

# A Bridge Too Far: Future Conduct and the Limits of Class-Action Settlements

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# A tale of two settlements

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- Authors Guild: Google authorized to sell digital books
  - Held: This "forward-looking business arrangement ... exceeds what the court may permit under Rule 23 ... it would release Google (and others) from liability for certain future acts."
- Literary Works: NEXIS et al. authorized to sell digital articles
  - Held: "[t]he Settlement's release of claims regarding future infringements is not improper."
- What gives?



# The problem posed

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- ☐ These are settlements involving:
  - ☐ (1) releases
  - ☐ (2) by the class
  - ☐ (3) for the defendant's future conduct
- ☐ The cases are all over the map
  - ☐ Copyright, real property, securities law, antitrust
  - ☐ Some permit forbid future-conduct releases, others forbid

# 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 releases: more at stake

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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 releases ...

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



# Solution: litigation-settlement parity

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- ☐ *Future-conduct releases always require heightened scrutiny*
- ☐ *But one bright-line rule is highly defensible: the parity principle*
  - ☐ *A class should be able to give up in settlement those and only those claims at stake in the underlying lawsuit*
- ☐ *The line is rooted in preclusion doctrine:*
  - ☐ *Past-conduct claims subject to claim preclusion (broad)*
  - ☐ *Future-conduct claims subject to issue preclusion (narrow)*

# The case for parity

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- ☐ Releases only claims already at stake in the lawsuit
- ☐ Grounds releases in specifics of defendant's past conduct
- ☐ Defendant's skin in the game limits moral hazard
- ☐ Cannot create new power, only confirm existing power
- ☐ Ties settlements to existing Article III controversies



# “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)
- This is almost right:
  - “Identical factual predicate” is a claim-preclusion concept
  - But for future conduct, issue preclusion is more relevant

# Cases banning future-conduct releases?

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- ☐ *Authors Guild* 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
  - ☐ E.g. Schwartz v. Dallas Cowboys (antitrust)



# Cases permitting future-conduct releases?

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- ☐ Cases allowing releases of unpleadable claims (e.g. Matsushita)
  - ☐ These are about interjurisdictional comity, not justiciability
- ☐ Consent-decrees awarding "roader relief than the court could have awarded after a trial"
  - ☐ These are promises to the class, not by the class
- ☐ Trespass/nuisance settlements transferring an easement
  - ☐ The future conduct here is a continuation of past conduct

# Application: copyright

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- ☐ Authors Guild: scanning and searching were plausibly fair use
  - ☐ But selling whole books en masse is not fair use
  - ☐ Exactly the sort of settlement we should be worried about
  - ☐ A scanning-and-searching settlement would be another story:
- ☐ Literary Works: principal issues involved scope of licenses
  - ☐ A win at trial for defendants would have authorized future uses
  - ☐ Settlement (properly) rejected on other grounds



Questions?