmark manipulation of a unidirectional or sufficiently delineated nature did not have fundamental conflicts that would defeat adequacy).

148 *See supra* Section III.C.

Even absent the use of the net harm standard for antitrust injury, netting principles would remain pertinent to the predominance analysis, albeit for reasons that do not center around the potential presence of uninjured members. Rather, especially with respect to classes with members who took oppositional trading positions, there would be oppositional incentives to establish the presence and extent of collusive manipulation. Such a problem would likely be muted in an antitrust class action involving allegations that defendants had manipulated the width of a bid-ask spread. Although sellers would seemingly have more incentive to establish the presence of manipulation of the bid rate than the ask rate, and vice versa, there would still be a mutual desire to substantiate the presence of manipulation with respect to the same pricing figures on the same dates. In this sense, both sellers and purchasers would, for the most part, be arguing in support of the very same proposition: that defendant(s) had manipulated the bid-ask spread.

Matters would be more complicated, however, with respect to allegations that defendant(s) had manipulated the estimates of their borrowing costs which would ultimately serve as the basis for a given benchmark figure. In such cases, unlike in the context of allegations involving the widening of a bid-ask spread, it is highly plausible that there would be members of the same class whose trading positions were oppositional to one another. These plaintiffs would resultantly have differing incentives to establish the direction and extent of the alleged manipulation, as well as the days on which it took place, thereby making it more difficult to provide a common means of substantiating the extent of damages.[149] Further

[149] Although these differences would not defeat predominance per se, they add further individuality to calculating damages that can, if it reaches a certain level, defeat predominance. *See, e.g.,* Kottaras v. Whole Foods Mkt., Inc., 281 F.R.D. 16, 24 (D.D.C. 2012) (quoting Windham v. Am. Brands, Inc., 565 F.2d 59, 68 (4th Cir. 1977)) ("[W]here the issue of damages . . . does not lend itself to . . . mechanical calculation, but requires 'separate mini-trial[s]' of an overwhelming[ly] large number of individual claims, . . . the 'staggering problems of logistics' . . . 'make the damage aspect of (the) case predominate,' and render the case unmanageable as a class action."). *Cf. In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d

complicating matters is the fact that predominance is a function of the underlying cause of action such that a prerequisite to its satisfaction is the production of a common, that is, predominating, metric for calculating damages. Since many courts have held that antitrust damages must reflect "net" injury, plaintiffs must produce a common means of ascertaining the extent of such net injuries.[150] Therefore, the more that class members' claims diverge in terms of the direction, extent, and dates of suppression, the worse the case will be for a finding of predominance.[151] There are thus numerous ways in which netting principles are relevant to determining whether common issues predominate among members of an antitrust class, even if one eschews the net harm standard for antitrust injury.

VI. CONCLUSION

Whether to use a net harm standard for antitrust injury is the source of much debate among courts and scholars. Given its alignment with the fundamental goals of antitrust law and the practical realities of antitrust class actions, the net harm standard for antitrust injury is, overall, more appropriate than the disregard thereof, and should thus receive greater implementation. Nonetheless, it appears that for antitrust

at 544 (concluding that the individual evidence that members of a securities fraud class would need to introduce in order to measure the extent of any damages militates against a finding of predominance).

[150] *See supra* Areeda, note 90 at 1138. *See also e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1366 (9th Cir. 1986); Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 563 (S.D.N.Y. 2017); Abrahamson v. Fleschner, 568 F.2d 862, 878 (2d Cir. 1977); Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds, 571 F.3d 672, 676 (7th Cir. 2009). This does not require plaintiffs to actually calculate the net injury figure, but rather requires a demonstration of a common *method* for doing so in the event that they prevail. Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 446 (2016) ("[T]he lack of common methodology for proving damages [is] fatal to predominance.").

[151] This does not mean, however, that it will necessarily be sufficient to defeat predominance, since "individualized damages alone cannot preclude certification[.]" Roach v. T.L. Cannon Corp., 778 F.3d 401, 409 (2d. Cir. 2015).

class actions, courts will need to grapple with the concept of net harm, and the process of netting harms against benefits, regardless of how they approach antitrust injury. Courts must navigate these doctrinal matters within the context of the procedural dictates that govern class actions, an endeavor which has proven to be increasingly difficult. There indeed exist devices that offer promise in easing the foregoing processes, the relative virtues of which are beyond the scope of this Note.