

Self-Conscious Common Law

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I. INTRODUCTION

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. Everyday examples include: Was law X *clearly established*? Did lawyer Y *misrepresent* law X? Would court Z have *accepted* law X had the issue been raised? Untangling these questions 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 deal 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 theme—namely, how law talks about itself.

II. DISCUSSION

Three examples of law-about-law are discussed below: legal malpractice, liability insurance, and the antitrust principle established by the Supreme Court’s decision in *FTC v. Actavis*.

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. *Bozelko v. Papastavros*, 147 A.3d 1023, 1029 (Conn. 2016). The causation element is law-about-law: how would another court have behaved differently if presented with the correct litigation strategy? *See id.*

This law-about-law element creates several issues. The first is whether a judge or jury should decide it. If the question is how a prior factfinder (judge or jury) would have acted on different evidence, there is general agreement to send that question to a jury. *Chocktoot v. Smith*, 571 P.2d 1255, 1259 (Or. 1977). But when it is how a prior court would have ruled on a legal question, the authority is reversed, and courts tend to reserve those questions for themselves. *Tinelli v. Redl*, 199 F.3d 603, 606–07 (2d Cir. 1999); *Phillips v. Clancy*, 733 P.2d 300, 306 (Ariz. Ct. App. 1986); *Thomas v. Bethea*, 718 A.2d 1187, 1197 n.7 (Md. 1998). The reasoning of these cases, however, is open to disagreement. The observation that “a judge is best suited” to answering the question, *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 133 F. Supp. 2d 747, 762 (D. Md. 2001), is not necessarily a reason for withholding it from juries, who, after all, routinely hear difficult and complex cases. *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979); *see also Curtis v. Loether*, 415 U.S. 189, 198 (1974) (risk of jury prejudice “insufficient to overcome the clear command of the Seventh Amendment”); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63 (1989) (same for risk of inefficiency); *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418, 425 (2015) (same for risk that jury verdicts will be “unpredictable”). *But see In re Japanese Elec. Prod. An-*

titrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980) (permitting a judge to take the case from the jury when its complexity was such that the jury could not fairly decide it). And it is not clear that how a court *would* have acted in a counterfactual scenario is “what the law is” in the *Marbury* sense, *see Tinelli*, 199 F.3d at 607 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), as it is purely hypothetical (and retrospective) and cannot govern future behavior. It may be that the tendency of courts to reserve for themselves cause-and-effect questions about judges stems from uneasiness with the proposition that courts are subject to ordinary cause-and-effect processes that juries can reason about.

To assist in deciding how a prior litigation would have progressed had the lawyer taken a different approach, courts sometimes employ 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. ??? The case-within-a-case effectively elides the distinction between law-about-law and law-about-fact by changing the causation question from ‘How *would* the client have fared without X error?’ to ‘How *will* the client fair now that X error is removed?’ ??? The former question is the usual but-for rule from tort law, the latter a useful “reflection or semblance” of it when the former question is difficult to answer. *See Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417, 427 (N.J. 1980).¹

Problems arise, however, when the case-within-a-case is treated as the actual test for malpractice causation rather than an approximation device. ??? Pennsylvania example ???

¹There are other justifications for the case-within-a-case approach, such as making the prior judge’s testimony irrelevant. *Phillips*, 733 P.2d at 306.

B. Liability Insurance

A liability insurance policy gives the insured a right to indemnity for payments made to satisfy certain kinds of liability of the insured to third parties. ??? After the insured has paid, a question sometimes arises whether the liability was covered. ??? For example, the insured may pay 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.

It may be that the law in effect at the time of payment differs from that in effect at the time of indemnity. ??? Even worse, the prior law may have been unsettled. ??? The common-law system allows 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 that may arise is that an insured may justifiably settle a claim even though it could have prevailed against the claimant at trial. ??? In that case, the insurer will argue that the payment falls outside the policy because a *liability* insurance policy requires *liability*. ??? By analogy to legal malpractice, it might seem that the insured must prove the case-within-the-case in the coverage suit. But courts have tended to reject that argument. ??? The key is to observe that coverage is a question of law-about-law and thus depends on the characterization of the *claim*, not of the insured’s underlying conduct that gave rise to the claim—it is a liability policy, not a conduct policy. With that understanding, the insured need not prove that a reasonable settlement of a covered claim was based on conduct that

would have resulted in actual liability to the underlying claimant. ???.

Perhaps the reason courts faithfully keep the distinction between law-about-law and law-about-fact in the liability insurance context while eliding the two in the malpractice context is that, in the malpractice context, proving the case-within-a-case only requires proving what the client has maintained all along about the strength of the claim. *See Lieberman*, 419 A.2d at 427. By contrast, asking an insured to prove the case-within-a-case would involve the insured making an about-face from contesting liability to embracing it. ???. The awkwardness of that situation justifies only asking the insured to demonstrate potential rather than actual liability. ???; *see also Lieberman*, 419 A.2d at 427 (suggesting case-within-a-case not be used in malpractice action where there was a “role reversal”).

The situation becomes more confusing if coverage turns on facts neither established nor refuted by the insured’s liability. ???. 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 never occurred. ???. 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 satisfy 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*.

Although these bizarre counterfactuals may be unpalatable to juries, acknowledging

that coverage under a liability policy is a question of law-about-law shows that ??? and ??? were correct in their approach to deciding coverage.

C. *FTC v. Actavis*

In *FTC v. Actavis* ???, ???, the Supreme Court dealt with the antitrust implications of a so-called “reverse-payment settlement”: one in which a patentholder pays an alleged infringer not to compete. In deciding whether such a settlement could give rise to a Sherman Act claim, the *Actavis* majority and dissent disagreed over whether a competitor could violate the antitrust laws by paying to remove competition that might have been precluded by a valid patent had the infringement suit proceeded to judgment. ???. In the dissent’s view, if the patent were *in fact* valid and infringed, it could not be an antitrust violation to remove the potential competition created by the cloud of uncertainty as to whether the accused infringer might prevail at trial. ???. The dissent also argued that treating potential competition as actual competition was contrary to the more-likely-than-not test for preponderance of the evidence in civil cases. ???.

The error in the dissent’s reasoning, and the reason the majority was right to reject it, is that it confuses law-about-law with law-about-fact. If a cloud of uncertainty regarding the outcome of a potential infringement trial would have spurred the patentholder to allow the alleged infringer on the market, that is actual competition, not potential competition. And it does not violate the more-likely-than-not test for a jury to consider whether it is more likely than not that the patentholder paid to remove that cloud of uncertainty.

There is a strangely close parallel between *Actavis* and the insurer–insured scenario discussed above. In both, the actor under scrutiny negotiates its liability to one party while

simultaneously holding a duty to protect certain interests of a third party in the outcome of that negotiation. In the insurer–insured context, the insured negotiates its liability to the claimant while owing a duty to the insurer not to pay in bad faith. ??? In an *Actavis* situation, the alleged infringer negotiates its liability to the patentholder while owing a duty to the consuming public not to unreasonably restrain trade. ??? In both, whether the negotiating party satisfies that duty is measured by its *potential* exposure rather than by litigating the case-within-a-case and seeing whether liability would have been found at trial. That is, just as the insurer cannot avoid payment by showing that the insured would have prevailed against the underlying claimant, an antitrust plaintiff cannot show that an alleged infringer acted wrongly by relitigating the infringement suit to a defense verdict. ???

Tellingly, even the *Actavis* dissent was not willing to let the FTC prove an antitrust violation by relitigating the infringement case and showing that the alleged infringer would have prevailed. ??? And with good reason: infringement suits would never settle if doing so would not obtain finality. Courts have recognized exactly the reason for not allowing a liability insurer to avoid coverage by relitigating the underlying claim. ???

III. CONCLUSION

These are just three examples of law-about-law, but there are many more: whether law was clearly established for purposes of 28 U.S.C. § 2254(d) or 42 U.S.C. § 1983, ???, whether an officer committed a “reasonable mistake of law” under the Fourth Amendment, ???, whether a statute is ambiguous and an agency’s interpretation of it “reasonable,” ???, whether a seller misrepresented the zoning status of a property, ???, among others.