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Class Action Settlements: Res Judicata, Release, and the Identical Factual Predicate Doctrine

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CLASS ACTION SETTLEMENTS: RES JUDICATA, RELEASE, AND THE IDENTICAL FACTUAL PREDICATE DOCTRINE

KRIS J. KOSTOLANSKY* & DIANE R. HAZEL**

ABSTRACT

The "identical factual predicate" rule is a judicial doctrine that limits the preclusive scope of class settlements. Under the doctrine, a release in a class settlement can release only those claims sharing an identical factual predicate with the settled class claims. Although it is undisputed the doctrine limits preclusion under the affirmative defense of release, the doctrine also limits res judicata. To date, the circuits have adopted inconsistent positions on whether the doctrine also limits res judicata, and the Supreme Court has not provided guidance. This article explains that the doctrine applies with equal force to res judicata. In the class settlement context, the court must enter a final judgment approving the settlement before the settlement becomes final. But as part of the final judgment, the court can only release claims that share an identical factual predicate. The doctrine is thus embedded within the final judgment prong of res judicata.

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I. INTRODUCTION

The settlement of a class action lawsuit should ideally resolve all issues and claims involved in the class litigation for all class members who do not opt out. When a putative class member raises similar claims—or claims based on similar facts—in a subsequent case, questions regarding res judicata and the scope of the class release arise inevitably. The resolution of these issues pits the important doctrines of judicial economy and finality against the equally important doctrines of due process and reasonable expectations.

To address these competing interests, the majority of circuits have adopted the "identical factual predicate" doctrine ("IFPD"). The IFPD permits a broad release of claims—including claims that were not pursued in the underlying class litigation—*if* the party raising the defense can show an identical factual predicate between the underlying class claims and subsequent claims.[1] The precise meaning of "identical factual predicate" remains subject to interpretation and is evolving within the federal circuit courts. Specifically, the circuit courts have adopted inconsistent positions on whether the doctrine requires a stricter identity of facts than that required under res judicata. Some courts have even conflated the two standards underlying res judicata and release. Although no circuit seems to dispute that the IFPD applies to the affirmative defense of release, the circuit courts' varying interpretations of the IFPD have left open the question of whether the doctrine also applies to the defense of res judicata. To further compound the uncertainty, there has been no direct guidance from the U.S. Supreme Court.

This article will define the IFPD and explain why the doctrine should apply with equal force to the affirmative defenses of release and res judicata. The IFPD is not equivalent to the same transaction or occurrence element under res judicata. To reach a final judgment on the merits in a class settlement, the underlying court must approve the settlement containing the release.[2] In approving the settlement and release, a court must determine that the released claims arise from the identical factual predicate.[3] This process, applied correctly, imbeds the IFPD into the res judicata defense.

This article first discusses the affirmative defenses of res judicata and release and how these defenses may be asserted following a class action settlement. The article proceeds to discuss the structure of class settlements and how this structure—combined with judicial review—balances the competing interests of finality and due process. Finally, with this context, the article explains how the identical factual predicate doctrine applies to both release and res judicata.

II. THE DISTINCT DOCTRINES OF RES JUDICATA & RELEASE

To understand IFPD in the context of a class settlement, it is first necessary to understand the defenses under which an identical factual predicate analysis may arise. Res judicata, or claim preclusion, "generally refers to the effect of a prior

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1. *See* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 107–09 (2d Cir. 2000).
2. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006).
3. *See* Hesse v. Sprint Corp., 598 F.3d 581, 590–91 (9th Cir. 2010).

judgment in foreclosing successive litigation of the very same claim."[4] For a claim to be precluded under the doctrine of res judicata, the following elements must be met: "(1) a valid, final judgment on the merits . . . ; (2) claims arising out of the same transaction and occurrence as the initial judgment;" and (3) identity of parties.[5] Although these elements may vary slightly by circuit, each circuit uses some version of this test, and all circuits require that there be a final judgment. If res judicata applies, the doctrine precludes claims that were raised or could have been raised.[6] As a result, not only does res judicata bar claims that were brought in the first forum, but it also bars all claims relating to the same transaction against the same defendant that could have been brought.[7] Res judicata also may be used as an affirmative defense in a later litigation when the prior action involved a class settlement because a court adjudicating the class case must enter a final judgment approving the settlement.[8]

Release differs from res judicata in that a class settlement may be drafted broadly to release claims that were not asserted and might not have been asserted in the class action. Because a release may reach claims that could not have been asserted in the initial class action, courts have developed a requirement that the release may only reach claims that stem from an identical factual predicate as those in the underlying action. Thus, the settling defendant may only buy a release that extends up to and not beyond the IFPD.[9]

The party seeking preclusion has the burden of raising these affirmative defenses.[10] Otherwise, the defenses are waived.[11] Res judicata applies to class judgments generally. The release defense only arises where there has been a class settlement. Thus, even though release and res judicata are distinct defenses, in the

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4. New Hampshire v. Maine, 532 U.S. 742, 748 (2001).

5. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 18:6, 18:15. (5th ed. 2018). In the class context, absent class members are not technically parties. Once a class is certified, absent class members are considered parties for preclusion purposes. *See also* Taylor v. Sturgell, 553 U.S. 880, 894–95 (2008) ("Representative suits with preclusive effect on nonparties include properly conducted class actions and suits brought by trustees, guardians, and other fiduciaries.") (internal citations omitted); Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002) ("[N]onnamed class members . . . may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.").

6. Allen v. McCurry, 449 U.S. 90, 94 (1980).

7. *E.g.*, Covert v. LVNV Funding, LLC, 779 F.3d 242, 247 (4th Cir. 2015) (finding statutory claims that could have been raised in earlier litigation barred by res judicata); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003) (holding plaintiffs barred from bringing their claims because claims arising from same transactional nucleus of fact could have been brought); *see* N. Assurance Co. of Am. v. Square D Co., 201 F.3d 84, 87–88 (2d Cir. 2000) (explaining that claim preclusion barring claims that could have been brought stems from requirement that plaintiff must bring all claims at once against the same defendant relating to the same transaction or event).

8. A judgment approving a class settlement satisfies the "final judgment" criteria of res judicata. *See* FED. R. CIV. P. 8(c)(1).

9. *See* TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982) (explaining that a court may permit release of a claim based on the identical factual predicate as underlying claims in settled class action).

10. *See* FED. R. CIV. P. 8(c)(1).

11. *Id.*

class action settlement context this article will demonstrate that both are circumscribed by the IFPD.

III. THE STRUCTURE OF CLASS SETTLEMENTS

Class settlements generally include certain features that ensure the finality of claims and protect absent class members' interests. During a class settlement, parties to the settlement agreement typically include a broad release of claims. Releases "are a standard feature of class action settlements."[12] In such a release, the parties will agree to release the claims currently at issue in the litigation as well as other claims that were not presented to the court. The defendants' desire to protect themselves from future claims, coupled with the class plaintiffs' desire to maximize the settlement amount, often produce an expansive release.

As a general rule, courts allow releases encompassing a broader set of claims than those asserted in the class complaint.[13] Courts permit the release of a broader range of claims to "promot[e] judicial economy by preventing the relitigation of settled questions resolved in comprehensive settlement agreements."[14] Further, defendants might be unwilling to settle with a class unless they can obtain a broad release designed to limit future liability. Without some limitation on liability and exposure, defendants "would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country."[15] As part of such broad releases, courts have allowed the release of claims not only pled but also the release of claims that were "not presented and might not have [even] been presentable."[16]

Before a class settlement with a release is finalized, the court must enter a judgment approving the settlement.[17] Court approval is a two-step process.[18] First, the court must "determin[e] whether the proposed settlement falls within the range of possible approval and whether it is reasonable to issue notification to settlement class members of the settlement's terms."[19] Assuming the Court issues preliminary approval, notice is distributed and absent class members have an opportunity to object.[20] In the second step, after notice and the opportunity for absent class members to be heard, the court will determine whether to grant final

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12. Berry v. Schulman*,* 807 F.3d 600, 616 (4th Cir. 2015).

13. *See, e.g.*, *id.* ("In class action settlements, parties may release not only the very claims raised in their cases, but also claims arising out of the 'identical factual predicate.'").

14. Freeman v. MML Bay State Life Ins. Co., 445 F. App'x 577, 579 (3d Cir. 2011) (citing In re Prudential Ins. Co. of Am. Sales Prac. Litig., 261 F.3d 355, 366 (3d Cir. 2001)).

15. *Wal-Mart Stores, Inc.*, 396 F.3d at 106 ("Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, '[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.'").

16. *TBK Partners*, 675 F.2d at 460 (2d Cir. 1982).

17. *See* RUBENSTEIN, *supra* note 5, at §18:15.

18. *Id.*

19. FED. R. CIV. P. 23(e)(2). For a judgment to be enforceable, the judgment must have been rendered with due process. Pelt v. Utah, 539 F.3d 1271, 1284 (10th Cir. 2008) ("The preclusive effect of a prior judgment will depend upon whether absent class members were 'in fact' adequately represented by parties who are present" and will not bind absent class members "if they were not accorded due process of law").

20. *Pelt*, 539 F.3d at 1284.

approval.[21] The court may only approve the settlement "after a hearing and on finding that [the settlement] is fair, reasonable, and adequate."[22]

A judgment in a class action lawsuit binds all members of the class and prevents class members from later bringing claims over the same transaction or occurrence in a future lawsuit if they have met IFPD.[23] Generally, by "precluding parties from contesting matters that they have had a full and fair opportunity to litigate," the doctrine of preclusion "protect[s] against the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions."[24]

IV. DUE PROCESS CONCERNS RAISED BY CLASS SETTLEMENTS

Class settlements augment some of the concerns that accompany the conclusion of class claims. As a form of representative litigation, the named class members litigate, and settle, on behalf of a group of absent class members.[25] As a result, absent class members will be bound by a judgment even though they had no involvement in the litigation or settlement of their claims. Thus, the judicial economy and efficiencies generated by a class action settlement directly clash with the right of a litigant—in this case, an absent class member with a claim not directly presented in the class case—to have due process of law.

By allowing the release of a broad range of claims—including those of unnamed class members—class settlements raise concerns under the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. Specifically, class settlements pose a risk that the rights of unnamed class members' claims will be sacrificed to the advantage of named class representatives. "Generally speaking, absent class members are not 'parties' before the court in the sense of being able to direct the litigation."[26] Named class representatives and their counsel could seek to obtain a better settlement for themselves while "throwing the others' claims 'to the winds.'"[27]

When a class settlement releases claims that were not raised in the settling litigation (either intentionally or inadvertently), class members may face preclusion arguments if they bring later claims in a different action bearing some relation to the underlying settled claims. In that context, defendants, or plaintiffs if facing

21. *See id.*; Stanforth v. Farmers Ins. Co. of Ariz., No. CIV 09-1146 RB/RHS, 2014 WL 11497806, at *3 (D.N.M. Jan. 10, 2014).

22. FED. R. CIV. P. 23(e)(2). For a judgment to be enforceable, the judgment must have been rendered with due process. *Pelt*, 539 F.3d at 1284 ("The preclusive effect of a prior judgment will depend upon whether absent class members were 'in fact' adequately represented by parties who are present" and will not bind absent class members "if they were not accorded due process of law").

23. Hansberry v. Lee, 311 U.S. 32, 42–43 (1940); RUBENSTEIN, *supra* note 5, at §18:1.

24. Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (internal quotation marks and citations omitted).

25. *See id.*

26. Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269 (7th Cir. 1998).

27. *TBK Partners*, 675 F.2d at 462 ("At the heart of our concern was the danger that a class representative not sharing common interests with other class members would 'endeavor[ ] to obtain a better settlement by sacrificing the claims of others at no cost to themselves' by throwing the others' claims 'to the winds.'").

counter claims, often argue that the affirmative defenses of res judicata and release preclude the claims.

Binding these unnamed parties seemingly undercuts the "deep-rooted historic tradition that everyone should have his own day in court."[28] Balanced against this historic tradition is the right to notice and the ability to opt out.[29]

A release capturing claims neither "presented" nor "presentable" raises issues regarding the efficacy of notice to absent class members.[30] It may not be readily apparent that non-presentable claims were to be subsumed within the release. Ineffective notice means that claims will be lost by those unwitting victims who fail to opt out and thereby protect claims that were neither presented nor presentable.

V. SAFEGUARDING UNNAMED CLASS MEMBERS' RIGHTS IN CLASS SETTLEMENTS

Given the due process concerns that arise with class settlements, class members when facing preclusion arguments may challenge the enforceability of a class action judgment on the grounds that the litigation denied them due process of law.[31] Procedural due process protection in the class context requires: (i) notice plus an opportunity to be heard and participate in the litigation; (ii) notice that is the best practicable and reasonably calculated to apprise parties of the action and opportunity to object; (iii) notice that describes the action and rights; (iv) the opportunity to remove oneself from the class and opt out; and (v) adequate representation by the named plaintiff(s) of absent class members' interests.[32]

The due process clauses, along with Federal Rule of Civil Procedure 23(e), serve as safeguards protecting the release of unnamed putative class members' claims.[33] Under Rule 23(e), class claims may only be settled or dismissed with the

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28. *Taylor*, 553 U.S. at 892.

29. FED. R. CIV. P. 23(c)(2). Class plaintiffs may seek exclusion from a class certified under Fed. R. Civ. P. 23(b)(3). *See* FED. R. CIV. P. 23(c)(2).

30. *See Wal-Mart Stores*, 396 F.3d at 115–16 (class settlement release considered sufficient where language of release quoted verbatim, which satisfied due process).

31. *Taylor*, 553 U.S. at 880 ("The federal common law of preclusion is, of course, subject to due process limitations.").

32. Phillips Petro. Co. v. Shutts, 472 U.S. 797, 812 (1985). Class members may challenge a class settlement on due process grounds by either (i) objecting to or opting out of a class settlement, *Shutts*, 472 U.S. at 812, or (ii) raising due process in response to an affirmative defense asserted in a second, subsequent litigation, Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269 (7th Cir. 1998) ("[A]fter the entry of final judgment, the unnamed class member can raise a collateral attack based on due process . . . ."). Raising a due process challenge after the settlement has been approved often proves to be more difficult for class members than opting out or objecting to the settlement on due process grounds before final approval and judgment. This is so because some courts have limited the scope of an individual class member's ability to collaterally attack a judgment in a subsequent litigation. *Compare* Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) ("Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court."), *with* Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process.").

33. FED. R. CIV. P. 23(e).

court's approval.[34] Rule 23(e) imposes certain requirements in approving a proposed settlement:

- The court must direct notice to all class members who would be bound.[35]
- The court may approve the settlement binding class members only after a hearing and a "finding that it is fair, reasonable, and adequate."[36]
- The parties must file a statement identifying any agreement made in connection with the proposed settlement.[37]
- If the class action was already certified under Rule 23(b)(3), the court may refuse to approve the settlement unless it allows class members a new opportunity to request exclusion.[38]
- Any class member may object to the settlement.[39]

Rule 23(e)'s requirement that the court approve the settlement and enter a finding that the settlement is "fair, reasonable, and adequate" seeks to reinforce due process of law and ensure adequate representation of class members who have not participated in shaping the settlement.[40] Courts thus have a duty to ensure that the settlement is fair and adequate to all potential class members.[41]

VI. IDENTICAL FACTUAL PREDICATE AS AN ADDITIONAL SAFEGUARD OF UNNAMED CLASS MEMBERS' RIGHTS

Although Rule 23(e) serves as a procedural safeguard on the front end during the finalization and approval of a class settlement, courts also have established safeguards on the back end for unnamed class members when a party argues a class settlement release precludes their claims. A class settlement release will only preclude subsequent claims if the released conduct arises out of the "identical factual predicate" as the claims at issue in the underlying class litigation.[42] Moreover, adequacy of representation in the underlying litigation also must be found.[43]

The Second Circuit, which has developed the most case law on the IFPD, requires the existence of (i) an identical factual predicate and (ii) adequacy of

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. FED. R. CIV. P. 23(e).
40. *Id.*
41. Grimes v. Vitalink Commc'ns. Corp., 17 F.3d 1553, 1557 (3d Cir. 1994).
42. RUBENSTEIN, *supra* note 5, at 18:19.
43. *E.g.*, *Wal-Mart Stores*, 396 F.3d at 106; *see* Reppert v. Marvin Lumber & Cedar Co., 359 F.3d 53, 58–59 (1st Cir. 2004) ("[A] court-approved settlement containing a release may be applied against a class member who is not a representative member, even if that member objects to the settlement, so long as acceptable procedural safeguards have been employed.") (citing Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 33 (1st Cir. 1991); *see also TBK Partners*, 675 F.3d at 462 ("these concerns are not implicated where the released claim rests on the same factual predicate as the class action claim").

representation before releasing claims.[44] "Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement."[45] Consequently, even if claims do share an identical factual predicate, the claims will not be precluded unless class plaintiffs also adequately represented the interests of class members during the underlying litigation.[46] Although other circuits have not articulated the test in precisely this way, almost all circuits analyze issues of class release similarly.

The IFPD is particularly important given that a class release may release claims that were not brought in the class case nor could have been brought.[47] To release claims that were "not presented and might not have been presentable," courts require that the released claims share the identical factual predicate underlying the claims in the class litigation.[48] Otherwise, there would be no limit on the claims that could be released.

In applying the IFPD, the subsequent court must examine the facts underlying both cases to determine if they share sufficient facts to justify the release of claims.[49] Almost every circuit has adopted the IFPD, and no circuit has rejected it.[50] However, without centralized guidance from the Supreme Court, courts have applied varying articulations of what the doctrine means and what level of identity or similarity of facts is required, particularly in relation to the related defense of res judicata. To understand how, and why, courts have struggled with the doctrine's application, it is important to understand the historical context in which the doctrine arose.

VII. THE HISTORICAL DEVELOPMENT OF THE IDENTICAL FACTUAL PREDICATE DOCTRINE AND ITS IMPACT ON THE DOCTRINE'S APPLICABILITY

The IFPD seemingly emerged as courts struggled to apply the principles of issue preclusion to class settlements. To explain how a class settlement release would preclude subsequent claims, a number of courts analogized release to the affirmative defense of issue preclusion.[51] Although a sister doctrine to claim preclusion, issue preclusion does not apply in the class settlement context. "Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law *actually litigated* and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or

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44. *Wal-Mart Stores*, 396 F.3d at 106–07.

45. *Id.* at 106.

46. *Id.* at 109 ("Claims arising from a shared set of facts will not be precluded where class plaintiffs have not adequately represented the interests of class members.").

47. *Id.* at 106–07.

48. *TBK Partners*, 675 F.3d at 460 ("We therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may 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."); *Reppert*, 359 F.3d at 58–59 (citing Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 377 (1996)).

49. *See Wal-Mart Stores, Inc.*, 396 F.3d at 107–09.

50. *See infra* note 91 (citing decisions from each Circuit).

51. *E.g.*, *TBK Partners*, 675 F.2d at 458.

a different claim."[52] Generally, for issue preclusion to apply, the prior case must involve: (1) the same issue; (2) actually litigated or determined; (3) by a valid final judgment on the merits; (4) in which resolution of the issue was essential to the judgment; (5) between the same parties to a later suit.[53] As with claim preclusion, each circuit uses some version of this test, though most jurisdictions no longer require complete mutuality.[54]

Because most class actions settle without an issue actually being litigated—let alone with a finding that that the resolution of the issue was essential to the judgment—few class judgments involve actually litigated issues.[55] As a result, parties cannot generally rely on issue preclusion to prevent relitigation of claims following a class settlement.[56] Nevertheless, the IFPD underlying a class settlement release has its roots in issue preclusion law.

In grappling with IFPD and release, several courts have compared the affirmative defense of release to issue preclusion and applied an issue preclusion test to determine what claims would be released. The majority of these courts rely on a Second Circuit case that serves as one of the foundational, and most cited cases, for IFPD. In *TBK Partners, Ltd. v. Western Union Corp.*, a group of objectors appealed the approval of a class settlement by a federal court. The objectors argued on appeal that the district court erred in approving the settlement because it would enjoin class members from prosecuting claims that were not part of the class action.[57]

The objectors were minority shareholders who disapproved of the merger price offered by Western Union and the valuation of their shares.[58] The objectors contended the settlement would bar class members from pursuing appraisal proceedings in state court to determine the fair value of their shares.[59] Thus, the objectors argued a federal court lacked the power to bar claims that were not, and could not, have been asserted in the class action.[60] They argued appraisal rights were individual statutory rights inappropriate for class adjudication and the New York State Supreme Court had exclusive jurisdiction over appraisal proceedings.[61]

The Second Circuit rejected that argument and affirmed the decision of the district court approving the settlement.[62] In doing so, the Second Circuit emphasized the 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."[63] The *TBK Partners* court went through a detailed analysis of the facts

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52. *New Hampshire*, 532 U.S. at 748–49 (emphasis added).
53. HERBERT B. NEWBERG, NEWBERG ON CLASS ACTION § 18.25, at 108 (5th Ed. 2017).
54. *See* Wright & Miller, Fed. Practice & P., Civil 4464.
55. NEWBERG, *supra* note 53, § 18.25, at 113.
56. The exception would be if an issue was actually determined before the class settlement and judgment. *See id.* at 112–13.
57. *TBK Partners*, 675 F.2d at 458.
58. *See id.* at 456.
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.*
63. *TBK Partners*, 675 F.2d at 460.

and found that both the class action and subsequent state appraisal proceeding "hinge[d] on the same operative factual predicate"—i.e. the correct valuation of whatever reversionary interest was owed to Gold & Stock's shareholders.[64] Because the same facts were at issue for both the unpleaded released state claims and the pleaded federal claims, the Second Circuit gave preclusive effect to the settlement's release. *TBK Partners* followed the reasoning of an earlier Second Circuit case—*National Super Spuds, Inc. v. New York Mercantile Exchange*. There, the Second Circuit emphasized the basic principle that "[i]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either."[65]

The test *TBK Partners* applied in analyzing the release was akin to issue preclusion, not claim preclusion.[66] But in approving the release of claims, *TBK Partners* warned that "[c]ourts should be cautious about permitting issue preclusion in the context of a settlement of a class action."[67] The Second Circuit further stated:

> [A]pproval of a settlement does not call for findings of fact regarding the claims to be compromised. The court is concerned only with the likelihood of success or failure, the actual merits of the controversy are not to be determined. The evidence is limited accordingly. The rules of evidence are relaxed. The court listens to the advice and wishes of interested parties. This is not the procedural stuff from which binding determinations of fact can be drawn.[68]

The *TBK Partners* court's concern regarding the sacrifice of some claims to obtain a better settlement were "not implicated where the released claim rests on the same factual predicate as the class action claim."[69] *TBK Partners* thus "announced a principled test for limiting the preclusive effect of a judgment based upon a class settlement."[70] Although *TBK Partners* captioned the analysis it applied as issue preclusion, the Second Circuit did not preclude the claims based on issue preclusion

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64. *Id.* ("It would be hard to imagine a claim that would be more tightly connected to those asserted in the class action than a claim in an appraisal proceeding that Western Union had undervalued the reversionary interest due Gold & Stock . . . .").

65. *Id.* at 461 (quoting Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 18 (1981); *see also* Epstein v. MCA, Inc., 50 F.3d 644, 664 (9th Cir. 1995) ("*Epstein I*") ("Had the judgment been based upon an adjudication rather than a settlement of the federal claims, the unpleaded state law claims would have been barred by the doctrine of issue preclusion because they turned on the 'very same set of facts.'"). *National Super Spuds* did not affirm the district court's approval of a settlement that would release distinct claims that depended not only on a different legal theory but also on proof of further facts—the holding of unliquidated contracts. *TBK Partners*, 675 F.2d at 460 (citing *Nat'l Super Spuds*, 660 F.2d at 18).

66. *Epstein I*, 50 F.3d at 663 ("*TBK Partners* announced and applied an issue preclusion test, not an 'arising out of the same transaction' test, in defining the limits on a court's power to release claims in a class settlement.").

67. *TBK Partners*, 675 F.2d at 461.

68. *Id.* (citing William E. Haudek, *The Settlement and Dismissal of Stockholders' Actions-Part II: The Settlement*, 23 Sw. L.J. 765, 809 (1969)).

69. *Id.* at 462 (concluding district court "exercised the extra vigilance required to ensure that a settlement's release of a claim not asserted in the class action does not unfairly disadvantage individual class members.").

70. Epstein v. MCA, Inc., 50 F.3d 644, 663 (9th Cir. 1995), *rev'd*, 516 U.S. 367 (1996).

because a class settlement release does not involve adjudicated issues.[71] Nevertheless, the Second Circuit's version of issue preclusion in the class settlement context served as the foundation for what became the identical factual predicate doctrine.

In *Epstein v. MCA, Inc.* ("*Epstein I*"), the Ninth Circuit in analyzing the Second Circuit's decision in *TBK Partners* explained that "had the judgment been based upon an adjudication rather than a settlement of the federal claims, the unpleaded state law claims would have been barred by the doctrine of issue preclusion because they turned on the 'very same set of facts.'"[72] In *Epstein I*, which was appealed to the Supreme Court in *Matsushita*, the defendant-appellee argued a Delaware Court of Chancery judgment approving a state class settlement precluded the federal claims in the pending action.[73] The Ninth Circuit disagreed in *Epstein I*, holding the settlement of the Delaware class action did not preclude the class action at issue.[74]

Epstein I declined to directly address the identical factual predicate doctrine.[75] Instead, *Epstein I* distinguished *TBK Partners* because it was not a supremacy clause case and because it applied an issue preclusion test, not an "arising out of the same transaction" test with regards to the court's power to release claims in a class settlement.[76] Although the *Epstein I* court determined *Nat'l Super Spuds* and *TBK Partners* "together provide[d] the doctrinal framework for using issue preclusion in determining the limits of judicial authority to release unpleaded claims in settling class actions," the court emphasized neither case touched on the issue before it—the preemptive effect of an exclusive federal jurisdiction statute on the reach of state judicial power in settling class actions.[77]

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71. *TBK Partners*, 675 F.2d at 461.
72. *Epstein I*, 50 F.3d at 663 (citing *TBK Partners*, 675 F.2d at 460).
73. *Id.* at 649.
74. *Id.*
75. *Id.* at 663.
76. *Id.*
77. *Id.* at 663–64 (distinguishing cases that involved release of unpleaded state claims by federal district courts which had or may have had pendent jurisdiction to adjudicate claims). The *Epstein I* Court determined the federal claims extinguished by the Delaware judgment could not have been extinguished by the issue preclusive effect of an adjudication of the state claims because they were based upon different underlying facts. *Id.* at 665. The Court also determined that because the district court released exclusively federal claims, a Delaware state judgment was not entitled to full faith and credit. *Id.* at 666. Because the Delaware court could not have extinguished the claims through adjudication because it did not have jurisdiction, the judgment was not entitled to full faith and credit. *Id.* The Supreme Court reversed the Ninth Circuit's opinion but did so on different grounds. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386 (1996) ("The Court of Appeals did not engage in any analysis of Delaware law pursuant to § 1738. Rather, the Court of Appeals declined to apply § 1738 on the ground that where the rendering forum lacked jurisdiction over the subject matter or the parties, full faith and credit is not required."). The Supreme Court determined the Delaware judgment was entitled to full faith and credit even though it released claims within the exclusive jurisdiction of federal courts. *Id.* at 368–87. On remand, the Ninth Circuit again held that the Delaware state judgment was not entitled to full faith and credit because it violated due process based on the inadequacy of the class representation, but then withdrew its opinion on petition for rehearing. Epstein v. MCA, Inc., 179 F.3d 641, 642 (9th Cir. 1999). The court determined that the Supreme Court's holding was premised on the validity of the Delaware judgment. *Id.* at 644–45 ("While the Court's explicit consideration in *Matsushita* of the due process requirements to bind absent class members admittedly did not include an express statement that the Delaware judgment in question did not violate due process, that conclusion was logically necessary to the Court's holding.").

The *Epstein I* court analyzed two other cases—*Grimes v. Vitalink Communications Corp.*[78]and *Nottingham Partners v. Trans-Lux Corp.*,[79] which *did* implicate the supremacy clause because exclusively federal securities claims were released by a state court judgment approving a class settlement.[80] *Epstein I* noted the judgments were given preclusive effect because the state and federal claims arose out of the identical factual predicate.[81] "In other words, had the judgment followed an adjudication rather than a settlement, it would necessarily have resolved the federal claims as a matter of issue preclusion."[82]

Epstein I, however, declined to go that far in its holding.[83] Instead, the Ninth Circuit found that "[a]ll we need decide today is whether to break new ground in giving preclusive effect that a state court judgment that extinguished exclusively federal claims that are factually unrelated to the state claims pleaded in the class action."[84] To the Ninth Circuit in *Epstein I*, because the state court did not have jurisdiction—and thus could not have adjudicated the claims—the state court judgment could not have been given preclusive effect.[85] Although the court did not ultimately address identical factual predicate, it approvingly cited the underlying policy of the doctrine, which it found "counsel[s] against an expansive state court power to release exclusively federal claims."[86] Specifically:

> In applying an issue preclusion test rather than a 'same transaction' test, the cases embrace Judge Friendly's common sense reasoning that a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication. Ignoring this reasoning, *Matsushita* asks us to impose a 'same transaction' test without offering logic or precedent in support of such a test. As we shall now show, the federal claims extinguished by the Delaware judgment could not have been extinguished by the issue preclusive effect of an adjudication of the state claims because, although the federal and state claims arose out of the same transaction, they are based upon different underlying facts.[87]

After proceeding to analyze the facts underlying the claims—and finding that the only thing they shared in common was that they arose out of the same transaction—the Court ultimately limited its opinion to jurisdiction and full faith and credit, concluding the state court could not extinguish exclusively federal claims that could

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78. Grimes v. Vitalink Commc'ns. Corp., 17 F.3d 1553, 1557 (3d Cir. 1994).
79. Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991).
80. *Epstein I*, 50 F.3d at 664.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* (noting this was a question of first impression of whether Congress, in denying state courts subject matter jurisdiction over Securities Exchange Act of 1934 Act claims, intended to leave state courts with the power to extinguish exclusively federal claims by approving a class settlement that could not have been extinguished by adjudicating the class action).
85. *Id.*
86. *Epstein I*, 50 F.3d at 664.
87. *Id.* at 664–65.

not have been extinguished through adjudication.[88] On appeal to the Supreme Court, the Court rejected *Epstein I*'s articulation of the adjudication test.[89] Instead, the Supreme Court held that the Delaware judgment did not bar further prosecution of federal claims under the full faith and credit clause.[90] The Court, however, did not base its holding on the identical factual predicate doctrine or approve its application, leaving much to the interpretation of the circuit courts.

VIII. THE BREADTH OF THE IDENTICAL FACTUAL PREDICATE DOCTRINE IN CURRENT JURISPRUDENCE

The lack of Supreme Court guidance on the IFPD has left its interpretation and application to the respective circuits. Almost every circuit has applied the IFPD in the context of a release in a class action settlement, with the exception being the Fifth Circuit.[91] Although the Tenth Circuit has not applied the IFPD in analyzing the preclusive effect of a class settlement release, it has acknowledged the existence of the doctrine and district courts in the Tenth Circuit have applied it, citing to other circuits.[92]

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88. *Id.* at 666 ("[W]e hold that the decree exceeds the jurisdiction of the state court and, therefore, is not entitled to full faith and credit.").

89. *See Matsushita*, 516 U.S. at 378.

90. *Id.* at 386–87.

91. *See, e.g.*, Reppert v. Marvin Lumber and Cedar Co., 359 F.3d 53, 58–59 (1st Cir. 2004) (citing doctrine but determining that release was "sufficiently broad to encompass the appellants' complaint and the allegations therein"); City P'ship Co. v. Atl. Acquisition Ltd., 100 F.3d 1041 (1st Cir. 1996) (citing doctrine and finding claims stemmed from problems with tender offers and arose from same factual predicate); Lomeli v. Sec. & Inv. Co. Bahr., 546 F. App'x 37 (2d Cir. 2013) (finding claims shared a single factual predicate); *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 247–48 (2d Cir. 2011) ("Any released claims not presented directly in the complaint, however, must be 'based on the identical factual predicate as that underlying the claims in the settled class action.'"); Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 106 (2d Cir. 2005) ("Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief. Plaintiffs' authority to release claims is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines. Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement."); Freeman v. MML Bay State Life Ins. Co., 445 F. App'x 577, 579 (3d Cir. 2011) ("The key inquiry is whether the factual predicate for future claims is identical to the factual predicate underlying the settlement agreement."); Berry v. Schulman, 807 F.3d 600, 616 (4th Cir. 2015) (finding claims based on same product that enables debt collectors to locate assets were released); Moulton v. U.S. Steel Corp., 581 F.3d 344, 349 (6th Cir. 2009) ("The question is not whether the definition of the claim in the complaint and the definition of the claim in the release overlap perfectly; it is whether the released claims share a 'factual predicate' with 'the claims pled in the complaint.'"); Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269 (7th Cir. 1998) (finding claims were based on identical factual predicate involving leases and potential for an early termination penalty); Williams v. Boeing Co., 517 F.3d 1120, 1133 (9th Cir. 2008) (citing identical factual predicate doctrine and finding claims do not arise from same "'conduct, transaction, or occurrence'"); *cf.* Thompson v. Edward D. Jones & Co., 992 F.2d 187, 191 n.6 (8th Cir. 1993) (noting that suitability claims rested on same or similar facts as class action claims, but not citing identical factual predicate doctrine specifically); Hesse v. Sprint Corp., 598 F.3d 581, 591 (9th Cir. 2010) (finding claims did not share an identical factual predicate with claims resolved in class settlement, but overlapping discussion with doctrine of res judicata); Thomas v. Blue Cross & Blue Shield Ass'n, 333 F. App'x 414 (11th Cir. 2009) (conflating release and res judicata and citing identical factual predicate doctrine).

92. *See In re* Motor Fuel Temperature Sales Practices Litig., 872 F.3d 1094, 1115 (10th Cir. 2017) (declining to consider argument on release of claims based on identical factual predicate when not raised

The existing circuit case law highlights the ambiguity of whether the doctrine would apply under both release and res judicata. At a glance, an "identical factual predicate" appears to be a stricter standard than the factual element of res judicata—i.e. same transaction or occurrence. The same transaction or occurrence factor under res judicata typically requires meeting several criteria, including showing a common nucleus of operative fact.[93] A class settlement release, on the other hand, requires identity of fact.[94] And, at least in the Ninth Circuit, an identical factual predicate means both the same set of facts (the predicate) *and* the same injury.[95]

Some courts have interpreted identical factual predicate to be narrower than the more relaxed standard of same transaction or occurrence under res judicata.[96] The Ninth Circuit in *Epstein I* certainly viewed the factual identity required as separate and distinct from the "same transaction or occurrence."[97]

But other courts have not viewed the factual similarity required as different, often using the "identical factual predicate" and "common nucleus of operative

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in district court). A number of Tenth Circuit district courts have applied the identical factual predicate doctrine, citing Second Circuit cases. *E.g.*, Stanforth v. Farmers Ins. Co. of Ariz., No. CIV 09-1146 RB/RHS, 2014 WL 11497806, at *4 (D.N.M. Jan. 10, 2014) ("emphasizing that "[i]t is well-established that 'a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action" and finding that cases are based on same factual predicate); Ali v. Wells Fargo Bank, No. CIV-13-876-D, 2014 WL 819385 (W.D. Okla. March 3, 2014) (finding stay appropriate where if class settlement approved, it would likely prevent class members from subsequently asserting claims relying on a different legal theory than that relied on in the class action, but depending upon same factual predicate); Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc., 679 F. Supp. 2d 1287, 1308 (D. Kan. 2010) ("class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.") (quoting *Wal-Mart Stores*, 396 F.3d at 107).

93. *E.g.*, Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004) ("Whether two cases implicate the same cause of action turns on whether they share the same nucleus of facts.") (internal quotations omitted); Nordhorn v. Ladish Co., 9 F.3d 1402, 1405 (9th Cir. 1993) (laying out criteria for whether two claims are the same for purposes of res judicata, including whether they arise out of the same transactional nucleus of facts).

94. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 748 (9th Cir. 2006).

95. *Id.* at 749 (holding claims released because price-fixing conduct and "the underlying injury are identical"); *In re* W. States Wholesale Nat. Gas Antitrust Litig., 752 F. App'x 560, 562 (9th Cir. 2018) (question of whether Plaintiff was injured forms part of factual predicate); *Hesse*, 598 F.3d at 589 (holding release was not enforceable to bar claims "brought to remedy a different set of injuries. . ."); *see also* McKinney-Drobnis v. Massage Envy Franchising, LLC, No. 16-cv-06450-MMC, 2017 WL 1246933, at *5 (N.D. Cal. Apr. 5, 2017) (finding claims not barred by prior settlement where based on different breaches and different injuries); Anderson v. Nextel Retail Stores, LLC, 2010 WL 8591002, at *4 (C.D. Cal. Apr. 12, 2010) ("The Ninth Circuit concluded that '[w]hile Plaintiffs seek to hold Defendant liable by positing a different theory of anti-competitive conduct, the price-fixing predicate (price-fixing interchange rates) and the underlying injury are identical.'") (quoting Reyn's Pasta, 442 F.3d at 749); Cancilla v. Ecolab Inc., No. C 12-03001 CRB, 2014 WL 2943237, at *7 (N.D. Cal. June 30, 2014) ("As already discussed, the *Cancilla* claims depend upon the same set of facts as *Ladore* . . . and both actions' underlying injuries of unpaid overtime are identical—thus, this case shares an identical factual predicate as *Ladore*.").

96. At least two courts have found the doctrine hinges on proof. For example, one court in the Second Circuit found if claims depend upon proof of further facts, there would be a separate factual predicate and identical factual predicate could not be met. Burgess v. Citigroup Inc., 624 F. App'x 6, 9 (2d Cir. 2015) ("distinct claims that depend 'upon proof of further facts' constitute a 'separate factual predicate.'"); *see In re* W. States Wholesale Nat. Gas Antitrust Litig., 725 F. App'x 560 (9th Cir. 2018).

97. Epstein v. MCA, Inc., 50 F.3d 644, 665 (9th Cir. 1995) ("[A]lthough the federal and state claims arose out of the same transaction, they are based upon different underlying facts.").

fact" terms interchangeably.[98] For example, the Ninth Circuit in *Class Plaintiffs v. City of Seattle*—a case three years before *Epstein I*—reasoned that "[t]he weight of authority holds that a federal court may release not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action . . . .'"[99] Yet, in *Class Plaintiffs*' analysis, the court found the claims asserted in the two actions "arise from the same common nucleus of operative fact" and could therefore be released.[100]

The Ninth Circuit in *Hesse v. Sprint Corp.* set forth a similarly convoluted analysis of release that also overlapped with res judicata.[101] In *Hesse*, the district court granted Sprint's motion for summary judgment after finding that the suit was barred by a class settlement between Sprint and its customers approved by a Kansas state court (the "*Benney* Settlement").[102] The *Benney* Settlement resulted from allegations that Sprint's surcharges to recoup federal regulatory fees violated consumer protection laws, were a breach of contract, and resulted in unjust enrichment.[103] The district court accepted Sprint's argument that the plaintiffs' claims fell within the broad release of liability in the *Benney* Settlement.[104]

The Ninth Circuit reversed.[105] First, the Ninth Circuit emphasized that "[a] settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,' but only where the released claim is 'based on the identical factual predicate as that underling the claims in the settled class action.'"[106] The Ninth Circuit cited several cases as examples of precedent holding that courts may properly release claims not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave rise to the settlement.[107] The *Hesse* court then shifted its focus and discussed whether Kansas law "is guided by the same general principles" of claim preclusion as the Ninth Circuit.[108] In analyzing whether claim preclusion would apply, the court noted the claims did "not share an identical factual predicate with the claims resolved in the *Benney* settlement."[109] Yet, in concluding that the claims lacked an identical factual predicate, the court emphasized that the Washington claims were "not derived from the same 'transaction or occurrence' as the claims" in *Benney*, seemingly reverting to a res judicata factual standard.[110] The court, however, ultimately rooted its opinion in the doctrine of release and adequacy of representation.[111]

98. *See* Class Plaintiffs v. Seattle, 955 F.2d 1268 (9th Cir. 1992).
99. *Id.* at 1287–88 (quoting *TBK Partners*, 675 F.2d at 460).
100. *Id.* at 1288.
101. *See generally* Hesse v. Sprint Corp., 598 F.3d 581 (9th Cir. 2010).
102. *Id.* at 585.
103. *Id.*
104. *Id.* at 597.
105. *Id.* at 592.
106. *Id.* at 590 (quoting Williams v. Boeing Co., 517 F.3d 1120, 1133 (9th Cir. 2008)).
107. *Hesse*, 598 F.3d at 590.
108. *Id.* at 581.
109. *Id.* at 591.
110. *Id.* at 592.
111. *Id.* at 584.

The Eleventh Circuit in *Thomas v. Blue Cross and Blue Shield Ass'n* used the identical factual predicate and common nucleus of operative fact tests interchangeably.[112] The Eleventh Circuit, however, adopted a different approach than *Class Plaintiffs*, but similar to that of *Hesse*. The *Thomas* court applied the IFPD when analyzing res judicata (claim preclusion), *not* release.[113] After finding the first three elements of res judicata were not disputed—i.e. final judgment on the merits, rendered by a court of competent jurisdiction, and identity of parties—the court analyzed whether the causes of action were the same.[114] The physician counterclaimant argued Blue Cross must show an identical factual predicate for claim preclusion to apply.[115] The court found that "an 'identical factual predicate' requires only a common nucleus of operative fact."[116] The Court concluded that the actions "share[d] the same operative nucleus of fact" and that "the district court did not err in finding that [the defendant's] counterclaims were released by the settlement agreement after he failed to opt out."[117]

Despite the conflation of the two tests by some courts, identical factual predicate is not the same as "same transaction or occurrence" or "common nucleus of operative fact." As the court in *Epstein I* observed, claims can arise "out of the same transaction, [but be] based upon different underlying facts."[118] For example, although the Ninth Circuit in *Reorganized FLI, Inc. v. OneOK, Inc.* found a prior class action and a subsequent litigation both challenged manipulative trading practices that allegedly inflated the price of natural gas, the court found the class settlement release from the prior action was not enforceable against the plaintiff in the subsequent litigation under the identical factual predicate rule.[119] The Ninth Circuit emphasized that "even if those elements of the factual predicates of each claim are identical, the question whether [the plaintiff] was injured by Defendants—as well as the follow-on questions of when, and where, and how—are also part of the factual predicate of [the plaintiff's] claims made here."[120] Because the two cases "depend[ed] on proof of different facts to establish a different injury," the defendants in the subsequent litigation were not entitled to judgment as a matter of law on their affirmative defense of release.[121]

To be sure, the identical factual predicate doctrine applies in the context of res judicata where there has been a class action settlement. But IFPD does not fall under the same transaction or occurrence prong. Instead, an identical factual predicate is part of the *valid, final judgment* prong of res judicata.

When faced with a class settlement, the court must approve the settlement under Fed. R. Civ. P. 23(e).[122] In approving a settlement, the court must accept the

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112. Thomas v. Blue Cross Blue Shield Ass'n, 333 F. App'x 414, 417–18 (11th Cir 2009).

113. *Id.* at 417.

114. *Id.*

115. *Id.*

116. *Thomas*, 333 F. App'x at 417 (citing Adams v. S. Farm Bureau Life Ins. Co., 493 F.3d 1276, 1289 (11th Cir. 2007)).

117. *Thomas*, 333 F. App'x at 419–20.

118. Epstein v. MCA, Inc., 50 F.3d 644, 665 (9th Cir. 1995).

119. *In re* W. States Wholesale Nat. Gas Antitrust Litig., 725 F. App'x 560, 562 (9th Cir. 2018).

120. *Id.* at 563 (citing *Hesse*, 598 F.3d at 581 (9th Cir. 2010)).

121. *Id.* at 563.

122. FED. R. CIV. P. 23(e).

release.[123] Once the release and settlement have been approved, and only then, the Court may enter its final judgment.[124] As a result, to reach a final judgment, a Court must approve the release, which is limited to foreclosing only those claims that share an identical factual predicate.[125] Even a reviewing court must apply the IFPD to limit the sweep of a broad release.[126] Thus, the identical factual predicate doctrine is embedded within the analytical framework that underlies the final judgment element of res judicata.

The Ninth Circuit in *Reyn's Pasta Bella, LLC v. Visa USA, Inc.* applied a similar analysis as proposed, though under the rubric of issue preclusion, not claim preclusion.[127] In analyzing whether an action was barred by a class settlement, the court explained that:

> Issue preclusion bars relitigation of issues adjudicated in an earlier proceeding if three requirements are met: (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.[128]

The *Reyn's Pasta* court found the underlying class court's decision that the settlement released the plaintiff's claims was necessary to the court's final judgment approving the settlement.[129] To approve the settlement under Rule 23(e)(2), "the Wal-Mart courts necessarily had to adjudicate the objections Plaintiffs raised, including whether the Wal-Mart settlement released Plaintiffs' price-fixing claims."[130]

The *Reyn's Pasta* court alternatively found that, even if issue preclusion were not applicable, the claims were released by virtue of the identical factual predicate doctrine.[131] Although the cases involved different legal theories of antitrust liability, the court concluded the price-fixing predicate based on interchange rates and the

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123. *Id.*

124. *Id.*

125. *Id.*

126. *See* TBK Partners LTD. v. W. Union Corp., 675 F.2d 456, 460 (7th Cir. 1982); Reppert v. Marvin Lumber and Cedar Co., 359 F.3d 53, 58–59 (1st Cir. 2004).

127. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 744 (9th Cir. 2006).

128. *Id.* at 746 (citing Kourtis v. Cameron, 419 F.3d 989, 994 (9th Cir. 2005)).

129. *Reyn's Pasta* differs from many class settlements in that many of the issues raised in the subsequent litigation were *actually litigated* in the underlying class action. During the underlying class fairness hearing approving the settlement, the parties litigated "virtually all of the issues they raise[d]" in the subsequent litigation. *Reyn's Pasta*, 442 F.3d at 746 n.6. The court took judicial notice of the briefs in the prior action and the transcript from the fairness hearing that showed the litigated issues. *Id.* Because the issues were actually litigated in the prior class case, the determination of the issues was found to be necessary to the final judgment, thus satisfying two important prongs of issue preclusion. *See id.*

130. *Reyn's Pasta*, 442 F.3d at 746 (noting that plaintiffs in underlying suit litigated "virtually all of the issues they raise here" in the fairness hearing).

131. *Id.* at 748 (quoting Class Plaintiffs v. Seattle, 955 F.2d 1268, 1287–89 (9th Cir. 1992)) ("The weight of authority holds that a federal court may release not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action . . .'").

underlying injury were identical.[132] "Thus, the [earlier class settlement] release encompasses Plaintiffs' claims if they arise from an identical factual predicate as the claims asserted by the [earlier] class."[133]

IX. BOTH RELEASE AND RES JUDICATA ARE CIRCUMSCRIBED BY IFPD

This reasoning of *Reyn's Pasta*—albeit in the issue preclusion context—should influence the reasoning all courts employ when considering arguments that later claims are precluded by res judicata and release. If a party asserts res judicata based on a prior class settlement as a defense, the party must meet its burden of meeting the elements of res judicata, including that the previous court entered a final judgment. For the prior court entering a final judgment to approve the class settlement, it necessarily could only approve a settlement release that extended as far as claims sharing an identical factual predicate. Thus, the final judgment prong of res judicata is circumscribed by IFPD.

As a result, a court faced with the defenses of res judicata and release should start its analysis based on the identical factual predicate doctrine. If an identity of facts is not shown, a party asserting res judicata and release should not prevail on either doctrine.

X. CONCLUSION

The release of unnamed class members' claims in a class settlement raises due process concerns that the Federal Rules of Civil Procedure, and development of federal common law, seek to minimize. Thus, although broad releases of claims in the class settlement context are generally permitted, a release will not automatically preclude subsequent claims touching on the same facts as the underlying litigation unless the parties can demonstrate an identical factual predicate.[134] The identical factual predicate doctrine, however, has been subject to various interpretations and applications by the circuits. Under these varying interpretations, courts have not been clear whether the doctrine also applies in the context of res judicata or whether identical factual predicate has the same meaning as the same transaction or occurrence element.

Finding an identical factual predicate is necessary to determining whether res judicata or release preclude claims. Courts have emphasized that a release may only release claims that share an identical factual predicate, and not beyond. Thus, a court cannot approve a class settlement release and consequently the settlement unless it determines the release will not extend beyond the boundaries of IFPD. In entering a final judgment approving a class settlement, the court makes the necessary determination that the release does not capture claims that do not share an identical factual predicate. This final judgment then later serves as one of the prongs in asserting a res judicata defense. Consequently, the identical factual predicate is a necessary prerequisite for both res judicata and class settlement release defenses.

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132. *Id.* at 749.
133. *Id.* at 748.
134. Adequacy of representation must also be found.