Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in *Valley Drug*

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> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative plaintiffs will fairly and adequately protect the interests of the class,". . . [relying on the defendants] is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house.[1]

CLASS ACTIONS IN many cases provide the only viable means for large groups of victims of illegal conduct to vindicate their legal rights.[2] At the same time, the representatives of a class may not always pursue the interests of the class members adequately.[3] Striking a balance between these two concerns is not always easy because measures designed to protect class members may have just the opposite effect.

This danger has important implications when the interests of some of the absent class members are alleged to be in tension with the interests of some of the representative plaintiffs. In theory, a strict prohibition against any conflict might best protect absent class members' rights. According to such an approach, the court would not allow one party to represent another unless their interests align perfectly. A

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1. Eggleston v. Chicago Journeymen Plumbers' Local 130, 657 F.2d 890, 895 (7th Cir. 1981).

2. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

3. *See* Fed. R. Civ. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class."). *See generally* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1768, at 326–27 (2004); 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.26 (4th ed. 2002).

court confronted by imperfect class representation could deny class certification entirely and require injured parties to pursue individual litigation.[4] Alternatively, the court could certify a class that includes only members who have no potential conflict of interest.[5]

In reality, however, these measures may do more harm than good. The very parties the court seeks to protect, the absent class members, may find themselves without anyone to represent their interests at all. Indeed, there may be a tendency for courts to focus on apparent conflicts even though doing so does not serve the interests of absent class members.

The reason for this problem is that in many instances alleged conflicts in potential class actions are identified by defendants. Like most litigants (other than class representatives), defendants have no obligation to promote anyone's interests but their own. And the defendants' interests are in most respects antagonistic to those of absent class members. As a result, defendants' advocacy on behalf of absent class members is likely to have perverse effects.

On the one hand, when absent class members' interests are in jeopardy, defendants may have little incentive to object.[6] In fact, the defendants are likely to be the primary beneficiaries of inadequate representation. If a conflict of interest causes the named plaintiffs to fail to fulfill their obligations, it is apt to be because they are not pursuing the legal rights of the absent class members vigorously enough. Greater vigilance on the part of the defendants in identifying conflicts would only harm the defendants. In these circumstances, it behooves the defendants to maintain a stony silence.

On the other hand, defendants have a strong incentive to assert that a conflict exists between the class representatives and the absent class members when doing so will minimize the defendants' own liability. Denial of class certification, or the certification of a class with

4. This might occur if a court could not determine which class members would and which would not be adequately be represented by particular named plaintiffs. *See In re* Terazosin Hydrochloride Antitrust Litig., 223 F.R.D. 666, 678 (S.D. Fla. 2004).

5. *See, e.g.*, Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1194 (11th Cir. 2003) (suggesting this possibility).

6. Defendants may have some reason to protect absent class members' rights, even if the failure to do so could decrease their liability. For example, absent class members may object to a settlement that fails to promote their interests adequately. Class action settlements require court approval. *See* FED. R. CIV. P. 23(e)(4)(A) ("Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A)."). As a result, the settlement might be rejected by the trial court or on appeal and, as a result, the defendants would lose the benefit of closure. Still, the class members' losses are usually the defendants' gains.

fewer members than the named plaintiffs propose, will help to limit the defendants' exposure if the absent class members are not in a position to pursue their legal rights on their own.[7] In these instances, absent class members will be served best if the court certifies a class, regardless of whether the interests of all members are aligned perfectly. Yet it is in precisely these circumstances that the defendants are likely, "with pious countenance,"[8] to raise objections on behalf of the absent class members.

In sum, doctrines aimed at protecting absent class members—particularly when used by defendants—have the potential to cause great mischief. This appears to be true of *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*,[9] a recent decision by the United States Court of Appeals for the Eleventh Circuit. In *Valley Drug*, the trial court certified a class of plaintiffs in an antitrust case.[10] On appeal, the Eleventh Circuit vacated and remanded.[11] It did not conclude that class certification was inappropriate, but rather held that additional discovery may be necessary to determine whether the named plaintiffs were adequate representatives of the class as a whole.[12]

Under prevailing law, the justification for the Eleventh Circuit's decision would have to be that the court was taking steps necessary to safeguard the absent class members.[13] However, this Article argues that the decision tends toward just the opposite effect. The court in *Valley Drug* subjected absent class members to costly discovery and jeopardized the legal rights of the very class members it was supposed to protect. An explanation of where the Eleventh Circuit went wrong

7. The absent class members may lack the resources to pursue their own claims or the claims may be so small that they do not warrant individual prosecution. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)). Or, the absent class members may be reluctant to vindicate their legal rights if doing so may damage an ongoing economic relationship. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (citing *In re* W. Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973); Malcolm E. Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CAL. L. REV. 1319, 1325 (1973)).

8. Eggleston v. Chicago Journeymen Plumbers' Local 130, 657 F.2d 890, 895 (7th Cir. 1981).

9. 350 F.3d 1181 (11th Cir. 2003).

10. *In re* Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 560 (S.D. Fla. 2001).

11. *Valley Drug Co.*, 350 F.3d at 1196.

12. *Id.* at 1195–96.

13. *See* Phillips v. Klassen, 502 F.2d 362, 365–68 (D.C. Cir. 1974). The purpose of Rule 23(a)(4) is to protect the interests of absent class members. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 796 (3d Cir. 1995), *cert denied*, 516 U.S. 824 (1995).

in *Valley Drug*—and how far the opinion strays from existing law—requires some background on antitrust law and class certification doctrine.

Part I addresses the relevant antitrust law. In particular, it explains the Supreme Court's decision in *Illinois Brick Co. v. Illinois*[14] to adopt the direct-purchaser rule, which generally permits only those who purchased directly from an antitrust violator to recover damages under the federal antitrust laws. Part II analyzes the standard for class certification in antitrust cases, focusing on the doctrine pertaining to potential conflicts of interest between class members. Part III then explains why a proper understanding of antitrust law, and of class certification doctrine, reveals that the Eleventh Circuit was wrong to suggest that there was a potential conflict of interest between class members in *Valley Drug*.

I. *Illinois Brick*

In *Illinois Brick*, the United States Supreme Court adopted the so-called "direct purchaser" rule for antitrust cases under federal law.[15] The rule provides that in most instances only those entities that purchased goods directly from the participants in an alleged antitrust violation may recover damages.[16] If, for example, a manufacturer of a brand-name prescription drug inflates the price of its products through a violation of the antitrust laws, a wholesaler who bought the drug directly from the manufacturer would be able to recover damages, but a retailer who later bought the drug from the wholesaler could not do so.[17]

Illinois Brick provided the Court an opportunity to reflect upon the policy decisions that led to its then-recent decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[18] *Hanover Shoe* held that victims of an antitrust violation generally can recover for the full increase in the amount they paid for a good or service, regardless of whether they were able to mitigate their injuries by passing on some or all of their losses down the chain of distribution.[19] In other words, a wholesaler that bought brand-name drugs from a manufacturer at an inflated

14. 431 U.S. 720 (1977).

15. Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 481 (7th Cir. 2002) (describing the "direct purchaser rule"), *cert. denied*, 516 U.S. 824 (1995).

16. *Id.*

17. As discussed below, even this simple example can get a bit more complicated. *See infra* Part I.B.

18. 392 U.S. 481 (1968).

19. *Id.* at 494.

price because of an antitrust violation could recover the full overcharge, regardless of whether the wholesaler was able to pass along that overcharge by increasing its own prices to retailers. *Hanover Shoe* thus deprived defendants of a strategy to eliminate or minimize the damages they owed to a particular plaintiff.[20]

The issue in *Illinois Brick* was closely related—whether, in turn, the only plaintiffs permitted to sue for money damages under federal antitrust law were those victims of an antitrust violation who bought goods or services directly from the defendants.[21] The Court perceived only two alternatives: (1) extend *Hanover Shoe*, by allowing only direct purchasers to recover damages and avoid an analysis of the ripple effects of antitrust violations down the chain of distribution, or (2) reverse *Hanover Shoe* (or read its holding narrowly) and allow all victims injured by an antitrust violation to recover damages under the federal antitrust laws.[22] The Court chose to extend the logic of *Hanover Shoe*.[23] It is important for present purposes that in the process the Court set forth the policy aims that determine who may enforce the federal antitrust laws through private actions for damages.[24]

A. The Policy Justifications for the Direct Purchaser Rule

According to *Illinois Brick*, the principal basis for *Hanover Shoe* was the Court's perception that it was best to avoid an analysis of the complicated reactions down the chain of distribution in response to an antitrust violation.[25] As the Court explained, *Hanover Shoe* sought to avoid any "attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production."[26] In *Hanover Shoe*, this meant allowing direct purchasers to recover the full overcharge from an antitrust violation.[27] *Illinois Brick* called for limiting recovery to direct purchasers only.[28] By allowing direct purchasers to recover the full overcharge, and by permitting only direct purchasers

20. *See Loeb*, 306 F.3d at 483 (describing *Hanover Shoe* as a benefit to plaintiffs, balanced by the benefit to defendants of *Illinois Brick*).

21. *Illinois Brick*, 431 U.S. at 726.

22. *Id.* at 728–29, 736.

23. *Id.* at 729.

24. *Id.* at 731–36 (discussing policy aims).

25. *Id.* at 731–32 & n.12.

26. *Id.* at 732.

27. *See id.* at 724–25.

28. *Id.* at 729.

to pursue money damages, the Court rendered the indirect effects of an antitrust violation irrelevant under federal antitrust law.[29]

According to the Supreme Court in *Illinois Brick*, interpreting *Hanover Shoe*, the primary policy concerns behind the direct purchaser rule may be summarized as certainty, efficiency, and effective enforcement.[30] The Court concluded that the application of economic theory to the practical realities of price and output decisions along the chain of distribution would result in an uncertain, complicated, and difficult analysis.[31] The result would be to impose costs on the judicial system and to extend already protracted litigation.[32] The direct purchaser rule prevented these difficulties.[33]

The Court also addressed its "longstanding policy of encouraging vigorous private enforcement of the antitrust laws,"[34] which serves the related aims of deterring antitrust violations and depriving antitrust violators of their "ill-gotten gains."[35] In this regard, the Court expected the direct purchaser rule to produce mixed results. On the one hand, allowing direct purchasers to recover "the full amount of the overcharge"[36] would provide them with a greater incentive to sue than would a division of damages among a larger group. The Court explained that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[37] Fewer plaintiffs with more at stake would be more likely to sue than a larger number of plaintiffs with less at stake.

On the other hand, the Court acknowledged—and lamented—the possibility that some direct purchasers might be reluctant to sue. They might be apprehensive about the response from the alleged wrongdoers. The Court "recognize[d] that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers."[38]

29. *Id.*
30. *Id.* at 731–32.
31. *Id.*
32. *Id.*
33. *Id.* at 732.
34. *Id.* at 745 (citing Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968)).
35. *Id.* at 732 n.12.
36. *Id.* at 724.
37. *Id.* at 735.
38. *Id.* at 746 (citing *In re* W. Liquid Asphalt Cases, 487 F.2d 191,198 (9th Cir. 1973); Wheeler, *supra* note 7, at 1325).

The Court thus placed various policy goals above the aim of solely compensating each victim of an antitrust violation only to the extent of its injuries.[39] The direct purchaser rule can further this traditional aim of damages, but it does not do so exclusively.[40] Consequently, the rule can produce counterintuitive results. Direct purchasers—entities, for example, that bought goods directly from the alleged wrongdoers and then resold them—in receiving damages based on the full amount of the overcharge, may recover more than is needed to restore them to their position "but for" the wrong. They may have incurred little or no net economic harm from an antitrust violation if they passed along increased prices to their customers. Yet, they may recover substantial damages under federal antitrust law. In contrast, indirect purchasers—entities that bought goods further down the chain of distribution—may not receive compensation, although they may have borne the brunt of the harm from an antitrust violation.[41]

In sum, *Illinois Brick* was explicit about the competing policy concerns relevant to the Court's decision. The result was an imperfect but practical compromise, one that the Court felt was consistently "on balance" with the legislative intent behind the federal antitrust laws.[42]

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39. *Id.* at 734–35.

40. *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 15 (3d ed. 2002) ("[T]he fundamental principle of damages is to restore the injured party as nearly as possible to the position he would have been in but for the wrong.").

41. *See* Kansas v. UtiliCorp United Inc., 497 U.S. 199, 211–12 (1990) (citations omitted) ("Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices because of their status as indirect purchasers.").

The Court in *Hanover Shoe* suggested that there "might" be an exception to the direct purchaser rule for a "pre-existing 'cost-plus' contract." *Hanover Shoe*, 392 U.S. at 494 (internal citation omitted); *see also Illinois Brick*, 431 U.S. at 724 n.2, 732 n.12, 736. In *Illinois Brick*, the Court later explained, "In such a situation, the purchaser is insulated from any decrease in its sales . . . because its customer is committed to buying a fixed quantity regardless of price." *Id.* at 736. The Supreme Court has since read this exception very narrowly. The Supreme Court in *UtiliCorp* said it "might" permit an exception to *Hanover Shoe* where it is "easy to prove" that a direct purchaser resells under a "pre-existing cost-plus contract" obligating a customer to buy a "fixed quantity regardless of price" so that the effect of an illegal overcharge "is essentially determined in advance." *UtiliCorp*, 497 U.S. at 217–18; *see* McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir.1996) ("The vitality of the 'pre-existing cost-plus contract' exception is doubtful, however, in light of *UtiliCorp.*"); City of Philadelphia v. Pub. Employees Benefit Serv. Corp., 842 F. Supp. 827, 833 (E.D. Pa. 1994) (stating the cost-plus exception "to the extent it *ever* existed, today is so eviscerated that it is virtually non-existent") (emphasis in original). The Eleventh Circuit in *Valley Drug* recognized that there is "a distinction" between the percentage markup contracts used in the pharmaceutical industry, and the "cost-plus" exception discussed in *Hanover Shoe.* 350 F.3d at 1190 n.18; *see Illinois Brick*, 431 U.S. at 735–36 (stating that percentage markup contracts do not qualify under the "cost-plus" exception).

42. *Illinois Brick*, 431 U.S. at 745–46.

B. Challenges in Applying the Direct Purchaser Rule

The Supreme Court recognized that the "direct purchaser rule" is imperfect in that some direct purchasers may be reluctant to sue, which could result in inadequate enforcement of the antitrust laws.[43] Moreover, the direct purchaser rule is somewhat counterintuitive. Courts may balk at awarding large damages to direct purchasers if they appear to have been able to pass on some or all of an overcharge, and therefore where it may appear that they may not have suffered a loss in profits. Courts may sense that compensation should flow instead to indirect purchasers, who may have suffered significant losses. Not easily put aside is the ingrained judicial sense, supported by doctrine in most areas of the law, that plaintiffs should recover only those compensatory damages sufficient to restore them to the position they would have occupied but for the defendants' wrongful acts.[44]

This impediment to applying the direct purchaser rule can produce unfortunate results. When its application is not obvious, courts may seek guidance from the traditional rule that injured parties may generally recover damages and that they may do so in proportion to their injuries.[45] This approach is likely to produce inconsistency and confusion. Courts would do better to rely on the original policy aims that the Supreme Court set forth in *Illinois Brick*.[46]

An example is useful in demonstrating how the direct purchaser rule works in practice, and the challenges to which it can give rise. Imagine litigation over whether a brand-name prescription drug manufacturer violated federal antitrust laws by delaying entry of a generic drug onto the market, as occurred in *Valley Drug*.[47] In a simple world, identifying the direct purchasers and the amount of the overcharge would be straightforward. Assume, for example, that a drug wholesaler bought one hundred units from the brand-name prescription drug manufacturer at $5 per unit. The wholesaler then sold the drugs to a retailer at $6 per unit. Further assume that had the generic drug entered the market, the wholesaler would have purchased fifty units of

43. *Id.* at 746.

44. *See, e.g.*, LAYCOCK, *supra* note 40, at 15.

45. *Id.*

46. Many scholars have championed this understanding of the task of the judge as interpreting the law in a manner consistent with its underlying purposes. Perhaps most notable are Lon Fuller and Ronald Dworkin. *See, e.g.*, Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) & RONALD DWORKIN, LAW'S EMPIRE (1986). For a discussion of the intellectual history of this idea in American jurisprudence, see generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 227–32 (1995).

47. 350 F.3d at 1183–84.

the brand-name prescription drug at $4 per unit (assuming the brand price would have decreased as a result of competition from the generic drug)[48] and fifty units of the generic drug at $2 per unit. The wholesaler then would have sold the drugs to the retailer at $5 and $3 per unit, respectively.

Applying *Illinois Brick* in these circumstances is relatively straightforward. The wholesaler is the direct purchaser. It bought the brand-name drugs directly from the manufacturer. The retailer, in contrast, is an indirect purchaser and, as a result, cannot recover any damages under federal antitrust law because of *Illinois Brick*. Moreover, the overcharge paid by the wholesaler is easy to calculate. It is the product of the number of units and the difference in price.[49]

A problem arises, however, if the channels of distribution for the brand-name and generic prescription drugs are not the same. Assume, for example, that brand-name prescription drugs tend to be

48. We assume that the brand price will decrease in response to generic competition for purposes of simplicity. We recognize that some researchers suggest that brand price may remain stable or even increase when a generic drug enters the market.

49. More precisely, the overcharge is the sum of: (1) the difference in the price of the brand-name drug actually purchased and the price of the brand-name drug if the alleged antitrust violation had not occurred (*$5 - $4 = $1*), multiplied by the number of units of the brand-name drug the wholesaler would have purchased without the antitrust violation (fifty units); and (2) the difference in price of the brand-name drug actually purchased and the price at which the wholesaler would have purchased the generic drug (*$5 - $2 = $3*), multiplied by the amount of the generic that the wholesaler would have purchased (fifty units). The total overcharge, then, is *$50 + $150 = $200*. Although the simplified example does not raise the issue, the prices for generic drugs often decrease over time, which would affect the amount of the overcharge.

The defendants in *Valley Drug* challenged this approach. They argued that lost profits, not the overcharge measure of recovery, is appropriate where the product they sold, a brand-name drug, would have been replaced with an "economically different" product, the generic drug. *See* 350 F.3d at 1186–87. The trial court rejected this argument. *In re* Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 557 & n.9 (S.D. Fla. 2001) (citing 2 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 394b, at 529 (1998)). The contrary position would require precisely the kind of complicated analysis of damages foreclosed by *Illinois Brick*. Indeed, courts have allowed a party to recover as an overcharge the difference between a brand-name drug and the substitute generic drug. *See In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 309–14 (E.D. Mich. 2001); *In re* Relafen Antitrust Litig., 218 F.R.D. 337, 344 (D. Mass. 2003); *see also In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144 (3d Cir. 1993), *cert. denied sub nom.* Bessemer and Lake Erie R.R. Co. v. Wheeling-Pittsburgh Corp., 510 U.S. 1091 (1994) (recognizing that a direct purchaser prevented from purchasing a different, but a cheaper substitute as a result of an antitrust violation may seek to recover the difference in price as an overcharge); Lee-Moore Oil v. Union Oil, 599 F.2d 1299, 1306 (4th Cir. 1979) (same). *See generally* ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 193–94 (1996) (discussing same issue) (citing *Lower Lake Erie*). The Eleventh Circuit did not address this issue explicitly on appeal because it vacated and remanded on other grounds. *See Valley Drug*, 350 F.3d at 1187.

distributed only through wholesalers, but that generic drugs at times are distributed directly from the generic drug manufacturer to the retailer, as the Eleventh Circuit in *Valley Drug* suggested at times occurs.[50] This situation gives rise to what one might call a "bypass" issue, which can create difficulties for the *Illinois Brick* analysis.

A simplified illustration is again useful. Imagine a variation on the scenario offered above involving a brand-name prescription drug manufacturer that uses illegal means to delay entry of a generic drug. Recall that the wholesaler bought 100 units of the brand-name prescription drug at $5 per unit. Assume that without the delay, the wholesaler would have bought fifty units of the brand-name drug at $4 per unit from the brand-name prescription drug manufacturer, which it would have sold to the retailer.[51] In addition, without the delay, the retailer would have bought fifty units of the generic drug directly from the generic drug manufacturer at $2 per unit (and fifty units of the brand-name drug through the wholesaler).[52]

These new circumstances may render application of the direct purchaser rule problematic. Surely, the wholesaler is the direct purchaser for the fifty units it bought from the brand-name drug manufacturer at $5 per unit and which it would have bought at $4 per unit but for the antitrust violation. Accordingly, the wholesaler is entitled to recover as an overcharge the difference between the brand price it actually paid ($5) and the brand price it would have paid ($4) multiplied by the number of units of brand-name drug it would have bought in a competitive market (fifty units).

The other fifty units, however, are a bit trickier. Because of the antitrust violation the wholesaler in fact bought the additional fifty units of the brand-name drug directly from the brand-name drug manufacturer. For this reason, the wholesaler might be the direct purchaser for those units as well. On the other hand, if not for the antitrust violation, the retailer would have bought fifty units of the generic drug directly from the generic drug manufacturer, instead of buying those fifty units of the brand-name drug indirectly through the wholesaler. For this reason, the retailer could be treated as the direct purchaser for purposes of *Illinois Brick*.[53]

50. 350 F.3d at 1191.

51. That is, the wholesaler's purchases would have decreased from one hundred units to fifty units.

52. This issue has arisen in the litigation in *Valley Drug*. *See* 350 F.3d at 1191.

53. Similar difficulties beset the effort to determine the amount of the overcharge. If the wholesaler is the direct purchaser, the amount for each unit would seem to be the difference in the price it paid for the brand-name drug ($5 per unit) and the amount the

While the right approach to this issue is not obvious, a few points about its resolution are. First, either the wholesaler or the retailer, but not both, should be able to recover the overcharge on the fifty units at issue. Defendants should not face liability for the same sale to two different plaintiffs under the federal antitrust laws.[54] The Supreme Court has sought to avoid duplicate liability under federal antitrust laws.[55]

Second, defendants should not be able to avoid all liability on any part of their sales.[56] As the Supreme Court explained long ago in *Bigelow v. RKO Radio Pictures, Inc.*,[57] "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."[58]

Third, relying on the policy aims of *Illinois Brick* is likely to provide useful guidance,[59] but the same is not true for recourse to the principle that the injured plaintiff should be made whole. Both the wholesaler and the retailer suffered a real injury from the alleged antitrust violation. But, neither suffered the full harm from the antitrust violation. In these circumstances, the traditional rule that all injured persons should recover and should do so sufficiently to be made whole[60] will not help in choosing the best candidate to recover as a direct purchaser. On the other hand, a court can resolve the issue by seeking to promote the policies that animate *Illinois Brick*: choosing an injured party that will allow for certainty, simplicity, and efficiency in enforcing the antitrust laws.[61]

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retailer in these circumstances would have paid for the generic drug ($2 per unit), at least for the additional fifty additional units that the wholesaler bought as a result of the delay. If the retailer is the direct purchaser, the overcharge might be that same amount or, alternatively, it could be the difference between the amount the retailer paid for the brand-name prescription drug ($6 per unit) and the amount it would have paid for the generic drug ($2 per unit). Other variations are possible.

54. *See Illinois Brick*, 431 U.S. at 730.

55. *See, e.g.*, Blue Shield of Va. v. McCready, 457 U.S. 465, 474–75 (1982); Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 489–90 (7th Cir. 2002).

56. This view is reflected in the Supreme Court's view of the importance, if not the primacy, of preventing defendants from keeping their ill-gotten gains. *Illinois Brick*, 431 U.S. at 725–26; *see also Loeb*, 306 F.3d at 484 (holding direct purchaser rule "never operates entirely to preclude market recovery for an [antitrust] injury").

57. 327 U.S. 251 (1946).

58. *Id.* at 265.

59. A cogent analysis of the issue of selecting a direct purchaser in a complicated setting is found in *Loeb*, 306 F.3d at 483.

60. *See, e.g.*, LAYCOCK, *supra* note 40, at 15.

61. *Loeb*, 306 F.3d 469 (7th Cir. 2002), took an approach along these lines. *Loeb* involved alleged price-fixing in the market for copper futures. *Id.* at 474. The conduct at issue affected the price for copper in various stages of production, including copper cath-

These important points can easily get lost in the complexities of antitrust litigation. Courts may flounder in particular because the direct purchaser rule can be counterintuitive. The best understanding of the direct purchaser rule requires putting aside the familiar concept of simply making a plaintiff whole and instead paying careful attention to the policy concerns of the Supreme Court.

Courts may not always find their way past this difficulty. Indeed, this challenge may account for the Eleventh Circuit's unprecedented class certification decision in *Valley Drug*.[62] Before addressing that opinion, however, some background is necessary on class certification, focusing in particular on its potentially salutary effects in antitrust litigation and on the requirements for a court to certify litigation for class treatment.

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ode, copper rod, and copper scrap. *Id.* The Seventh Circuit had to decide which, if any, of the purchasers along the chain of production could sue for damages under federal antitrust law. *Id.* In *Loeb*, the Seventh Circuit held that whichever victims of an antitrust violation are deemed to be direct purchasers for purposes of *Illinois Brick*, the general rule is that a defendant should be liable for the full measure of the harm it caused. The court explained:

> [The Supreme Court's decisions in] *Hanover Shoe*, *Illinois Brick*, and *McCready* make plain that the antitrust laws create a system that, to the extent possible, permits recovery in rough proportion to the actual harm a defendant's unlawful conduct causes in the market without complex damage apportionment. This scheme at times favors plaintiffs (*Hanover Shoe*) and at times defendants (*Illinois Brick*), but it never operates entirely to preclude market recovery for an injury.

Id. at 483.

The Seventh Circuit recognized that in the case before it more than one plaintiff had a plausible claim to be a direct purchaser and that no one candidate was ideal. At the same time, it gave full consideration to the problem of duplicate recovery. The court concluded:

> [T]he solution to this problem, however, is not to deny a right to recover to everyone. Such a draconian rule would give a green light to antitrust scofflaws to conspire to fix prices in a particular market and would create incentives to engage in antitrust conspiracies in markets with complex distribution structures. Instead, the proper course is to recognize only the best of the several potential plaintiffs who otherwise satisfy the requirements for bringing suit under the antitrust laws.

Id. at 490. The Seventh Circuit ensured enforcement of the antitrust laws by selecting among the potential direct purchasers by recourse to the primary policy considerations that animated *Illinois Brick*: certainty, simplicity, and efficiency. *Id.* at 489–92.

62. Of course, it is also possible that the court was resistant to allowing direct purchasers who allegedly profited from the alleged antitrust violation to recover under the antitrust laws or, for that matter, that the court was simply hostile to class actions. There is no way to know with certainty.

II. Class Certification in Federal Antitrust Cases

A. The Synergy Between Class Certification and the Direct Purchaser Rule

The class action device can complement the direct purchaser rule. This is so both because certification of a class serves many of the policies identified in *Illinois Brick* and because proceeding as a class action can solve some of the difficulties created by that decision.

Class certification, much like the direct purchaser rule, can reduce the cost and unpredictability of litigation. In a class action, a few named plaintiffs retain counsel to represent a larger group of similarly situated individuals.[63] The named plaintiffs endure the tribulations of litigation on behalf of the class.[64] Their counsel ordinarily assume the financial risks: the lawyers receive compensation for their time and recover litigation costs when, and only if, they secure a recovery for the class.[65]

The most obvious benefits of class certification in appropriate cases are efficiency,[66] simplicity, and certainty.[67] Once a class is certified, a court can rule on common issues once for all class members.[68] Without class certification, courts would have to revisit the same issues time and again for different plaintiffs.[69] That sort of duplication would waste not only judicial resources, but also the time and money

63. *See* 1 NEWBERG & CONTE, *supra* note 3, § 1:1, at 2 & § 3:2 at 215 (4th ed. 2002) (citing Reitner v. Sonotone Corp., 442 U.S. 330 (1979); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert denied*, 434 U.S. 1086 (1978)).

64. *Id.*

65. 4 NEWBERG & CONTE, *supra* note 3, § 14:2, at 512. *See generally* Charles Silver, *A Restitutionary Theory of Attorney's Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991).

66. 1 NEWBERG & CONTE, *supra* note 3, § 1:1, at 3 & 1:5, at 25 (citing Am. Pipeline & Const. Co. v. Utah, 414 U.S. 538, 553 (1974); Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 159 (1982)).

67. Silver, *supra* note 65, at 675 n.106 ("Class actions can also be used to . . . reduce the risk of inconsistent verdicts and obligations and to achieve distributive fairness among victims in cases where defendants possess limited funds.").

68. *See* 7A WRIGHT & MILLER, *supra* note 3, § 1780, at 564–65 n.5 (citing Klamberg v. Roth, 473 F. Supp. 544 (D.N.Y. 1979) (finding that individuals had claims substantial enough to bring individual actions did not outweigh the benefit of having defendant's liability determined in one proceeding justified class certification); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp 714, 724 (N.D. Ill. 1968)).

69. 2 NEWBERG & CONTE, *supra* note 3, §5.46, at 464 nn.5–6 (citing *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995), *on remand to In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., No. MDL 961 1996 WL 683785 (E.D. Pa. Nov. 25, 1996), *aff'd*, 134 F.3d 133 (3d Cir. 1998); Lowery v. Circuit City Stores, Inc., 158 F. 3d 742, 758 n.5 (4th Cir. 1998), *cert. granted, judgment vacated on other grounds*, 527 U.S. 1031 (1999); *Gen. Tel. Co. of the Southwest*, 457 U.S. 147; Allison v. Citgo Petroleum Corp., 151 F. 3d 402, 414 (5th Cir.

of the parties.[70] It would also leave individual litigants unsure as to how the court will rule in their particular case.[71]

Class certification can also ensure that injured victims are able to pursue their legal rights.[72] Courts have long recognized that when a wrongdoer imposes small injuries on a large number of victims, class certification may be the only viable means to pursue vindication through litigation.[73]

Less often recognized is that class certification may enable direct purchasers who are apprehensive about suing individually to assert their legal rights. Recall that the Supreme Court recognized that some direct purchasers might be reluctant to sue their suppliers for fear of disrupting an economic relationship.[74] Class certification can solve this problem.[75] A few named plaintiffs face the ire of the entities that

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1998); Catholic Soc. Servs., Inc. v. INS, 182 F.3d 1053, 1059 (9th Cir. 1999), *reh'g en banc granted*, 197 F.3d 1041 (9th Cir. 1999), *and on reh'g en banc*, 232 F.3d 1139 (9th Cir. 2000)).

70. 2 NEWBERG & CONTE, *supra* note 3, § 5:3, at 422 (citing Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972) ("[C]lass actions . . . may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.")); *see also id.* § 5:46, at 464 (citing FED. R. CIV. P. 23 advisory committee's note) ("Subdivision (b) (3) encompasses those cases in which a class action would achieve economies of time, effort, and expense and promote uniformity of decision . . . without sacrificing procedural fairness or bringing about other undesirable results.")).

71. *Id.* at 466 ("The end result [in class actions] affords increased legal certainties for all litigants, class plaintiffs and defendants alike."); Transamerican Refining Corp. v. Dravo Corp., 130 F.R.D 70, 76 (S.D. Tex. 1990) (certification would promote uniformity and economy in cases, therefore problem of manageability did not justify denial of class certification).

72. 4 NEWBERG & CONTE, *supra* note 3, § 14.6, at 571 n.61 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.")).

73. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997). The Court stated:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Id. (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); *see also* 6 NEWBERG & CONTE, *supra* note 3, § 18:1 (citing Coleman v. Cannon Oil Co., 141 F.R.D. 516, 520 (M.D. Ala. 1992)). Nothing in Rule 23, however, prohibits certifying a class comprised of both large and small claimants. *See* Paper Sys., Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 605 (E.D. Wis. 2001) ("[T]he presence of large claimants in a proposed antitrust class and the possibility that some of them might proceed on their own does not militate against class certification.").

74. Illinois Brick Co. v Illinois, 431 U.S. 720, 746 (1977).

75. *See, e.g., In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 325 (E.D. Mich. 2001) (certifying class of direct purchasers of brand-name prescription drug alleging overcharges

allegedly violated the antitrust laws. They initiate and pursue the litigation. The absent class members can remain bystanders for most, if not all, of the adversarial proceedings.[76] Ordinarily, all they need to do to benefit from the litigation is to refrain from opting out of the class after they receive notice that it has been certified.[77] Once the case is resolved, either through settlement or trial, the absent class members need only submit claims to enjoy the fruits of the class litigation. This arrangement promotes key policies from *Illinois Brick*: by encouraging widespread participation in antitrust litigation among injured parties, wrongdoers are unable to retain their ill-gotten gains and therefore lose incentive to violate the antitrust laws in the first place.

B. The Requirements for Class Certification of Antitrust Litigation

Class certification may well complement the direct purchaser rule, but that does not mean it is appropriate in every case. For a court to certify litigation for class treatment, the plaintiffs must show that the case meets the requirements of Federal Rule of Civil Procedure 23(a)[78] and one of the provisions of Federal Rule of Civil Procedure 23(b),[79] which, in cases involving damages, ordinarily is Rule 23(b)(3).[80]

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arising from delayed generic competition, including class members with potentially large claims and stating that "[it is not] obvious that all members of the class would be willing to independently sue their suppliers"), *leave to appeal under* FED. R. CIV. P. 23(f) *denied*, 332 F.3d 896 (6th Cir. 2003).

76. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552 (1974) (absent class members are passive members to the litigation and need not take any active steps to protect their interests); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, 14–15 (Rand 2000) ("If an [absent] plaintiff remains silent, then he is deemed to have chosen to be a member of the class, and the outcome of the class action (whether in favor of plaintiffs or defendants) is binding on him."). *Id.* ("Absent parties' rights, under the rule, are protected by ensuring that the plaintiffs who bring the class action are truly representative of those who are absent—a responsibility given to the judge, who must agree that the plaintiffs who have come forward may act on behalf of the class"); 1 NEWBERG & CONTE, *supra* note 3, § 1:3, at 17.

77. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Abbott Labs., Inc. v. CVS Pharmacy, Inc., 290 F.3d 854, 859 (7th Cir. 2002); Sperling v. Hoffmann-La Roche, Inc., 24 F.3d 463, 470 (3d Cir. 1994) ("Members of a Rule 23(b)(3) class are automatically included . . . unless they make a timely election to opt-out."); HENSLER ET AL., *supra* note 76, at 74–75.

78. FED. R. CIV. P. 23(b) provides, "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied." *See also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1996); Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 151 n.3 (1982); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 533 (S.D.N.Y 1972).

79. *Amchem Prods.*, 521 U.S. at 615–18.

80. HENSLER ET AL., *supra* note 76, at 13–15 ("[The revised Rule 23(b)(3) allows for class certification] when, as a practical matter, it would be more efficient for litigants with

Rule 23(a) requires that the members of the proposed class be numerous,[81] that the claims of the class members involve common issues of fact or law,[82] and that the named plaintiffs have claims typical of the class as a whole[83] and will represent the class adequately.[84] Rule 23(b)(3) further requires that issues common to the class predominate over issues affecting only individual class members.[85] It is quite common for antitrust cases to satisfy these requirements, particularly if they are based on illegal conduct that affects the market as a whole.[86]

The focus of *Valley Drug* was whether the named plaintiffs could represent the class adequately. In particular, the court addressed whether their interests were in sufficient tension with those of some of the absent class members such that class certification would be inappropriate.[87] Courts will generally find the named plaintiffs in a proposed class action to be inadequate representatives of the class only if a "fundamental" conflict exists between them and the absent class

similar interests (usually in securing money damages) to proceed collectively, led by representative parties.").

81. FED. R. CIV. P. 23(a)(1). There is no minimum "magic" number that is required to satisfy the numerosity requirement, but numerosity is generally found where the proposed class has forty members, and fewer will suffice. *See, e.g.*, Stewart v. Abraham, 275 F.3d 220, 226 (3d Cir. 2001) (noting forty class members are generally sufficient to satisfy numerosity); Philadelphia Elec. Co. v. Anaconda Brass Co., 43 F.R.D. 452, 463 (E.D. Pa. 1968) (holding twenty-five members are sufficient to satisfy numerosity).

82. FED. R. CIV. P. 23(a)(2). For an example of the commonality requirement, see *In re Potash Antitrust Litigation*, 159 F.R.D. 682 (D. Minn. 1995), in which the court held that the common question requirement was satisfied because putative class members had a common interest in proof of a concerted action, conspiracy, and of agreement with the goal to fix prices of wholesale potash.

83. FED. R. CIV. P. 23(a)(3). For an example of the typicality requirement, see *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D 677 (N.D. Ga. 1991).

84. FED. R. CIV. P. 23(a)(4). For application of the adequacy requirement, see *In re Potash*, 159 F.R.D. at 692–93 (named plaintiffs adequate although interests not perfectly aligned).

85. FED. R. CIV. P. 23(b)(3) requires that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 924 (3d Cir. 1992); *In re* Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 138–40 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002).

86. *See, e.g.*, *In re* Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 21–22 (D.D.C. 2001); *In re* Vitamins Antitrust Litig., 209 F.R.D. 251, 262–63 (D.D.C. 2002); *In re* Infant Formula Antitrust Litig., No. MDL 878, 1992 WL 503465, at *6 (N.D. Fla. 1992); *In re* Bromine Antitrust Litig., 203 F.R.D. 403, 413–14 (S.D. Ind. 2001); *In re* Catfish Antitrust Litig., 826 F. Supp. 1019, 1039 (N.D. Miss. 1993); *In re* Wirebound Boxes Antitrust Litig., 128 F.R.D. 268, 271–72.

87. Valley Drug Co. v. Geneva Pharms., 350 F.3d 1181, 1187 (11th Cir. 2003).

members.[88] The Eleventh Circuit in *Valley Drug* explained that "the existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy."[89]

III. The Eleventh Circuit's Opinion in *Valley Drug*

With an understanding of the formal requirements and policy considerations behind *Illinois Brick*, a grasp of the "bypass" issue, and the standard for adequate representation under 23(a)(4), it is possible to assess the Eleventh Circuit's decision regarding class certification in *Valley Drug*.

A. The Background of *Valley Drug*

Valley Drug arose from agreements between the manufacturer of a brand-name prescription drug and two potential generic competitors. These agreements provided that the competitors would refrain from marketing their competing, generic products during the pendency of patent litigation in return for multi-million dollar payments.[90] In particular, Abbott Laboratories, maker of the brand-name drug Hytrin, agreed to pay Geneva Pharmaceuticals, Inc. and Zenith Goldline Pharmaceuticals—both generic drug companies. In return, the generic drug companies agreed to refrain from marketing generic versions of Hytrin, all of which have the same active ingredient, ter-

88. *Id.* at 1189; *see also* Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 430–31 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 2837 (2004) ("To defeat the adequacy requirement of Rule 23, a conflict 'must be more than merely speculative or hypothetical,' but rather, it must be fundamental. It must go to the heart of the litigation.") (internal citations omitted).

89. *Valley Drug*, 350 F.3d at 1189 (citing 7A WRIGHT & MILLER, *supra* note 3, § 1768, at 326–27; 1 NEWBERG & CONTE, *supra* note 3, § 3.26, at 3-143 to -155).

90. *See* Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294, 1295–1301 (11th Cir. 2003) (discussing background of the litigation). The Federal Trade Commission has investigated a number of similar agreements involving delayed generic entry. *See* FTC, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY ch.3, at 12 (Oct. 2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf http://www.ftc.gov/os/2003/10/innovationrpt.pdf ("The Commission has pursued numerous antitrust enforcement actions affecting both brand-name and generic drug manufacturers when it had reason to believe that a company abused its patent rights in violation of the antitrust laws."); *id.* at 12–13 nn.58–66 (identifying FTC enforcement actions and consent decrees, including the one at issue in *Valley Drug*, between Abbott Laboratories, maker of the brand-name drug Hytrin, and Geneva Pharmaceuticals, Inc., a generic drug company); Consent Order, *In re Abbott Labs.*, (FTC May 22, 2000) (No. C-3945), *available at* http://www.ftc.gov/os/2000/05/c3945.do.htm) (last accessed Sept. 27, 2004).

azosin hydrochloride ("terazosin").[91] Abbott's payment to Zenith was $3 million up front, followed by potential incremental payments of $3 million to $6 million every three months during the delay.[92] Abbott also agreed to pay Geneva $4.5 million per month pending litigation over Abbott's patent rights, subject to certain conditions.[93] The plaintiffs in *Valley Drug* filed a lawsuit claiming that these agreements violated federal antitrust laws.

The trial court in *Valley Drug* certified a class of all direct purchasers of Hytrin from Abbott.[94] On appeal, the Eleventh Circuit vacated and remanded based on its concern that a "fundamental conflict" potentially existed between the class representatives and some of the absent class members.[95] In particular, the court was worried about a possible conflict between the named plaintffs and the three largest pharmaceutical wholesalers in the United States,[96] which the court believed might have derived a net gain from the allegedly illegal conduct.[97] The reasons for this potential net benefit were threefold:

(1) *A Set Percentage Mark-Up.* According to the defendants, the three largest national wholesalers allegedly charge the same percentage mark-up from their acquisition cost on branded and generic drugs. As a result, higher prices for brand-name drugs than generic drugs would allegedly generate higher profits for the national wholesalers.[98]

(2) *Inelastic Demand.* The defendants argued that terazosin is used for severe conditions, leaving patients little alternative but to buy the drug. According to this theory, sales are not responsive to price fluctuations. If this is right, a drop in price allegedly would not result in an increase in sales volume, which might otherwise compensate for any decreased profits of the national wholesalers on individual sales.[99]

(3) *Bypass.* Another possibility the Eleventh Circuit considered was that the generic drug manufacturers, unlike brand-name drug

91. *Valley Drug*, 344 F.3d at 1300.
92. *Id.*
93. *Id.* at 1300–01.
94. The class was defined as "all entities who purchased Hytrin, also known by the chemical name terazosin hydrochloride, directly from Abbott at any time during the period commencing March 31, 1998, through August 13, 1999." *In re* Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 560–61 (S.D. Fla. 2001) (amending prior class definition sua sponte).
95. Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1184 (11th Cir. 2003).
96. *Id.* at 1189–90.
97. *Id.* at 1190–91.
98. *Id.*
99. *Id.* at 1191.

manufacturers, might bypass wholesalers and sell some of their product directly to retailers. The agreements to delay entry of the generic drugs might therefore preserve sales of the branded drug that the large wholesalers would lose once generic drugs became available.[100]

The Eleventh Circuit noted that none of the national wholesalers chose to be a named plaintiff in the action and that some of them assigned a portion of their interest in the litigation to third parties.[101] It drew the inference that the interests of the national wholesalers might not be promoted by the litigation.[102] The appellate court acknowledged that the record before it was insufficient to assess whether some class members experienced a net gain and others a net loss from the alleged antitrust violations.[103] It therefore authorized discovery, including so-called "downstream" discovery, which the court did not define but which generally refers to discovery further down the chain of distribution, such as that of a direct purchaser's own sales.[104]

B. Intuition Collides with an *Illinois Brick* Wall

To assess the Eleventh Circuit's decision, it is important first to try to make sense of it. This is difficult, however, because the court never described the precise potential conflict of interest that gave rise to its concern. The court emphasized the need to assess "the economic reality of the situation" to determine if "some class members . . . have economic interests that are significantly different from—and potentially antagonistic to—the named representatives purporting to represent them."[105] However, the court never explained the interests of the class members that might be at odds. True, the court repeatedly noted that some class members might have experienced a net benefit from the conduct at issue and others a net loss.[106] But that claim pro-

100. *Id.*

101. *Id.* at 1193.

102. *Id.*

103. *Id.* at 1191–92. In fact, pharmaceutical industry analysts have noted that generic competition generates a number of benefits for the three national wholesalers, including (1) increased margins; (2) increased leverage to negotiate better purchase prices and greater rebates; (3) lower capital and inventory costs; (4) improved liquidity; (5) additional means of earning profits; and (6) better return on committed capital. *See* FITCH RATINGS, THE GENERIC EQUATION: THE EMERGENCE OF GENERIC PHARMACEUTICALS AND THEIR IMPACT ON PHARMACEUTICAL WHOLESALERS 2–4 (Oct. 14, 2003) (analyzing businesses of the national wholesalers); J.P. MORGAN, 2003 DISTRIBUTION OUTLOOK 16–22 (Apr. 21, 2003) (analyst report).

104. *Valley Drug*, 350 F.3d at 1192. The court noted that the district court, on remand, "retained discretion" to decide "how much discovery is enough." *Id.* at 1195.

105. *Id.* at 1195 (footnote omitted).

106. *Id.* at 1188, 1190–91.

vides only a description of potential characteristics of class members. It does not purport to explain how their interests might conflict with the named representative in connection with the litigation. At no point did the court identify any goals of the national wholesalers in the litigation that might be different from the goal of the class representatives. It never said that any class members would like to achieve a specific objective that others would like to prevent. It never said whether or how any absent class members would be harmed if the named representatives succeeded in proving defendants' liability.

The court did suggest that the national wholesalers may have been content to have the alleged antitrust violation occur.[107] Perhaps the court thought that this might be a sufficient reason to believe that the national wholesalers would not benefit from the class litigation. The litigation, however, sought only recovery of the overcharges resulting from the allegedly illegal conduct *that had already occurred.* After all, by the time the district court certified the class, generic terazosin had been on the market for more than two years.[108] Pursuing claims in litigation would not deprive the national wholesalers of any profits they allegedly obtained from the delay of the entry of generic drugs onto the market, if that was in fact the effect of the agreements. Moreover, as the Eleventh Circuit noted, under *Illinois Brick* the national wholesalers could recover as damages any overcharge they paid "even if they experienced a net gain."[109] Thus, the economic interests of the national wholesalers would be to receive treble damages from the antitrust litigation, whether or not they suffered a loss in profits. Just like the named plaintiffs, the national wholesalers would like the court to conclude an antitrust violation had occurred and to calculate the resulting overcharge in an amount as large as possible. What, then, was the "economic reality" that would pit the interests of the national wholesalers against those of the class representatives?[110]

107. *Id.* at 1193.

108. *See In re* Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 533 & n.1, 556 (S.D. Fla. 2001) (stating that the generic drug entered the market in August 1999).

109. *Valley Drug,* 350 F.3d at 1193.

110. Because the requirement is of a "fundamental conflict" that goes to the merits of the litigation, 6 NEWBERG & CONTE, *supra* note 3, § 18:17, at 58, an advantage to some class members over the long-term from an antitrust violation does not prevent class certification where all class members will benefit from proving an antitrust violation and damages. *Id.* § 18:18, at 62–63 & n.3 (citing *In re* Potash Antitrust Litig., 159 F.R.D. 682 (D. Minn. 1995)).

The Eleventh Circuit's opinion in *Valley Drug* never answered this question. It merely returned time and again to the possibility that the national wholesalers may have benefited from the agreements between Abbott, Geneva, and Zenith, while other class members may have been harmed.[111] The court then ended with the following cryptic assertion: "In the matter at hand, it would not be difficult to imagine that the national wholesalers, who benefitted from the defendants' conduct, would have substantially different interests and objectives than the named representatives purporting to represent them."[112]

The court did not identify what it "imagine[d]," but it did cite as a "rule" that "'a class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class.'"[113] That "rule," however, derived not from antitrust cases, which are subject to the direct purchaser rule, but from cases governed by the general principle that injured plaintiffs may recover only in an amount needed to make them whole. In such cases, if some class members obtained a net benefit from the alleged wrongful conduct, they might have no legal claim for damages at all. As a result, a plaintiff who incurred a net harm from the challenged conduct might not be able to protect the interests of class members who obtained a net gain,[114] par-

111. *Valley Drug*, 350 F.3d at 1188, 1190–91.

112. *Id.* at 1196 (citing Sosna v. Iowa, 419 U.S. 393, 403 n.13 (1975)).

113. *Id.* at 1189 (quoting Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000)).

114. *Pickett*, for example, involved a suit by cattle producers brought under the Packers and Stockyards Act, 7 U.S.C. §§ 181–229 (2004), that alleged that the defendant, a beef processor, depressed beef prices by locking up supply through forward contracts (whereby the packer and cattle producer agree on the price for cattle weeks or months before the animals are ready for slaughter) and by other means. *Pickett*, 209 F.3d at 1278. Plaintiffs alleged that the use of forward contracts injured cattle producers who elected to sell their cattle on the open or "spot" market, and thereby violated the Packers and Stockyards Act, which prohibits beef packers from giving "any undue or unreasonable preference or advantage to any particular person." 7 U.S.C. § 192(b) (2004) (quoted in *Pickett*, 209 F.3d at 1278). Plaintiffs sought damages and injunctive relief on behalf of a class of all cattle producers that had sold cattle to the defendant during a defined time period. *Pickett*, 209 F.3d at 1277. The district court certified the class—actually, the district court at first denied certification, see *Pickett v. Iowa Beef Processors*, 182 F.R.D. 647 (M.D. Ala. 1998), then the case was reassigned to a different judge, plaintiffs moved for reconsideration of the class certification decision, and the second district judge certified the class. *See Pickett*, 209 F.3d at 1278–79 & n.2. However, the Eleventh Circuit reversed, finding that defendants' conduct benefited many class members who "willingly entered into forward contracts" and that the injunction sought by the representative plaintiffs "would impose a significant restriction on the way these producers do business." *Id.* at 1280–81.

ticularly if the suit challenges ongoing conduct that benefits some class members.[115]

115. In various cases that the Eleventh Circuit cited, using actual harm to measure damages gave rise to tensions between the recovery different plaintiffs could seek. In *Pickett*, for example, the original district court, in denying class certification, had noted that class members who claimed damages "will have to argue that other Plaintiffs received benefits" because the crux of the damage claim was that the defendant had illegally granted undue advantage to certain class members to the detriment of other class members. *Pickett*, 182 F.R.D. at 653. Class members who received such benefits, however, would "have no standing to bring a claim." *Id.* at 654. In other words, some class members, by pursuing their legal claim in the litigation, would necessarily tend to injure or even defeat the potential claims of other claims members, because under the substantive law governing the claims at issue, a plaintiff may recover only for actual damages suffered. At a minimum, some class members would be seeking to label other class members as having obtained an unfair and possibly illegal advantage.

The same is true of *Auto Ventures, Inc. v. Moran*, No. 92-426-Civ, 1997 WL 306895 (S.D. Fla. 1997), cited by the Eleventh Circuit in both *Pickett* and *Valley Drug*. In *Auto Ventures*, the car maker Toyota allegedly harmed class members (car dealers) by withholding cars to punish the dealers for failing to purchase additional, unwanted items and services. Other class members, however, allegedly were rewarded by Toyota for agreeing to buy the same items and services. The court found that a conflict existed between these groups of class members because "[a]s a practical matter, penalized dealers may be forced to argue that rewarded dealers accumulated benefits, not damages, as a consequence of their more amicable relationship with the Defendants." *Id.* at *5. In other words, class members who were deprived of cars would, in the course of trying to prove their legal claim, necessarily tend to defeat or injure the legal claims of other class members who allegedly were rewarded by Toyota.

The Eleventh Circuit in *Valley Drug* also cited *In re Healthsouth Corp. Securities Litigation*, 213 F.R.D. 447, 462–63 (N.D. Ala. 2003); *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988); *Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); and *Phillips v. Klassen*, 502 F.2d 362 (D.C. Cir. 1974). Again, none of these cases is an antitrust case. In *Healthsouth*, a securities fraud case, some class members allegedly benefited by defrauding fellow class members. *See Healthsouth*, 213 F.R.D. at 448. In *Bieneman*, the named plaintiff repeatedly attempted to sue over noise at O'Hare airport in Chicago. The plaintiff lost on the merits, then later attempted to bring a class action on behalf of some 300,000 persons. *See Bieneman*, 864 F.2d at 465. The Seventh Circuit, in language quoted in *Valley Drug*, stated that "[s]ome of these" 300,000 persons "undoubtedly derive great benefit" from the airport. *Id.* The Seventh Circuit discussed this issue in dicta, however, in the context of noting the large number of individual "variables" that may determine the impact of the airport on a particular class member. *Id.* A class member who "benefited" from the existing operations at O'Hare might well oppose the representative plaintiff's efforts to effect changes in those operations. *Id.* In *Morris*, eighteen members of the Army National Guard sued over alleged violations that occurred in reducing the number of jobs in a missile program. The plaintiffs were among 291 technicians whose jobs would be eliminated. *See Morris*, 553 F.2d at 867–68. The opinion discusses the plaintiffs' motion for class certification in two sentences. *Id.* at 870–71. But apparently, the eighteen plaintiffs sought to represent all 291 technicians, even though all proposed class members would be competing for only 115 available positions. *Id.* at 867. A remedy that would protect the job of one class member could deprive another of a position. Finally, in *Phillips*, plaintiffs were former U.S. Post Office employees who accepted offers to resign with various benefits rather than lose their jobs in a reduction in force, but who then sued, alleging their retirements were coerced. *See Phillips*, 502 F.2d at 363–64. The plaintiffs sought to represent a class of 1,500, and

Under the direct purchaser rule, however, each direct purchaser may recover the full amount of the overcharge it paid. It is irrelevant whether, for example, a direct purchaser may have actually benefited from higher prices associated with brand-name drugs because its profits were a percentage of its acquisition costs.[116] The Eleventh Circuit never grappled with this aspect of the legal framework for recovery of damages under *Illinois Brick* and *Hanover Shoe*.[117] None of the cases the Eleventh Circuit cited was an antitrust case brought by direct purchasers.[118] None, therefore, involved the rule that a plaintiff's recovery does not depend on the actual net harm it suffered. The court's formalistic approach failed to adjust to the very task it placed before itself: assessing the potential conflict in light of the "economic reality of the situation."[119] The court refused to apply its rule for the potential conflicts "any differently than [the court] would apply [the rule] in all other contexts."[120] In sum, by relying on case law that developed in areas of law unaffected by the direct purchaser rule, the court based its decision on an approach to damages that simply did not apply.

C. Applying the Policy Concerns of *Illinois Brick* to *Valley Drug*

The Eleventh Circuit should have ruled quite differently in *Valley Drug* in light of *Illinois Brick* and *Hanover Shoe*.[121] Under *Hanover Shoe*, no discovery would be necessary to determine which class members

requested a ruling that "all the resignations" were unlawful. *Id.* at 367. The court observed that some class members undoubtedly desired to resign, and a class ruling finding their retirements unlawful might subject some class members to *affirmative liability* to, for example, repay retirement bonuses, obligations "they are not in a financial position to shoulder." *Id.* In such circumstances, involving individuals and potential affirmative liability, the potential conflict could not be cured by notice and an opportunity to opt out. *Id.*

116. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

117. The court did acknowledge that plaintiffs had relied throughout their briefs in support of class certification on *Illinois Brick* and *Hanover Shoe*. *See Valley Drug*, 350 F.3d. at 1192. Indeed, the court recognized that these cases together meant that all of the class members—those who may have profited and those who did not—could recover whatever overcharge they paid. *See Id.* The court then concluded, however, that this fact did not eliminate any "fundamental conflict" between the class members. *Id.* What the court failed to explain was why, in light of the direct purchaser rule, there was a conflict between the class members at all. As noted in the text, it simply never identified the objectives of different class members that might have been at odds. *See id.*

118. *See supra* notes 114–115.

119. *Valley Drug*, 350 F.3d at 1195.

120. *Id.* at 1193 (citing Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000)). The *Valley Drug* court described the Pickett decision as "ruling a class cannot be certified where some class members benefitted economically from conduct alleged to be illegal by the named representatives." *Id.*

121. The Southern District of Ohio in *J.B.D.L. Corp. v. Wyeth-Ayerst Labs.*, No. C-1-01-704, 2003 WL 23844777 (S.D. Ohio May 12, 2003), explained the point succinctly:

profited from the allegedly illegal conduct and, for those that did, by how much. That discovery could not yield information about any conflicting objectives among the potential class members, and so would not be worth pursuing. After all, every class member could recover the overcharge it paid, whether or not it was able to pass on some or all of it to downstream purchasers.[122] A review of the policy goals of *Illinois Brick* shows that foregoing this unnecessary discovery would have been the best course.

The primary policy goals that the Supreme Court identified in *Illinois Brick* were certainty, efficiency, and effective enforcement. It was toward these ends that the Supreme Court chose a standard that would avoid any inquiry into "the complex economic adjustments to a change in the cost of a particular factor of production."[123] According to the Court, that inquiry was by its nature uncertain, complicated, and inefficient.[124] Yet that is the path down which the Eleventh Circuit's decision may lead. *Valley Drug* authorized "downstream discovery,"[125] designed to determine if any direct purchasers profited from an alleged antitrust violation. That task can be difficult, costly, and, under *Hanover Shoe* and *Illinois Brick*, is ultimately irrelevant.[126]

> Wyeth next argues that there is a conflict between the class representatives and some class members because some class members purchased large quantities of Premarin and were able to resell it at a greater profit after price increases. This argument is also without merit. Antitrust injury is considered complete when the direct purchaser pays an illegal overcharge and whether he was able to pass through the overcharge to indirect purchasers is irrelevant to the inquiry. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968); *Hawaii v. Standard Oil Co. Of California.*, 405 U.S. 251, 262 n.14 (1972); *Illinois Brick*, 431 U.S. at 724–25. Thus, as long as the price paid by the class members for Premarin was higher than it would have been absent the alleged anticompetitive conduct, there is no conflict created if indeed some of the direct purchasers were able to recoup the overcharge through price increases passed on to other purchasers.

Id.

122. The Eleventh Circuit acknowledged that it did not disagree with the Tenth Circuit's holding in *Sports Racing Services v. Sports Car Club of America*, 131 F.3d 874 (10th Cir. 1997), that

> "Hanover Shoe precludes the argument that [plaintiff] did not suffer cognizable antitrust injury merely because it passed overcharges on to its customers or otherwise was shielded from competition by defendants' anticompetitive behavior. . . . As a direct purchaser, [plaintiff] may sue for and recover the full amount of the illegal overcharge."

Valley Drug, 350 F.3d at 1192 (quoting Sports Racing Servs. v. Sports Car Club of Am., 131 F.3d at 885).

123. Illinois Brick Co. v. Illinois, 431 U.S. 720, 731–32 (1977).

124. *Id.*

125. 350 F.3d at 1195–96.

126. See *In re Visa Check/Master Money Antitrust Litigation*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002), in which the

Moreover, the court imposed this difficult and costly enterprise on the absent class members. This is, to put it gently, ironic. In the name of protecting the absent class members—especially the national wholesalers—the court foisted a burden on them.[127]

In contrast, class certification without any downstream discovery would promote vigorous enforcement of the antitrust laws to the benefit of the absent class members. The Eleventh Circuit acknowledged that the national wholesalers could sue, even if they profited from the conduct at issue in *Valley Drug*.[128] *Illinois Brick* reveals that in an ideal world they would do so. Indeed, the structure that the Supreme Court created for private enforcement of the antitrust laws was designed to force defendants to pay treble damages for the overcharge they imposed on *all* of their sales.[129]

Furthermore, the Court's analysis in *Illinois Brick* belies the Eleventh Circuit's suggestion that the national wholesalers may have cho-

district court rejected the argument that a class seeking antitrust overcharge damages should not be certified because defendants' alleged conduct created "'winners' and 'losers.'" *Id.* at 85. The district court stated that "[t]his argument is immaterial when an antitrust plaintiff proceeds on an 'overcharge theory' of damages." *Id.* (emphasis added); *see also In re* Buspirone Patent & Antitrust Litig., 210 F.R.D. 43, 60 (S.D.N.Y. 2002) (rejecting argument that major wholesalers may have benefited from delayed generic entry, and explaining that to permit the argument would introduce "just the kind of complicated proceedings . . . that the Supreme Court held to be generally inappropriate in the antitrust context" (citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492–93 (1968)); *In re* Relafen Antitrust Litig., 218 F.R.D. 337, 344 (D. Mass. 2003) (defendant's arguments "regarding actual economic harm" are "irrelevant" where class seeks overcharge damages); *id.* at 343 ("Louisiana Wholesale asserts claims typical of those of the class, claiming similar injuries, suffered during the same period and arising from the same conduct. As such, the Court conclude[s] that no conflicts presently exist."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 317 (E.D. Mich. 2001) (rejecting argument that some class members who incur an overcharge may nevertheless not have suffered antitrust injury because they allegedly obtained a net benefit (citing *In re Visa Check*, 192 F.R.D. at 85)); *id.* at 306 (approving Louisiana Wholesale as class representative and rejecting defendants' speculative arguments about potential conflicts).

Some discovery might be appropriate to determine if a purchaser qualified for the very narrow exception to *Illinois Brick* for "cost-plus" contracts. *See supra* note 41. This exception, however, rarely, if ever, applies and so any such discovery should be very limited.

127. Courts have consistently refused to permit downstream discovery in federal antitrust cases governed by *Hanover Shoe* and *Illinois Brick*. *In re* Vitamins Antitrust Litig., 198 F.R.D. 296, 301 (D.D.C. 2000) ("no court has ever allowed production of individualized downstream data"); Go-Tane Serv. Stations, Inc. v. Ashland Oil, Inc., 508 F. Supp. 200, 204 n.8 (N.D. Ill. 1981); *In re* Folding Carton Antitrust Litig., No. MDL 250, 1978 U.S. Dist. LEXIS 20409, at *9 (N.D. Ill. May 5, 1978) ("Whether purchasers absorbed, passed-on, or made a profit . . . is irrelevant, and investigations into such matters are proscribed by *Illinois Brick*."); *In re* Wirebound Boxes Antitrust Litig., 131 F.R.D. 578 (D. Minn. 1990); *In re* Polyester Staple Antitrust Litig., No. 3:03CV1516 (W.D.N.C. Feb. 5, 2004).

128. 350 F.3d at 1193–94.

129. *See Illinois Brick*, 431 U.S. at 745–46; *Hanover Shoe*, 392 U.S. at 494.

sen not to serve as named plaintiffs because their interests were not served by the litigation. As the Supreme Court noted, a potential hazard of the direct purchaser rule is under-enforcement because some direct purchasers may be reluctant to bring an action that might "disrupt[ ] relations with their suppliers."[130] The national wholesalers may have hesitated to initiate litigation against the drug manufacturers for this reason. Class certification can cure this problem by permitting absent class members to recover overcharges simply by remaining in the class, thereby promoting the deterrent function of private enforcement of the antitrust laws. Absent class members who do not wish to participate may opt out. The national wholesalers did not opt out of the class originally certified in *Valley Drug*.[131] It is implausible to think that such "sophisticated businesses"[132] would fail to remove themselves from a class that was harming their interests.[133]

130. *Illinois Brick*, 431 U.S. at 746.

131. *See In re* Terazosin Hydrochloride Antitrust Litig., 223 F.R.D. 666, 679 (S.D. Fla. 2004). Nor did they opt out of several other similar class action suits seeking overcharges arising from alleged delayed generic competition. *Id.*

132. 350 F.3d at 1194 n.20.

133. *See* Larry James Oldsmobile-Pontiac-GMC Truck Co., Inc., 164 F.R.D. 428, 437 (N.D. Miss. 1996) (if "class member genuinely disputes the appropriateness of the suit" "such a member may utilize the opt-out procedure"); Lockwood Motors, Inc. v. Gen. Motors Corp., 162 F.R.D. 569, 578 (D. Minn. 1995) (same); *In re* Potash Antitrust Litig., 159 F.R.D. 682, 692 (D. Minn. 1995) (even if defendants' allegedly anticompetitive conduct may benefit some class members in the long run, such class members "are free to opt out"); Uniondale Beer Co., Inc. v. Anheuser-Busch, Inc., 117 F.R.D. 340, 343 (E.D.N.Y. 1987) ("[A]ny class member holding a different position on the benefits of the lawsuit or believing that its interests conflict with those of the named representatives may 'opt out.'"); Race Buick Pontiac-Cadillac Oldsmobile-GMC. Inc. v. Gen. Motors Corp., No. Civ. A. No. 94-25-E, 1994 WL 868022, at *4 (W.D. Pa. Oct. 11, 1994) ("To the extent that differences of opinion exist between the named plaintiff and some of the members of the putative class the Court is satisfied that the differences can be adequately addressed by the opt-out procedure."); Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979) ("Any antagonistic interests were ameliorated by the provision for notice in the decree, with an opportunity to opt out of the class."); Cortright v. Resor, 325 F. Supp. 797, 807 (E.D.N.Y. 1971), *rev'd on other grounds*, 437 F.2d 245 (2d Cir. 1971) (fact that no class members objected or asked to be excluded from the litigation refuted allegations that the representative plaintiffs were not adequate or that antagonism existed). *See generally* 7A WRIGHT & MILLER, *supra* note 3, §1768 ("Silence after appropriate notice . . . may demonstrate that the members have acquiesced in the party's representation and show a lack of antagonism. This is especially true if the members have been fully informed that the judgment in the action will be conclusively binding on them.").

Finally, one might question whether the court would want to protect the interest an absent class member might have in encouraging a violation of the antitrust laws. The court addressed this issue in *In re Potash*, 159 F.R.D. at 690–91, where the defendants were accused of fixing the price of potash, a mineral used to make fertilizer. As in *Valley Drug*, the representative plaintiffs were among the smaller purchasers of potash. *Id.* In arguing that the representative plaintiffs failed the adequacy requirement of Rule 23(a)(4), defendants

Permitting direct purchasers who allegedly profited from an antitrust violation to recover alongside, and from the efforts of, direct purchasers who suffered a net loss, may, in a sense, entail a windfall that the law rarely permits. But allowing that "windfall" was the fundamental result of the decision of the Supreme Court in *Illinois Brick*.[134] Including all direct purchasers in a single class may, like politics, make for strange bedfellows, but it does not create a conflict among class members seeking damages.

D. A Court at War with Itself—*Valley Drug* on Remand

The Eleventh Circuit's decision left the trial court with a struggle of jurisprudential proportions. Long ago Lon Fuller suggested that incoherence may be one of the defects of interpreting law other than in furtherance of the purposes it serves.[135] On remand, the trial court was forced to confront this possibility as it was asked to implement a ruling that it seemed to recognize did not make sense. The result is an opinion that at first appears to concede that class certification is appropriate, but then denies class certification because the plaintiffs allegedly failed to make a showing that they never should have been required to make.

To be more concrete, the trial court saw itself as charged with pursuing two irreconcilable tasks on remand: first, to find the named plaintiffs adequate representatives of the class if their interests did not conflict with those of the absent class members[136] and, second, to find the named plaintiffs inadequate representatives if some members of the proposed class gained and others lost from the conduct at issue.[137]

In regard to the first task, the Eleventh Circuit directed the trial judge to assess whether there was a "fundamental"[138] conflict sufficient to render the named plaintiffs inadequate representatives of the

submitted affidavits from several large-volume purchasers stating that they did not believe the litigation was in their "long-term interest." The court responded: "[T]he fact that an illegally controlled potash market tends to favor the long-term interests of several large members of the putative class is . . . not an interest the law is willing to protect" and such class members "are free to opt out." *Id.* at 692.

134. *See, e.g.*, Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 327 (9th Cir. 1980) (any "windfall" is only that which was approved by the Supreme Court).

135. *See* Fuller, *supra* note 46, at 644 (questioning possibility of ordered legal system that is not aimed toward good (or just or moral) ends).

136. *In re Terazosin*, 223 F.R.D. at 671.

137. *Id.*

138. *Valley Drug*, 350 F.3d at 1189 (quoting 7A WRIGHT & MILLER, *supra* note 3, § 1768, at 326; 1 NEWBERG & CONTE, *supra* note 3, § 3.26, at 3–143 to -144).

class.[139] On this point, the trial court was clear—"the evidence indicate[d] there [wa]s no class antagonism or conflict, much less a fundamental one."[140] Many of the absent class members themselves, including the three national wholesalers, offered affidavits stating that their interests and objectives were aligned with the interests and objectives of the class representatives.[141] Moreover, the three national wholesalers, which the Eleventh Circuit suggested might be uninterested in or even opposed to the litigation, in fact represented to the court that they did not perceive any conflict and, to the extent such a conflict might exist, waived any objection.[142] They wanted the benefit of the class litigation.[143] Finally, no concrete set of conflicting objectives came to light in the renewed litigation on class certification.[144] Indeed, asked repeatedly for an example of such a conflict, Abbott's counsel could offer none. When pressed by the trial court, Abbott's vague response was:

> *For example, if you have parties that were actually not harmed out of pocket, actually benefitted, might they approach the case differently than parties who need to be compensated for actual losses? Might they have a different position on settlement? They might. And this is part of the reason you don't get into the speculation.*[145]

In other words, Abbott could not identify any actual conflict at all.[146]

139. *In re Terazosin*, 223 F.R.D. at 671.

140. *Id.* at 679.

141. *Id.* at 678–79. These affidavits were from twenty-three absent class members, including some that were identified by the court to participate in downstream discovery which, in turn, was supposed to allow an assessment of whether the proposed class contained some members who suffered a net loss and some who enjoyed a net gain from the conduct at issue. *Id.*

142. *Id.* at 679. These three national wholesalers suffered the bulk of the alleged damages of the proposed class. *Id.* at 678–79. The same national wholesalers had chosen not to opt out of other similar litigation in the past, which had yielded them significant compensation. *Id.* at 679.

143. *Id.* Considering that the underlying purpose of the adequacy requirement is to protect the interests of absent class members, an affidavit from an absent class member attesting to its desire to participate in a class action should be conclusive regarding that class member's interests.

144. *Id.* at 680.

145. Transcript of Oral Argument at 123, *In re* Terazosin Hydrochloride Antitrust Litig., 223 F.R.D. 666 (S.D. Fla. 2004) (No. 99-MDL-1317).

146. Abbott's counsel, without apparent irony, dismissed the affidavits submitted by the national wholesalers—in which they state they did not perceive a conflict and wished to remain as class members—as "self-serving" because "All they are saying is, 'We want a free check.' Why not? Who wouldn't sign that?" *Id.* at 149. In other words, defense counsel was admitting that the litigation would benefit the national wholesalers, whether or not they enjoyed a net benefit from any antitrust violation, just as the litigation would benefit class members who suffered a net loss from the alleged antitrust violation. This argument was tantamount to a concession that no conflict in fact existed between absent class members.

All of this was consistent with the reality of the litigation. As the trial court explained, "[T]he rights of the absent class members will not be sacrificed or diminished [in class litigation], and advancing the interests or maximizing the recovery of one member or subset of members will not sacrifice the rights or diminish the recovery of any other class member or members."[147] Based on the underlying purpose of the adequacy requirement, no conflict existed. The natural conclusion should have been that the class should be certified. The problem, however, was that the trial court did not perceive itself as having leeway to decide that issue on the merits.

The trial court understood itself to be constrained by a second task on remand: to implement the specific directives of the Eleventh Circuit. This required the trial court to abide by the rule which it understood the Eleventh Circuit to articulate: "A fundamental conflict exists 'where some party members claim to have been harmed by the same conduct that benefitted other members of the class.'"[148] True, the appellate opinion elsewhere said that when a class contains both those who enjoyed a "net gain" and those who suffered a "net loss" from a single course of conduct, a conflict is only "highly likely."[149] The trial court may have had more room to maneuver than it thought. Still, its earlier decision to certify a class had been vacated, providing the court with reason for caution.

Further, the trial court faced a real difficulty. It is not easy to craft an exception to a rule that does not make any sense in the first place. The trial court acknowledged that the representative plaintiffs "did present logical arguments to support the conclusion that no fundamental antagonistic interest exists."[150] But similar logical arguments establish that the Eleventh Circuit's decision simply is not correct. No conflict arises in direct purchaser litigation when a class includes some net "winners" and some net "losers," a fact which the trial court appeared to appreciate. That put the trial court in a bind. It could have carved out an exception to the Eleventh Circuit's ruling, but doing so—on the basis that the net effects of an overcharge are irrelevant under the direct purchaser rule—would seem to contravene the Eleventh Circuit's ruling.

147. *Id.* at 680 (citing Valley Drug, Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)).

148. *Id.* at 673 (quoting *Valley Drug*, 350 F.3d at 1189).

149. *Valley Drug*, 350 F.3d at 1193–94.

150. *In re Terazosin*, 223 F.R.D. at 678.

Similar problems plagued the downstream discovery that the Eleventh Circuit authorized the trial court to undertake. On remand, the trial court allowed the defendants to conduct discovery in regard to a sample of twenty-three absent class members.[151] The court recognized that the discovery was "difficult not only because it involved the novel area of downstream discovery of absent class members, but also because of the logistical and mechanical issues that surfaced during the process."[152] As a result, it was unsuccessful.

Most of the absent class members subjected to the discovery did attempt to respond (a few did not).[153] However, of those that responded, for various reasons the production was generally insufficient to separate net "winners" from net "losers."[154] The court acknowledged the "good-faith and diligent efforts made to compile th[e] data."[155] However, mergers and consolidation in the industry, the sheer volume of data, the need to create new data compilation programs, the large number of subpoenas outstanding from other litigation matters, honest mistakes, and the challenges of creating a formula to analyze the data, combined to confound the effort.[156] The discovery did not yield a clear division between class members who gained and class members who lost because of the defendants' actions.[157] Of course, this outcome is unsurprising. The difficulty of this very task was the catalyst for the Supreme Court's decisions in *Hanover Shoe* and *Illinois Brick*.[158] The Court adopted the direct purchaser rule precisely because this sort of undertaking would "weigh[ ] down

151. *Id.* at 674.

152. *Id.* at 679.

153. *Id.* at 674.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 679.

158. The degree of difficulty might well have been caused by peculiar complications in assessing, for example, the economic effects of the alleged antitrust violation on the three national wholesalers, including that generic competition could increase margins, increase leverage to negotiate purchase prices and rebates, lower capital and inventory costs, improve liquidity, create additional means of earning profits, and generate better return on committed capital. *See supra* note 103. Discovery necessary to establish the effect of the overcharge on individual plaintiffs might well be feasible if it were necessary to assess individual damages, as it is in indirect purchaser actions under some state antitrust laws. *See, e.g., In re* Cipro Cases I and II, 2004 Cal. App. LEXIS 1286, at *21, *28–*31 (Ct. App. July 21, 2004) (holding class certification of California antitrust claims was appropriate even if at some point the court must assess damages individually for each class member).

treble-damages actions with . . . 'massive evidence and complicated theories.'"[159]

In response, the representative plaintiffs made several arguments that individualized downstream discovery was unnecessary, including that all of the direct purchasers would gain more from the recovery based on the antitrust violation than they possibly could have gained from the defendants' conduct.[160]

The trial court acknowledged that the plaintiffs' analysis was "logical."[161] Indeed, it concluded that the plaintiffs' arguments and evidence sufficed to show there really was no conflict.[162] But, that did not matter. As the trial court explained, "[S]hould the Court accept any of Plaintiffs' alternative approaches to satisfy the Eleventh Circuit mandate, the ordered downstream discovery of sales, volume, and rebate data would have been an irrelevant academic exercise. Therefore, the Court must conclude that none of the Plaintiffs' approaches satisfies the Eleventh Circuit instructions."[163] In other words, when a trial court is following directions from an appellate court that are unjusti-

159. Illinois Brick Co. v. Illinois, 431 U.S. 720, 741(1977) (quoting Hanover Shoe, Inc. v. United Machinery Corp., 392 U.S. 481, 493 (1968)). See also *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), in which the Third Circuit vacated the district court's denial of class certification. There, plaintiffs (gasoline retailers) alleged they had been overcharged on purchases of gasoline by being forced to purchase gasoline only from the oil company from which the retailer leased its service station. *Id.* at 439. The district court found that plaintiffs were required to prove the amount of their lost profits, if any, as a result of defendants' conduct and that, because proving lost profits would be complicated by "pass-on" issues, class certification was inappropriate. Bogosian v. Gulf Oil Corp., 62 F.R.D. 124, 138–39 (E.D. Pa. 1973). The Third Circuit agreed that proving the amount of pass-on and lost profits would be complicated, but, the court stated "it is precisely for this reason that the Supreme Court eliminated the 'passing-on defense' in *Hanover Shoe, Inc.*" *Bogosian*, 561 F.2d at 456.

160. *In re Terazosin*, 223 F.R.D. at 676.

161. *Id.* at 677.

162. *Id.* at 680.

163. *Id.* at 678. This conclusion does not follow logically. The Eleventh Circuit did authorize downstream discovery, but it did so on a limited record, and the opinion expressly invited a comparison, on remand, between, on the one hand, the amount of overcharge damages that a class member may be entitled to recover and, on the other hand, the amount of the net economic benefit that the same class member obtained from defendants' conduct. Valley Drug, Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1193–96 (11th Cir. 2003). The record before the Eleventh Circuit did not allow this comparison. A showing that in general class members would benefit more from recovering the overcharge than from the antitrust violation would obviate the need for downstream discovery and permit class certification, while still satisfying the mandate of the Eleventh Circuit. That said, the potential "tradeoff" conflict that the Eleventh Circuit identified still makes no sense in light of the direct purchaser rule. Because the plaintiffs sought damages only for past conduct, there is no "tradeoff" that any class member must make, and all class members are entitled to recover the full amount of the overcharge. Also, the Eleventh Circuit

fied in the first place, the trial court cannot deviate from the instructions, even if doing so would better serve the purposes of the law. Perhaps the only way to abide in good faith by a misdirected order is to follow it to the letter. Recourse to the spirit of the law may appear tantamount to insubordination. As a result, the trial court concluded that the failure of the named plaintiffs to show which class members were "winners," and which "losers," required denial of class certification.[164]

In an apparent effort to salvage the situation, the trial court nevertheless made factual findings sufficient to support the underlying standard for adequacy in class actions.[165] The trial court explained, "Based on this Court's interpretation of the Eleventh Circuit's instructions, this renewed motion for class certification must be denied. However, if the Court's reading of the opinion is inaccurate, these alternate factual showings may satisfy the Eleventh Circuit's concerns."[166] Rare, indeed, is such a tortured effort by a trial court to decide an issue correctly, even if the court failed to do so becasue it felt obligated to follow errant orders from above.

Conclusion

Courts assessing potential conflicts between class members should tread carefully. They may harm the very absent class members they are obligated to protect. This danger is particularly grave when it comes to the direct purchaser rule, which can lead courts astray, especially when they rely on doctrine developed in areas of the law subject to the general principle that a plaintiff should recover only for the net damages it suffered.

That is apparently what occurred in *Valley Drug*. The Eleventh Circuit and the district court (apparently against its better judgment) imposed on the national wholesalers, and other class members, discovery

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did not have before it the affidavits from the national wholesalers attesting to their desire to participate as class members.

164. *In re Terazosin*, 223 F.R.D. at 680. The court stated,

> Except for the Plaintiffs' failure to comply with the Eleventh Circuit's directions to determine net 'winners' and 'losers' to ensure a homogeneous class to avoid any potential unforeseen conflict, the [trial] Court does not find a realistic possibility for fundamental antagonism. The economic realities, factual circumstances, and superior efficiency seem to support certification of this class, but the clear mandate of the Eleventh Circuit requires denial of the renewed motion.

Id.

165. *Id.* at 678–80.

166. *Id.* at 678 n.25.

about whether they profited from the alleged antitrust violation, even though that issue had no proper bearing on the issue of class certification. In the name of protecting absent class members, then, the court subjected them to an expensive and unnecessary burden. When this discovery failed to yield clear answers about whether some direct purchasers made more profit, or less, as a result of an overcharge—an issue the Supreme Court made irrelevant by its rulings in *Hanover Shoe* and *Illinois Brick*—the result was that the class members' interests, as the class members themselves expressed them in affidavits submitted to the court, were sacrificed to avoid a chimerical class conflict. One can only imagine the pious faces of defendants as they advocate for this approach in future cases.