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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

SETH ARD
ZACHARY B. SAVAGE
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas,
32nd Floor
New York, New York 10019
(212) 336-8330

STEVEN G. SKLAVER
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100

FRANCIS JOSEPH BALINT, JR.
ANDREW S. FRIEDMAN
BONNETT FAIRBOURN FRIEDMAN
& BALINT, PC
7301 North 16th Street, Suite 102
Phoenix, Arizona 85020
(602) 274-1100

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. Wren's Claims Are Not Subject to Claim Preclusion 4

A. Under Texas Law, A Class Settlement Cannot Preclude Unripe Claims 4

B. Transamerica Cannot Refute Texas's Claim Preclusion Ripeness Rule 7

C. Wren's Claims Were Not Ripe at the Time of *Oakes* 9

D. Transamerica's Hypothetical About Wren's 40th Anniversary Claim Is Wrong and Irrelevant 15

II. The Settlement Agreement Preserves Wren's Claims 16

A. The Carveout Provision Preserves Wren's Claims 16

B. Transamerica Cannot Square Its Position with the Agreement or the Policy 17

C. Transamerica's Waiver Argument Is Baseless 21

III. Preclusion of Wren's Claims Would Violate Due Process 23

A. Under *Hesse*, the District Court Was Required to Consider Wren's Due Process Arguments 23

B. The *Oakes* Class Representatives Neither Possessed Nor "Pretended to Prosecute" Wren's Claims 25

C. Transamerica Is Advocating for a Materially Misleading Class Notice 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Ballaris v. Wacker Siltronic Corp.,
370 F.3d 901 (9th Cir. 2004) 22

Brown v. Dynamic Pet Prod. & Frick's Meat Prod., Inc.,
2019 WL 4277807 (S.D. Cal. May 20, 2019) 24

City of Lubbock v. Stubbs,
327 S.W.2d 411 (Tex. 1959) 5

Compania Financiara Libano, S.A. v. Simmons,
53 S.W.3d 365 (Tex. 2001)....................5

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

F.B.T. Prods., LLC v. Aftermath Recs.,
621 F.3d 958 (9th Cir. 2010) 22

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

In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.,
431 F.3d 141 (3d Cir. 2005) 25

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,
2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019)....................13

Johnson-Williams v. Citimortgage, Inc.,
750 F. App’x 301 (5th Cir. 2018)....................10, 11

Kachina Pipeline Co., Inc. v. Lillis,
471 S.W.3d 445 (Tex. 2015) 22

Kremer v. Chemical Constr. Corp.,
456 U.S. 461 (1982)....................6

Lawson v. Sun Microsystems, Inc.,
791 F.3d 754 (7th Cir. 2015) 22

Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.,
140 S.Ct. 1589 (2020)..5

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996)..9

Media Rts. Techs., Inc. v. Microsoft Corp.,
922 F.3d 1014 (9th Cir. 2019) 6

Melito v. Experian Marketing Solutions.,
923 F.3d 85 (2d Cir. 2019) 13

Moralez v. Whole Foods Mkt., Inc.,
897 F. Supp. 2d 987 (N.D. Cal. 2012)..25

Morgan v. Covington Twp.,
648 F.3d 172 (3d Cir. 2011) 6

Nelson v. Adams USA, Inc.,
529 U.S. 460 (2000)..21

Perry v. Del Rio,
66 S.W.3d 239 (Tex. 2001)..14

Pierce v. Cent. United Life Ins. Co.,
2011 WL 13183215 (D. Ariz. Dec. 29, 2011)..24

Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.,
83 F. Supp. 2d 781 (E.D. Tex. 2000)..9

Prusky v. Aetna Life Ins. & Annuity Co.,
2006 WL 952320 (3d Cir. 2006) 19

Puerta v. United States,
121 F.3d 1338 (9th Cir. 1997) 22

Rawe v. Liberty Mut. Fire Ins. Co.,
462 F.3d 521 (6th Cir. 2006) 6

Ross v. Chipotle Mexican Grill, Inc.,
2016 WL 7634445 (S.D. Cal. Aug. 8, 2016) 24

Ruiz v. Snohomish Cnty. Pub. Util. Dist. No. 1,
824 F.3d 1161 (9th Cir. 2016) 15, 17

Sanders v. Blockbuster, Inc.,
127 S.W.3d 382 (Tex. App. 2004)..8, 10, 12

TVPX ARS Inc. v. Genworth Life & Annuity Ins. Co.,
959 F.3d 1318 (11th Cir. 2020) 12

United States v. Sacramento Mun. Util. Dist.,
652 F.2d 1341 (9th Cir. 1981) 22

Whitman v. State Farm Life Ins. Co.,
2021 WL 4264271 (W.D. Wash. Sept. 20, 2021) 20

Williams v. General Electric Capital Auto Lease, Inc.,
159 F.3d 266 (7th Cir. 1998) 13

Yearby v. Am. Nat'l Ins. Co.,
2021 WL 3855833 (N.D. Cal. Aug. 30, 2021) 5, 11, 12

Yearby v. Am. Nat'l Ins. Co.,
3:20-cv-09222-EMC (N.D. Cal.)..11

Rules

Fed. R. Civ. P. 23(c)(2)(B) 28

Tex. R. Civ. P. 42(c)(2)(A) 29

Other Authorities

Restatement (Second) of Judgments § 24 (1982) 11

18 Wright & Miller, Federal Practice & Procedure § 4409 (3d ed.) 6

INTRODUCTION

Transamerica's answering brief makes two concessions that all but resolve this appeal. First, it concedes that the preclusive effect of a class settlement is controlled not only by the text of the settlement agreement, but also by the doctrine of claim preclusion. Transamerica Br. 33. Second, it concedes that the governing source of claim preclusion law is Texas law. Transamerica Br. 16. Thus, the only question this Court needs to answer to resolve this appeal in Wren's favor is this: Under Texas claim preclusion law, may a judgment preclude a claim that was not ripe at the time the lawsuit giving rise to that judgment was filed?

Answering that question is not hard. The Supreme Court of Texas answered it less than three years ago. "Res judicata cannot bar a claim that was not ripe at the time the first lawsuit was filed." *Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 706 (Tex. 2021). The district court properly found that "Mr. Wren's claims to the Cash Value Increases were not ripe at the time of the *Oakes* settlement" in 2000. ER-13. Under a straightforward application of *Eagle Oil*, Wren's claims should proceed.

Transamerica has no meaningful response to the bright-line Texas rule that ripeness is required for claim preclusion. In a single, impenetrable paragraph, Transamerica maintains that *Eagle Oil*'s claim preclusion rules do not apply here because *Eagle Oil* "was not a class action" resolved by settlement, and that a class

action settlement agreement is "not impacted" by concerns of "concrete injury" and "subject matter jurisdiction." Transamerica Br. 24. The argument is difficult to parse, but Transamerica seems to be saying that the rules of claim preclusion differ as between class settlements and other judgments. They do not. There is no special, extra broad version of the doctrine that applies only where the judgment in the first case resulted from a class settlement; the rules are the same regardless of whether the original judgment arose out of a class settlement or was litigated to judgment. Indeed, Transamerica implicitly gives up its own argument by relying on several claim preclusion cases that arise outside the class settlement context. *See id.* at 16–17.

And the district court was undeniably correct in holding that Wren's claim was unripe when *Oakes* settled. Transamerica does not even try to explain why that conclusion was wrong. Transamerica first breached the Cash Value Increase provision when it failed to pay Wren's scheduled Cash Value Increase in 2020. Transamerica, in fact, ***paid*** the first scheduled Cash Value Increase to come due after *Oakes*, in 2010. It was not until 2016 that Transamerica first informed policyholders that it would no longer provide that benefit; and it was not until 2020 that Transamerica finally breached. There was simply no way that Wren could have litigated his claims for breach of the Cash Value Increase provision, in any forum, at the time of *Oakes*.

Transamerica's remaining arguments on preclusion distort the law and the facts. On the law, Transamerica conflates rules of contract interpretation with rules of claim preclusion, forgetting its own concession (and the law that requires) that the text of the settlement agreement is not dispositive. Transamerica also invokes irrelevant authority about "presentable" claims—a doctrine that has nothing to do with ripeness and has been rejected under Texas law anyway. And on the facts, Transamerica relies on a fundamentally incomplete account of this case, pretending that this case is merely about the fact that Transamerica ***made*** certain promises decades ago. That is only half the story: This case is about Transamerica's ***breach*** of those promises, decades later. In the end, Transamerica does not come up with a single Texas case in which a judgment precluded a claim for breach of contract where the breach first occurred after the judgment was entered.

If the Court does not reverse on *Eagle Oil* claim preclusion grounds, then it should reverse the district court's erroneous interpretation of the Settlement Agreement. On that issue, Transamerica also makes a fatal concession—that the Settlement Agreement's text preserves claims for death benefits. It does. And it does so by preserving ***all*** claims for contractual benefits, including the one Wren brings now, in the Carveout Provision. Transamerica tries to distinguish death benefits claims from Cash Value Increase claims, but it cannot; the Settlement Agreement treats all claims for contractual benefits equally. They are all carved out from what

the District Court conceded was the Agreement's otherwise "uncomfortably broad" release. ER-15.

Finally, Transamerica has no tenable response to Wren's due process arguments, which *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010) required the district court to address. As Transamerica concedes, the district court did not do so, which requires a remand at minimum. And Transamerica's merits arguments on due process fare no better. On adequacy of representation, Transamerica falsely implies that the *Oakes* class representatives sued Transamerica for breach of the Cash Value Increase provision. They did not. The breach of contract claim is premised on pre-2000 conduct, and the Cash Value Increase assumptions are only mentioned, briefly, in the context of the fraud claim. Finally, on class notice, Transamerica points to the class notice's statement that Transamerica would be released from "past" (*i.e.*, pre-2000) actions. But Wren's claims are not based on pre-2000 actions; they are based on conduct that occurred more than a decade later.

ARGUMENT

I. Wren's Claims Are Not Subject to Claim Preclusion

A. Under Texas Law, A Class Settlement Cannot Preclude Unripe Claims

Transamerica acknowledges that "the preclusive effect of a class settlement is governed by res judicata [*i.e.*, claim preclusion] and not just the settlement agreement itself." Transamerica Br. 33. Transamerica also accepts that the source of

the governing claim preclusion law is Texas law. Transamerica Br. 16. With those two points established, there is only one question left: Does Texas claim preclusion law permit a judgment to preclude a claim that was not ripe when the lawsuit that gave rise to the judgment was filed?

The answer, the Supreme Court of Texas recently affirmed, is no. "Res 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. That rule resolves this appeal. Wren's claim is based on conduct that did not occur, and could not have occurred, until decades after *Oakes* was filed. Even the district court recognized that his claim was not ripe at the time of *Oakes*. ER-13.

Texas courts have adhered to the ripeness rule for decades. *See, e.g.*, *Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001). It stems from the foundational principle that preclusion does not attach if, in the interval between two suits, "facts have changed, or new facts have occurred which may alter the legal rights or relations of the parties." *City of Lubbock v. Stubbs*, 327 S.W.2d 411, 414 (Tex. 1959); *see also Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S.Ct. 1589, 1595–96 (2020). It is also a necessary component of the federal identical factual predicate test. *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." (emphasis and internal quotation marks omitted)).

The rule that a judgment cannot preclude claims not ripe at the time of the original action is required for ***any*** jurisdiction's claim preclusion test. *See, e.g.*, *Media Rts. Techs., Inc. v. Microsoft Corp*., 922 F.3d 1014, 1021 (9th Cir. 2019) (federal common law of claim preclusion: "[C]laim preclusion does not apply to claims that were not in existence and could not have been sued upon—*i.e.*, were not legally cognizable—when the allegedly preclusive action was initiated.").[1] Were it otherwise, a litigant could lose his cause of action before having his constitutionally required "full and fair opportunity to litigate [his] claim." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480–81 & n.22 (1982). Transamerica never responds to this elementary point.

---

[1] *See also, e.g., Morgan v. Covington Twp.*, 648 F.3d 172, 177–78 (3d Cir. 2011) (the "bright-line rule" is that "res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint"); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 530 (6th Cir. 2006) ("[R]es judicata does not apply to claims that were not ripe at the time of the first suit."); 18 Wright & Miller, Federal Practice & Procedure § 4409 ("The easiest circumstances [defeating the applicability of claim preclusion] occur when the second action draws on facts . . . that simply could not have been asserted in the first action.").

B. Transamerica Cannot Refute Texas's Claim Preclusion Ripeness Rule

Nor does Transamerica cite any authority suggesting otherwise. Instead, it falls back on irrelevant contract interpretation cases that do not involve claim preclusion, arguing that so long as a settlement agreement is approved by a court, all claims "mentioned" in that agreement are barred by claim preclusion. *See* Transamerica Br. 21–22, 24–25 (citing the following pure contract interpretation cases, not one of which discusses claim preclusion: *Coppedge-Link ex rel. Coppedge v. State Farm Life Ins. Co.*, 2004 WL 1572913 (Tex. App. July 15, 2004), *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000), and *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537 (Tex. App. 2005)). But that argument is foreclosed by Transamerica's concession that the preclusive effect of a class settlement is determined by both the settlement agreement ***and*** claim preclusion law. After all, every class settlement whose preclusive effect is under review has been previously approved by some court. And as Transamerica concedes, claim preclusion rules limit the preclusive effect of a class settlement. This Court has explained that 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.

And contrary to Transamerica's suggestion, there is no special, extra broad version of claim preclusion that applies only where the judgment from the first case

resulted from a class settlement. *See* Transamerica Br. 24–27. Transamerica cites *Sanders v. Blockbuster, Inc.*, 127 S.W.3d 382 (Tex. App. 2004) for this proposition, but *Sanders* itself confirms that it was applying ordinary claim preclusion principles by stating that "[t]he principle of *res judicata* applies to class action settlements" and quoting *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992), a non-class claim preclusion case. 127 S.W.3d at 386. *See also Sanders*, 127 S.W.3d at 386 (quoting the Restatement (Second) of Judgments § 24 (1982)).

Moreover, Transamerica's attempt to distinguish *Eagle Oil* borders on incoherent. Nowhere does Transamerica explain why claim preclusion rules should turn on whether "concerns" of "concrete injury" and "subject matter jurisdiction" are present, or how such a test would even be operationalized. Transamerica Br. 24. Claim preclusion is claim preclusion; the rules are the same regardless of whether the original judgment arose out of a class settlement or was litigated to judgment. Indeed, Transamerica implicitly concedes the incorrectness of its position by relying on several Texas claim preclusion cases that arise outside the class settlement context. *See id.* at 16–17 (citing *Jistel v. Tiffany Trail Owners Ass'n, Inc.*, 215 S.W.3d 474 (Tex. App. 2006), *Barr v. Resol. Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627 (Tex. 1992), and *J-W Power Co. v. Henderson Cnty. Appraisal Dist.*, 2023 WL 4002733 (Tex. App. June 14, 2023)).

Transamerica also tries to import an inapposite line of caselaw concerning claims that may not have been "presentable" in the original class action. *See* Transamerica Br. 22–23. What those cases have recognized is that a state court class settlement may, where the underlying state preclusion law permits it, release claims that are subject to exclusive federal jurisdiction and were thus not "presentable" in the state court. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996). Those cases say nothing about releasing claims that were not ripe and not presentable in ***any*** court. At any rate, those cases have no relevance here because the governing preclusion law, Texas law, ***forbids*** a state court judgment from releasing an exclusively federal claim. *See Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 83 F. Supp. 2d 781, 789-93 (E.D. Tex. 2000). In the end, Transamerica does not come up with a single Texas case in which a judgment precluded a claim for breach of contract where the breach first occurred after the judgment was entered.

C. Wren's Claims Were Not Ripe at the Time of *Oakes*

Unable to refute the ripeness rule, Transamerica suggests, without explanation, that Wren's claims for breach actually were ripe at the time of *Oakes*. Even the district court recognized that was wrong. Not only had that breach not occurred when *Oakes* settled in 2000, but Transamerica's initial practice, following *Oakes*, was the opposite: It ***paid*** the first Cash Value Increase when it came due, in 2010. It was not until 2016 when Transamerica decided it would no longer pay the

Cash Value Increase when it became due, going forward. There was simply no way that Wren could have litigated claims for breach of the Cash Value Increase provisions—in any forum—at the time of *Oakes*. *See Eagle Oil*, 619 S.W.3d at 707 ("A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass." (internal quotation marks omitted)).

Transamerica repeatedly points out that Wren's claim and the claims in *Oakes* arise out of the same contract. That is both true and irrelevant. The same thing was true in *Eagle Oil*—both cases were for breach of the same contract. 619 S.W.3d at 701-05. But because the claims in the second suit "concern[ed] [the defendant's] post-trial actions" and "were not ripe until after the . . . trial [in the first case] concluded," the defendant was "not entitled to summary judgment on res judicata grounds." *Id.* at 706-07. *Sanders*, by contrast, was not a breach of contract case.[2] And in *Johnson-Williams v. Citimortgage, Inc.,* 750 F. App'x 301 (5th Cir. 2018), the second action was based on the same underlying conduct—the foreclosure of the plaintiff's home—as the first. *Id.* at 304–05 (concluding that the claims were based on "the same factual foundation" (internal quotation marks omitted)). In fact, the *pro*

[2] If there were any conflict between *Sanders* and *Eagle Oil*, *Eagle Oil*—which was decided more recently, by Texas's highest court—would control.

se plaintiff in *Johnson-Williams* forfeited any argument that her claims were not barred. *Id.* at 304.

That Texas (like many jurisdictions) calls its approach to claim preclusion a "transactional" approach does not change a thing. As the Restatement (which Transamerica cites, and which Texas has adopted) explains, the term "transaction," in the context of claim preclusion, has a specialized meaning that does not mean the same thing as "contract": "[T]he overtones of voluntary interchange often associated with the term in normal speech do not obtain." Restatement (Second) of Judgments § 24, *cmt. b*. If, as Wren pointed out in his opening brief, the "transactional" approach meant that all claims arising out of the same contract are necessarily precluded, Transamerica could, without any prospect of liability, charge all *Oakes* policyholders a million dollars per month in premiums next year. Opening Br. 25. Not even Transamerica defends that absurd result.

Yearby, which Transamerica tries in vain to distinguish, underscores the irrelevance of Transamerica's "same contract" point. There, the plaintiff's second suit alleged a breach of the very same provision (the COI provision) sued on in the first case, *Albanoski*. *See* 2021 WL 3855833, at *1, *8; *Yearby v. Am. Nat'l Ins. Co.*, 3:20-cv-09222-EMC (N.D. Cal.), Dkt. 39-1 at 73–74 (*Albanoski* complaint). The court nonetheless held that the second suit could proceed because the conduct giving rise to the breach in the second suit had not occurred at the time of the class

settlement. 2021 WL 3855833, at *14-16. Transamerica somehow thinks this case is factually distinguishable from *Yearby* because the "promises" Wren sues on here "existed both when the Policy issued and when *Oakes* settled." Transamerica Br. 30. But the same is true of *Yearby*; the promises Yearby sued on also existed when Yearby's policy issued and when *Albanoski* settled. Indeed, *Albanoski* and *Yearby* were suits for breach of the ***exact same promise***.[3] This case is thus even easier on its facts than *Yearby*, as *Oakes* never alleged that Transamerica breached the Cash Value Increase provision.

Nor does *Sanders* suggest otherwise. Again, that case affirmatively states that the rules of "*res judicata* appl[y] to class settlements," including the rule that res judicata bars claims that "'with the use of diligence, should have been litigated in the prior suit.'" 127 S.W.3d at 386 (quoting *Barr*, 837 S.W.2d at 628). No litigant, no matter how diligent, can litigate an unripe claim. Consistent with that rule, *Sanders* held that certain post-settlement claims were precluded because the illegal conduct underlying them had already occurred; those claims arose out of the same "ongoing policy or program" that was at issue in the original class action. *Id.* at 386. But the opposite scenario is presented here: Transamerica's decision to stop paying the Cash Value Increases had not occurred at the time of *Oakes*, and in fact was a

[3] It is also true of *TVPX ARS Inc. v. Genworth Life & Annuity Ins. Co.*, 959 F.3d 1318 (11th Cir. 2020), which Transamerica does not try to distinguish.

direct ***reversal*** of its practice of paying them for the first 16 years after *Oakes*. *See* Opening Br. 10–11.

The identical factual predicate cases on which Transamerica relies—*Melito v. Experian Marketing Solutions*., 923 F.3d 85 (2d Cir. 2019), *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,* 2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019), and *Williams v. General Electric Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998)—are inapt for similar reasons. In *Melito* and *In re Payment Card*, the released claims were based on a "continuation of conduct at issue and underlying the original claims," rather than a new course of conduct. *In re Payment Card*, 2019 WL 6875472, at *25 (citing *Melito*, 923 F.3d at 95). And in *Williams*, the second lawsuit at issue involved an identical claim, based on identical conduct, as the first suit. 159 F.3d at 273. Indeed, *Williams* expressed serious doubt that the claims in the second suit could have been barred if—as is the case here here—all of second suit's claims had been unripe at the time of the original action. *Id.* In any event, as both parties agree, Texas law—not the "identical factual predicate" test—governs here.

In the end, the only way Transamerica can suggest that Wren's claims were ripe at the time of *Oakes* is by giving a fundamentally incomplete picture of this case. On Transamerica's telling, the two cases involve the same "basic nature" because the *Oakes* complaint contained a handful of allegations about unrealistic and

unattainable "promises" that Transamerica made when selling the policies. *See* Transamerica Br. 28. Transamerica then asserts that the conduct giving rise to this case is simply a "continuation" of those same promises. *Id.* at 32. But the conduct giving rise to Wren's claims is not Transamerica's making or continuation of any promises; it is Transamerica's ***breaching*** of certain promises, 16 years later. Had Wren tried to sue for a hypothetical future breach of those promises back in 2000, his claims would have rested on contingent future events that may not occur at all—and, in fact, did not occur at the 20th anniversary in 2010. His claims would have been immediately dismissed as unripe.

And that outcome is exactly what the judicial system demands. The point of ripeness doctrine—under both Texas and federal law—is to "avoid premature adjudication" of cases involving "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001) (internal quotation marks omitted). At the time of *Oakes*, that was the state of Wren's claim. Not only had Transamerica not yet breached the Cash Value Increase provision, but when the first Cash Value Increase came due, ten years later, it ***honored*** the provision. And when Transamerica did breach, it was not because it was financially unable to pay the Cash Value Increases; it was because someone at Transamerica came up with the idea that *Oakes* might excuse compliance. Opening Br. 11. On Transamerica's account, however, Wren should

have asked the Texas court, back in 2000, to hazard a guess as to whether Transamerica would comply with that provision over the next 30 years—a quintessential advisory opinion. Wren did not do that; instead, he did what any prudent litigant would do, and asserted his claim for breach only after the breach happened. He should be allowed to pursue that claim now, and this Court should not invite litigants to rush to the courthouse to file suit about contingent future events that may never occur at all.

D. Transamerica's Hypothetical About Wren's 40th Anniversary Claim Is Wrong and Irrelevant

Finally, the Court should give no credit to Transamerica's hypothetical about the preclusive effect that this action might have on Wren's claim for the 40th anniversary Cash Value Increase payment. *See* Transamerica Br. 33. As an initial matter, the hypothetical is just that, a hypothetical; the preclusive effect of a judgment arising from this action is a matter for some future court, not this one. *See Ruiz v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1168 (9th Cir. 2016).

Moreover, the current state of Wren's 40th anniversary claim is nothing like the state Wren's Cash Value Increase claim occupied back in 2000. Transamerica ***has already breached*** the Cash Value Increase provision; it did so in 2020, when it refused to pay Wren's 30th anniversary increase. The conduct underlying the 40th anniversary claim is thus a continuing course of breaching conduct that has already begun. Presumably, Transamerica itself recognizes that the 40th anniversary claim is

ripe, since it has never challenged that claim on ripeness grounds. Those circumstances, however, are nothing like the circumstances that existed in 2000. *Oakes* did not allege—and could not have alleged—that Transamerica had breached the Cash Value Increase provision, given that Transamerica paid the Cash Value Increases through 2010.

But even if Transamerica were right that the 40th anniversary claim is not ripe now, it would make no difference to this appeal. All it would mean is that 40th anniversary claim should be dismissed as unripe. That would simply strengthen the conclusion that the 30th anniversary claim was not ripe in 2000—and that the district court's decision dismissing that claim was reversible error.

II. The Settlement Agreement Preserves Wren's Claims

The district court's erroneous interpretation of the Settlement Agreement provides a second, independent basis for reversal.

A. The Carveout Provision Preserves Wren's Claims

The Settlement Agreement unambiguously preserves Wren's claims. There are two relevant provisions. First is the Releasing Provision, Section H.1.b.1 (ER-212), which, standing alone, would release claims for death benefits, claims for Cash Value Increases, and any other claim "related to" the policies. Second is the Carveout Provision, Section H.1.b.2 (ER-214), which removes from the Releasing Provision's

scope all "claim[s] for benefits that will become payable in the future pursuant to the express written terms of the policy form," including Wren's claim. *Id.*

The Carveout Provision is critical to the structure of the entire Settlement Agreement. Without it, the Agreement would release all policyholders' contract claims, including even claims for death benefits. Transamerica cannot and does not defend that absurd result. Transamerica Br. 42. After all, policyholders continued to pay, and Transamerica continued to charge and collect, premiums for decades after *Oakes*. Instead, Transamerica tries to make its interpretation appear more palatable by acknowledging that the release at least preserves death benefit claims. *Id.* (conceding that the Agreement "does not alter . . . the right to receive death benefits or the surrender value of the policy").

That concession, however, is fatal. It requires that Transamerica distinguish—in some principled, consistent way—between a carve-out for death benefit claims and for Cash Value Increase claims. It cannot do so. The Settlement Agreement treats all "claim[s] for benefits that will become payable in the future" equally, no matter what type of "claim for benefits" it is.

B. Transamerica Cannot Square Its Position with the Agreement or the Policy

Much of Transamerica's briefing on the contract interpretation question focuses on the wrong provision and the wrong issue. It spends pages on the Releasing Provision, arguing that it covers claims for Cash Value Increase payments.

Transamerica Br. 35–38. But whether the Releasing Provision, standing alone, covers claims for Cash Value Increase payments is beside the point. The question is whether the Carveout Provision carves out claims for Cash Value Increase payments from the virtually unlimited scope of the Releasing Provision.

Transamerica also suggests that the Releasing Provision does not cover death benefit claims, but there is no real question that it does. *See* Transamerica Br. 42. The very subsection that mentions claims based on "persistency bonuses" to which Transamerica repeatedly refers, subsection H.1.b(1)(b)(15), also mentions claims based on "death benefits." *E.g.*, Transamerica Br. 10, 37, 44, 55; *see also* ER-213. And the Releasing Provision expressly covers all claims "arising out of or related to, in whole or part" to the policies. ER-212. That language plainly covers claims for death benefits. The Releasing Provision follows that broad language with several subsections that specify particular claims that it "include[s] without limitation," but those subsections are examples of particular claims that are released; they do not limit the broad, general release. ER-212. Moreover, a claim for death benefits is just as much a claim arising out of the "performance" of a Policy as a claim for a Cash Value Increase. Transamerica Br. 40 (quoting ER-211).

Equally unavailing is Transamerica's attempt to draw a distinction between death benefit and Cash Value Increase claims within the Carveout Provision. Transamerica Br. 43. That provision preserves any "claim for benefits that will

become payable in the future pursuant to the express written terms of the policy form." ER-214. That is exactly what Wren is doing here—he is making a "claim" for "benefits" that became payable after *Oakes* pursuant to the terms of his policy. Transamerica's two contrary arguments fail.

First, there is no real question that one can make a "claim" for a Cash Value Increase. Transamerica's 2020 letter to Wren confirms that Wren is doing so here. *See* ER-62 ("[Y]ou are requesting that the 30th year Cash Value Bonus be credited to your policy."). And Transamerica's brief repeatedly refers to Wren's "claim" for benefits. *See, e.g.,* Transamerica Br. 1 ("Wren's claim to persistency bonuses is transactionally related to the *Oakes* claims"); *see also id. 31*, 49. Moreover, Transamerica's argument is internally inconsistent. Transamerica contends that the Releasing Provision releases Wren's claims here because it covers "[a]ny ***claims***" relating to "persistency bonuses"; but then also argues that the Carveout Provision, which preserves any "***claim*** for benefits," does not apply because Wren's claim is not a "claim." *See, e.g., Transamerica* Br. 37–38, 42 (emphasis added). Transamerica cannot have it both ways, and "claim" does not mean two different things in these neighboring and inextricably linked provisions.

Second, it is equally clear that the Cash Value Increase payments are "benefits." Cash Value Increase payments increase the policy's account value, which is Wren's property. *See Prusky v. Aetna Life Ins. & Annuity Co.*, 2006 WL 952320,

at *1 (3d Cir. 2006); *Whitman v. State Farm Life Ins. Co.*, 2021 WL 4264271, at *1 (W.D. Wash. Sept. 20, 2021). Cash Value Increase payments also increase the policy's surrender value—*i.e.*, the cash Wren would receive if he were to give up his policy—which Transamerica ***concedes*** is a benefit preserved by the Settlement. Transamerica Br. 42; ER-244, 246. The Cash Value Increase payments are also "benefits" in that they increase the amount of interest Transamerica pays into the policy account; and lower Wren's obligation to make out-of-pocket premium payments. ER-244. Transamerica tries to escape this conclusion by repeatedly calling the payments "persistency bonuses," but the label makes no difference. The payments are not discretionary; the policy expressly says that they are "guaranteed." ER-238 ("These are the amounts which are guaranteed."). And whether they are discretionary versus guaranteed, or however labeled, makes no difference. By any definition of "benefits," the Cash Value account credits that Wren is claiming here qualify.

Finally, Transamerica fails to reconcile its position with Section M.21 of the Settlement Agreement. That section proscribes any interpretation of the Agreement that would change the contractual terms of a policy—which is what Transamerica's interpretation would do. *See* Opening Br. 34; ER-231. Transamerica claims fealty to Section M.21 because, rather than "eliminat[ing Wren's] right to recover . . . contract benefits," its interpretation simply "release[s] his right to pursue claims . . . related

to cash value increases." Transamerica Br. 45. But that distinction is illusory; any interpretation that releases Wren's right to pursue claims related to Cash Value Increases necessarily eliminates Wren's right to recover those contract benefits. Transamerica's contrary argument is pure *ipse dixit*.[4]

C. Transamerica's Waiver Argument Is Baseless

Transamerica's merits position has no basis in the text. It therefore resorts to arguing that this Court cannot consider the pertinent sections and phrases of the Settlement Agreement because Wren supposedly waived reliance on those provisions. *See* Transamerica Br. 39, 41 n.10, 50.

That waiver argument fails. The parties crossed-moved for summary judgment, and the district court expressly addressed the very provisions and arguments that Transamerica says were waived. *See* ER-6 (quoting H.1.b.1 in its entirety); ER-7 (quoting H.1.b.2 in its entirety); ER-11-15 (analyzing H.1.b.1 and H.1.b.2 together); ER-12 (concluding that "the *Oakes* release is unambiguous"). As its opinion makes plain, the district court was "fairly put on notice as to the substance of the issue[s]." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Transamerica cites no case in which an appellant waived an argument about a particular clause of a contract, or about whether the contract was ambiguous, where the interpretation of

[4] Transamerica does not try to defend the district court's flawed interpretation of M.21. *See* Opening Br. 38–40.

the contract was the very subject of the decision below. *Contra Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) (appellant's argument about proper interpretation of a contract "is more elaborate on appeal than it was in the district court, but no rule prohibits appellate amplification of a properly preserved issue").

Moreover, Transamerica's argument rests on an improperly narrow view of appellate argument. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004) (internal quotation marks omitted) Indeed, "[a]n argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that." *Puerta v. United States*, 121 F.3d 1338, 1341 (9th Cir. 1997).

Finally, whether the *Oakes* release unambiguously bars Wren's claims—which is what the district court necessarily ruled on when granting Transamerica summary judgment—is a purely legal issue. *See F.B.T. Prods., LLC v. Aftermath Recs.*, 621 F.3d 958, 962–63 (9th Cir. 2010); *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015). This Court can therefore consider it no matter what was pressed or passed on below. *See Ballaris*, 370 F.3d at 908; *see also United*

States v. Sacramento Mun. Util. Dist., 652 F.2d 1341, 1343-44 (9th Cir. 1981) ("Whether a contract is ambiguous is a question of law, freely reviewable by the appellate court.").

III. Preclusion of Wren's Claims Would Violate Due Process

Wren's due process challenges provide a third and independent basis for reversal.

A. Under *Hesse*, the District Court Was Required to Consider Wren's Due Process Arguments

Hesse v. Sprint Corp., 598 F.3d 581 (9th Cir. 2010) sets the governing rule as to when a court considering the prelusive effect of a class settlement may defer to due process findings made by the initial, certifying court. If the certifying court made an "explicit" finding "specific" to the claims at issue in the second court, then the second court should defer to that finding. *Id.* at 588. If not, the second court must at least consider the due process arguments. *Id.* Transamerica never disputes that the district court here refused to consider Wren's due process arguments. That refusal to do so here requires, at a minimum, a remand for consideration of this issue.

Transamerica tries, but fails, to distinguish *Hesse*. It concedes that *Hesse* permits collateral review, but then says *Hesse* is distinguishable because "the Kansas court did not make any findings as to adequacy of representation related to the WA tax claim." Transamerica Br. 52. That attempted distinction fails. Simply substitute "Texas" for "Kansas," and "Cash Value Increase" for "WA tax," and that sentence

describes this case exactly: The Texas court did not make any findings as to adequacy of representation related to the Cash Value Increase claim. The Texas court of course found that the class notice and representation were adequate; that is true of ***any*** certified class action. But that is not enough, under *Hesse*, to absolve the district court of addressing Wren's arguments. Since the Texas court made no due process findings "specific" to the Cash Value Increase claim, the district court needed to address them under *Hesse*. *See* ER-67–82.

Transamerica's string-cite to four district court cases only supports Wren's position. *See* Transamerica Br. 51–52. In three of those cases, the certifying court had expressly rejected the challenge being leveled in the second court, so the second court appropriately deferred to the initial court's finding. *See Brown v. Dynamic Pet Prod. & Frick's Meat Prod., Inc.*, 2019 WL 4277807, at *8 (S.D. Cal. May 20, 2019) ("[T]he record explicitly confirms that the Missouri Court considered the factual objections . . . raised by the plaintiff in this case."); *Ross v. Chipotle Mexican Grill, Inc*., 2016 WL 7634445, at *5 (S.D. Cal. Aug. 8, 2016) ("[T]he Los Angeles Superior Court explicitly found that the Claims Administrator complied with the court's order and that the notice methodology was adequate to alert class members to the settlement."); *Pierce v. Cent. United Life Ins. Co.*, 2011 WL 13183215, at *7 (D. Ariz. Dec. 29, 2011) ("The Alabama court ha[d] found that the content and manner of class notice in *Skelton* was sufficient and satisfied due process"). And in

the fourth case, where the certifying court had "made no specific finding" regarding plaintiff's due process claims, the second court "dispose[d] of [those] arguments on their merits." *Moralez v. Whole Foods Mkt., Inc.*, 897 F. Supp. 2d 987, 998 (N.D. Cal. 2012).

Bizarrely, Transamerica suggests that this Court should look to Texas state law in interpreting the federal Constitution's Due Process Clause. *See* Transamerica Br. 57. But the federal constitution is federal law. Also, the proposition for which Transamerica cites Texas law—that this Court should reject Wren's adequacy of representation challenge because he did ***not*** previously challenge adequacy—is illogical, contrary to Transamerica's own argument that the Texas court already considered this issue, and foreclosed by *Hesse*. *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." (emphasis added)).

B. The *Oakes* Class Representatives Neither Possessed Nor "Pretended to Prosecute" Wren's Claims

Hesse also disposes of Transamerica's arguments on adequacy. *Hesse* holds that insurmountable conflicts exist when the class representative did not "possess[] the same type of claim" as absent class members. 598 F.3d at 589. That conflict was particularly acute in *Hesse*, where the class representative had not even "pretend[ed]

to prosecute" the claims at issue in the second action. *Id.* The same is true here. The *Oakes* class representatives did not possess, or pretend to prosecute, a claim for breach of the Cash Value Increase provision. *See* ER-143–161.

Transamerica cannot, in good faith, deny that fact. Instead, it mostly dances around the issue, saying that the *Oakes* plaintiffs brought claims "related to" the Cash Value Increases, or claims "regarding . . . how their policies would perform in the future related to, in part, persistency and other bonuses." Transamerica Br. 58–59.[5] Wren does not dispute that, as part of the "Fraud" count of the *Oakes* complaint, in a single paragraph with eleven subsections listing ways in which Transamerica provided "deceptive marketing materials and software to prepare illustrations to induce Plaintiffs and Class Members to purchase the product," the tenth subsection claims that Transamerica was "[u]sing unrealistic, unattainable cash value increase assumptions in the twentieth, thirtieth, and fortieth years." ER-153. But nowhere does the *Oakes* complaint allege that Transamerica ***breached*** the Cash Value Increase provisions, nor could it have, given that no such breach occurred until 2020 and Transamerica paid Cash Value increases through 2010.

[5] At one point, Transamerica states that "the rights to [Cash Value Increase payments] ***were*** actually raised and litigated in *Oakes*." Transamerica Br. 58 (Transamerica's emphasis). If Transamerica means to suggest that the *Oakes* plaintiffs brought a claim for breach of the Cash Value Increase provision, or otherwise litigated their entitlement to the Cash Value Increases, that is false.

The complaint's three-paragraph breach of contract count says nothing of the sort. *See* ER-155 ¶¶ 38–40. In fact, the breach of contract count does not say much at all. *See id.* What it does make clear, however, is that whatever conduct the *Oakes* class representatives were suing on for breach, it occurred ***before*** 2000. *See* ER-155 ¶ 39 ("Defendants ***breached*** the terms of their . . . life insurance contract and the illustration used to sell it." (emphasis added)). The Court need not identify what exact conduct the *Oakes* plaintiffs were referring to, but the complaint contains several allegations that plausibly fit this description. *See, e.g.*, ER-146 ¶ 11 (alleging that defendants illustrated policy at a 9% earnings rate, but only credited a 6.89% rate); ER-147 ¶ 16 (alleging that plaintiff "was damaged when its policy failed to perform as illustrated" because defendants had subtracted premiums from his policy's cash value once plaintiff's contributions "vanished"). What is not plausible is that the *Oakes* plaintiffs claimed breach based on a refusal to pay future scheduled Cash Value Increases. That breach had not occurred, and nothing in the *Oakes* complaint remotely suggests that it had. It could not have occurred because the first Cash Value Increase was not due until ten years after *Oakes* was resolved—and was paid.

C. Transamerica Is Advocating for a Materially Misleading Class Notice

Finally, enforcement of the *Oakes* judgment here would violate Wren's Due Process right to adequate notice of the class settlement.

Transamerica does not dispute that, under the Due Process Clause, a class notice may not mislead class members about the scope of released claims. Transamerica Br. 56. But under Transamerica's reading, that is what the *Oakes* notice would do. The notice twice assured *Oakes* class members that the settlement would "not alter their contractual rights," and that they would "still be able to make a claim for benefits" under those policies. ER-121, 137 (emphasis in original). Yet Transamerica is asking the Court to extinguish class members' contractual rights to their Cash Value Increase payments. To vindicate that position would give effect to a materially misleading class notice.

Transamerica tries to defend its position by reverting to the release, which was attached as a 3-page appendix to the class notice. Transamerica Br. 55; Opening Br. 46. But the plain language of the Carveout Provision preserves Wren's claims. *See supra*, at 16–21. At a minimum, the release is unclear on the issue, and Transamerica concedes that class notices using "undefined or vague terms" violate Due Process. Transamerica Br. 56. Class members should not have to parse a highly-technical, nearly 2,000-word release, tracking its defined terms (some of whose definitions were not included in the class notice), to know whether they were releasing claims for future breaches—particularly where, elsewhere, the notice assured them that they would not be releasing such claims. *Accord* Fed. R. Civ. P. 23(c)(2)(B) (class notice

must convey required information in "plain, easily understood language"); Tex. R. Civ. P. 42(c)(2)(A) (same).

Transamerica's only other response makes a familiar error. Transamerica points out that the notice said that Transamerica would be released for "past actions" that might cause harm in the future. ER-36; Transamerica Br. 55-56. But this case is not about "past" (*i.e.*, pre-2000) actions; it is about actions Transamerica took more than a decade after *Oakes*. The only way Transamerica can turn this case into one about "past actions" is by making the same mistake it did regarding ripeness: pretending Wren's case is about Transamerica's ***making*** of certain promises in the policies. *See supra*, at 13–14. This case, however, is about Transamerica's ***breach***, which happened decades later.

CONCLUSION

The Court should reverse the district court's grant of summary judgment and enter summary judgment in Wren's favor. Alternatively, the Court should vacate the district court's grant of summary judgment and remand for further proceedings.

Dated: November 13, 2023

/s/ Zachary B. Savage

Seth Ard
Zachary B. Savage
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas,
32nd Floor
New York, New York 10019
(212) 336-8330

Steven G. Sklaver
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100

Francis Joseph Balint, Jr.
Andrew S. Friedman
BONNETT FAIRBOURN FRIEDMAN
& BALINT, PC
7301 North 16th Street, Suite 102
(602) 274-1100

Attorneys for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 22-56131

I am the attorney or self-represented party.

This brief contains 6,987 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- [x] complies with the word limit of Cir. R. 32-1.
- [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- [ ] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- [ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- [ ] complies with the length limit designated by court order dated ________.
- [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Zachary B. Savage **Date** November 13, 2023
(use "s/[typed name]" to sign electronically-filed documents)