Self-Conscious 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 "reverse-payment" antitrust claim recognized in *FTC v. Actavis*, 570 U.S. 136 (2013).

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 therefore 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"). 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 absent the lawyer's error, courts sometimes employ a device called the "case within a case" (or "suit within a suit"), 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. *Witte v. Desmarais*, 614 A.2d 116, 121 (N.H. 1992). The case-within-a-case collapses the distinction between law *about* the prior lawsuit and the law *of* the prior lawsuit by changing the causation question from what thee result "would have been" (law-about-law) to what it "*should have* been" (just plain law). *See Harline v. Barker*, 912 P.2d 433, 440 (Utah 1996) (emphasis in original) (quoting 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 27.7, at 641). The former question is the usual but-for rule from tort law, the latter a "reflection or semblance" of it when the former question is difficult to answer. *Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417, 427 (N.J. 1980).[1]

Mistaking the case-within-a-case for the actual causation element rather than an approximation can lead to misleading results. In arguing that settlement of an underlying claim should bar a subsequent malpractice suit, the Pennsylvania Bar Associations has warned

[1]There 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.

that the case-within-a-case would "essentially a free second bite at the apple"—allowing the plaintiff to re-roll the dice while keeping the settlement. *Khalil v. Williams*, 53 EAL 2021 (Pa. Aug. 3, 2021), Brief for Amici Curiae Pa. Bar Ass'n *et al.*, at 11. But that is only true under the incorrect assumption that "damages can only be measured against the result the client would have obtained if the case had been tried to a final judgment." *Elizondo v. Krist*, 415 S.W.3d 259, 263 (Tex. 2013); *Lieberman*, 419 A.2d at 427. In a malpractice case arising out of a settlement, a court can avoid re-rolling the dice by requiring the client to prove that "absent malpractice, they probably would have recovered *a settlement* for more than" the original amount. *Elizondo*, 415 S.W.3d at 270 (emphasis added). That proposition can be tested, for example, by reference to "settlements made under comparable circumstances." *Id.*

B. Liability Insurance

"The holder of a liability insurance policy has a contractual right to payment ... when ... the insured's liability to a third party is within the scope of the insurance policy." 7A Couch on Ins. § 103:11 (Westlaw 2022).

When the insured has paid a third-party claimant to satisfy an alleged liability, a question sometimes arises whether the liability satisfied was within the scope of the insurance policy. *See, e.g. Liberty Mut. Ins. Co. v. Metro. Life Ins. Co.*, 260 F.3d 54, 58–59 (1st Cir. 2001). For example, the insured may pay to settle a lawsuit asserting multiple claims, some covered and some not. *Crosby Estate at Rancho Santa Fe Master Ass'n v. Ironshore Specialty Ins. Co.*, 578 F. Supp. 3d 1123, 1134–35 (S.D. Cal. 2022). In such cases, the coverage question turns on law-about-law: whether the legal basis for liability fits within the

legal test for coverage. *See id.*

It can occur that the law in effect at the time of payment differs from that in effect at the time of indemnity. *See Cardinal v. State*, 107 N.E.2d 569, 577 (N.Y. 1952). Even worse, the prior law may have been unsettled. *See id.* The common-law system allows for gaps in authority. Helena Whalen-Bridge, *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, 58 J. Legal Educ. 364, 367–68 (2008). 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. *See Cardinal*, 107 N.E.2d at 578 ("That question must be answered nunc pro tunc, not by a long-later trial, under newly handed down decisions, as to who could be held for damages, and on what theory ... .").

Another issue that can arise is that an insured may justifiably settle a claim even though it might have prevailed against the claimant at trial. *See Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986) In that case, the insurer may argue that the payment falls outside the policy because a *liability* insurance policy requires "actual," not potential, liability. *Catlin Specialty Ins. Co. v. J.J. White, Inc.*, 387 F. Supp. 3d 583, 591 (E.D. Pa. 2019) (Goldberg, J.). By analogy to legal malpractice, it might seem that the insured must prove the case-within-the-case in the coverage suit. *Servidone Const. Corp. v. Security Ins. Co. of Hartford*, 477 N.E.2d 441, 445 (N.Y. 1985). But courts have tended to reject that argument. *Catlin*, 387 F. Supp. 3d at 590 (surveying cases). 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. *Id.*; *see also Chicago, R.I. &*

Pac. Ry. Co. v. United States, 220 F.2d 939, 941 (7th Cir. 1955) (fact that party was not actually liable does not mean it has no indemnity right for settlement). These decisions have tended to rest on the policy ground of promoting settlement, *e.g.*, *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988), but an argument from contract interpretation would be that a contract insuring "liability" is law-about-law and thus makes the coverage question turn on the claim against the insured and not the insured's conduct that gave rise to the claim—a "liability" policy is not a "conduct" policy.

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 actual liability via 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 a case-within-a-case against itself 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. Reverse-Payment Patent Settlements

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 error in the dissent's reasoning (and the reason the majority was right to reject it) is that it confuses law *about* the infringement litigation with the law *of* the infringement litigation. *Within* patent law, it is true that 'every patent is either valid or not, no middle

ground.' But when talking *about* patent law, it is possible to have a patent of unknown validity. ???. If a cloud of uncertainty regarding the outcome of an infringement trial would spur the patentholder to allow competition, it violates the antitrust laws to pay to remove it. ???.

Legal malpractice and liability insurance are inherently about prior litigations so no further justification is needed for treating those as law-about-law; the same is not true of antitrust law, which is usually about "trade," not litigation. *See* 15 U.S.C. § 1. The *Actavis* majority is probably correct that the real reason the Sherman Act should be treated similarly is because Congress would have wanted to put antitrust policy on par with patent policy in reconciling the two statutes. 570 U.S. at 137. A textual justification for doing so is that the word "trade" in the Sherman Act includes trade in property rights and therefore refers also to the legal proceedings that enforce those property rights, thus making the Sherman Act textually law-about-law.

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. The following statements are therefore analogues:

Liability Insurance	***Actavis***
The insurer cannot avoid payment merely by showing that the insured would have prevailed against the underlying claimant.	An *Actavis* plaintiff cannot show that an alleged infringer wrongfully settled merely because the infringement suit would have failed.
The insured cannot obtain reimbursement for an unreasonable settlement merely by showing it would have lost at trial.	An *Actavis* defendant cannot avoid antitrust liability merely by showing that the patent was valid and infringed.

Interestingly, even the *Actavis* dissent seemed to acknowledge that an antitrust plaintiff could not prevail by collaterally attacking the patent's *actual* validity. ???. Taking the analogy from the liability insurance context, there is a good reason for not letting an antitrust plaintiff rely on the ultimate success or failure of the infringement suit (instead, as the *Actavis* majority allowed, limiting the antitrust plaintiff to showing the parties' *anticipation* of success): lawsuits would never settle if settlement did not create finality. ???

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.