Through the Legal Looking Glass: Recursion and Self-Reference in Legal Doctrine

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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" crops up more than we might like. Take the classic example from qualified immunity, where the court must ask not what the law *is* but what was *clearly established* at an earlier point in time. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Or, in a proceeding collaterally attacking a conviction for ineffective assistance of counsel, a court may need to ask whether a lawyer's assessment of the law was reasonable at the time and whether a court would have accepted a hypothetical defense had it been raised. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). What these examples have in common is they ask the court to examine not what the law ultimately requires but the (possibly unsettled) state of lawmaking itself.

As it turns out, requiring courts to step back from their usual role of "say[ing] what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), often causes confusion. Courts tend to conflate statements about the unsettled state of the law with statements about what the law ultimately requires. This essay explores such problems by surveying law-about-law in three discrete areas that may, at first, seem unrelated: legal malpractice, liability insurance, and antitrust. The purpose will be to demonstrate that all three are actually variations of a common underlying theme: that "law about law" is fundamentally different than ordinary

legal statements that merely assert what the law ultimately requires. Further, these examples will show that trying to analyze second-order legal statements without appreciating their distinct nature inevitably leads to erroneous results.

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, 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 analyzing this question, courts 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. The causation shifts from what the result "would have been" (law-about-law) to what it "*should have* been" (*i.e.*, what a correct interpretation of the law ultimately would have required). *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)). While the former "law about law" question would seem to be a more faithful embodiment of the usual but-for rule from tort law, the latter offers a "reflection or semblance" of it that is easier

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 while the case-within-a-case approach is useful, it is important not to mistake it for the actual causation element. If the original case has settled, the settlement proceeds act as a safety net that would not be available in the counterfactual "case within the case." *Khalil v. Williams*, 53 EAL 2021 (Pa. Aug. 3, 2021), Brief for Amici Curiae Pa. Bar Ass'n *et al.*, at 11. But a prior settlement need not preclude the claim altogether, since it would incorrect to assume 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 that may arise is whether a judge or jury should decide causation. 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). That result, however, is hard to square with the Seventh Amendment (and analogous state civil jury protections), and the reasoning of the cases so holding is questionable. The observation that "a judge is best suited" to answer the question, *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 133 F. Supp. 2d 747, 762 (D. Md. 2001), is not usually a sufficient reason for withholding an issue 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, as such a pronouncement is purely retrospective and cannot govern future behavior. It may be that the tendency of courts to reserve for themselves causation questions about judges stems from uneasiness with the proposition that judges, being human, 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). And "liability," is, of course, often a statement of legal judgment. Thus,

when the insured has paid a third-party claimant to satisfy an alleged liability, a question may arise as to 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.*

As an example, suppose the law in effect at the time of payment differed from that at the time of indemnity. *See Cardinal v. State*, 107 N.E.2d 569, 577 (N.Y. 1952). Or suppose the prior law was unsettled. *See id.* The common-law system, after all, 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 the coverage court may be tempted to fulfill its ordinary common lawmaking function by filling those gaps—even though the gaps were not filled at the time of the underlying action. But, just as in qualified immunity, 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). 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, and rightly so. *Catlin*, 387 F. Supp. 3d at 590 (surveying cases). Requiring an insured who made a reasonable settlement of a disputed claim to prove they would have lost at trial eliminates all incentive to settle, thus prolonging litigation. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988). It should be enough, rather, for the insured to show that the settlement was reasonable and that the claim, if successful, would have resulted in covered liability. *Id.*; *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). And as a matter of contract interpretation, an agreement to insure against "liability" must turn on the claims made against the insured rather than the conduct giving rise to those claims—a "liability" policy is not a "conduct" policy.

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; *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 cover-

age and to avoid creating a multitude of administrative problems in which settlement would be all but impossible.

The situation becomes more confusing if coverage turns on facts neither implied by, nor inconsistent with, actual 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 the third-party claimant would not have had to prove that date in order to recover. But recall that the insured may have made a reasonable settlement of a claim in which there was no injury at all—seemingly requiring the insured to prove the date of an injury that never took taken place. *Id.* If this sounds far-fetched, consider 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, a coverage 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 insured's hypothetical (rather than actual) liability to *its* 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 established 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 res judicata and determined that the insurer's argument failed because a settlement is not a "judicial ruling" triggering preclusion. *Id.* at 898. But that reasoning is doubtful. As a species of contract law, the coverage question is more accurately viewed as one of interpretation: whether the insuring agreement 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 (Md. 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 reference to actual facts (*i.e.*, the truth) undermines the parties bargained-for coverage rather than clarifies it, understanding that a liability policy is law-about-law shows this to be the correct approach.

C. Antitrust

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, even by direct horizontal agreement. *See id.* at 164, 171.

The majority correctly rejected this argument because it confuses law *about* the infringement 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, the situation is more nuanced. 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.

As it turns out, there is an unusually 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. That is, 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. And 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.").

The analogy goes further. Just as the prohibition on using actual facts to determine liability insurance coverage cuts both ways, neither side of an *Activis* dispute may measure liability using the ultimate outcome of a hypothetical infringement suit. In *Actavis*, for example, 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 (dissenting opinion). And with good reason: 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.

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. And while it is good for competitors to respect the antitrust laws, it should not come at the cost of making patent litigation endless.

A final question is whether there is a textual justification for treating antitrust law as law-about-law. Legal malpractice and liability insurance are inherently "about" prior legal proceedings and therefore naturally 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. As a policy matter, that may or may not make sense, but it is a stretch to say Congress adopted it through a mere prohibition on "unreasonable" restraints. Still, there may be a textual justification: the word "trade" in the Sherman Act includes trade in property rights and therefore refers 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 regulation is ambiguous and an agency's interpretation of it reasonable, *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019), 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—the same principles should govern other areas where the law talks about law.