

Self-Conscious Common Law

By: Owen E. Healy

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I. INTRODUCTION

How does the law answer questions about itself? Questions such as: 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 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 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. ??? But when it is how a prior *judge* would have ruled on a different argument, the authority is reversed, and courts tend to reserve those questions for themselves. ??? But the reasoning of cases so holding 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 versus 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 makes no exception for questions about which judges think 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 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. ??? 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 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 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 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 actual

liability to the underlying claimant. ???.

It may be tempting to view the effect of settlement on a later indemnity suit through the lens of preclusion doctrine. ??? In ???, for example, it has become common practice for plaintiffs settling with an insured to obtain a pro forma default judgment establishing the insured's liability in a subsequent coverage action. ??? But that commits the same error as assuming that the insured must prove actual liability—that is, it confuses law-about-law (whether the claim is covered) with law-about-fact (whether the conduct is covered). Thus, whether a policy affords coverage to a prior settlement is a matter of contract, not preclusion, law. ???.

The confusion becomes worse 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 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 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 settlements 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 merely by settling a claim it might have won. ???

Tellingly, 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 others: 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” for Fourth Amendment purposes, ???, whether a statute is ambiguous and an agency’s interpretation of it is “reasonable” under *Chevron*, whether a seller misrepresented the zoning status of a property, ???, among others.