No. 10-2514

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Steven Messner, Amit Berkowitz, Henry W. Lahmeyer, M.D., S.C., Painters District Council No. 30 Health & Welfare Fund,

Plaintiffs-Appellants

v.

NorthShore University HealthSystem,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 07 C 4446
The Honorable Joan Humphrey Lefkow

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS AND REVERSAL

Avidan J. Stern
Lynch & Stern LLP
150 S. Wacker Drive
Suite 2600
Chicago, Illinois 60606
Phone: (312) 346-1600

Eric L. Cramer
Andrew C. Curley
Berger & Montague, P.C.
1622 Locust St.
Philadelphia, PA 19103
Phone: (215) 875-3000

Professor Joshua P. Davis
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117
Tel: (415) 422-6223

Counsel for Amicus Curiae
The American Antitrust Institute

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2514

Short Caption: Messner, et al. v. NorthShore Univesrity HealthSystem

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s Avidan J. Stern Date: August 9, 2010

Attorney's Printed Name: Avidan J. Stern

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

Address: Lynch & Stern LLP, 150 S. Wacker Drive, Suite 2600, Chicago, IL 60606

Phone Number: (312) 346-1600 Fax Number: (312) 896-5883

E-Mail Address: avi@lynchandstern.com

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N/A

Attorney's Signature: /s Eric L. Cramer Date: August 9, 2010

Attorney's Printed Name: Eric L. Cramer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

Address: Berger & Montague, P.C., 1622 Locust St.
Philadelphia, PA 19104

Phone Number: 215 875 3000 Fax Number: 215 875 4604

E-Mail Address: ecramer@bm.net

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N/A

Attorney's Signature: /s Andrew C. Curley Date: August 9, 2010

Attorney's Printed Name: Andrew C. Curley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

Address: Berger & Montague, P.C., 1622 Locust Street, Philadelphia, PA 19103

Phone Number: 215.875.3050 Fax Number: 215.875.4604

E-Mail Address: acurley@bm.net

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N/A

Attorney's Signature: /s Joshua P. Davis Date: August 9, 2010

Attorney's Printed Name: Joshua P. Davis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

Address: University of San Francisco School of Law
2130 Fulton Street, San Francisco, CA 94117

Phone Number: 415-422-6223 Fax Number: 415-622-6433

E-Mail Address: davisj@usfca.edu

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 100 prominent antitrust lawyers, law professors, economists and business leaders.[1] AAI frequently appears as *amicus curiae* in cases raising important competition issues. See http://antitrustinstitute.org for a complete description of AAI's activities. AAI submits this brief because the lower court's incorrect reading of the requirements of Rule 23 undermines the enforcement of the federal antitrust laws.

The Supreme Court has long recognized the important role private enforcement plays in the enforcement of the federal antitrust laws. *See, e.g., Mitsusbishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). The federal government cannot be expec-

[1] AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no person or entity other than AAI or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

ted to prosecute all violations of federal antitrust laws. Nor has the federal government traditionally seen its role as compensative of the victims of antitrust violations. The private mechanism fills these significant gaps.[2]

Further, given the economic disparities between typical antitrust defendants and their victims, the often diffuse nature of the harms, and the costs involved in litigating antitrust cases, the class mechanism is integral to private enforcement of the antitrust laws. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions . . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions[.]").

As detailed below, the reasoning used by the district court to deny class certification in this matter will not only affect the members of the proposed class in this case, but could thwart the ability of consumers and victims of

---

[2] *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. Rev. 879, 897, 906 (2008) (available at SSRN: http://ssrn.com/abstract=1090661) (reviewing 40 recent successful private antitrust cases and finding that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws,* 2011 B.Y.U. L. Rev. __ (forthcoming) (available at SSRN: http://ssrn.com/abstract=1565693) (showing important deterrent effect of private enforcement of antitrust laws).

anticompetitive violations more generally from seeking redress. Denial of class certification in cases like this one undermines the litigation efficiencies that Rule 23 of the Federal Rules of Civil Procedure is meant to provide, and has the potential to have far-reaching harmful effects on competition and consumers throughout the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The representative plaintiffs in this case are private persons and entities claiming that the merger of two hospitals—Evanston Northwestern Healthcare ("ENH") and Highland Park Hospital—violated the federal antitrust laws, causing them and a similarly situated class of persons and entities to pay artificially inflated prices for health services at the combined hospital. The Federal Trade Commission ("FTC") previously determined this merger to be anticompetitive, explaining that "there is no dispute that ENH substantially raised its prices shortly after the merging parties consummated the transaction."[3] The FTC observed, based on the analysis of both the plaintiffs' and the defendants' economic experts, that the merger "gave the combined entity the ability to raise prices through the exercise of market power."[4] Yet the district court's ruling would preclude injured patients and insurers and other third party payors from pursuing a class action to recover their damages—a

[3] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315, Opinion of the Commission (FTC Aug. 6, 2007), at 4, *available at* http://ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[4] *Id.* at 5.

decision that, for all intents and purposes, will bar redress for the vast majority of the victims of the anticompetitive merger.

Importantly, the decision follows from a flawed analysis of the kind of common impact that must be shown for a class to be certified. There is nothing particularly unusual about the hospital industry in terms of how hospitals price their products and negotiate with customers. If a class action is not appropriate in a case such as this, then firms in many industries considering a violation of the antitrust laws will be emboldened by the knowledge that they are unlikely to face liability for the damages they cause, thereby increasing the frequency of illegal mergers and other anticompetitive conduct.

In the trial court's March 30, 2010 Opinion & Order, No. 1:07-cv-04446 (March 30, 2010) ("Op."), denying plaintiffs' motion for class certification, the district court noted multiple issues that *were* common to the class as a whole. They include whether plaintiffs' claims were subject to arbitration (Op. at 15-16), and whether the statute of limitations has run on plaintiffs' claims (Op. at 18-19), the latter of which, the lower court noted, involves the common question of "whether ENH engaged in a continuing violation of antitrust law[.]" *Id.* at 19. It is also evident, as the district court apparently assumed, that proving the underlying antitrust violation—including whether the merger improperly enhanced the defendant's market power in the relevant product and geographic markets—would be common to the class as a whole. And since ENH plans to

"vigorously contest[] liability,"[5] despite the FTC's determination, it is likely that the litigation and trial of this case will focus on issues common to the class, such as whether the merger violated antitrust law, and whether it enhanced market power in the relevant market.

Despite all of these central common issues, the trial court denied class certification for only one reason: its finding that plaintiffs had not offered common evidence capable of showing injury to *every* member of the proposed class. Op. at 19-20, 57. According to the district court, the plaintiffs' failure to make that showing meant that common issues did not predominate over individual issues, rendering certification under Rule 23(b)(3) inappropriate.

In so ruling, the trial court applied the wrong legal standard. It is not true that satisfying the predominance test requires evidence capable of showing harm to *every* member of a proposed class. Common evidence capable of establishing *widespread* injury to the class suffices, even if some class members suffered no harm. *Kohen v. Pacific Investment Management Company LLC* ("*PIMCO*"), 571 F.3d 672, 677 (7th Cir. 2009) (the "possibility or indeed inevitability" that a class will include uninjured parties "does not preclude class certification"); *Pella Corp. v. Saltzman* ("*Pella*"), 606 F.3d 391 (7th Cir. 2010) (same); *see also, e.g., In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 U.S. Dist. LEXIS 36719, at **41–42 (E.D. Pa. May 2, 2008) ("even if it could be shown that some individual class members were not

[5] Respondent's Answer in Opposition to Petition for Leave to Appeal, April 23, 2010, at 8, n.5.

injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class") (citation omitted); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007) ("In order to demonstrate that common evidence exists to prove class-wide impact or injury, plaintiffs do not need to prove that every class member was actually injured").

To be more precise, the trial court's error was compound. It followed first from an improper characterization of the showing necessary to establish common impact, that is, that plaintiffs are capable of offering common proof to establish that the antitrust violation harmed the class members. The trial court held that the *issue of impact* is common to the class only if common evidence can establish injury to *each* class member. Op. at 19-20 ("'[W]here [impact] cannot be established *for every class member* through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.'") (quotation omitted) (emphasis added). However, as just explained, the long-accepted rule, recently confirmed by this Circuit, is that where plaintiffs put forward common evidence capable of establishing that harm is *widespread* among class members—even if the common evidence is not capable of showing that *every* class member suffered injury—proof of impact will *not* defeat predominance. *PIMCO*, 571 F.3d at 678; *Pella*, 606 F.3d at 395-96.

The trial court's error also derived from its inappropriate conflation of predominance regarding *impact* with predominance regarding *the case as a whole*. To satisfy Rule 23(b)(3), the trial court required plaintiffs to show "that

common proof will predominate with respect to *each element* of their claims." Op. at 14 (emphasis added). But the proper test is whether common issues will predominate *overall* at trial, not whether they will predominate in regard to each element of plaintiffs' claims. *See Pella*, 606 F.3d at 394-95; *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107-108 (2d Cir. 2007) (noting that even if individual issues predominate regarding proof of impact, that does not necessarily mean they will predominate at a class trial). Rule 23(b)(3) itself, fairly read, does not reference individual elements of a plaintiff's claim, but rather considers the plaintiff's case as a whole and asks whether "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3).

The fact is that the parties generally allocate little or no time at an antitrust trial to whether there are or could be uninjured members among the class. The overriding issue is almost always proving the antitrust violation itself and the aggregate damages to the class as a whole. As long as the class definition does not exaggerate total damages—and it would not under a proper measure of aggregate damages—defendants do not have any interest in determining at trial whether the class contains uninjured members. The record before the district court and its factual findings provide no reason to believe that this case would be an exception to the general practice. Thus, even if individual issues predominate regarding a single element of a claim—such as impact—a trial court may nevertheless certify a class if common issues predominate in the

overall case. *See Cordes*, 502 F.3d at 107-108. At minimum, the class should be certified to determine the multiple common issues. *Pella*, 606 F.3d at 395-96.

For these reasons, the trial court's order denying class certification should be reversed and remanded. The trial court should not inquire whether plaintiffs offered common evidence capable of establishing harm to *every* class member. It should ask instead whether plaintiffs have offered common evidence capable of showing injury that is *widespread* among class members and, if not, whether common issues *nevertheless predominate* over any individualized issues.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY REQUIRED EVIDENCE CAPABLE OF SHOWING IMPACT TO EVERY CLASS MEMBER

The district court subjected plaintiffs' proof of impact to the wrong standard. It introduced the subject of common impact by quoting the following dicta from another Circuit: "'[W]here [impact] cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.'" Op. at 20 (quoting *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003)).[6] The

[6] The lower court also cited *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008), for the proposition that "to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." Op. at 19-20. It is unclear whether this means that to satisfy predominance plaintiffs must have classwide evidence capable of showing harm to every class member, or simply that for any particular individual class member to recover, it would need to demonstrate injury. Notably, the Third Circuit has long held that satisfaction of predominance does not require common proof of injury to all class members. *See*

lower court then improperly judged plaintiffs' proof of impact by that standard, holding that plaintiffs had failed to satisfy predominance because they did not proffer an economic methodology capable of estimating "the price increases (if any) that *each individual class member* faced." Op. at 54 (emphasis added). It was this focus on harm to each and every individual class member—as opposed to deciding whether plaintiffs had evidence capable of demonstrating widespread injury to the class—that ultimately led the district court to find that plaintiffs had failed to satisfy predominance. That was error.

The district court's cursory analysis of common impact foundered on its attempt to apply this incorrect standard. The district court first noted that plaintiffs have a reliable means of estimating "the difference (if any) between the *average* price increases at a treatment hospital [*i.e.*, a hospital impacted by the merger] and the *average* price increases at a control hospital." Op. at 54 (emphasis in original). Thus, according to the lower court, plaintiffs, like the FTC before them, have a reliable common means of proving that prices, on average, are higher due to the challenged merger. The problem, for the lower court then, was plaintiffs' ability to go from the *average* price increases due to

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Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977) (vacating district court's denial of class certification even though class contained some unharmed members for whom "the free market price would be no lower than the conspiratorially affected price"); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 158 (3d Cir. 2002) (up-holding class certification despite recognizing the existence of some unharmed "[class] purchasers whose contracts were tied to a factor independent of the price of linerboard"). The *Hydrogen Peroxide* panel acknowledged it was not empowered to overrule prior precedent, 552 F.3d at 318 n.18, so the better interpretation of that opinion is as only requiring proof of impact (not necessarily common proof) regarding those class members who seek to recover.

the merger to a showing that every individual class member paid a higher price due to the merger.

Plaintiffs and their expert proposed to make this showing in multiple ways, including through apparently undisputed economic analysis demonstrating that, absent some compelling reason to believe otherwise, ENH would have exercised the enhanced market power it acquired through the merger by imposing price increases across all hospital services. Neither ENH nor its expert offered a theory to explain *why* the average price inflation due to the merger would be concentrated into a small number of services or patients, or would somehow be randomly dispersed across a small minority of the class. Plaintiffs, therefore, had (a) a reliable method of computing artificially inflated average prices charged by the hospital due to the challenged merger, and (b) an undisputed economic theory as to why average price increases would translate into *widespread* harm to the ENH patients and payors that make up the proposed class. That alone should have been enough to establish that plaintiffs had evidence capable of demonstrating widespread impact, which constitutes common impact under the correct standard.

Moreover, Plaintiffs had far more than economic theory to move from average price inflation to a showing of widespread overcharges. While largely ignoring the compelling economic testimony (and admissions from ENH) regarding the likely uniform exercise of market power across a range of hospital services, the district court focused on plaintiffs' expert's evaluation of the structure of the contracts between ENH and the large managed care organiza-

tions ("MCOs").[7] *See*, *e.g.*, Op. at 43 ("The analysis that establishes impact is that which relates to contract structure."). Plaintiffs' expert's review of the contracts revealed that if ENH overcharged a given insurer by a certain percentage, "all or substantially all" patients covered by that insurer would be overcharged by the same percentage. *Id.* at 22. However, the district court rejected the notion that "ENH increased prices across contracts at uniform rates across services" (*id.* at 56), and on that basis concluded that predominance was not satisfied. *Id.* at 56-57.

But, as shown below, not only is there no requirement that proof of impact requires a showing that class members all experienced "uniform" price increases, there is no rule that plaintiffs must proffer evidence capable of showing overcharges (even at variable levels) to all. The district court's own contractual analysis upon which it placed such great weight showed that *all 15 of the prices evaluated in the contract for which a comparison could be drawn went up when the price to the MCO went up*. Op. at 56. Now, some of those prices went up at rates that were "non-uniform," but all that means is that the *amount* of the overcharge would vary from class member to class member, not that there would be class members who did not pay overcharges. In any event, the court appears to have held the mistaken belief that evidence showing variable price increases meant that there were some class members who did

[7] MCOs are class members, as are the patients and insurance plans that pay for services at prices "determined by the pricing structures negotiated by the MCOs." Op. at 6.

not pay higher prices due to the merger, and denied class certification on those grounds. The court was wrong to do so.

II. CLASS CERTIFICATION DOES NOT REQUIRE HARM TO EVERY CLASS MEMBER

A. A Class May Include Some Members Who Did Not Suffer the Relevant Injury

In two recent opinions, the Seventh Circuit has confirmed that class certification under Rule 23(b)(3) does not require plaintiffs to offer evidence capable of proving that every member of a proposed class suffered injury.

The first decision was *PIMCO*. The defendant in *PIMCO* allegedly cornered the market for 10-year U.S. Treasury notes, driving up prices when investors who had sold short had to close out their contracts. However, not every purchaser of the notes was necessarily harmed by the scheme. Some class members who sold short might have done so as a hedge, and may have gained on net because they took a more substantial "long" position, so that the increase in price actually benefited rather than harmed them. *PIMCO,* 571 F.3d at 678-79. In other words, some members of the class—which included all investors who bought futures contracts on Treasury notes during the relevant period to close out a short position, *id.* at 674, 676—likely did not suffer any harm (and indeed may have benefited), and therefore did not have a valid claim. The defendant argued that plaintiffs' failure to show harm to *some* class members made class certification under Rule 23(b)(3) inappropriate. *Id.* at 676.

This Court rebuffed the defendant's position in no uncertain terms:

> [A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct. Those cases focus on the class definition; if the definition is so broad that it sweeps within it persons who could not have been injured by defendant's conduct, it is too broad.

PIMCO, 571 F.3d at 677 (citations omitted)

The *PIMCO* Court thus rejected the view that evidence capable of showing injury to every class member is necessary for class certification. Indeed, it suggested that the inclusion of some class members who were not harmed is "almost inevitable." *PIMCO,* 571 F.3d at 677. A class simply should not include members *who could not possibly have been injured*. *Id.* Nor should it include a "wildly" larger number of members than were injured. *Id.* at 679. But, according to *PIMCO*, a court need not determine which class members were injured and which were not before certifying a class. It explained, "Putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification." *Id.* at 676.

Here, all of the members of the class *could have been* injured. They all purchased the services that were allegedly subject to an antitrust violation. Indeed, the FTC previously determined this merger to be anticompetitive, explaining that "there is no dispute that ENH substantially raised its prices

shortly after the merging parties consummated the transaction."[8] The FTC observed, based on the analysis of both the plaintiffs' and the defendant's economic experts, that the merger "gave the combined entity the ability to raise prices through the exercise of market power."[9]

And the trial court did not reach the issue of whether the class included a "wildly" larger number of members than those who were harmed. Instead, it inquired whether plaintiffs had shown they can prove injury to *every* member of the proposed class, putting the cart before the horse in just the way *PIMCO* held was improper.

The Seventh Circuit reaffirmed this doctrine in *Pella*. Plaintiffs brought a proposed class action alleging that the defendants had sold aluminum-clad windows that were insufficiently water-proof, causing the wood to rot prematurely. *Pella,* 606 F.3d at 392. The defendants attempted to implement a program to compensate affected customers by modifying the warranty, but they never informed the end consumers of the program or the defect. *Id.* The proposed plaintiff class therefore brought claims for consumer fraud. *Id.*

The defendants argued that class certification was inappropriate. Because the members of the class would have to show causation and damages on an individual basis, the defendants contended that any defect in the windows did not necessarily cause the wood to rot for any given plaintiff. *Pella,* 606 F.3d at

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[8] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315, Opinion of the Commission (FTC Aug. 6, 2007), at 4, *available at* http://ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[9] *Id.* at 5.

394. This Court acknowledged these individual issues, but held that they—and the resulting fact that some class members' claims would not be valid—did not render class certification inappropriate:

> [T]he need for individual proof alone does not necessarily preclude class certification. A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments. Under the district court's plan, class members still must prove individual issues of causation and damages. While it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown, or the facts bearing on their claims may be unknown, this possibility does not preclude class certification.

Id. (citations omitted).

Just as in *Pella*, here proof of the underlying antitrust violation necessarily would be common to the class. But the trial court focused on an issue that could conceivably involve individualized proof: whether that antitrust violation, if established, caused harm to particular members of the class. The trial court below reasoned that that potential individual issue—and the possibility that some class members were not harmed—precluded certification under Rule 23(b)(3). That ruling was directly contrary to *PIMCO* and *Pella*.

B. Proving "Common Impact" Does Not Require Evidence Capable of Showing Injury to Every Class Member

The general rule in the Seventh Circuit is that certification of a class under Rule 23(b)(3) does not require common proof of injury to every class member. This rule bears on what is called "common impact" in antitrust cases, that is, the issue of whether plaintiffs have shown that they will be able to use common evidence in attempting to prove anticompetitive conduct had an "impact"—

otherwise known as "fact of damage" or "antitrust injury"—on the members of the proposed class. In particular, *PIMCO* can be understood as holding that for plaintiffs to prove common impact for purposes of class certification, they need merely provide evidence capable of showing that injury was *widespread* among class members, not that all or virtually all class members suffered harm. This has been the prevailing view for at least twenty years of class certification jurisprudence. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 252 (D. Del. 2002) ("[A] class can be certified even where some individual, absentee class members may later prove not to be injured"); *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("[T]he 'impact' element of an antitrust claim need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation.") (citation omitted); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("[C]ourts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class"); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class."); *Presidio Golf Club v. National Linen Supply Corp.*, Nos. C-71-945 SW, C-71-431 SW, 1976 U.S. Dist. LEXIS 11577, at **13–14 (N.D. Cal. Dec. 30, 1976) ("[T]he fact that certain members of

plaintiffs' class escaped injury altogether would not preclude certification or destroy the class' prima facie case of impact.").

This interpretation reflects the reasoning in *PIMCO*. There, this Court stated that class certification should be reconsidered if it turns out that a "high percentage" of the members of the class were not harmed by the defendant's effort to corner the market. *PIMCO*, 571 F.3d at 679. In other words, as long as the percentage of the class that suffered harm is high—and the percentage that did not is low—the issue of injury is common to the class.

In *PIMCO*, this common evidence involved plaintiffs showing that the conduct at issue did in fact generally raise the price of futures contracts on Treasury notes. *PIMCO*, 571 F.3d at 678. It is true that some class members may have hedged somewhat, but they would still have suffered some injury, even if the amount of the injury might not be the same as the total increase in price. *Id.* It is also true that other class members might have bet on the price rising, and sold short as a hedge. *Id.* But as long as there was no reason to believe that a high percentage of class members escaped harm entirely—as long as the class was not so large that it "wildly overstate[d] the number of parties that could possibly demonstrate injury"—the possibility that some class members were uninjured would not preclude class certification under Rule 23(b)(3). *Id.* at 678-79.

Here, as discussed above, the trial court interpreted common impact to require plaintiffs to offer evidence capable of showing harm to *every* class member. Op. at, *e.g.*, 19-20. That requirement is at odds with both the letter

and spirit of *PIMCO*. It conflicts with the letter of *PIMCO* because that case imposed a much lower burden, one that required only that the percentage of class members who were unharmed is not "high." *PIMCO*, 571 F.3d at 679.

The trial court's reasoning also runs counter to the policy considerations underlying *PIMCO* because this Court focused on the purposes of class certification, including the value of "the economies of class action procedure." *PIMCO*, 571 F.3d at 676. It does not make sense from a practical perspective to force plaintiffs to proceed in hundreds or thousands of individual cases if only a small number of class members did not suffer harm. Class litigation in such circumstances may be able to resolve the claims of almost the entire class, perhaps requiring additional attention to the circumstances of a small number of class members. Requiring proof of harm to *every* class member would preclude certification in many cases where a class action would be superior to individual actions, providing the most efficient means for litigating the claims at issue.

C. Common Issues Must Predominate in the Case as a Whole, Not in Regard to Each Element

The rule that not every class member must be injured for a class to be certified derives from another doctrine as well. It is not just that the issue of impact or injury can be common even if some class members were unharmed. It is also true that even if common issues do not predominate regarding impact, they may predominate in *a case as a whole*. *Pella*, 606 F.3d at 394-95; *Cordes*, 502 F.3d at 107-108.

Pella provides an example of this point. The difficulty in *Pella* was not merely that some class members may not have been harmed by the defect in the windows, but that determining causation and damages in that case was "necessarily an individual issue." *Pella*, 606 F.3d at 394. Unlike here, in *Pella* there was no way to show that multiple members of the class suffered harm from the defect through common evidence. Individual issues—not common issues—predominated in regard to the elements of causation and fact of damage. But this Court nevertheless affirmed certification of classes regarding those issues that were common, *id.* at 396, including whether the windows had an inherent design defect and whether the defendants had a duty to disclose any such design defect. *Id.* at 395. The fact that some of the elements of plaintiffs' claims required individual attention did not preclude class certification. *Id.* at 395.

Thus, even if individual issues predominate regarding *one element of a claim*—for example, injury or impact—that does not establish they predominate *in the case as a whole*. As the Second Circuit reasoned in *Cordes*, an antitrust case, even if individual issues predominate regarding impact, that does not necessarily mean they will predominate at a class trial. *Cordes*, 502 F.3d at 108. The latter proposition could theoretically follow from the former *if* the "trial would focus largely" on the issue of impact. *Id.* But impact ordinarily plays little or no role at trial. Antitrust trials usually focus on whether there was an antitrust violation, and address the harm done to the class only in the

aggregate, never reaching what proportion of the class was harmed.[10] If the trial will not determine which class members were injured and which were not—and will produce a judgment only for the total harm to the proposed class—a lack of common impact should not pose an impediment to class certification.

The district court actually relied on this same reasoning in correctly rejecting the defendant's argument that "individualized statute of limitations determinations" preclude class certification. Op. at 17-18. The lower court (*id.* at 17), for instance, quoted the following from *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000):

> [T]he mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3).

Just as variations in the sources and application of statutes of limitations might affect different class members differently, so too might variations in the evidence required to prove injury affect different class members differently. But that is not dispositive. To paraphrase *Mowbray*, the point is that *other* common issues might nonetheless bind class members together sufficiently to satisfy predominance.

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[10] *See* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969 (2010) (available at SSRN: http://ssrn.com/abstract=1578459).

The district court also cited (Op. at 17) *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002), for the proposition that challenges based on the statute of limitations do not preclude predominance because "those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." Similarly, the issue of whether any particular class member paid an overcharge relates to whether that class member may recover "in contrast to underlying common issues of the defendant's liability." Accordingly, the district court correctly ruled that individualized issues with regard to the statute of limitations, if any, would be unlikely to predominate over all of the other common issues at trial. That same reasoning should have been applied to the issue of impact or injury.

In sum, even if the issue of impact here could not be proven with classwide evidence, it should not end the predominance inquiry. The crucial issue would then become whether all of the other issues common to the class as a whole—including the key issue of whether the merger violated the antitrust laws in the first place—nevertheless would likely predominate at trial. The failure of the trial court to make that assessment was error.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the lower court, or at minimum, vacate and remand with instructions to assess plaintiffs' evidence in a manner consistent with the correct legal standards.

Dated: August 9, 2010

s/ Avidan J. Stern
Avidan J. Stern
LYNCH & STERN LLP
150 South Wacker Drive, Suite 2600
Chicago, Illinois 60606
Phone: (312) 346-1600

Eric L. Cramer
Andrew C. Curley
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Phone: (215) 875-3000

Prof. Joshua P. Davis
UNIVERSITY OF SAN FRANCISCO
SCHOOL OF LAW
2130 Fulton Street
San Francisco, CA 94117
Tel: (415) 422-6223

Counsel for Amicus Curiae
The American Antitrust Institute

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Dated: August 9, 2010

s/ Avidan J. Stern
Avidan J. Stern
LYNCH & STERN LLP
150 South Wacker Drive, Suite 2600
Chicago, Illinois 60606
Phone: (312) 346-1600

Eric L. Cramer
Andrew C. Curley
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Phone: (215) 875-3000

Professor Joshua P. Davis
UNIVERSITY OF SAN FRANCISCO
SCHOOL OF LAW
2130 Fulton Street
San Francisco, CA 94117
Tel: (415) 422-6223

Counsel for Amicus Curiae
The American Antitrust Institute

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2010, I caused 2 copies of the foregoing brief to be served via overnight delivery and electronic mail upon the following counsel:

Gene C. Schaerr
WINSTON & STRAWN LLP
1700 K Street N.W.
Washington, D.C. 20006
gschaerr@winston.com

Mary Jane Fait
John E. Tangren
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, IL 60603
fait@whafh.com

Duane M. Kelley
David E. Dahlquist
William P. Ferranti
Scott M. Walton
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
dkelley@winston.com

Counsel for Defendant-Appellee NorthShore University HealthSystem

Marvin A. Miller
Matthew E. Van Tine
MILLER LAW LLC
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
mmiller@millerlawllc.com

Counsel for Plaintiffs-Appellants

s/ Avidan J. Stern
Avidan J. Stern
LYNCH & STERN LLP
150 South Wacker Drive, Suite 2600
Chicago, Illinois 60606
Phone: (312) 346-1600

Counsel for Amicus Curiae
The American Antitrust Institute