

A Bridge Too Far? The Google Books Settlement and the Limits of Class-Action Law

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The Google Books lawsuit and settlement in one slide

- * Google scanned, indexed, and displayed short “snippets” from books
 - * This would have been the subject of a major fair use fight
- * Under the settlement, these uses continue
 - * Google also sells *full* books (individually and blanket subscription)
 - * 63% of revenues to rightsholders, via Book Rights Registry
 - * For out-of-print books, all of this is on an opt-out basis

Key Rule 23 innovation: release of future-conduct claims

- ❖ The settlement is clearly forward-looking, but *how?*
 - ❖ *It releases class members' claims based on Google's future conduct*
- ❖ This characterization distinguishes the class-action precedents:
 - ❖ Releases *by the class* raise issues that promises *to the class* don't
 - ❖ Future-conduct claims ≠ “future claims” based in past conduct
 - ❖ Structured settlements pay out over time for a one-time release

Future-conduct releases matter

- ❖ The Google Books settlement itself is a big deal, but what about ...
- ❖ ... a pre-*Deepwater Horizon* settlement for any future BP oil spills?
- ❖ ... a settlement to build a skyscraper on class members' land?
- ❖ ... an insurer-patient settlement on future health coverage rules?

Why are forward-looking settlements so worrisome?

- ❖ *Informational problems* for class members and judges
- ❖ Settlement *design problems* ...
 - ❖ ... especially *moral hazard* on the defendant's part
- ❖ Threats to class members' *autonomy* and property rights
- ❖ Aggregation of rights means *concentration of power* ...
 - ❖ ... which can have *third-party effects*
- ❖ *Separation of powers* at risk

Ends and means

- ❖ Substantively, there are strong arguments in favor of the settlement
 - ❖ And pragmatically, don't hold your breath waiting for Congress
- ❖ But procedurally, forward-looking settlements are Pandora's box
 - ❖ Perhaps *this* settlement can be distinguished, perhaps not
 - ❖ Either way, a limiting principle is needed

A limit: *unfamiliar* future conduct

- ❖ Proposal: settlements involving future-conduct releases allowed only for the continuation of the defendant's past conduct
 - ❖ Addresses many information and design issues
 - ❖ Natural parallel to preclusion doctrine
 - ❖ Rationalizes class action caselaw (“identical factual predicate”)
 - ❖ Required by Article III, Due Process, and the Rules Enabling Act?

Discussion
