

A Bridge Too Far:  
Google Books,  
Future-Conduct Releases, and the  
Limits of Class-Action Settlements

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I: Quickly

# The Google Books decision

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- ☐ *Google scans, indexes, and displays snippets from books*
- ☐ *Settlement would have let Google sell complete books*
- ☐ *Settlement required release for Google's future conduct*
  - ☐ *Rejected on this basis by the court*
  - ☐ *Disallows releases "beyond the scope of the pleadings"*

# But why?

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- ☐ *Why shouldn't a settlement be able to reach future conduct?*
- ☐ *What does future conduct have to do with the pleadings?*
- ☐ *What is the legal basis for such a doctrine?*
- ☐ *Is the sale of books "beyond the scope" of an infringement suit?*

# My answers

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- ☐ *Future-conduct settlements are unusually dangerous*
- ☐ *Limiting releases to the underlying lawsuit reduces the danger*
  - ☐ *It establishes parity between litigation and settlement*
  - ☐ *Clearest statement: "identical factual predicate"*
- ☐ *Judge Chin got it right: the settlement was a "bridge too far"*

## II: Carefully

# Two important distinctions

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- ☐ Future conduct, not future claims or future claimants
  - ☐ "Future claims" in mass tort cases involve past conduct
  - ☐ Parties with future-conduct claims may have past-conduct claims, as well
- ☐ Watch for releases by classes, not by individuals
  - ☐ Individuals can also act via contract; classes cannot
  - ☐ Promises/releases by defendants to a class are unproblematic

# Future-conduct release dangers I:

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- ☐ *Baseline: 23(b)(3) damages action for defendant's past conduct:*
  - ☐ *Class can lose its right to compensation, but no more*
- ☐ *Future-conduct releases can result in fresh harms to the class*
  - ☐ *Releases give the defendant more scope for action*
- ☐ *Thus, there is more at stake for the class*

# Future-conduct release dangers II

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- *Future-conduct releases are harder to design and review*
  - *"It's hard to make predictions, especially about the future."*
  - *Endemic moral-hazard problems for the defendant*
- *Future-conduct releases concentrate power in the defendant*
  - *Possible threats to the class and to third parties*
- *Future-conduct releases require courts to act as legislatures*
  - *Insert standard competence and accountability arguments here*

# Solution: link past and future conduct

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- *Future-conduct releases always require heightened scrutiny*
- *But one bright-line rule is highly defensible:*
  - *Releases allowed only for past conduct and its continuation*
  - *It's the novel future conduct that's the most worrisome*
- *The line is rooted in preclusion doctrine:*
  - *Past conduct: res judicata; its continuation: collateral estoppel*
  - *I.e., it creates parity between litigation and settlement*

# “identical factual predicate”

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- “[C]lass action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the ‘identical factual predicate’ as the settled conduct.” Wal-Mart v. Visa, 396 F.3d 96, 107 (2d Cir. 2005)
- Doctrine responded to failures of adequate representation ...
- ... by drawing on preclusion law ...
- ... and reaching the ‘right’ results in future-conduct cases
- “Could not have been presented” refers to jurisdictional limits, not justiciability ones, and is limited by IFP (cf Matsushita)

# Back to Google Books

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- ☐ *Past conduct: scanning and searching were plausibly fair use*
- ☐ *Future conduct: selling whole books en masse is not fair use*
- ☐ *This is exactly the sort of settlement we should be worried about*
- ☐ *A scanning-and-searching settlement would be another story:*
  - ☐ *If Google wins at trial, it would be allowed to continue*
  - ☐ *And this is a continuation of its past conduct*
  - ☐ *Scrutinize it closely, but it's potentially permissible*

Questions?

# Outtakes

# Cases banning future-conduct releases?

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- ☐ Some objectors pointed to cases like Williams v. Vukovich
  - ☐ But that's a race discrimination case ...
  - ☐ ... and individuals can't prospectively waive the civil rights laws
- ☐ Some areas of law bar future-conduct releases even by individuals
  - ☐ Which ones? Those with a public policy against private ordering
  - ☐ This policy does not extend to copyright with the same force

# Cases permitting future-conduct releases?

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- ☐ *Matsushita and other cases allowing releases of unpleadable claims*
  - ☐ *These are about interjurisdictional comity, not justiciability*
- ☐ *Firefighters and other consent-decree cases*
  - ☐ *These are promises to the class, not by the class*
- ☐ *Uhl, Alvarado, and the other real-estate cases*
  - ☐ *The future conduct here is a continuation of past conduct*

# It's not just a good idea, it's the law

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- ☐ *Rule 23 typicality and commonality don't work for future conduct*
  - ☐ *Fair, reasonable, and adequate is impossible to assure ex ante*
- ☐ *Due Process limits implicated due to high stakes*
  - ☐ *And, in state court at least, personal jurisdiction fails*
- ☐ *Rule 82 and Article III issues with unripe claims*