Self-Conscious Common Law

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Written as an application writing sample. Not edited by any other person (or robot).

I. Introduction

How does the law answer questions about itself? That is—was law X *clearly established*? Did lawyer Y *misrepresent* law X? Would court Z have *accepted* law X had the issue been raised? Statements about statements ("higher-order statements") have long bothered logicians, *see* W.V. Quine, *Philosophy of Logic* 66–68 (2d ed. 1986), so it is not surprising that they would make trouble for judges as well. But law-about-law is not just a theoretical curiosity. Untangling it matters to judges who must decide whether to submit such "legal facts" to juries. And, as shown below, the way law "talks about law" can affect the substance of legal rights.

This essay surveys how courts have dealt with law-about-law in three discrete and seemingly unrelated areas. The purpose is to demonstrate that all three are variations of the same underlying issue—namely, how law talks about itself.

II. Discussion

A. Legal Malpractice

In a legal malpractice case arising out of litigation, the former client accuses the lawyer of having litigated the case incorrectly. To prove causation, the plaintiff must show that, had the lawyer acted correctly, the outcome would have been more favorable. ???. The causation element is law-about-law: how would another court have behaved differently had it been presented with the correct litigation strategy? ???

This law-about-law question creates several issues. The first is whether a judge or jury should decide it. ???. If the question is how a prior jury would have acted on different evidence, there is general agreement to send that question to a jury also. ???. But when the question is how a prior *judge* would have ruled on a different argument, the authority is reversed, and courts tend to decide those questions for themselves. ???. But the reasoning of those cases is not convincing. It is doubtful that how a prior court would have resolved a hypothetical dispute really falls on the "law" side of the law/fact dichotomy. It has none of the hallmarks of law: there are no statutes addressing it, ??? (???search for source defining "law"???) The argument that judges are better than juries at predicting how other judges would act, even if true, is not a reason for withholding a factual question from the jury. ???. Juries routinely resolve difficult factual questions. The Seventh Amendment does not have a footnote for "except if the judge things they can do a better job." ???. Judges should not be shy of the fact that they, too, are subject to the laws of cause and effect, and juries can reason about their actions.

To assist in deciding how a prior litigation would have progressed had the lawyer taken a different action, courts sometimes employee a device called the "case within a case," in which the malpractice plaintiff litigates the original case to a new judgment and the difference in outcomes is taken to represent the plaintiff's damages. ???. But it is important to understand that the case-within-a-case is not actually how the prior litigation would have resolved—it is an approximation device. Unfortunately, failure to appreciate this distinction has led to some bad law. ??? Pennsylvania example ???

B. Insurer–Insured

A liability insurance policy gives the insured a right to be indemnified for payments made to satisfy certain kinds of liability of the insured to third parties. ???. After the insured has made a payment, a question sometimes arises whether the payment satisfied a covered liability. ???. For example, the insured may have paid to settle a lawsuit asserting multiple claims, some covered and some not. ???. In such cases, the coverage question turns on law-about-law: whether the legal basis for liability fits within the legal test for coverage.

The law in effect at the time the claim was paid may differ from when indemnity is sought. ???. Even worse, the law at payment time may have been unsettled. ???. The common law system allows for gaps in authority—in fact, those 'gaps *are* the law' because they represent the extension of old authority to new facts. ???. A question arises whether the coverage court should fulfill its ordinary common lawmaking function and fill the gaps. It should not: in the law-about-law, a conclusion that liability was unsettled at the time of payment is sufficient to resolve coverage. ???.

Another issue is that an insured might justifiably settle a claim even though it could have prevailed against the claimant at trial. ???. In that situation, the insurer may argue that the payment does not fall within a liability insurance policy when there is no actual liability. ???. By analogy to the case-within-a-case from legal malpractice, it might seem that the insured must prove the underlying in the coverage suit. The key to uncovering the unsoundness of this position is to observe that the coverage question is one of law-about-law and thus depends on the characterization of the *claim*, not on the insured's underlying conduct that gave rise to the claim. Thus, the insured is not required to prove that a reasonable settlement of a covered claim was based on actual liability to the underlying

claimant. ???.

The confusion becomes even worse if coverage turns on facts neither established nor refuted by the insured's liability to the underlying claimant. ???. For example, coverage may depend on the date of conduct giving rise to injury. ???. But, since the insured is not required to prove actual liability, the insured may be required to prove the date of conduct that might never have occurred at all. ???. As a particularly perplexing example, after deciding that asbestos manufacturer W.R. Grace & Co. could obtain indemnity for settlements to alleged customers for whom Grace did not actually install asbestos, the court observed that, to establish liability arising within the coverage period, Grace was seemingly required to prove "the date of noninstallation," a question about as comprehensible as the sound of one hand clapping. ???. As another example, a manufacturer seeking coverage for liability to purchasers of silicone breast implants was required to prove the *date* of injury (but not the *fact* of injury), even though science conclusively established that the product caused no injury at all. ???; *see also Catlin*.

C. *FTC v. Actavis*

III. Conclusion