

Releases in Class Action Settlements: Strategies for Defining, Negotiating, and Drafting Enforceable Relief

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Releases in Class Action Settlements: Part I: Identical Factual Predicate Doctrine

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PART I: IDENTICAL FACTUAL PREDICATE DOCTRINE

- Origins of Identical Factual Predicate Doctrine
 - Legal Background
- Claim Preclusion and Release
- Practice Pointers: Associate Perspective

ORIGINS OF IDENTICAL FACTUAL PREDICATE DOCTRINE: LEGAL BACKGROUND

- Identical Factual Predicate Rule
 - Judicial doctrine that limits the preclusive scope of class settlements.
 - A release in a class settlement can release a broader set of claims than were asserted in the class complaint.
 - The scope of a class action release is limited to claims sharing an “identical factual predicate” with the settled class claims.

ORIGINS OF IDENTICAL FACTUAL PREDICATE DOCTRINE: LEGAL BACKGROUND

- **Due Process Concerns Raised by Class Settlements**

- All class settlements implicate due process concerns for unnamed class members
- Plaintiffs and Defendants incentivized to negotiate broad release of claims at the expense of absent class members
 - Broad release of claims generally permitted, including claims not presented or presentable in underlying case
- Broad class action release may bar future claims by unnamed litigants

- **Identical Factual Predicate and Due Process**

- F.R.C.P. 23 and Notice Requirements
 - Broad release calls into question efficacy of class notice
- Identical Factual Predicate Doctrine protects litigants against assertion of defenses to subsequent litigation
 - Release
 - Claim Preclusion
- To release claims, most circuits require:
 - Identical Factual Predicate
 - Adequate representation

ORIGINS OF IDENTICAL FACTUAL PREDICATE DOCTRINE: LEGAL BACKGROUND

- *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456 (2d Cir. 1982)
 - Foundational case for development of identical factual predicate doctrine
 - Group of minority shareholders objected to settlement agreement because release would enjoin claims not presented in the litigation
 - Settlement barred class members from pursuing appraisal proceedings in state court
 - Second Circuit affirmed the district court’s approval of the settlement.
 - District court could “permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.”
 - Due process concerns not present where “the released claim rests on the same factual predicate as the class action claim.”

ORIGINS OF IDENTICAL FACTUAL PREDICATE DOCTRINE: CLAIM PRECLUSION AND RELEASE

- IFP Doctrine and Claim Preclusion

- Scope of judgment in a litigated class action determined by res judicata. Claims that were or could have been raised in the prior action are barred if: (1) the prior action resulted in a final judgment; (2) the claim arises out of the same transaction and occurrence as the prior action; and (3) the claimant was a party to the prior action (including class members).
- When a class action settlement is successfully approved, the settlement is made a final judgment of the court. The preclusive effect of the settlement is determined by IFP doctrine.
 - Most courts have held that a the a claim is barred by IFP doctrine if it arises out of the same transaction or shares a “common nucleus of operative fact” with the underlying class claims. This test is considered by many courts to be the same as and coextensive with the standard for res judicata.
 - *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. MDL 2672 CRB, 2018 WL 1588012, at *1 (N.D. Cal. Mar. 30, 2018)

ORIGINS OF IDENTICAL FACTUAL PREDICATE DOCTRINE: CLAIM PRECLUSION AND RELEASE

- IFP Doctrine and Scope of Release (Cont'd.)
 - Most courts will apply the IFP doctrine at the release stage.
 - Settlement agreements that include release language which purports to release claims that do not share an identical factual predicate with the underlying claims may not be approved.
 - *Marshall v. Northrop Grumman Corp.*, 469 F. Supp. 3d 942, 949 (C.D. Cal. 2020) (release language rejected)
 - Broad release of “any cause of action, demand, or claim on the basis of, connected with, or arising out of any of. . .any and all actual or potential claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, costs, and causes of action ... whether known or unknown ... for actions or omissions that occurred during the Class Period only,” that (1) were asserted in the class action or could have been asserted in the Class Action, or (2) would be barred by the principles of res judicata or collateral estoppel had the claims been fully litigated and resulted in a final judgment.”
 - *Sandoval Ortega v. Aho Enterprises, Inc.*, No. 19-CV-00404-DMR, 2021 WL 5584761, at *11 (N.D. Cal. Nov. 30, 2021) (release language approved)
 - Released “all claims alleged in the operative complaint in the Action, and any additional wage-and-hour claims that could have been brought based on the facts alleged therein.”

ORIGINS OF IDENTICAL FACTUAL PREDICATE DOCTRINE: PRACTICE POINTERS

- Track jurisdictional developments
- Draft pre-mediation memorandum and proposed release language
- Active participation during mediation
- Address potential scope objections during approval process

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STRAFFORD PUBLICATIONS WEBINAR

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Releases in Class Action Settlements: Strategies for Defining, Negotiating, and Drafting Enforceable Relief

Part II: Additional Issues in the Defense and Enforcement of Class Action Settlements

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Know Your Jurisdiction/Judge

1. Doctrines

- Res Judicata/Claim Preclusion
- Collateral Estoppel/Issue Preclusion
- “Identical Factual Predicate”

2. Federal v. State Court

- N.D. Cal. Guidelines

3. Judge

4. Court Approving Settlement v. Collateral Attack: Due Process, Full Faith and Credit

The Court Approving the Settlement

Preliminary and Final Approval

- Objectors
- Competing Class Counsel;
“Reverse Auction”
- Trial and Appellate Courts (e.g.,
N.D. Cal. Guidelines)

Collateral Attack

- Rendering forum does not decide preclusive effect of judgment.
- But can make views known (e.g., specifically addressing scope of release, preclusive effect of release, defendant's right to challenge claim-splitting, etc.)

Collateral Attack: Limited Scope

- Limited scope of collateral review / Due Process
 - Inadequate Notice
 - Denial of Opt-Out Right for Damages Claims
 - Denial or Limitation of Right to Object
 - Inadequate Class Representative/Counsel
 - E.g., Overbroad Release, Unasserted Claims, Claims-Splitting

Collateral Attack: Adequacy of Representation

- *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999)
- “Agent Orange Case”: *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d in part, rev’d in part, vacated in part*, 539 U.S. 111 (2003) (per curiam) (*Stephenson* respondents’ judgment affirmed by equally divided Court)
- *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 454 (5th Cir. 2016) (“two-prong inquiry”: “(1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? And(2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class?”).
- Make sure that court makes specific findings of adequacy.

Options on Collateral Attack

Motion Practice in Second Suit

- Release/Res Judicata
- Burden of Proof?
- Affirmative Defenses (Fed. R. Civ. P. 8 (c)(1))
- *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442 (3d Cir. 2016) (defendant generally has burden of proving release defense, but plaintiff asserting no preclusion because of due process violation has burden of proof)
- *Pelt v. Utah*, 539 F.3d 1271, 1283-84 (2008) (defendant has burden of proof)

Options on Collateral Attack: Injunction?

- **All-Writs Act, 28 U.S.C. § 1651(a)**

“(a) [Federal courts] may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

- **Anti-Injunction Act, 28 U.S.C. § 2283**

“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

- **State v. Federal; Federal v. State**

Full Faith and Credit: Release of Claims Over Which Court Had No Jurisdiction

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996)

- Can state court approve class settlement release of claims over which it had no jurisdiction?
- Release in state court judgment must be given full faith and credit in accordance with law of rendering state court forum
- “[A] federal court may [not] withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts.”
- Yes: Delaware (*Matsushita*)
- No: Alabama (*In re Lease Oil Antitrust Litigation (No. II)*, 200 F.3d 317 (5th Cir. 2000))

The Northern District of California: Procedural Guidance for Class Action Settlements

<https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>

Preliminary Approval

- 1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:
 - a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.
 - b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.

N.D. Cal. Guidelines (cont'd)

1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:

...

c. If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

d. If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.

e. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.

Release of Unknown Claims

- Cal. Civ. Code § 1542

“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”

- Waiver of Statutory Rights

Claims-Splitting and Unasserted Claims

- General Rule

Must assert all causes of action arising from the same set of operative facts

- Why Would Class Counsel “Claim-Split”?

- Jurisdictional issues (e.g., exclusively federal claim)
- Likelihood of Class Certification (e.g., product defect case (economic loss (diminution in value/price premium) v. personal injury); (b)(1) / (b)(2) v. (b)(3) class)
- Prevent removal to federal court (e.g., punitive, treble damages; effect of CAFA)

- Issue arises on class certification, but can affect release strategy, enforceability, collateral attack

Claims-Splitting (cont'd)

Courts divided

- *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 432 (4th Cir. 2003) (class action “is one of the recognized exceptions to the rule against claim-splitting”).
- *Slade v. Progressive Sec. Inc. Co.*, 856 F.3d 408, 413 (5th Cir. 2017) (in evaluating whether class counsel’s decision to forgo claims defeated adequacy/typicality, courts should consider, “at least, (1) the risk that unnamed class members will forfeit their right to pursue the waived claims in future litigation, (2) the value of the waived claim, and (3) the strategic value of the waiver, which can include the value of proceeding as a class (if the waiver is key to certification).”).

Claims-Splitting (cont'd)

- *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) (“[T]he general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damages claims, even if based on the same events.”) (citing cases), *cert. denied*, 520 U.S. 1103 (1997).
- *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (“Unless a district court finds that personal injuries are large in relation to statutory damages, a representative plaintiff must be allowed to forego claims for compensatory damages in order to achieve class certification.”).
- *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) (“A representative can’t throw away what could be a major component of the class’s recovery.”)

Effect of Opt-Out Right

- *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 792 (3d Cir. 1995) (“Since the plaintiff is offered the opportunity to opt out of the class simultaneously with the opportunity to accept or reject the settlement offer . . . the plaintiff knows exactly what result he or she sacrifices.”)
- *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (“[T]he Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an ‘opt-out’ form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so”).
- *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996) (“If [state court] class action plaintiffs wish to preserve absolutely their right to litigate exclusively federal claims in federal court, they should either opt out of the settlement class or object to the release of any exclusively federal claims.”).

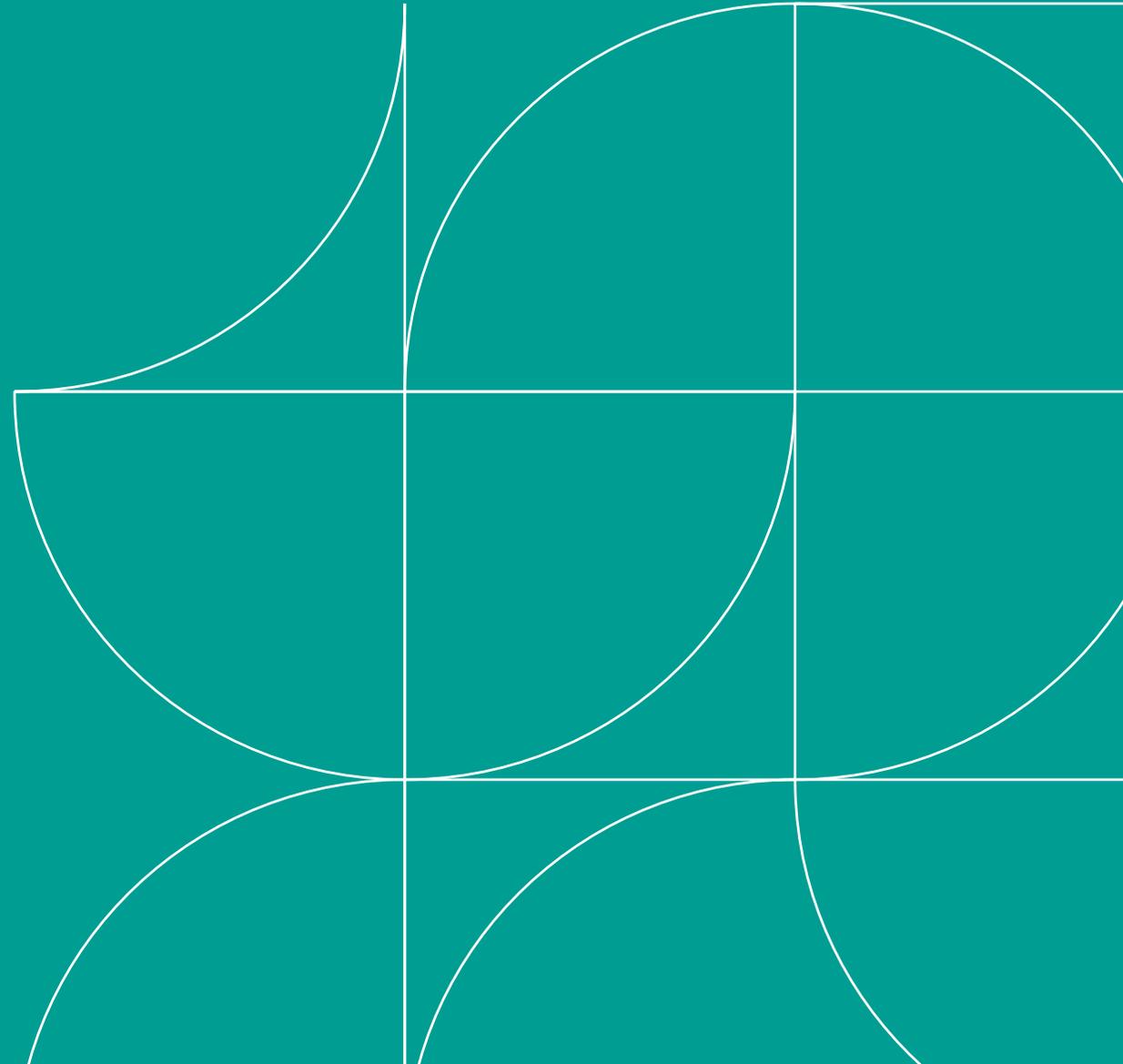


Negotiating Releases In Class Action Settlements

Gerald L. Maatman, Jr.
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Today's Discussion Presenter



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Today's Discussion Points

- 1 Practice Pointers
- 2 Applicable Case Law Issues
- 3 War Stories

Practice Pointers In Settling Class Actions

- The “inherent tension” issue – garnering the broadest release possible to avoid future lawsuits vs. the approval process and case law on the limits of a release in a class action setting
- Mediation goals and tactics – angling for the lowest payment of money with the broadest settlement bar possible
- Dealing with the “size of the class” problem due to the growth of the class during the pendency of the litigation and/or data insufficiencies to generate the class population
- Crafting settlement classes and release provisions to guard against objections to the purported settlement

Applicable Case Law Issues

- *Aboumrad, et al. v. Borrego Springs*, 2021 U.S. Dist. LEXIS 41944 (S.D. Cal. Mar. 5, 2021) (settlement approval denied because release sought to include parties who were not part of the litigation)
- *In Re Jimmy John's Overtime Litigation*, Case No. 14-CV-5509 (N.D. Ill. Mar. 9, 2021) (settlement approval granted where non-monetary relief afforded dismissed plaintiffs in return for waiving appeal)
- *Hilsey, et al. v. General Mills*, 2021 U.S. Dist. LEXIS 105648 (S.D. Cal. June 8, 2021) (settlement approval denied because phantom class relief cannot support a class-wide release)
- *Prescott, et al. v. Bayer Healthcare Corp.*, 2021 U.S. Dist. LEXIS 82495 (N.D. Cal. April 29, 2021) (settlement approval denied where release for class members deemed overbroad)

War Stories

- Beware of “professional objectors”
- Require amendments to complaint to conform the release to the claims at issue
- Negotiate a favorable “escalator” clause for size of the class
- Refrain from “side deals”
- Link “blow up” clauses to release

**thank
you**

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