22-56131

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM F. WREN, a California resident, individually
and on behalf of others similarly situated,

Plaintiff-Appellant,

—v.—

TRANSAMERICA LIFE INSURANCE COMPANY, an Iowa corporation,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

INTRODUCTION 1

JURISDICTIONAL STATEMENT 5

STATEMENT OF THE ISSUES 5

STATEMENT OF THE CASE 5

I. Wren's Policy Expressly Guarantees Cash Value Increase Benefits on Scheduled Policy Anniversaries, If Reached 5

II. In 2000, a Texas Court Approves the *Oakes* Class Settlement, Which Preserves and Increases Policyholders' Contractual Benefits 6

III. Transamerica Pays Wren's Twentieth Anniversary Cash Value Increase in 2010 10

IV. In 2016, Transamerica Announced It Would No Longer Honor Its Cash Value Increase Obligations because of *Oakes* 11

V. While Acknowledging that Wren's Claims Were "Not Ripe at the Time of the *Oakes* Settlement," the District Court Held That *Oakes* Precluded Wren's Claims 12

SUMMARY OF ARGUMENT 13

STANDARD OF REVIEW 16

ARGUMENT 16

I. The *Oakes* Judgment Does Not Preclude Wren's Claim 16

A. The District Court Erroneously Ignored Principles of Claim Preclusion 16

B. Under Texas Claim Preclusion Law, Wren's Claims Must Proceed 18

C. The Federal "Identical Factual Predicate" Test Also Requires That Wren's Claims Proceed 21

D. The District Court's "Identical Factual Predicate" Analysis Was Fundamentally Flawed......................................24

II. The *Oakes* Settlement Does Not Bar Wren's Claims 29

A. The Settlement Preserved Policyholders' Claims for the Benefits Afforded by Their Policies, including the Scheduled Cash Value Increases 30

B. The District Court Made No Attempt to Harmonize the Settlement Agreement's Various Provisions, Rendering Several Provisions of the Settlement Meaningless 35

C. Wren's Interpretation Is At Least Reasonable..........................40

III. Enforcement of the *Oakes* Judgment Against Wren Violates His Due Process Rights to Adequate Representation and Notice 41

A. The *Oakes* Class Representatives Suffer From the Same Conflicts That This Court Identified and Prohibited in *Hesse* 42

B. The Class Notice Assured Wren That He Would Retain the Future Contractual Benefits of His Policy..........................44

C. This Court Must Ensure That Enforcement of the Settlement Against Wren Satisfies Due Process 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

Barforough v. Nationstar Mortg., LLC,
2017 WL 4413430 (Tex. App. Oct. 5, 2017) 35, 36

Brown v. Ticor Title Ins. Co.,
982 F.2d 386 (9th Cir. 1992) 41

Castaneda v. Dura-Vent Corp.,
648 F.2d 612 (9th Cir. 1981) 40

Clinton v. Acequia, Inc.,
94 F.3d 568 (9th Cir. 1996) 28

In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.,
431 F.3d 141 (3d Cir. 2005) 48

Dukes v. Wal-Mart Stores, Inc.,
603 F.3d 571 (9th Cir. 2010) 47

Eagle Oil & Gas Co. v. TRO-X, L.P.,
619 S.W.3d 699 (Tex. 2021) ....*passim*

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 42

Epstein v. MCA, Inc.,
50 F.3d 644 (9th Cir. 1995) 17

Feller v. Transamerica Life Ins. Co.,
2016 WL 6602561 (C.D. Cal. Nov. 8, 2016) 21

Gooch v. Life Invs. Ins. Co. of Am.,
672 F.3d 402 (6th Cir. 2012) 45

Hansberry v. Lee,
311 U.S. 32 (1940)....................41

Hegarty v. Transamerica Life Ins. Co.,
2021 WL 4899482 (N.D. Cal. Oct. 21, 2021) 39

Hegarty v. Transamerica Life Ins. Co.,
2022 WL 4596614 (N.D. Cal. May 31, 2022)..39

Hege v. Aegon USA, LLC,
780 F. Supp. 2d 416 (D.S.C. 2011) 45

Henry v. Masson,
333 S.W.3d 825 (Tex. App. 2005)..21

Hernandez v. Del Ray Chem. Int'l,
56 S.W.3d 112 (Tex. App. 2001)..29

Hesse v. Sprint Corp.,
598 F.3d 581 (9th Cir. 2010) ....*passim*

JL Beverage Co., LLC v. Jim Beam Brands Co.,
828 F.3d 1098 (9th Cir. 2016) 16

King v. Baylor Univ.,
46 F.4th 344 (5th Cir. 2022) 40

Kremer v. Chemical Cont. Corp.,
456 U.S. 461 (1982)...3, 14, 20, 29

Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.,
140 S.Ct. 1589 (2020)..3, 14, 18, 22

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996)...16, 17, 18, 19

Media Rts. Techs., Inc. v. Microsoft Corp.,
922 F.3d 1014 (9th Cir. 2019) 22, 29

Molski v. Gleich,
318 F.3d 937 (9th Cir. 2003) 45, 47

Mullane v. Cent. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950)...44

Phan v. CL Invs., LLC,
2022 WL 175367 (Tex. App. Jan. 20, 2022) 20

Philips Petroleum Co. v. Shutts,
472 U.S. 797 (1985)..41, 44

Prime Mgmt. Co. v. Steinegger,
904 F.2d 811 (2d Cir. 1990) 23

Sellers v. Mins. Techs., Inc.,
753 F. App'x 272 (5th Cir. 2018) 40

In re Serv. Corp. Int'l,
355 S.W.3d 655 (Tex. 2011) 35

Stafford v. Allstate Life Ins.,
175 S.W.3d 537 (Tex. App. 2005)...21, 25

Stephenson v. Dow Chem. Co.,
273 F.3d 249 (2d Cir. 2001) 48

Travelers Ins. Co. v. Joachim,
315 S.W.3d 860 (Tex. 2010) 19

TVPX ARS, Inc. v. Genworth Life & Annuity Insurance Co.,
959 F.3d 1318 (11th Cir. 2020) 18, 22, 25

Twigg v. Sears Roebuck & Co.,
153 F.3d 1222 (11th Cir. 1998) 47, 48

Yearby v. Am. Nat'l Ins. Co.,
2021 WL 3855833 (N.D. Cal. Aug. 30, 2021) 22

Statutes

28 U.S.C. § 1291 5

28 U.S.C. §§ 1332(a) 5

28 U.S.C. §§ 1332(d)(2) 5

Other Authorities

2 McLaughlin on Class Actions (19th ed.) 18, 22

6 Newberg and Rubenstein on Class Actions (6th ed.) 16, 17, 42, 49

7B Fed. Prac. & Proc. Civ. (3d ed.) 45

Manual for Complex Litigation (Fourth)...45

INTRODUCTION

In 2016, Defendant-Appellee Transamerica Life Insurance Company ("Transamerica") notified Plaintiff-Appellant William Wren that it would no longer pay him certain benefits of his life insurance policy. Wren's policy, which he purchased in 1990, expressly guaranteed that on scheduled policy "anniversaries," Transamerica would increase the cash value of Wren's policy account if the policy was still active on those anniversaries. The first cash value increase came due on Wren's 20th policy anniversary in 2010, and, in 2010, Transamerica paid it. But when Wren's 30th anniversary cash value increase came due in 2020, Transamerica did not pay. So in 2021, Wren sued Transamerica for breach of contract.

On cross-motions for summary judgment, the district court held that Wren's claims, based on Transamerica's 2020 failure to pay, were barred by a class action settlement ***reached in 2000***. That class action, called *Oakes*, was based on misrepresentations Transamerica's predecessor had allegedly made to policyholders when first selling the policies more than two decades earlier. *Oakes* had nothing to do with any failure to pay the scheduled cash value increases.

Indeed, *Oakes* could not possibly have been about a failure to pay cash value increases. The increases were neither due nor unpaid at the time of *Oakes*. After all, Transamerica ***paid*** the first cash value increase that came due in 2010, about a decade ***after*** the *Oakes* settlement. It was not until 16 years later, in 2016, that Transamerica

reversed course and decided to stop paying the increases. And the specific conduct that gave rise to this lawsuit—Transamerica's actual failure to pay the 30th anniversary increase—did not occur until 2020. In other words, at the time of *Oakes*, Wren ***could not have*** sued Transamerica for breaching its cash value increase obligations because Transamerica did not breach its payment obligations for another 20 years. Had Wren made such a claim, it would have been immediately dismissed as unripe.

The district court acknowledged this. It wrote: "***Mr. Wren's claims to the Cash Value Increases were not ripe at the time of the*** **Oakes** ***settlement***." ER-13 (emphasis added). That should have ended both motions and resulted in summary judgment for Wren on this issue. Instead, the court concluded that the *Oakes* settlement barred Wren's claims.

For three independent reasons, that was reversible error.

First, the district court ignored basic principles of claim preclusion. Class action settlements bar subsequent claims only if the later suit is barred by both the terms of the settlement ***and*** by claim preclusion. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010). And it is elementary that claim preclusion cannot bar claims that were not ripe at the time of the original judgment, under governing Texas law and federal claim preclusion law. *See Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 706 (Tex. 2021) ("Res judicata cannot bar a claim that was not ripe at

the time the first lawsuit was filed."); *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S.Ct. 1589, 1595–96 (2020) (two claims do not "share a common nucleus of operative facts" where "the complained-of conduct in the [second] [a]ction occurred after the conclusion of the [first] [a]ction"). Indeed, that rule is required by the Constitution; for claim preclusion to apply, a litigant must, at a bare minimum, be permitted a "full and fair opportunity to litigate [his] claim." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480–81 & n.22 (1982). Wren's claim, as the district court conceded, was unripe and un-litigable at the time of *Oakes*. He must therefore be afforded the opportunity to pursue it now.

Second, the district court erroneously interpreted the text of the *Oakes* settlement. That agreement expressly preserved class members' rights to enjoy the benefits of their policies going forward. While class members released claims such as the fraudulent inducement claims from *Oakes*, they were permitted to continue making claims for benefits to which they were contractually entitled—like claims for death benefits, guaranteed minimum interest credits, and scheduled cash value increases—into the future. The district court's conclusion that the settlement unambiguously released Transamerica from all benefits claims, ever, conflicts with the plain text of the agreement, renders multiple provisions of the agreement meaningless, and would essentially make the policies completely valueless. At the

very least, the settlement is ambiguous on this issue. This legal error independently requires reversal.

Third, enforcement of the *Oakes* settlement against Wren here would violate Wren's due process rights. The Due Process Clause allows class action settlements to bind absent class members only when they receive constitutionally adequate representation and notice of the settlement. Wren received neither. As for representation, as this Court held in *Hesse*, adequate representation requires that the class representatives "possess[] the same type of claim" as any subsequent plaintiff against whom the class settlement is sought to be enforced. 598 F.3d at 589. But the *Oakes* plaintiffs did not possess a claim remotely similar to the one Wren asserts here; Wren's claim did not even exist or ripen until 20 years after *Oakes*. And as for notice, Wren could not have known that participation in the *Oakes* settlement would mean giving up his right to future benefits like the scheduled cash value increases. To the contrary, the class notice affirmatively represented that class members ***would*** "be able to make a claim for any benefits that may become payable in the future." ER-121; ER-36. That, however, is the exact opposite of happened below; the district court ***extinguished*** Wren's rights to benefits that ultimately became payable 20 years after the *Oakes* settlement. The Due Process Clause does not permit such a result.

JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction under 28 U.S.C. §§ 1332(a) and 1332(d)(2). On November 9, 2022, the district court granted Transamerica's motion for summary judgment and entered final judgment. ER-2. On November 30, 2022, Wren timely noticed this appeal. ER-279. This Court has jurisdiction to review the district court's order under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Wren's claims are barred by claim preclusion.

2. Whether the *Oakes* settlement agreement unambiguously bars Wren's claims.

3. Whether preclusion of Wren's claims would violate Wren's due process right to adequate representation and notice.

STATEMENT OF THE CASE

I. Wren's Policy Expressly Guarantees Cash Value Increase Benefits on Scheduled Policy Anniversaries, If Reached

On September 7, 1990, Transamerica issued a life insurance policy to Appellant William Wren, insuring the lives of Wren's parents.[1] ER-237. That policy, called a "Direct Recognition Life I" policy, provided Wren with two primary benefits. First, the policy provided Wren with a death benefit of $1,000,000. *Id.*

[1] The policy was issued by one of Transamerica's predecessors-in-interest, General Services Life Insurance Company. For ease of reference, this brief refers to that entity as "Transamerica."

Second, the policy established an account for Wren whose "cash value" could build up over time. The account's cash value at any given point would depend on several factors, including the premiums Wren paid into the account, the interest Transamerica had credited to the account, and the charges Transamerica deducted. Wren could access the policy account's cash value (less applicable charges) by surrendering the policy or by taking out a loan against it. ER-238.

To encourage Wren to continue paying premiums to keep his policy in force, the policy expressly guaranteed to increase the account's cash value on specified policy anniversaries (the "Cash Value Increases"), assuming the insureds lived that long and the policy did not lapse beforehand. The written terms of the policy "guaranteed" that if the policy remained active on certain anniversaries of the policy's issue date, Transamerica would increase the cash value of Wren's account by a percentage of the scheduled premiums Wren paid over the policy's first decade. ER-238. The first guaranteed payment was due on the 20th anniversary, which the policy reached and Transamerica paid. ER-84. The second was due on the 30th anniversary, which the policy reached but Transamerica did not pay. ER-62.

II. In 2000, a Texas Court Approves the *Oakes* Class Settlement, Which Preserves and Increases Policyholders' Contractual Benefits

In 1997, a putative class action was filed against Transamerica in Texas state court captioned *Richard Oakes, et al. v. Bankers United Life Assurance Co., et al.*,

No. 96-06849 (Dallas County, Texas, Dist. Ct., 192nd Judicial District) ("*Oakes*").[2] *Oakes* concerned Direct Recognition Life policies issued between December 30, 1988 and December 31, 1997. ER-145 ¶ 7. In August of 2000, the Texas court approved a settlement of that action. ER-7.

Oakes alleged that Transamerica fraudulently induced policy purchases by misrepresenting the terms, nature, and expected performance of the policies. The main alleged misrepresentation was that Transamerica had falsely portrayed the number of premium payments that a policyholder would need to make before the policy would be "paid up" and thus provide a set level of benefits. *See* ER-149; ER-153; ER-108. *Oakes* also alleged that Transamerica misrepresented the interest rates with which policyholders would be credited; projected unjustifiably low expense charges; used unrealistically low mortality rates; made unrealistic cash value assumptions in the twentieth, thirtieth, and fortieth years; and misrepresented whether the policy's cash values might decrease in the future. *See* ER-152–153.

The main cause of action in *Oakes* was fraud. *See* ER-151–154. The complaint asserted, for example, that the defendant's "misrepresentations and promises were made with the intent that the Plaintiffs and Class Members rely on them and induce them to act," and that "[a]s a result, Plaintiffs and Class Members . . . agreed to

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[2] Again, though *Oakes* was filed against one of Transamerica's predecessors-in-interest, Bankers United Life Assurance Company, this brief refers to "Transamerica" for ease of reference.

purchase the Direct Recognition Life policy in reliance on the Defendants' systematic misrepresentations and omissions." ER-151. The *Oakes* complaint also made a breach of contract claim, spanning four cryptic sentences, the basis for which is unclear. *See* ER-155. But whatever the factual predicate for the contract claim, the complaint's use of the past tense confirms that the alleged breach occurred at some point before 2000. *Id.* ("Defendants ***breached*** the terms of their Direct Recognition life insurance contract . . . . When these Defendants ***elected*** not to abide by the terms of the Direct Recognition Life policy, they ***breached*** their established contract with the Plaintiffs and Class Members." (emphasis added)).

There was no allegation in *Oakes* that Transamerica had breached any Cash Value Increase payment obligation contained in the policy. Nor could there have been, since even for the earliest-issued policy, the first Cash Value Increase payment (the 20th anniversary increase) was not yet due, and would not be due for eight more years, assuming the insureds lived that long and the policies die not lapse beforehand. ER-145 (noting earliest issued policy in *Oakes* class was from December 30, 1988).

When *Oakes* settled, the settlement agreement (the "Settlement" or "Settlement Agreement") did not diminish the express contractual benefits that the class members held under their policies. To the contrary, the Settlement offered ***additional*** benefits to class members (like Wren) to keep their policies in force

following the *Oakes* judgment. For example, the Settlement provided Wren with an "Interest Bonus Credit," which increased the cash value of his account by 1%. ER-172 ¶ 47; ER-59. The Settlement also provided in-force policyholders like Wren a "Contributed Insurance Benefit" that briefly augmented the death benefits available under the policy. ER-170 ¶ 28; ER-178–181.

Consistent with those benefits, the Settlement expressly reserved the rights of policyholders to seek the benefits promised in writing by the policy. The "Carveout Provision" of the Settlement, Section H.1.b.2, states that "[n]othing in this Release shall be deemed to alter a Class Member's rights (except to the extent that such rights are altered or affected by the election and award of benefits under the Settlement Agreement) to make a claim for benefits that will become payable in the future pursuant to the express written terms of the policy form issued by the Defendants." ER-214. Similarly, the class notice sent to absent class members, including Wren, expressly promised (in bold font) that:

> **The settlement of this lawsuit does <u>not</u> alter your contractual rights under the express terms of your existing Policy. You will still be able to make a claim for any benefits that may become payable in the future under the express terms of your existing Policy.**

ER-121 (bold font and emphasis in original).

III. Transamerica Pays Wren's Twentieth Anniversary Cash Value Increase in 2010

Years after the *Oakes* settlement, when the first Cash Value Increase finally came due under the policy, Transamerica paid it, consistent with the policy. Specifically, Wren's policy reached its twentieth anniversary in September 2010, and in September 2010, Transamerica credited Wren's cash value account with an additional $26,889.07—exactly 42% of the first ten years' worth of scheduled premiums. ER-84 (explaining that the $26,889.07 Cash Value Increase was being applied "as part of" the "milestone" of the policy "reach[ing] the end of the 20th year"). In its letter notifying Wren of that increase, Transamerica acknowledged that, pursuant to the written terms of the policy, "guaranteed" portions of the Cash Value Increase would also come due in the 30th year, if reached. *Id.* ("Please note that future amounts to be so credited will also be based on the first 10 years of scheduled premium. Any such amounts would be paid at the end of the 30th and 40th years, based on a consideration of ***guaranteed*** and non-guaranteed portions." (emphasis added)).

As a result, up through at least through 2010, Transamerica still interpreted the policy to "guarantee" Cash Value Increases; told policyholders as much; paid the Cash Value Increases when they came due; and did not interpret the *Oakes* settlement to mean that the increases were somehow extinguished by that settlement. The 42% Cash Value Increase paid in 2010 also adhered to representations that

Transamerica had been making to Wren ever since the *Oakes* Settlement. Between 2003 and 2008, Transamerica furnished illustrations to Wren projecting that it would pay Cash Value Increases of 42% at the end of the 20th year, 300% at the end of the 30th year, and 300% at the end of the 40th year. ER-99; ER-93; ER-88.[3]

IV. In 2016, Transamerica Announced It Would No Longer Honor Its Cash Value Increase Obligations because of *Oakes*

In 2016, however, Transamerica suddenly made an about-face. In a letter dated March 25, 2016, it informed Wren that "we will not credit any cash value bonuses for this policy for the 30th and 40th anniversary years." ER-64. In the letter, Transamerica did not deny that the terms of Wren's policy obliged it to make Cash Value Increase payments, if those anniversaries were reached. Instead, the sole justification for its decision was the *Oakes* settlement. *Id.*

Wren's insureds lived to 2020 (and beyond), and Wren paid sufficient premiums to keep the policy in force. Accordingly, the Wren policy reached its 30th anniversary, and his scheduled cash value increase came due in September 2020. But Transamerica did not pay it. ER-62. In February 2021, Wren commenced this action to enforce his contractual right to receive the scheduled Cash Value Increase. ER-253–278.

[3] These illustrations were in fact furnished by Transamerica's predecessor-in-interest Life Investors Insurance Company of America. Again, for ease of reference, this brief refers to Transamerica throughout.

V. While Acknowledging that Wren's Claims Were "Not Ripe at the Time of the *Oakes* Settlement," the District Court Held That *Oakes* Precluded Wren's Claims

Wren's lawsuit asserts claims for breach of contract, breach of the contractual covenant of good faith and faith dealing, and tortious breach of the duty of good faith and fair dealing ("tortious bad faith"). ER-273–276. Each claim arises out of Transamerica's refusal in 2020 to pay the Cash Value Increases.

Transamerica first moved to dismiss the tortious bad faith claim. It argued that the claim was barred by a two-year statute of limitations because it accrued when Transamerica informed Wren in 2016 that it would not pay the Cash Value Increases in the future when they came due. The district court denied that motion, holding that the claim did not accrue until 2020, when Wren's 30th anniversary Cash Value Increase first came due and Transamerica refused to pay it. As the district court explained, "up until that point, the possibility remained that Transamerica would in fact issue the benefit due under the Policy (as it did at the 20th anniversary), or that the insured would pass away before the cash value bonus became due, mooting the issue." ER-251.[4]

After the district court denied that motion, the parties simultaneously moved for summary judgment on whether *Oakes* bars Wren's claims. The district court granted Transamerica's motion and denied Wren's.

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[4] Transamerica did not argue that the breach of contract claim was time barred.

In so doing, the district court recognized that "Wren's claims to the Cash Value Increases were not ripe at the time of the *Oakes* settlement." ER-13. It nevertheless concluded Wren's claims were barred. In the district court's view, the fact that the claims were unripe at the time of *Oakes* was irrelevant because the claims were deemed to be covered by the Settlement's release language. As a matter of contract interpretation, the court believed that the only reasonable interpretation of the release, which it conceded was "uncomfortably broad," was that it covered Wren's claims. ER-15. Though it held that the "identical factual predicate" federal preclusion test was met, in doing so it flouted blackletter law holding that the test cannot be met where, as here, the new claim could not have been brought at the time of the original lawsuit. And it (erroneously) declined to address Wren's state-law claim preclusion and constitutional due process arguments, holding that they were irrelevant in light of the *Oakes* settlement. ER-15–16.

This appeal followed.

SUMMARY OF ARGUMENT

For three independent reasons, this Court should reverse the district court's grant of summary judgment.

<u>First</u>, the district court disregarded basic principles of claim preclusion. Class action settlements bar subsequent claims only if the later suit is barred by both the terms of the settlement ***and*** by claim preclusion. *Hesse*, 598 F.3d at 590. And it is

elementary that claim preclusion cannot bar claims that were not ripe at the time of the original judgment, under governing Texas law and federal claim preclusion law. *See Eagle Oil*, 619 S.W.3d at 706 ("Res judicata cannot bar a claim that was not ripe at the time the first lawsuit was filed."); *Lucky Brand*, 140 S.Ct. at 1595-96 (two claims do not "share a common nucleus of operative facts" where "the complained-of conduct in the [second] [a]ction occurred after the conclusion of the [first] [a]ction"). Indeed, that rule is required by the Constitution; for claim preclusion to apply, a litigant must, at a bare minimum, be permitted a "full and fair opportunity to litigate [his] claim." *Kremer*, 456 U.S. at 480–81 & n.22. Wren's claim, as the district court conceded, was unripe and un-litigable at the time of *Oakes*. He must therefore be afforded the opportunity to pursue it now.

Second, the district court erroneously interpreted the text of the *Oakes* settlement. That agreement expressly preserved class members' rights to enjoy the benefits of their policies going forward. While class members released claims such as the fraudulent inducement claims from *Oakes*, they were permitted to continue making claims for benefits to which they were contractually entitled—like claims for death benefits, guaranteed minimum interest credits, and scheduled cash value increases—into the future. The district court's conclusion that the settlement unambiguously released Transamerica from all benefits claims, ever, conflicts with the plain text of the agreement, renders multiple provisions of the agreement

meaningless, and would essentially make the policies completely valueless. At the very least, the Settlement is ambiguous on this issue. This legal error independently requires reversal.

Third, enforcement of the *Oakes* settlement against Wren here would violate Wren's due process rights. The Due Process Clause allows class action settlements to bind absent class members only when they receive constitutionally adequate representation and notice of the settlement. Wren received neither. As for representation, as this Court held in *Hesse*, adequate representation requires that the class representatives "possess[] the same type of claim" as any subsequent plaintiff against whom the class settlement is sought to be enforced. 598 F.3d at 589. But the *Oakes* plaintiffs did not possess a claim remotely similar to the one Wren asserts here; Wren's claim did not even exist or ripen until 20 years after *Oakes*. And as for notice, Wren could not have known that participation in the settlement would mean giving up his right to future benefits like the scheduled Cash Value Increases. To the contrary, the class notice affirmatively represented that class members ***would*** "be able to make a claim for any benefits that may become payable in the future." That, however, is the exact opposite of happened below; the district court ***extinguished*** class members' rights to benefits that ultimately became payable 20 years after the *Oakes* settlement. The Due Process Clause does not permit such a result.

STANDARD OF REVIEW

This Court reviews a district court's decision on cross-motions for summary judgment de novo. *JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1104 (9th Cir. 2016).

ARGUMENT

I. The *Oakes* Judgment Does Not Preclude Wren's Claim

A. The District Court Erroneously Ignored Principles of Claim Preclusion

The law is clear. Class action settlements are governed by different principles and requirements than settlements of private, individual lawsuits. Unlike private, individual lawsuits, class settlements can bar future suits only if the claim is precluded by ***both*** the settlement agreement ***and*** claim preclusion. As this Court has repeatedly held, a class "settlement agreement's bare assertion that a party will not be liable for a broad swath of potential claims does not necessarily make it so." *Hesse*, 598 F.3d at 590. Instead, "in class actions, future litigation is always governed by the doctrine of preclusion and never by the settlement contract directly." 6 Newberg and Rubenstein on Class Actions ("Newberg") § 18:19 (6th ed.); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375–79 (analyzing whether prior class settlement barred subsequent suit under law of claim preclusion); *Hesse*, 598 F.3d at 590–92 (same).

This Court examined this principle at length in *Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir. 1995) ("*Epstein I*"), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). There, the defendant invoked a prior state court class settlement and argued that, even if claim preclusion did not bar plaintiff's claims, they were nonetheless barred under contract law given the settlement's broad release. *Id.* at 666. This Court rejected that argument as an improper "attempt to equate class settlements with the settlement of traditional litigation." *Id.* In non-class litigation, individual plaintiffs' out-of-court agreements are "a matter of judicial indifference" and are therefore analyzed under the law that governs private conduct: contract law. *Id.* "The settlement of the class action is," by contrast, "an act of judicial power." *Id.* at 667.[5] Or, as a leading treatise puts it, "[t]he process by which a class action settlement is approved has the effect of turning the private settlement into a judicial ruling, a judgment." Newberg § 18:19.

Class settlements are therefore not analyzed like ordinary private agreements, but like the judgments that they are. For a class settlement to bar a claim, not only must the release cover the claim under ordinary rules of contract interpretation, but

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[5] Though the Supreme Court reversed this Court's decision in *Epstein I*, it did so because this Court's particular claim preclusion analysis was flawed. 516 U.S. at 373–379. The Supreme Court's ruling had nothing to do with this Court's holding that claim preclusion is required in the class action context regardless of what the contract says. "[W]hether the settlement could bar [the] suit as a matter of contract law" was "outside the scope of the question on which [the Supreme Court] granted certiorari." *Id.* at 379 n.6.

enforcement of the settlement must also satisfy the requirements of claim preclusion. *E.g., Matsushita*, 516 U.S. at 375–79; *Hesse*, 598 F.3d at 590–92; *TVPX ARS, Inc. v. Genworth Life & Annuity Ins. Co.,* 959 F.3d 1318, 1325–28 (11th Cir. 2020); *see also* 2 McLaughlin on Class Actions (19th ed.) ("McLaughlin") § 6:29 (explaining that while "[t]he settlement agreement defines the scope of the release negotiated by the parties, . . . [t]he 'identical factual predicate' [preclusion] rule provides the outer limit on claims that may properly be included within the scope of the release"). If claim preclusion does not apply, then the claim must be allowed to proceed, no matter what the language of the class settlement agreement says.

The district court disregarded this basic feature of class action law, concluding its decision by stating that "[t]o the extent the parties' arguments regarding res judicata are distinct from their arguments regarding the *Oakes* Release, the Court ***need not reach them*** because it has already determined that the Release bars Mr. Wren's claims." ER-16 (emphasis added).[6] That was a clear error of law.

B. Under Texas Claim Preclusion Law, Wren's Claims Must Proceed

Federal courts "look to state law in determining the preclusive effect of a state court judgment releasing such claims." *Hesse*, 598 F.3d at 587 (citing *Matsushita*, 516 U.S. at 374). The relevant state is the state where the judgment was rendered.

[6] The terms "res judicata" and "claim preclusion" are interchangeable. *See Eagle Oil*, 619 S.W.3d at 705; *Lucky Brand*, 140 S. Ct. at 1594.

See Matsushita, 516 U.S. at 375–379 (analyzing Delaware preclusion law); *Hesse*, 598 F.3d at 591 (analyzing Kansas preclusion law). The *Oakes* judgment was entered in Texas, so the preclusion law that applies is Texas law.

Under Texas claim preclusion law, a judgment cannot bar a claim that did not ripen until after the judgment was entered. Texas follows the majority approach to claim preclusion, which requires "(1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). Critically, as the third element implies, "***[r]es judicata cannot bar a claim that was not ripe at the time the first lawsuit was filed***." *Eagle Oil*, 619 S.W.3d at 706 (emphasis added).

Eagle Oil is instructive. There, the plaintiff brought claims for breach of a contract on which it had previously sued and lost. 619 S.W.3d at 701–705. The claims in the second suit, however, were "substantively different breaches occurring at different times" from those in the first suit and "concern[ed] the defendant's post-trial actions." *Id.* at 706–07. In other words, the claims in the second suit "were not ripe until after the . . . trial [in the first case] concluded." *Id.* at 707. The Supreme Court of Texas therefore held that the defendant was unable to "establish[] that

[plaintiff's] claims . . . could have been brought in the [first] suit," and was "not entitled to summary judgment on res judicata grounds." *Id.*

Under that basic rule, Wren's claims must proceed. The district court expressly (and correctly) found that Wren's claims "were not ripe at the time of the *Oakes* settlement." ER-13. That determination is conclusive under Texas law. *Eagle Oil*, 619 S.W.3d at 706 ("Res judicata cannot bar a claim that was not ripe at the time the first lawsuit was filed."); *see also Phan v. CL Invs., LLC*, 2022 WL 175367, at *5 (Tex. App. Jan. 20, 2022) (review denied Sept. 2, 2022) (judgment in prior lawsuit did not preclude subsequent claim because the facts giving rise to it had not occurred at the time of the first lawsuit). Indeed, it is conclusive as a matter of constitutional due process, as a party cannot be bound by claim preclusion unless he previously had a "full and fair opportunity to litigate [his] claim." *Kremer.*, 456 U.S. at 480–81 & n.22. Wren's claims arise out of Transamerica's refusal to make the contractually required anniversary payments—a refusal that did not (and could not) occur until years after the *Oakes* settlement, assuming the insureds lived that long and the policy did not lapse beforehand. Concededly unripe and un-litigable at the time of *Oakes*, these claims are not barred under Texas preclusion law and must be allowed to proceed.

The district court thought that this unripe claim was nonetheless subject to dismissal simply because it was purportedly "'within the subject matter of the

Release.'" ER-13 (quoting *Henry v. Masson*, 333 S.W.3d 825, 844 (Tex. App. 2005) and citing *Stafford v. Allstate Life Ins.,* 175 S.W.3d 537, 542 (Tex. App. 2005)). But the scope of the settlement agreement's release is irrelevant to this inquiry; that is a matter of contract interpretation, not claim preclusion. As discussed above, a class settlement—unlike the private, individual settlements at issue in *Henry* and *Stafford*—may preclude a claim only if the relevant jurisdiction's claim preclusion test is satisfied. And under Texas preclusion law, Wren cannot be precluded from bringing a claim that was unripe at the time of the *Oakes* judgment.

C. The Federal "Identical Factual Predicate" Test Also Requires That Wren's Claims Proceed

The same result obtains under the federal "identical factual predicate" claim preclusion test. Federal courts often apply the "identical factual predicate" test to determine whether a federal class settlement bars a subsequent suit. Courts in the Ninth Circuit have applied it in cases involving state class settlements as well, because it is guided by the "same general principles" as traditional state-law claim preclusion tests. *Hesse,* 598 F.3d at 591–92; *see, e.g.*, *Feller v. Transamerica Life Ins. Co.,* 2016 WL 6602561, at *6 (C.D. Cal. Nov. 8, 2016). As the doctrine's name itself reflects, the test asks whether the purportedly "released claim is based on the identical factual predicate as that underlying the claims in the settled class action." *Hesse*, 598 F.3d at 590 (internal quotation marks omitted).

A necessary and oft-repeated corollary is that two suits cannot have "identical factual predicates" when the second suit is based on conduct that had not occurred at the time of the first. *See Yearby v. Am. Nat'l Ins Co..,* 2021 WL 3855833, at *15 (N.D. Cal. Aug. 30, 2021) ("Under th[e] 'identical factual predicate' doctrine, numerous courts have accepted the general proposition that a class action settlement's release is unenforceable against claims predicated on the defendant's post-settlement conduct." (internal quotation marks omitted)); McLaughlin § 6:29 (explaining that, under the identical factual predicate test, "future claims based on facts that have not yet occurred . . . are not permissible to release").

The Supreme Court has recently reiterated this same bedrock principle of claim preclusion law. *Lucky Brand*, 140 S.Ct. at 1595–96 (two claims do not "share a common nucleus of operative facts" where "the complained-of conduct in the [second] [a]ction occurred after the conclusion of the [first] [a]ction"); *accord Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1021 (9th Cir. 2019) ("The rule in this circuit, and others, is that claim preclusion does not apply to claims that accrue after the filing of the operative complaint in the first suit." (internal quotation marks omitted)).

This rule applies even where the second lawsuit asserts a breach of the same contract as the first lawsuit. The Eleventh Circuit recently applied these principles to life insurance policies in *TVPX ARS Inc. v. Genworth Life & Annuity Insurance*

Co., 959 F.3d 1318 (11th Cir. 2020). There, the policyowner had participated in a 2004 class settlement covering claims that the insurer had breached the policy by "increasing policy charges, including cost of insurance rates." *Id.* at 1321–23. In 2018, the policyowner sued the insurer under the same policy, alleging that the insurer had charged inflated cost of insurance rates from 2013 through 2018. *Id.* at 1323–24. The district court enjoined the suit, but the Eleventh Circuit vacated that order. *Id.* at 1329. According to the Eleventh Circuit, it made no difference that the two suits involved claims for breach of the same insurance policy, or that they both concerned inflated cost of insurance charges. What mattered instead was whether the plaintiff was "capable of bringing the same claims in the first action." *Id.* at 1326. Because the district court had not made findings to support that conclusion, its order could not stand. *Id.* at 1328; *see also Prime Mgmt. Co. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990) ("[W]hen the parties have entered into a contract to be performed over a period of time and one party has sued for a breach, res judicata will . . . not . . . bar a subsequent suit for any breach that had not occurred when the first suit was brought."); *accord* Restatement (Second) of Judgments § 26 cmt. g (similar).

Thus, the result is the same under the identical factual predicate test as under Texas claim preclusion law. The *Oakes* judgment was entered in 2000. The conduct Wren challenges here occurred in 2020—or 2016, at the absolute earliest. Because

the claims in the two cases cannot possibly be based on an "identical factual predicate," Wren's claims must proceed under that test as well.

D. The District Court's "Identical Factual Predicate" Analysis Was Fundamentally Flawed

Though the district court professed to apply the identical factual predicate test, the analysis it conducted bears little resemblance to it (or to any other variant of claim preclusion law, such as Texas law). The district court should have asked whether the claims in the two suits were based on an "identical factual predicate." *Hesse*, 598 F.3d at 590. Had it asked that question, it would have easily denied Transamerica's motion because the facts giving rise to this action postdate *Oakes* by about two decades.

It did not, however, do so. Instead, the district court fell back on principles of contract interpretation, which is, as discussed above, an entirely separate inquiry. Its flawed analysis—which spans a mere three sentences—does not withstand scrutiny. Each sentence was wrong.

1. Start with the first sentence. The district court began by stating that "even if the Court applies the Ninth Circuit's 'identical factual predicate' test, Mr. Wren's claims arise from the same policies as those alleged in *Oakes*." ER-13.

But the fact that Wren's claims arise from the same policies as in *Oakes* has little to do with the identical factual predicate test. The relevant question is whether the claims arise out of the "same offending ***conduct***," not whether the claims arise

out of the same policy. *TVPX*, 959 F.3d at 1327–1328 (emphasis added). Indeed, if the district court's inquiry were the right one, Transamerica could decide to start charging all *Oakes* policyholders a million dollars per month in premiums next year, knowing it would be immunized from any challenges to that patently illegal rate hike by the decades-old *Oakes* settlement. But the district court was wrong. As discussed above, where parties enter a long-term contract like an insurance policy, preclusion does not bar a second suit for breach where the breaching conduct had not yet occurred at the time of the first suit. *Supra* at 22–23.

The district court cited no authority to support its errant view of the identical factual predicate test other than *Stafford v. Allstate Life Ins.*, 175 S.W.3d 537 (Tex. App. 2005). That case, however, involved a non-class settlement decided under ordinary principles of contract interpretation and did not consider the federal "identical factual predicate" test or any other variant of preclusion law. It has no relevance to the requirement that the two suits must share the "identical factual predicate" for the former settlement to bar the later suit.

2. The second sentence is also misguided. The district court asserted that, "[a]s in *Oakes*, Mr. Wren complains of a 'decrease in a Policy's cash value.'" ER-13. But that assertion is both wrong and irrelevant.

The assertion is wrong because Wren makes no claim that Transamerica decreased his policy cash values. Wren's claims are based instead on Transamerica's

refusal to increase policy cash values when contractually due on set policy anniversary dates, once reached. *E.g.*, ER-260 ¶¶ 30–32.[7] That was not at issue in *Oakes*, nor could it have been because no such refusal had occurred yet.

And the district court's assertion is irrelevant because whatever "complain[t]" it was referring to from *Oakes*, it necessarily pertained to conduct that occurred years before Transamerica's refusal to credit the Cash Value Increase that is at issue here. Again, as the court recognized, "Wren's claims to the Cash Value Increases were not ripe at the time of the *Oakes* settlement." ER-13. Indeed, the district court affirmatively found that Wren's tortious bad faith claim, likewise based on Transamerica's failure to credit the Cash Value Increases, did not accrue until September 2020. ER-252. (Even on Transamerica's (rejected) view, that claim accrued when it sent its repudiation letter in 2016—sixteen years after the *Oakes* judgment was entered. ER-251–252.) In short, the factual predicate of any

[7] The document the district court cites in support of its assertion about the claims from *Oakes* is not even the *Oakes* complaint. It is the class notice's description of the Settlement Agreement's release. *See* ER-121; ER-36. And all that document says is that Transamerica would be released from "***past actions*** which have caused, or may cause in the future . . . a decrease in a Policy's cash value." *Id.* (emphasis added). In other words, not even the class notice's description of the release—which neither defines the scope of the claims asserted or released, nor governs the preclusive effect of the Settlement—suggests that Transamerica was released from future performance of its contract obligations, such as a future refusal to pay the scheduled Cash Value Increases.

"complaint" from *Oakes* cannot be the same as the factual predicate of Wren's claims, since Wren's claims indisputably arose many years later.

3. The district court's final sentence likewise strays from the relevant inquiry. "Mr. Wren," it claimed, "cannot have participated in a class action that accused [Transamerica] of 'using unrealistic, unattainable cash value increase assumptions in the twentieth, thirtieth, and fortieth years,' and now be surprised that those cash value increases are ***in fact*** unrealistic and unattainable." ER-13 (emphasis in original). That assertion is flawed on multiple levels.

For starters, it is impossible to square with the district court's recognition that Transamerica's pre-2016 conduct suggested it ***would honor*** the future cash value increases notwithstanding the *Oakes* Settlement. *See* ER-14 ("[It] is understandable that Mr. Wren was confused and misled by Transamerica's actions after the *Oakes* settlement."). Given that Transamerica both (a) paid the 20th anniversary increase and (b) represented that the 30th and 40th anniversary payments, including "guaranteed" portions of them, "would be paid," Wren had every reason to be surprised by Transamerica's subsequent about-face.

More important, whether Wren was "surprised" that Transamerica refused to credit the scheduled Cash Value Increases is irrelevant. Before 2020 (or 2016 at the absolute earliest), Wren had no justiciable claim. Even if he did ***suspect***, back in 2000, that Transamerica might ultimately refuse to credit the thirtieth and fortieth

anniversary increases, a suspicion of future misconduct is not enough; he had to wait until he had an actual, ripe controversy before suing. Had he tried to sue before the Cash Value Increases were due, his claims would have been dismissed as unripe. As the district court recognized, before 2020, "the possibility remained that Transamerica would in fact issue the benefit due under the Policy (as it did at the 20th anniversary), or that the insured would pass away before the cash value bonus became due, mooting the issue." ER-251; *see also Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (contract claim unripe where performance not yet due). It defies logic to fault Wren for failing to assert a claim that would have been immediately dismissed as unripe. Indeed, the district court's conclusion undermines the very purpose of ripeness doctrine by encouraging parties like Wren to bring claims based on events that may never occur. *See id.* (basic rationale of ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" (internal quotation marks omitted)).

The district court's reasoning also flouts basic due process precepts. The district court believed that Wren's claims were barred because he should have known back in 2000 that Transamerica would eventually fail to pay the Cash Value Increases. But the district court simultaneously conceded that Wren could not, in fact, have brought those claims back in 2000 because they were unripe and thus not yet accrued. In other words, by the district court's own reasoning, Wren was ***never***

allowed to litigate his claims: Not then, and not now. That conclusion defies the most basic preclusion rule, required by the Constitution, that a party must receive a "full and fair opportunity to litigate [his] claim." *Kremer*, 456 U.S. at 480–81 & n.22.

In short, it makes no difference to the identical factual predicate test (or to any other variant of claim preclusion law) whether Wren was "surprised" that Transamerica ultimately breached. The identical factual predicate test permits a class settlement to bar only those claims "in existence" at the time of the prior suit; it does not bar claims that a party suspects will arise in the future. *Media Rts. Techs.,* 922 F.3d at 1021; *Hernandez v. Del Ray Chem. Int'l*, 56 S.W.3d 112, 116 (Tex. App. 2001) ("For res judicata to apply, a claim must be in existence at the time suit is filed, and cannot merely be of [a] prospective anticipated claim."). Because Wren's claims were not ripe and did not exist at the time of *Oakes*, they cannot possibly satisfy the identical factual predicate test, or any other variant of claim preclusion. They must be allowed to proceed.

II. The *Oakes* Settlement Does Not Bar Wren's Claims

The Court need not even address the text of the *Oakes* settlement. Because claim preclusion requires Wren's claims to proceed, the judgment should be reversed for that reason alone. Nevertheless, if this Court wishes to review the district court's contract interpretation, it should reverse on that basis as well. The district court

believed that the text of the *Oakes* settlement barred Wren's claims as a matter of law. As a matter of contract interpretation, reviewed *de novo*, the district court was wrong.

A. The Settlement Preserved Policyholders' Claims for the Benefits Afforded by Their Policies, including the Scheduled Cash Value Increases

Section H.1.b.1 is the Settlement's "Releasing Provision." By itself, this provision is virtually unlimited. It purports to release Transamerica from any claim related to the class policies that could ever be asserted. Stripped down to its essentials, it states:

> Plaintiffs . . . release . . . any and all causes of action, . . . known or unknown . . . that have been, could have been, may be or could be alleged or asserted now or in the future . . . in the Action or in any other court action or before any . . . other adjudicatory body . . . connected with, arising out of, or related to, in whole or in part, the Policies[.]

ER-212. If the Releasing Provision were the only provision in the Settlement Agreement that defined the scope of the released claims, then, at least as a matter of contract interpretation, it might cover Wren's claims. It would also make the policies completely worthless, since Transamerica would be released from making any payments whatsoever (then or in the future) under the policies, including for the death benefit and cash value of the policies, since those contractual benefits indisputably "arise out of or relate, in whole or part" to the policies. Even the district court acknowledged that the Releasing Provision is "uncomfortably broad." ER-15.

For this reason, the Settlement necessarily—and expressly—permitted policyholders to continue to assert claims against Transamerica for the contractual benefits those policies provided. Immediately following the Releasing Provision, is the "Carveout Provision," Section H.1.b.2. The Carveout Provision reads:

> Nothing in this Release shall be deemed to alter a Class Member's rights (except to the extent that such rights are altered or affected by the election and award of benefits under the Settlement Agreement) ***to make a claim for benefits that will become payable in the future pursuant to the express written terms of the policy form issued by the Defendants***. Under no circumstances shall this Section H.1.b.2 entitle a Class Member to assert claims that relate to the allegations contained in the Action or to the matters described in Section H.1.

ER-214 (emphasis added).

The Carveout Provision thus expressly exempts from the release any "claim for benefits that will become payable in the future pursuant to the express written terms of the policy form." *Id.* Wren's claim in this action is exactly that: it is a claim for benefits, pursuant to the express written terms of his policy, which became payable after the Settlement Agreement was executed. The Carveout Provision thus preserves Wren's claim.

Transamerica asserts that second final sentence of the Carveout Provision takes away the entirety of what the first sentence grants. That sentence states: "Under no circumstances shall this Section H.1.b.2 entitle a Class Member to assert claims that relate to the allegations contained in the Action or to the matters described in Section H.1." But Section H.1 includes the Releasing Provision that releases

everything that relates in any way, shape, or form to the policies. If that were indeed what the final sentence meant, then the Carveout Provision would itself be meaningless, since the unlimited release in Section H.1 would operate as a trump card and release all claims to enforce Transamerica's contractual obligations under the policies.

That facially absurd interpretation is neither intended nor expressed by the Settlement. Instead, the second sentence of the Carveout Provision merely indicates that any claim premised on the allegations in *Oakes* is released notwithstanding the Carveout Provision, no matter how such a claim is labeled. An *Oakes* class member could not, for example, file a new, post-*Oakes* lawsuit based on the pre-2000 conduct at issue in *Oakes*, even if he called the claim a "claim for benefits" under the "express written terms of the policy." But the Carveout Provision still ensures that policyholders retain the contractual benefits of their policies going forward, including the promised death benefits and Cash Value Increases.

Any other interpretation of the Carveout Provision would not only entirely negate the value of the policy, but would be inconsistent with the benefits provided by the Settlement itself. Under the Settlement, policyholders like Wren, whose policies were in force at the time of the Settlement, received a slight ***increase*** to the cash values available under their policies (the Interest Bonus Credit). *See* ER-172 ¶ 47. But under the district court's interpretation of the Settlement, that form of relief

would make no sense. The Settlement would, on the one hand, increase the cash values available under class members' in-force policies, but on the other hand, bar class members from ever asserting any claim to cash values.

The absurd consequences that flow from the district court's interpretation of the Settlement do not stop there. As discussed, one contractual benefit that the policy provides is the death benefit—*i.e.*, the money Transamerica pays out when the insured eventually dies. *See* ER-237 (Wren death benefit of $1,000,000). Under the district court's interpretation, however, policyholders would not be able to bring a claim to enforce those benefits, even if Transamerica flatly refused to pay them when they came due. To use the district court's language, such a claim would be a "claim[] to enforce the ***performance*** of [a] Policy"—just like a policyholder's claim to enforce his right to a Cash Value Increase. ER-12 (emphasis in original); *see also* ER-7 (noting that "death benefits" is among the matters described in the Releasing Provision). So, on the district court's view, it would be barred. That implausible result, however, is impossible to square with the Carveout Provision, which expressly allows policyholders to pursue "claim[s] for benefits that will become payable in the future." ER-214.

The parenthetical in the middle of the Carveout Provision's first sentence underscores that the Carveout Provision preserves policyholders' contractual rights. The parenthetical says that the Settlement does not alter the class members' rights

to receive benefits "except to the extent that such rights are altered or affected by the election and award of benefits under the Settlement Agreement." ER-214. In other words, the Settlement Agreement may alter the class members' contractual rights by ***increasing*** certain benefits, like Interest Bonus Credit and the Contributed Insurance Benefit. But it in no way suggests that the Settlement Agreement somehow takes away class members' preexisting contractual rights. It simply ensures that the Carveout Provision is not interpreted to nullify the ***additional***, forward-looking policy benefits afforded by the Settlement.

So too does a provision later in the Settlement Agreement. Section M of the Settlement addresses "General Matters and Reservations." Subsection 21 of that section states, very simply: "Neither this Agreement nor any of the relief to be offered under the Stipulation of Settlement shall be interpreted to alter in any way the contractual terms of any Policy or to constitute a novation of any Policy." ER-231. The meaning of that sentence is plain: The terms of the policies are the same as they were before the Settlement was executed. In other words, the Settlement has no effect on Transamerica's obligations to pay the scheduled Cash Value Increases, except for the slight increase in those Cash Value Increases provided by the Settlement itself.

Finally, if there were any doubt about the participating class members' ability to enforce the future benefits of their policy contracts, the class notice made it clear.

Mimicking the language of both the Carveout Provision and Section M.21, it explains, in bold font:

> **The settlement of this lawsuit does not alter your contractual rights under the express terms of your existing Policy. You will still be able to make a claim for any benefits that may become payable in the future under the express terms of your existing Policy.**

ER-121 (bold and underline in original). *See also* ER-137 ("[T]he proposed settlement does not alter your contractual rights under the express terms of your existing Policy. You will still be able to make a claim for any benefits that may become payable in the future under the express terms of your Policy.") Once again, that is precisely what Wren seeks to do here: enforce a contractual benefit under the express terms of his policy, which came due long after the *Oakes* Settlement was reached and approved.

B. The District Court Made No Attempt to Harmonize the Settlement Agreement's Various Provisions, Rendering Several Provisions of the Settlement Meaningless

The district court, however, disregarded the Carveout Provision and Section M.21 of the Settlement Agreement. It correctly recited the principle that, under Texas rules of contract interpretation, which apply here, courts must "examine the entire writing and strive to harmonize and give effect to all provisions in the contract, so that no provision is rendered meaningless." ER-11 (quoting *Barforough v. Nationstar Mortg., LLC*, 2017 WL 4413430, at *2 (Tex. App. Oct. 5, 2017)). *See also In re Serv. Corp. Int'l*, 355 S.W.3d 655, 661 (Tex. 2011). The same case that it

cited also makes clear that, under Texas law, "general, categorical release clauses are narrowly construed." *Barforough*, 2017 WL 4413430, at *3. But the district court ignored those principles. It made no attempt to "harmonize," or even make sense of, the multiple relevant provisions at issue. Instead, it simply treated the "uncomfortably broad" Releasing Provision as a trump card.

As explained above, the Carveout Provision expressly carves out claims for future contract benefits from the scope of the Releasing Provision. In the district court's view, however, the Carveout Provision did not apply to Wren's claims. Relying on the parenthetical discussed above, the district court reasoned that the Carveout Provision did not "controvert" the Releasing Provision because, per the language of the parenthetical, the Releasing Provision had "altered" Wren's contractual rights. ER-12.

But saying that the Releasing Provision "altered" Wren's rights does nothing to harmonize the Releasing Provision with the Carveout Provision. It simply elevates the Releasing Provision over the Carveout Provision. After all, standing on its own, the Releasing Provision "alters" ***every contractual right a policyholder might ever assert***, including even the basic contractual right to death benefits. *See supra*, at 33. Although it recognized that its construction of the two provisions led to such an

absurd result,[8] the district court made no attempt to reconcile them and find a way in which they might work together. Instead, it simply gave the Releasing Provision controlling effect and rendered the Carveout Provision meaningless.

The district court also misread the Carveout Provision's parenthetical. The parenthetical does not exclude from the Carveout all "alterations" to the policyholders' contractual rights. The parenthetical excludes from the Carveout only those alterations of contractual rights that result from "***the election and award of benefits*** under the Settlement Agreement." ER-214 (emphasis added). In other words, as explained above, the parenthetical guards against the risk that the Carveout Provision could be read to nullify the benefits that the Settlement itself creates for class members: the Interest Bonus Credit and the Contributed Insurance Benefit. But the district court ignored this key language. Instead, it read the Carveout Provision to carve out no claims at all, a meaningless result that fails to sensibly harmonize all the Settlement's pertinent provisions.

In trying to fix its problematic reading of the Settlement Agreement, the district court tied itself in knots. It suggested that the Carveout Provision would have meaning ***if*** it carved out at least claims for future death benefits. *See* ER-14 at n.5. But the district court did not actually conclude that the Carveout Provision preserved

[8] *See* ER-14 at n.5 (district court recognizing that "it is hard to see what 'claim for benefits . . . will become payable in the future pursuant to the express written terms of the policy' if even death benefits were released by the *Oakes* Settlement")

those claims, nor did it draw any distinction between future death benefits claims and Wren's future contract benefit claims. That is because it is impossible to do so: The relevant provisions admit no distinction between a contract claim for future death benefits and a contract claim for future Cash Value Increases. Instead, the district court simply chose to ignore the problem, stating that it would "not decide whether the *Oakes* Release bars a class member's claim for death benefits." *Id.* It thereby left unresolved the interpretive problem that it created. *Id.*

The district court also incorrectly discounted Section M.21 of the Settlement Agreement. That provision reinforces the Carveout Provision; it reiterates that the Settlement Agreement "shall not be interpreted to alter in any way the contractual terms of any Policy." ER-231. Yet according to the district court, the "objectively manifest meaning" of M.21 is that the Settlement Agreement "shall not be construed to ***otherwise*** alter the contractual terms" of the policies. ER-12 at n.4 (emphasis in original). That is obviously incorrect. The district court added a word ("otherwise") that appears nowhere in the provision's text, and which is essential to the district court's reasoning. Moreover, the "objectively manifest meaning" that the district court supposedly discerned is that Section M.21 means ***nothing at all***. That is, restated only slightly, the district court construed Section M.21 to mean: "The Settlement Agreement shall not be construed to alter the contractual terms of the

policies, other than the ways in which the Settlement Agreement alters the contractual terms of the policies." To restate the court's construction is to refute it.

In defending its atextual and self-refuting reading of M.21, the district court concluded that Wren's interpretation of that provision as preserving claims to enforce the scheduled Cash Value Increases would "nullify the entirety of the Settlement Agreement's release provisions." ER-12–13 at n.4. That is plainly incorrect.[9] At a minimum, the Settlement Agreement's release provisions, including the Carveout Provision, bar all claims sharing the same factual predicate as those claims asserted in *Oakes*. There is no question that, for instance, Wren cannot assert fraudulent inducement claims premised on Transamerica's point-of-sale representations about the number of premium payments that were be needed to keep his policy in force. Of course, this Court need not determine the precise scope of what was released in *Oakes*; it is enough to recognize that the *Oakes* Settlement

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[9] In this portion of its opinion, the district court relied on and quoted a magistrate judge's order arising out of a discovery dispute in *Hegarty v. Transamerica Life Ins. Co.*, 2021 WL 4899482 (N.D. Cal. Oct. 21, 2021). Nowhere in that opinion, however, did the magistrate judge explain how Wren's reading of M.21 supposedly "nullifies" the Settlement's release provisions. As shown above, it does not. In any event, when *Hegarty* reached summary judgment, the district court denied Transamerica's motion and allowed the plaintiff's claim to proceed, in part questioning whether the identical factual predicate test could be satisfied. *See Hegarty v. Transamerica Life Ins. Co.*, 2022 WL 4596614, at *1 (N.D. Cal. May 31, 2022) ("Defendant has not submitted sufficient evidence to support a finding that the claims pleaded in the instant case and those pleaded in the operative *Oakes* complaint … are, as a matter of law, based on an 'identical factual predicate.'").

released ***some*** claims, and Wren's claims to enforce the Scheduled Cash Value Increases are not among them.

C. Wren's Interpretation Is At Least Reasonable

At the very least, Wren's interpretation of the Settlement Agreement is reasonable, rendering the district court's grant of summary judgment for Transamerica improper. The clearest indication that Wren's interpretation of the Settlement is reasonable is that, for 16 years after *Oakes*, Transamerica agreed with Wren's interpretation that the increases were still "guaranteed" and paid them. ER-84. "In contract cases, summary judgment is appropriate only if the contract or the contract provision in question is unambiguous. *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981); *see also Sellers v. Mins. Techs., Inc.*, 753 F. App'x 272, 275 (5th Cir. 2018) (same). And, under Texas law, "if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, which creates a fact issue." *King v. Baylor Univ.*, 46 F.4th 344, 362 (5th Cir. 2022). Wren's interpretation—which follows the plain text of the Settlement Agreement, which harmonizes several key provisions of the Settlement Agreement, and which comports with the settlement's basic structure—is at least reasonable. The district court was therefore wrong to grant summary judgment in Transamerica's favor.

III. Enforcement of the *Oakes* Judgment Against Wren Violates His Due Process Rights to Adequate Representation and Notice

Finally, wholly apart from contract interpretation or claim preclusion principles, extending the *Oakes* judgment to preclude Wren's claims would violate Wren's due process rights to adequate representation and notice.

A final judgment in a class action can bind absent class members only if it was rendered consistent with the requirements of due process. *Brown v. Ticor Title Ins. Co.,* 982 F.2d 386, 390 (9th Cir. 1992) (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)). Due process requires, at a minimum, that the absent class members received adequate representation and adequate notice of the suit. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). Even though the initial settlement class-certifying court will necessarily have made findings about adequacy of representation and notice, the second court, in which enforcement of the judgment is sought, may re-evaluate that finding to ensure that enforcement satisfies due process. *See Hesse*, 598 F.3d at 587–89. If enforcement of the judgment would be "constitutionally infirm," the second court should not give the judgment preclusive effect. *Id.* at 587. Here, enforcement of the *Oakes* judgment against Wren would violate Wren's due process right to adequate representation and adequate notice.

A. The *Oakes* Class Representatives Suffer From the Same Conflicts That This Court Identified and Prohibited in *Hesse*

"Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members." *Hesse*, 598 F.3d at 589. Insurmountable conflicts exist when the class representative does not "possess[] the same type of claim" as the absent class members. *Id*. Indeed, courts regularly acknowledge that a plaintiff cannot serve as an adequate representative for a claim that he is incapable of litigating. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (plaintiffs who lacked standing to prosecute injunctive claims not adequate representatives for injunctive class); Newberg § 3:59 ("[A] plaintiff cannot be an adequate representative for claims she does not have standing to pursue.").

This Court applied these principles in *Hesse*. There, the defendant, Sprint, had previously settled a Kansas state court class action ("*Benney*") involving claims that it had illegally passed on to its customers certain federal regulatory fees. 598 F.3d at 585–86. Some time after the *Benney* settlement, a different Sprint customer (Hesse), who lived in Washington state, sued Sprint for passing on Washington state taxes called "B&O taxes." *Id.* at 584–85. Hesse was indisputably a member of the *Benney* nationwide class, received notice of the proposed settlement (including its broad release), did not opt out, and received the benefits of that prior settlement. *Id.* at 585.

Sprint argued that the prior class settlement and release barred Hesse's later suit, and the district court agreed, granting summary judgment to Sprint. *Id.* at 585–86.

This Court reversed. The Court agreed that the text of the class settlement in *Benney* covered Hesse's B&O tax claims, but held the release could not, consistent with the Due Process Clause, bar them. 598 F.3d at 587. That was because the class representative in *Benney*, who did not "possess[] the same type of claim" as Hesse, was not a typical nor adequate representative of Hesse. *Id*. at 588–89. Benney had not been harmed in the same way as Hesse; while both Hesse and Benney had paid some of the same fees (*e.g.*, the ones at issue in *Benney*), Hesse had also paid the B&O tax, whereas Benney had not. *Id*. at 589. Benney did not "even pretend to prosecute" the B&O tax claims. *Id.* Accordingly, even though Benney had been willing in the settlement to waive the nationwide class member's claims over the B&O tax (and did so), the Due Process Clause did not allow that result:

> [T]he *Benney* Class Plaintiff's interest in settling his federal Regulatory Fee claims, even at the cost of a broad release of other claims he did not possess, was in conflict with the Washington Plaintiffs' unrepresented interest in prosecuting their B&O Tax Surcharge claims. The *Benney* Class Plaintiff's representation of the Washington Plaintiffs was therefore inadequate as to those claims.
>
> The *Benney* Judgment would be constitutionally inform if it were interpreted, as Sprint contends it should be, to preclude the B&O Surcharge claims at issue in this case, because the *Benney* Class Plaintiff's representation of the Washington Plaintiffs failed to satisfy due process as to those claims. Thus, even if Kansas law – contrary to our interpretation of it below – did allow the *Benney* Judgment to release the Washington Plaintiffs' claims related to the B&O Tax

> Surcharge, we would not be bound to give the *Benney* Judgment that effect.

Id. at 589.

The situation here is materially the same. Just as Plaintiff Benney did not possess, or even "pretend to prosecute," the B&O claims, Plaintiff Oakes likewise did not possess or "pretend to prosecute" the Cash Value Increase claims. And it makes sense that Oakes did not pretend to prosecute the Cash Value Increase claims; the claims were unripe, so he could not—and had no incentive to—prosecute them. But, as *Hesse* holds, a class representative who did not possess "the same type of claim" as a subsequent plaintiff against whom the class settlement is sought to be enforced is constitutionally inadequate. 598 F.3d at 589. Plaintiff Oakes did not possess the Cash Value Increase claim at all. The Due Process Clause therefore prohibits him from waiving that claim on Wren's behalf.

B. The Class Notice Assured Wren That He Would Retain the Future Contractual Benefits of His Policy

Enforcement of the *Oakes* judgment here would also violate Wren's right to adequate notice of the settlement.

It is a fundamental principle of due process that the notice to absent class members be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306,

314 (1950). "The notice should describe the action and the plaintiffs' rights in it." *Shutts*, 472 U.S. at 812. Put differently, a class notice must "fairly apprise prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests." *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 423 (6th Cir. 2012) (internal quotation marks and alterations omitted); *see also* Manual for Complex Litigation (Fourth) § 21.312 (notice should permit class members to "make an informed decision about whether to opt out").

At a minimum, "due process does require that the notice not be materially misleading." *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 430 (D.S.C. 2011) (collecting cases); *see also Molski v. Gleich*, 318 F.3d 937, 952 (9th Cir. 2003) (notice that "misled the putative class members" violated due process); 7B Fed. Prac. & Proc. Civ. § 1797.6 (3d ed.) ("A proposed notice that is incomplete or erroneous or that fails to apprise the absent class members of their rights will be rejected as it would be ineffective to ensure due process.").

The notice here does not satisfy that requirement. Not only does it fail to mention that class members would allegedly be releasing any claims to potentially hundreds of thousands of dollars in future Cash Value Increases—a fact that would obviously affect a class member's decision on whether to opt out—it affirmatively misleads. After first stating that "future claims" would be barred ***only*** if those claims

were based on Transamerica's "past actions," it went on to assure potential class members, in bold font, that:

> **The settlement of this lawsuit does <u>not</u> alter your contractual rights under the express terms of your existing Policy. You will still be able to make a claim for any benefits that may become payable in the future under the express terms of your existing Policy.**

ER-121; *see also* ER-137 ("[T]he proposed settlement does not alter your contractual rights under the express terms of your existing Policy. You will still be able to make a claim for any benefits that may become payable in the future under the express terms of your Policy."). Yet the district court construed the Settlement to ***extinguish*** participating class members' right to enforce the terms of their policies. To vindicate that position would give effect to a materially misleading class notice.

It is no answer to state, as Transamerica did below, that the *Oakes* class notice attached the three-page release as an appendix to the class notice and instructed class members to "read it very carefully." ER-121. As discussed above, the class notice twice states, in plain and unambiguous language, that class members would "still be able to make a claim for any benefits that may become payable in the future under the express terms of your Policy." Transamerica's contention otherwise directly contradicts that representation.

Molski is illustrative.[10] There, in purporting to summarize a proposed class settlement, the proposed class notice suggested that class members would retain their claims for emotional distress damages. 318 F.3d at 952. But that was incorrect: Under the proposed release, class members would in fact be giving up those claims. *Id.* at 945–46. This Court therefore rejected the proposed settlement because, among other issues, the settlement would have violated class members' due process rights by misleading them regarding the scope of the release. *Id.* at 951–53.

Accordingly, as did the Eleventh Circuit in *Twigg v. Sears Roebuck & Co.*, 153 F.3d 1222 (11th Cir. 1998), this Court should not allow the Settlement to bar Wren's claims. In *Twigg*, the plaintiff claimed that Sears auto centers had billed him for services that it never performed. *Id.* at 1223-24. A prior class action had litigated and settled that very claim. *Id.* at 1228. The notice from the prior class action, however, described the prior class action's claims as claims about "unnecessary and/or improper repairs," not claims about services that Sears never performed. *Id.* at 1228. The notice, in other words, did not "adequately inform an absent class member like [plaintiff] either that claims like his were being litigated or that they had been settled." *Id.* The Eleventh Circuit therefore refused to "allow[] the judgment in the prior action to bar [the plaintiff's] claims because invocation of the

[10] A portion of *Molski* was overruled on grounds not relevant to this case by *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), which itself was reversed by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

bar would not be consistent with due process." *Id.* at 1229. This Court should rule the same.

C. This Court Must Ensure That Enforcement of the Settlement Against Wren Satisfies Due Process

It makes no difference that the state court in *Oakes* concluded, back in 2000, that the *Oakes* class representatives were adequate, or that the class notice was acceptable. A court may entertain collateral due process challenges to a class settlement unless the certifying court made findings "specific[]" to those challenges. *Hesse*, 598 F.3d at 588.[11] Because the *Oakes* court did not address the specific due process challenges Wren raises here—indeed, it could not have, since Wren's claims did not yet even exist—this Court may review the merits of Wren's due process challenges.

The facts of *Hesse* are once again instructive. Although the *Benney* court had certified the Kansas class, it "made no finding that the [Kansas] Class Plaintiff's representation of the class was adequate ***as to the [Washington] Tax Surcharge claims at issue in this [i.e., the federal] case.***" *Id.* at 588 (emphasis added). And

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[11] *See also In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005) ("Collateral review is only available when class members are raising an issue that was not properly considered by the District Court at an earlier stage in the litigation."); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258, 261 (2d Cir. 2001) (permitting review of adequacy of representation because "there ha[d] been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund").

because that question "was not addressed with any specificity by the Kansas court, it [was] a proper subject for collateral review." *Id.* Here, just like the *Benney* court, the *Oakes* court "made no finding that the [*Oakes*] Class Plaintiff[s'] representation of the class was adequate as to the . . . claims at issue in this case." 598 F.3d at 588. Nor did the *Oakes* court make any finding that the class notice adequately disclosed class members' release of their Cash Value Increase claims. This Court may therefore entertain Wren's due process challenges.

The district court concluded otherwise, but in doing so it ignored the teachings of *Hesse*. The court reasoned that it could ignore the substance of Wren's due process arguments because "the *Oakes* court specifically held that the notice provided to absent class members complied with . . . due process." ER-15.[12] But that is true of every case entertaining a collateral challenge to a class action judgment. *See* Newberg § 18:37 (explaining that because the class action court "will have necessarily made findings as to each of the due process concerns," the "collateral forum is therefore ***always*** in the position of ***re***-examining something the class action court has already examined" (emphases in original)). Courts nonetheless permit such challenges in the name of due process to proceed. *Id.* The *Oakes* court never

[12] The district court did not even reference adequacy of representation with respect to the class representatives. All it noted, from the *Oakes* judgment, was that the *Oakes* court had found that "the plaintiffs' ***counsel*** adequately represented the class." ER-15 (emphasis added).

evaluated the due process challenges "at issue in this case," so it was the district court's responsibility to consider them. Because it failed to do so, this Court should, at an absolute minimum, reverse and remand for the district court to consider Wren's due process challenges.

CONCLUSION

The Court should reverse the district court's grant of summary judgment and enter summary judgment in Wren's favor on this issue by holding that *Oakes* does not bar Wren's claims, or, in the alternative, vacate the district court's grant of summary judgment and remand for further proceedings.

Dated: July 20, 2023

<u>/s/ Zachary B. Savage</u>

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FOR THE NINTH CIRCUIT

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