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

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The Google Books decision

- 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 by the court on this basis, among others
Future-conduct releases

☐ The Google Books settlement involved future-conduct releases

☐ Such settlements are unusually dangerous

☐ They require closer scrutiny from courts (a standard)

☐ Releases limited to claims at stake in the lawsuit (a rule)

☐ The DOJ got it right: the settlement was a “bridge too far”
Future conduct vs past conduct

- Released claims in the Google Books settlement:
  - “(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 . . .”
  - “(B) after the Effective Date, any act or omission authorized by this Amended Settlement Agreement . . . when that act or omission is undertaken by a Person who is authorized to undertake it under 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 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
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
Dangers of future-conduct releases

- 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 1: closer scrutiny

- Courts already scrutinize settlements for adequacy
- As required by Rule 23 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

- A class should be able to give up in settlement those and only those claims at stake in the underlying lawsuit.

- The line reflects preclusion doctrine:
  - Past-conduct claims subject to claim preclusion (broad)
  - Future-conduct claims subject to issue preclusion (narrow)

- Rule 23 and Article III limit jurisdiction over unrelated matters.
The normative case for parity

- 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
Counterarguments to parity

- Cases like Vukovich seem to prohibit all future-conduct-releases
- But even individuals can't prospectively waive the civil rights laws
- Some bodies of law have a public policy against private ordering
- But not all! E.g., copyright depends on licensing
- Firefighters and consent-decree cases allow "broader relief than the court could have awarded after a trial"
- These are individual promises ("relief") to the class
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 would be allowed to continue

Scrubitize it closely, but it’s potentially permissible
Questions?