

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

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Outline

- Google scans, indexes, and displays snippets from books
 - Settlement would have let Google sell complete books
 - To do this, it used releases for Google's future conduct
- In this talk:
 - What are future-conduct releases?
 - Why are they so dangerous?
 - What should courts do about them?

I: Future-Conduct Releases

Releases from Authors Guild

- Past: "(A) any of the following actions taken on or before the Effective Date . . . (ii) any Google Releasee's Digitization of such Books and Inserts and any Google Releasee's use of Digital Copies of Books and Inserts for Google's use in Google Products and Services . . ."
- Future: "(B) after the Effective Date, any act or omission authorized by this Amended Settlement Agreement . . ."

Two important distinctions

- Future conduct, not future claims or future claimants
 - "Future claims" in mass tort cases involve past conduct
 - Parties can have both future-conduct and past-conduct claims
- Watch for releases by classes, not by individuals
 - Individuals can also act via contract; classes cannot

II: Dangers

More at stake

- 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*

Other dangers

- *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*

III: Solutions

Solution 1: closer scrutiny

- Courts already scrutinize settlements for adequacy
 - As required by Rule 23(e)(2) and Due Process
 - With more at stake in future-conduct releases and more opportunities for mischief, closer scrutiny is required
- I discuss details and some specific ideas in the paper, e.g.
 - Ex ante: seek advice from special masters and political branches
 - Ex post: retain jurisdiction and pay fee awards over time

Solution II: parity of preclusion

- Tie settlement to the underlying lawsuit:
 - A class can give up a claim in settlement only if it was at stake in the underlying lawsuit
- Rule 23 and Article III limit jurisdiction over unrelated matters
- The line reflects preclusion doctrine:
 - Past-conduct claims subject to claim preclusion (broad)
 - Future-conduct claims subject to issue preclusion (narrow)

The normative case for parity

- Stakes no higher than in the underlying 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*

Back to Google Books

- Past conduct: scanning and searching were plausibly fair use*
- Future conduct: selling whole books en masse is not fair use*
 - I.e. no possibility of preclusion against class members*
- 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 will be allowed to continue scanning*
 - Close scrutiny required, but potentially permissible*

Discussion