Self-Conscious Law

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

I. Introduction

Statements about statements ("second-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 cause trouble for judges as well. But "law about law" is commonplace, as resolving one legal issue often involves asking questions such as, Was law X clearly established? Did a lawyer misrepresent law X? or, Would a court have accepted law X had the issue been raised? Untangling these questions matters to judges who must decide, for example, whether historical facts about the law should be found by judges or 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 areas that may seem unrelated at first. The purpose is to demonstrate that all three are variations of the same underlying theme: 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 under the correct litigation strategy 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 if presented with a different approach? *See id.*

To assist in answering the causation question, 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 the result "would have been" (law-about-law) to what it "*should have* been." *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 (3d ed. 1989)). 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). Other justifications for the case-within-a-case approach include making the prior judge's testimony irrelevant. *Phillips v. Clancy*, 733 P.2d 300, 306 (Ariz. Ct. App. 1986).

But mistaking the case-within-a-case approximation for the actual causation element can lead to misleading results. For example, in arguing that settlement of an underlying claim should bar a subsequent malpractice suit, the Pennsylvania Bar Associations complains that

allowing the malpractice suit would permit "essentially a free second bite at the apple," a second roll of the dice in which the original settlement acts as a safety net. *Khalil v. Williams*, 53 EAL 2021 (Pa. Aug. 3, 2021), Brief for Amici Curiae Pa. Bar Ass'n *et al.*, at 11. But the Association's argument rests on 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.* Thus, while eliding the distinction between law *about* the prior case and the law *of* the prior case can be useful for approximation purposes, it is important to remember that the causation element of legal malpractice is, ultimately, law-about-law.

Another issue is whether a judge or jury should decide the causation element. If the question is how a prior jury would have acted on different evidence, there is general agreement that a jury should resolve that question as well. *Chocktoot v. Smith*, 571 P.2d 1255, 1259 (Or. 1977). But when the question is how a prior judge 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*, 733 P.2d at 306; *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 answer a question, *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 133 F. Supp. 2d 747, 762 (D. Md. 2001), is not

usually a reason for withholding issues from jurors, 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 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.

B. Liability Insurance

A second example of law-about-law comes from 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 policy 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). Or the prior law may have been unsettled. *See id.* The common-law system allows for gaps in authority, *see* 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), and a question arises whether the coverage court should fulfill its ordinary common lawmaking function and fill the gaps. It should not: in resolving the coverage question, what matters is that the law was in fact unsettled, not how "newly handed down decisions" would have settled it "long[] later." *Cardinal*, 107 N.E.2d at 578.

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). When that happens, the insurer may argue that the payment falls outside the policy because a "liability" policy requires "actual 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) (lack of actual liability does

not preclude indemnity 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 against "liability" turns on the claims made against the insured rather than the conduct giving rise to those claims. To put it another way, a "liability" policy is not a "conduct" policy.

The situation becomes more confusing if coverage turns on facts neither implied by, nor inconsistent with, the insured's liability. *See Catlin*, 387 F. Supp. 3d at 594. For example, coverage may depend on the date of conduct giving rise to injury, even though, since the insured is not required to prove actual liability, the insured may be required to prove the date of conduct that never occurred. *Id.* As a particularly perplexing example, after deciding that asbestos manufacturer W.R. Grace & Co. could obtain indemnity for settlements to alleged customers for whom it did not actually install asbestos, one court observed that the manufacturer was then seemingly required to prove "the date of the non-installation," a question about as comprehensible as the sound of one hand clapping. *Maryland Cas. Co. v. W.R. Grace & Co.*, No. 88-cv-2613, 1996 WL 109068, at 7 (S.D.N.Y. Mar. 12, 1996). Courts have crafted various solutions to this conundrum, but a general approach is not firmly established. *See Catlin*, 387 F. Supp. 3d at 594–96 (surveying approaches).

Another puzzling situation occurs when the *insurer* attempts to use the law-about-law coverage rule to its own advantage. In *Apex Mortgage Corp. v. Great Northern Insurance Co.*, 972 F.3d 892 (7th Cir. 2020), an insurer sought to disclaim coverage for an insured's settlement of a premises liability claim based on an exclusion that would apply if the insured were "in possession" of the property. *Id.* at 894. In arguing that the insured's settlement es-

tablished the applicability of the exclusion, the insurer posited that liability under a premises theory could only attach if the insured were in possession—and thus a claim under such a theory was inherently outside the policy. *Id.* at 897–98. The Seventh Circuit treated the issue as one of preclusion law and determined that the insurer's argument failed because a settlement is not a "judicial ruling." *Id.* at 898. But the issue is more accurately viewed as one of contract law: whether the insurance contract was intended to cover risks related to possession of the property. As an analogy, an insured could not avoid a fraud exclusion in a professional negligence policy by arguing that a claim denominated "fraud" was based on conduct that was *in fact* only negligent. *Moscarillo v. Professional Risk Management Servs., Inc.*, 921 A.2d 245, 256 (2007). Similarly, a commercial general liability policy does not extend to claims of product defects even if the damage were in fact inflicted by the insured's negligence. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896–97 (2006). To find coverage based on the insured's actual rather than alleged conduct would sweep in risks the policy was never meant to cover. *See id.* at 899 ("To hold otherwise would be to convert a policy for insurance into a performance bond."). This observation is the flip-side to the one stated above that refusing to indemnify a settlement of a covered claim based on a lack of actual liability eliminates most of the value of a "liability" policy. Although it may seem counterintuitive that actual facts undermine the parties bargained-for coverage rather than clarify it, understanding that a liability policy is law-about-law shows this to be the correct approach.

In the malpractice context, it was noted above that courts sometimes elide the distinction between law *about* the prior litigation and the law *of* the prior litigation; doing so is administratively simple because proving the case-within-a-case only requires the client to

show what it has maintained all along about the strength of its 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 "turning about face" from contesting liability to embracing it. *Uniroyal*, 707 F. Supp. at 1378. The awkwardness of that task justifies only asking the insured to demonstrate potential rather than actual liability. *Id.*; *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"). Thus, recognizing that liability insurance is law-about-law is necessary both to correctly enforce the scope of coverage and to avoid creating a multitude of administrative problems in which settlement would be all but impossible. As will be shown below, these observations hold in other areas of law-about-law.

C. Reverse-Payment Patent Settlements

A final example of law-about-law comes from an area that is not usually considered to be "about" legal proceedings the way malpractice and liability insurance are: antitrust. In *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), the Supreme Court dealt with a so-called "reverse-payment settlement": one in which a patentholder pays an alleged infringer not to infringe (i.e., compete). In deciding whether such a settlement could give rise to a Sherman Act violation, 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. *See id.* at 164 (dissenting opinion). In the dissent's view, if the patent were *in fact* valid and infringed, it could not be an antitrust violation to remove competition within its scope. *See id.* at 164, 171.

The majority correctly rejected this argument because it confuses law *about* the in-

fringement litigation with the law *of* the infringement litigation. Within patent law, it is true that "a patent is either valid or invalid," no middle ground. *Actavis*, 570 U.S. at 171 (dissenting opinion). But when talking *about* patent law, it is accurate to acknowledge that a patent whose validity has not been adjudicated "may or may not be valid." *Id.* at 147 (majority opinion). If a cloud of uncertainty regarding the outcome of an infringement trial might spur the patentholder to "permit[] the patent challenger to enter the market before the patent expires," it violates the antitrust laws to pay to remove that competition. *See id.* at 154.

There is an exceedingly 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 owing a duty to protect the interest 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 unreasonably or in bad faith. *Uniroyal*, 707 F. Supp. at 1379. 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 its duty is measured by its *potential* exposure rather than by litigating the case-within-a-case. *Luria*, 780 F.2d at 1091–92; *Actavis*, 570 U.S. at 157 ("[I]t is normally not necessary to litigate patent validity to answer the antitrust question . . . ."). The following statements are therefore analogous:

1. A liability insurer cannot avoid payment merely by showing that the insured would have prevailed against the underlying claimant. *Luria*, 780 F.2d at 1091–92.
2. An *Actavis* defendant cannot avoid antitrust liability merely by showing that the patent would have been found valid and infringed had the infringement suit proceeded to trial. *See Actavis*, 570 U.S. at 147 ("[T]hat the agreement's 'anticompetitive effects fall within the scope of the exclusionary potential of the patent' . . . [does not] immunize

the agreement from antitrust attack.").

Just as the prohibition on using actual facts to determine liability insurance coverage cuts both ways, the prohibition on measuring the antitrust claim against the ultimate outcome of the infringement suit does too. As the *Actavis* dissent observed, the FTC did not seek to "assess the validity of [the] patent[] or [the] question[] of infringement by bringing [its] antitrust suit"—that is, the FTC did not seek to collaterally attack the patent by showing it was *in fact* not valid or not infringed. *Actavis*, 570 U.S. at 164–65. The analogy to liability insurance shows that the FTC was wise not to pursue such an approach: in defending the antitrust suit, the accused infringer would have to "turn about face" from contesting infringement to embracing it, "markedly reduc[ing] the advantages . . . of settling." *Uniroyal*, 707 F. Supp. at 1378. For the same reason as in liability insurance, playing out the case-within-a-case of patent infringement would not only be theoretically incorrect: it would lead to a quagmire in which settlement would be impossible.

A final question is whether there is a textual justification for treating antitrust law as law-about-law. Legal malpractice and liability insurance are about prior legal proceedings and therefore inherently law-about-law, but the same justification does not hold for antitrust, which is about "trade." *See* 15 U.S.C. § 1. The *Actavis* majority took a policy-based approach, reasoning that the Sherman Act should take account of uncertainty in patent law 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 possible 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, the Sherman Act is textually law-about-law.

III. Conclusion

These are just three examples of law-about-law, but there are many more: "clearly established" law for purposes of 28 U.S.C. § 2254(d) or 42 U.S.C. § 1983, *see Pearson v. Callahan*, 555 U.S. 223, 244 (2009), "reasonable mistake[s] of law" under the Fourth Amendment, *Heien v. North Carolina*, 574 U.S. 54, 61 (2014), whether a statute is ambiguous and an agency's interpretation of it reasonable, *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 843 (1984), whether a seller misrepresented the zoning status of a property, *Lundin v. Shimanski*, 368 N.W.2d 676, 679 (Wis. 1985), among others. Given the close parallels illustrated between the three examples set out above—in particular the almost perfect analogy between liability insurance and antitrust law—it is likely that the same principles should govern other areas where the law talks about law, and that these examples should provide guidance.