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

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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
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