Promises and Public Trust: Rethinking Insurance Law Through Stories

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Sales and claims stories articulate theories about insurers' relationships with their customers, about their relationships with the public, about the purposes of insurance, and about the conflicts between private and public interests. Tom Baker uses these stories to argue for an expansion of the damages allowed in ordinary breach of contract cases.[1] His argument is not only compelling, but it also demonstrates the utility of stories in legal analysis. But such a narrow reading does not begin to capture the deeper wisdom of Baker's paper. If we take these stories seriously, we must confront much more than contract damages.

The real force of Baker's paper is in its depiction of the "inescapable tensions in the relationship between insurance companies and their insureds."[2] In this Comment, I take sales and claims stories in a different direction. Instead of using them, as Baker does, to resolve a dilemma in insurance law, I expand on two fundamental stories—the promise and the public trust—and suggest that a regime of markets and contracts cannot adequately handle the inescapable tensions revealed by the stories. In the spirit of full disclosure, I acknowledge that this argument is mine and that Baker might well disagree with the use to which I put his stories. Notwithstanding any disagreements we might have, however, I think Baker's stories brilliantly capture the core of the insurance business and the social dilemmas that it poses.

Insurers tell sales stories in advance of contracting. These stories generally take the form of a promise of protection, and are expansive,

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1. Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1423-29 (1994).

2. *Id.* at 1401.

appealing to our fear of limitless hidden dangers and suggesting that insurance will provide unlimited security.[3] Claims stories, on the other hand, are told after a contract has been struck, when a policyholder returns to exact fulfillment of the promise. These stories emphasize the limits of the contract and often ask the individual to sacrifice her needs for the benefit of the larger community of policyholders whose interests the insurer holds in public trust.[4]

Baker connects these day-to-day insurance stories to larger cultural archetypes. The sales stories become tales of individual vulnerability and isolation that are mitigated only by social connections because promises to insure are fundamentally social arrangements. These social arrangements—the promises of the many to protect the one—create in turn a new dependence and vulnerability, but one now subject to the whims of our protectors instead of the whims of nature. The claims stories become tales of human greed in the face of generosity, and ultimately, tales of the vulnerability of social arrangements to the nasty urges of the individual.

I. Insurance as Promise

Insurance, the law says, is an instance of commercial contract.[5] Thus, one central problem in insurance law is the nature of the product insurers sell, or, put another way, the nature of the promise between insurer and insured. An insurer sells its promise to pay, but has a financial incentive in any one case to avoid paying a claim. This money-for-promise arrangement creates a strong tension within the insurer-insured relationship. One might think that the words of the insurance policy would define exactly the promises between an insurer and an insured. But when a dispute arises—when parties disagree on the interpretation of an insurance policy—the words of the policy alone are no longer sufficient to resolve the dispute. Thus, the language of the contract itself does not provide clear rules for behavior that both parties accept, and we have to look elsewhere for interpretive guidance. Baker suggests that insurance advertising should play a large part in determining the meaning of promises in an insurance contract.[6]

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3. *See id.* at 1403-07.

4. *See id.* at 1407-13.

5. *See, e.g.*, Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 54 (1980) ("[W]e hold that a disability income protection insurance plan is a commercial contract . . . ."); *see also* Baker, *supra* note 1, at 1417 (noting that most judicial opinions emphasize the contractual nature of the insurance relationship).

6. *See* Baker, *supra* note 1, at 1426 ("The lesson of the sales stories is simple: The real promise of the insurance relationship is not 'if *X* happens, we'll pay *Y* dollars,' but rather 'we'll be there for you,' keeping your life or business together when disaster strikes.").

Insurance advertisements imply that companies are selling not only a basket of specific coverages, but also a more general promise of security. They are selling, as Baker says, "a promise 'to be there.'"[7] In arguing for expanded damages under ordinary contract law—that is, without shifting ground to tort law—Baker would, in effect, allow insurer advertising to become part of the contract.[8] Under this view, the contract is not just what is written in black and white, but also what is communicated in the larger relationship between insurers and customers in that dance known as marketing.

This is a radical step and it is worth pondering its implications. Baker and other scholars want to preserve the boundaries between tort and contract.[9] Their goal is to permit more expansive damages within the framework of contract law in order to gain some of the policy advantages of the expanded damages allowed under bad faith actions brought in tort. The most important of these advantages is the deterrent effect that expanded damages would probably have on insurer readiness to delay and withhold settlements.[10] But to gain the result of expanded damages within contract—that is, without defining good faith breaches as tortious—Baker must radically alter the boundaries of the contract itself.

Baker is not alone. Many judges have already imported insurer advertising into the contract in order to determine whether an insurer breached an insurance contract.[11] Judges have often taken notice of advertising slogans and found that when people buy insurance, they think, and are usually told, that they are buying "peace of mind." Robert Jerry's resolution of the problem is quite similar to Baker's. Jerry also urges remaining within the contract framework but broadening courts' interpretations of foreseeability. Damages in contract would still be limited to those losses that arise from the breach of contract and that were "foreseeable [by the parties] at the time of contracting."[12] Jerry uses marketing practices,

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7. *Id.*

8. *See id.* at 1426-28 (arguing that the broad promise of protection contained in insurer advertising justifies an award of emotional damages for breach of an insurance contract).

9. *See id.* at 1432 ("Providing complete compensatory damages in the good faith insurance case should reduce the extent of insurance bad faith actions . . . ."); Robert H. Jerry, II, *Remedying Insurers' Bad Faith Contract Performance: A Reassessment*, 18 CONN. L. REV. 271, 296-301 (1986) (arguing that more flexible contract damages are a desirable replacement for bad faith tort actions); William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1232 (1994) ("[T]he border war between contract law and tort law manifested in the battle over the tort of bad faith performance in insurance contracts should be resolved under contract law's own terms.").

10. *See* Baker, *supra* note 1, at 1432 ("[A] broader contract damages rule allowing recovery for attorneys' fees and emotional damages can alter the strategic calculus . . . .").

11. *E.g.*, D'Ambrosio v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 396 A.2d 780, 786 (Pa. Super. Ct. 1978), *aff'd*, 431 A.2d 966 (Pa. 1981); Irion v. Prudential Ins. Co., 765 F. Supp. 337, 338 n.2 (N.D. Tex. 1991), *rev'd*, 964 F.2d 463 (5th Cir. 1992).

12. Jerry, *supra* note 9, at 299.

and especially insurer advertising, to show that the range of damages foreseen by the parties includes the secondary consequential losses normally recoverable only under a bad faith action.[13] For example, sales stories commonly invoke images of the distress that follows from losses that befall the uninsured.[14] These images suggest that in the process of contracting, both the insurer and insured contemplate the emotional distress that could result were the insurer not to pay a claim.

Baker and Jerry give compelling reasons for expanding the boundaries of the contract to include representations and promises made during the marketing phase of the insurance relationship. Robert Keeton gives one additional reason: In the normal course of insurance marketing and contracting, the insured usually does not even see the actual policy until *after* the contract has been made.[15] Because insurance customers must agree to an unseen contract, there is certainly a strong argument for recognizing the promises made or suggested in the pre-contracting phase of the bargaining as part of the contract.

Reading marketing stories into an insurance contract, however, opens up a tremendous problem. Baker's sales stories demonstrate that what people are buying and selling in insurance contracts is inherently vague—peace of mind, security, a promise to "be there," or a long-term relationship of protection. Morcover, the difficulty of adequate specification is not just the result of insurers' efforts to tap into profound human insecurities and then reassure people with vague metaphors of parents, neighbors, rocks, or umbrellas. To paraphrase Tolstoy (somewhat liberally), good fortune is the same for everyone, but misfortune comes in infinite variety. Baker describes one of these varieties of misfortune—you have a disease that will lead to blindness, but your disability insurance policy will not cover you for time off from work to undergo a preventive treatment because you are not disabled yet.[16] This hypothetical resonates precisely

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13. *See* Jerry, *supra* note 9, at 298-99 & n.133 (arguing that the sales efforts demonstrate the range of foreseeable damages and citing cases that recognize the role of advertising in this foreseeability analysis).

14. *See* Baker, *supra* note 1, at 1415 (describing insurance advertisements that portray "the insurance company as a hero rescuing the policyholder in distress").

15. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 968 (1970). Readers might recall any life, health, or homeowner insurance purchases they have made, to be reminded that a customer is rarely shown the actual policy until after the application has been signed and the first premium paid. A year ago, I asked to see the full policies of the health insurance plans offered by my university *before* making my selection of a plan. I was told by representatives of the three plans that I could receive the policy only after I had enrolled. I might have been able to obtain copies of the policies in advance of my purchase had I pushed harder, but the point remains that the ordinary consumer of insurance is asked to enter into a contract without the opportunity to read the full contract.

16. Baker, *supra* note 1, at 1401-02.

because it is not at all far-fetched: it is exactly the kind of problem that arises again and again in insurance.

Every loss is different, and this infinite variety plays havoc with the concept of foreseeability that undergirds contract law. People buy insurance in part because they can foresee certain kinds of losses—the death of a breadwinner, the loss of the ability to work, an illness, a liability suit, fire, theft, and so on. At the same time, people rarely foresee the exact form that a loss will take, much less whether a loss will occur. Paradoxically, it is the simultaneous foreseeability and unforeseeability of potential loss that drives us to buy insurance—foreseeability in the sense of our capacity to imagine loss, and unforeseeability in the sense of our inability to predict the exact nature of the loss that might befall us.

Meanwhile, the very idea of an insurance contract presumes the parties can specify foreseeable losses that will trigger the insurer's promise to pay. Here, the tension between sales stories and claims stories is manifest: in selling policies, insurers press the expansive reading of the contract and their willingness to protect the insured against the unforeseeable, but in monitoring claims, insurers press the narrow reading of the contract and their obligation to limit payouts to situations foreseen by the contract.[17]

For several reasons, then, bringing sales stories into the contract—using them as a basis to interpret promises and award damages—pushes insurance contracts to look very much like duties in tort. Given the advertising and sales stories to which the insured was exposed, interpreting the insurer's obligations according to a standard of reasonable expectations of the insured moves us far away from contract law's formal agreement standard and closer to tort law's reasonable person standard. Interpreting insurers' obligations against a background concept of "the insurance relationship," using insurer advertising and marketing stories to define that relationship, yields a relationship that looks quite a bit like the tort law duty of care. In fact, it is striking how much the sales themes Baker identifies—trust, security, commitment, "good hands," "taking care of one another," keeping promises[18]—sound like a "caring relationship." Some insurance advertising explicitly promotes "caring" as the company's product: CIGNA, one of the largest health and life insurance companies, began a major new advertising campaign in 1993 by changing its motto from "We get paid for results"[19] to "A business of caring."[20]

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17. *See id.* at 1414-16.

18. *See id.* at 1405.

19. BUS. WK., Mar. 16, 1992, at 142 (advertisement).

20. *See* U.S. NEWS & WORLD REP., Oct. 11, 1993, at 39 (advertisement) (proclaiming that CIGNA had "adopted a new corporate symbol" and displaying the new symbol of a tree over the new motto of "A Business of Caring"); U.S. NEWS & WORLD REP., Nov. 22, 1993, at 4-5 (advertisement) ("CIGNA is . . . 50,000 people with the very same job. Caring about what happens to our cus-

If the law should construe insurance contracts to include the promises implied in insurance advertising and marketing, and if the sales stories then require construing insurance promises according to the reasonable expectations of people in a relationship of care, what is left of the distinction between contract and tort? The border between contract and tort is maintained, but only by something of a fiction. Perhaps this is an important strategic fiction: It may be easier to persuade courts to expand contract damages if they think they are still operating incrementally within contract law than if they think they are feeding the "voracious appetite" of tort.[21]

The difficulty of adequately specifying covered losses, combined with the vast disparities between the sales stories and claims stories, means that insurers are not only trading in emotion, as Baker says,[22] but trading in ambiguity and confusion as well. This ambiguity and confusion also demands that contracts be interpreted in favor of the insured. Still, a presumption in favor of the insured when a dispute arises may not be strong enough to deal with the real problem. Beneath the conflicting stories—the sales promise to be there and the claims retreat to the black letter of the contract—is a disturbing fact of the insurance business. Insurers deliberately and knowingly tell two conflicting stories—"we protect against the unforeseeable" and "we protect only against that foreseen in the contract"—at different phases of their relationship with customers. Changing the promise, then, is their ordinary mode of doing business. If standard operating procedure in the insurance business includes promising one thing but meaning another, it is hard to sustain the distinction between good faith and bad faith breaches of contract, and hard to imagine that case-by-case damages—either in contract or in tort—will induce genuine good faith and fair dealing. Changing the promise is more than just "an inescapable tension" as Baker puts it.[23] It is a structural problem that requires conceptualizing insurance as something more than a contractual relationship.

II. Insurance as Public Trust

The second "inescapable tension" Baker identifies is that between the insurer's role as a protector of the individual policyholder and its role as guardian of the insurance trust fund.[24] While the sales stories promise

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tomers. . . . [O]ur commitment to caring . . . is something we're going to try to prove every chance we get."). For other insurance company advertisements stressing the theme of insurance as a caring relationship, see Deborah A. Stone, *Ad Missions: How Insurance Companies Sell Ideology*, AM. PROSPECT, Winter 1994, at 19, 22-23.

21. Powers, *supra* note 9, at 1219.

22. Baker, *supra* note 1, at 1428.

23. *Id.* at 1401.

24. *Id.* at 1402.

seemingly unbounded devotion, like a parent's love for a child, the claims stories ask the individual to regard her claim as one among many in the larger community of potential claimants.

To support enlarged compensatory damages within the framework of contract law, Baker very cleverly turns the insurers' public trust argument on its head. Because insurance is a public trust, insurers say, they have an obligation to protect *all* their policyholders and all future claimants, not only the claimant at the door. On that ground, public interest requires insurers to challenge policyholders' claims in order to protect the common pool of resources from which all claims are eventually paid.[25] But if we accept that insurance is a public trust, Baker says, it is just as much in the public interest for policyholders to challenge insurers' refusal to pay in order to protect and enforce insurers' promises to the public.[26] Insurers, after all, are in the business to make money, and they increase their profits to the extent they do not have to pay out claims.[27] Because insurers have strong incentives to interpret policyholders' claims as invalid, the system needs some policing from the other side. "[A]n insured who prevails in a coverage case," Baker says, "increases the value of the insurance company's promise to all its policyholders."[28] Compensatory damages, especially attorneys' fees, provide an incentive for policyholders to do this kind of enforcement.

This argument is compelling, yet I believe the tension is far deeper than Baker lets on. The deeper conflict is between the collective purposes of members of an insurance scheme and the private purposes of insurers. For policyholders or members of an insurance plan, the plan is an agreement by members to pool their resources in order to meet the losses of a few individuals. Contributors to these plans buy protection in the event of loss, with the understanding that their contributions will most likely be used to subsidize others and that they will likely not receive payouts.

Historically, insurance was organized in a way that made collective purposes more evident. Pre-existing social groups and organizations provided coverage for losses as an additional benefit of membership. Insurance was often a mutual assistance compact among members of an existing group without the intervention of a for-profit firm.[29] An early example

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25. *See id.* at 1411 (explaining the insurer's argument that the insurance company "protects not the insurance company, but the premium-paying public").

26. *Id.* at 1429.

27. Baker is well aware that insurers have other means of increasing their profits, but he understands the centrality of minimizing claims payments to the insurers' fiseal strategy. *See id.* at 1401.

28. *Id.* at 1429.

29. *See generally* 1 R. CARLYLE BULEY, THE AMERICAN LIFE CONVENTION, 1906-1952: A STUDY IN THE HISTORY OF LIFE INSURANCE 114-20 (1953) (tracing the emergence and development of assessment and fraternal organizations as an alternative to the old-line insurance companies);

of such a compact can be found in the constitution of a Universalist Society church, formed in 1791 in Langdon, New Hampshire.[30] In New England at that time, many towns maintained churches, taxed their citizens for support of the single town church, and required church attendance.[31] Forming a Universalist church was thus an act of political and religious rebellion. One article in the Langdon constitution reads: "Agreed, if any one of our society should be oppressed or obliged to defend himself by law, on account of his religious sentiments, that we will each one of us bear a part according to his ability."[32] This promise of mutual assistance, even though no money was apparently collected in advance, is the essential core of insurance. Like many insurance plans, this one was created to further the other goals of an already cohesive group. Similarly, in the late nineteenth century, and on into the twentieth century, many ethnic benevolent societies and fraternal organizations offered their members small amounts of life, health, disability, and funeral insurance.[33] These societies recruited members, decided on the terms of insurance, assessed contributions, managed their assets, and made payouts, all as part of their self-government. As the members of many ethnic societies matured and their children became more assimilated, the societies often used insurance benefits as a lure for members and a kind of social glue to hold an otherwise dispersing ethnic community together.[34]

In commercial insurance, an insurance company performs all or some of these same functions, and in exchange for organizing the mutual assistance compact and bearing some of the risks, it receives a profit. Some commercial insurance is offered to pre-existing groups, such as employee groups or professional associations. Other commercial insurance is sold to individuals and assembles strangers' money into common financial pools. Either way, insurance companies create pools of policyholders'

LISABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939, at 64-75 (1990) (noting that ethnic workers' associations provided a variety of insurance coverage to their members); S.S. HUEBNER, LIFE INSURANCE: A TEXTBOOK 437-62 (3d ed. 1935) (discussing the nature and importance of fraternal insurance and assessment associations). For a discussion of various ethnic benevolent societies that provided insurance to its members, see Frank Renkiewicz, *The Profits of Nonprofit Capitalism: Polish Fraternalism and Beneficial Insurance in America*, *in* SELF HELP IN URBAN AMERICA: PATTERNS OF MINORITY BUSINESS ENTERPRISE 113, 113-129 (Scott Cummings ed., 1980) [hereinafter SELF HELP]; Joseph Stipanovich, *Collective Economic Activity Among Serb, Croat, and Slovene Immigrants in the United States*, *in* SELF HELP, *supra*, at 160, 168; M. Mark Stolarik, *A Place for Everyone: Slovak Fraternal-Benefit Societies*, *in* SELF HELP, *supra*, at 130-41.

30. *See* 2 HISTORY OF CHESHIRE AND SULLIVAN COUNTIES, NEW HAMPSHIRE 184 (D. Hamilton Hurd ed., 1886) [hereinafter HISTORY].

31. CHARLES B. KINNEY, JR., CHURCH AND STATE: THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE, 1630-1900, at 12 (1955).

32. HISTORY, *supra* note 30, at 184.

33. HUEBNER, *supra* note 29, at 438-39; Renkiewicz, *supra* note 29, at 117; Stolarik, *supra* note 29, at 136.

34. Stipanovich, *supra* note 29, at 174.

money from which they pay individual claims. In this way, commercial insurance does foster mutual assistance, even though, from the insurance company's point of view, the central purpose of insurance is to earn a profit, not to foster cooperative social organization.

Sales stories and claims stories mask both the mutual assistance aspect of insurance and the conflict between the insurer's purpose—profit making—and the insured's purpose—protection. In the sales story, insurers portray the insurance contract as merely bilateral—between only the insurance firm and the policyholder. Sales stories downplay the role of other policyholders in providing resources to protect the individual, as well as the strong likelihood that because any one policyholder is unlikely to incur losses, her premiums will compensate the losses of other policyholders. Indeed, one prominent series of advertisements by the trade associations of life and health insurers conveys the message that each person pays only for her own risks. "If you don't take risks, why should you pay for someone else's?" asked one advertisement.[35] "The lower your risk the lower your premium," was the tag line in the entire series.[36] Thus, at the point of sale, insurers try to disguise the multilateral nature of insurance contracts; they portray insurance as saving for oneself rather than as saving to protect a community.

The public trust claims story, on the other hand, does portray the insurance contract as multilateral: The insurer is a guardian for everyone and a distributor of limited resources among multiple claimants.[37] However, the public trust claims story uses the image of the multilateral contract not to bolster community purposes but to bolster a company's own position in its conflict with a claimant.[38] At the moment of a claim, the policyholder's and the company's interests come into conflict because a payout is in the policyholder's interest but not the company's. At that moment, the insurer, once a monolithic, benevolent paternalist, suddenly goes democratic on the claimant. The story shifts our focus. No longer do we see a claimant in conflict with a single, giant, rock-solid insurance company; instead, the story shows one citizen among many in a community of policyholders. Now we are in the rhetoric of utilitarianism, in which the needs of an individual must be subordinated to the greater good of all.

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35. U.S. NEWS & WORLD REP., June 22, 1987, at 15 (advertisement); *see also* Deborah A. Stone, *AIDS and the Moral Economy of Insurance*, AM. PROSPECT, Spring 1990, at 66 (asserting that insurance companies have begun to campaign that their company does not impose the costs of high-risk people on other policyholders).

36. U.S. NEWS & WORLD REP., June 22, 1987, at 15 (advertisement).

37. *See* Baker, *supra* note 1, at 1411-13 (noting that claims stories commonly emphasize the insurer's duty to the public as a whole).

38. *See id.* at 1430 (arguing that while insurers invoke images of the public trust, claims stories often mask strategic behavior on the part of the insurer).

Through the public trust claims story, the insurance company has been transformed into a community of ordinary little people—all potential future claimants in need—threatened by and vulnerable to the single claimant. In an important sense, the insurer has used the public trust story to organize a united front of policyholders against the individual claimant.

Between the bilateral sales story and the multilateral claims story, an important story is left out: the conflict between the insurers' role as profit seeker and the communal nature and purpose of insurance. As a profit seeker, the insurer has no inherent incentive to preserve the common purposes of the community of policyholders it serves. Moreover, in its role as profit seeker, the insurer comes into direct conflict with the policyholder as claimant, and it benefits by pitting the individual against the community, rather than by fostering solidarity.

"Pure" mutual assistance arrangements, without the intervening role of a profit-seeking firm as an organizer of insurance, do not obviate the need for policing claims. No insurance plan, however informal and neighborly, simply distributes payments on demand of the members. Fraternal and benevolent associations typically had mechanisms, such as visitors to the sick, to assure that individuals did not take advantage of the collective good will.[39] But commercial organization intensifies the incentives for the insurer as profit seeker to police and limit claims because the firm must protect its own profits as well as the common trust fund. Profits are the first to go if claims run in excess of premium and investment income.

In a pure mutual assistance arrangement, the moment of claim might still bring the individual into conflict with the community because a claim depletes the common resources. But if the claim is legitimately for a loss that the community agreed to protect, then that conflict is muted because paying for such losses was exactly the purpose of the insurance arrangement. Commercial insurance intensifies the conflict between the policyholder and the insurance company at the moment of claim because the insurance company has its own purpose, making a profit, in addition to the mutual protection purposes of the policyholders. Every claim paid, no matter how consonant with the policy and the protective purpose of the insurance, depletes a company's potential profits.

The public-trust claims story certainly can and should be used, as Baker does, to support the expansion of insurance contract damages.[40] However, relying on individual consumers to police insurance company behavior may not be sufficient, especially when the consumers who are to

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39. Stolarik, *supra* note 28, at 136. To prevent false claims, and to show concern for the incapacitated, the lodges elected "committees for the sick" whose members were charged with visiting each claimant, expressing sympathy, and "verifying his problem." *Id.*

40. *See* Baker, *supra* note 1, at 1428-29.

undertake this enforcement are precisely those who, by definition, are weakened by a loss that an insurer refuses to cover. Baker's instrumental use of the story, therefore, does not go far enough.

By juxtaposing the public-trust story with an alternative story, the story of conflict between the commercial goals of insurers and the communal needs of citizens, one can reveal the more profound strategic functions of the public-trust story. The public-trust story serves not only to help insurers avoid paying claims but, in a much more profound way, to bolster the position of the commercial insurance industry in society. It masks and justifies the insurer's interest in profit. It pits individual policyholders against the community of premium payers, rather than fostering a sense of common membership and mutual assistance. It is designed to stifle some consumer demand for more favorable treatment under individual contracts. And finally, it probably helps defuse citizens' demands for tougher regulation of the industry by persuading some disappointed claimants that pressing their claims would be anti-social.

Mutual-aid societies illustrate how insurance can be an instrument of social cohesion, of sustaining needy individuals with group aid, and of stimulating individual loyalty to a group. The community-maintenance purposes of insurance have attenuated as the profit-making purposes have grown. Neither an insurer whose goal is profits, nor a collection of isolated policyholders with no connection to each other outside the insurer's computer, can promote common concerns for public purposes.

III. Conclusion

Baker's paper confirms that stories are indeed a useful analytical device to illuminate the arguments and justifications underlying public policy. Baker uses this analytic tool to demonstrate that courts can and should consider broadening the damages allowed under good faith contract actions. Such a broadening, he argues, would accomplish some of the policy objectives of bad faith tort doctrine, but without opening up insurance disputes any further to social regulation via tort suits. However, further analysis of the sales and claims stories identified by Baker suggests two structural problems in the behavior and regulation of private insurance markets, problems that are probably not amenable to correction by adjudication of individual suits under whatever legal doctrine.

Analysis of the sales stories shows that insurers sell not only specific coverages, but also a vague and more generalized promise to provide security for policyholders. The requirements of competitive markets in private insurance push insurers to use sales strategies that trade on the ambiguity and vagueness of their promise, while the requirements of profit-making and fiscal solvency push them to be much more restrictive in interpreting these promises once policyholders make actual claims. This

disparity between insurers' behavior at two moments in the insurance process violates the very concept of a promise in ordinary understanding.[41] If such a violation of trust is central to (or at least common in) the business of insurance, then the notion of good faith at the heart of contract law is undermined. When a business violates ordinary notions of promise and good faith as a matter of standard practice, enforcement by individual consumers is probably impossible and some kind of stronger, more centralized regulation may be necessary.

The second structural problem revealed by the juxtaposition of sales and claims stories has to do with the conflict between communal purposes and private interest. Insurance is, in essence, a socialization of costs. It is a contractual and financial arrangement whereby the many pool their resources to aid the few who suffer certain defined losses. Even when insurance is organized as a private, for-profit firm, it remains a social arrangement of mutual assistance, for it is mainly other policyholders' money that goes to pay for the losses of the individual.

Both the promise and the public-trust stories mask the social and communal nature of insurance. The first presents insurance as if it were merely a relationship between the policyholder and the insurance firm as a single entity, and asks the individual to look to a private firm for security. The second presents the insurer as an agent or trustee for the community of policyholders, then pits the interests of the individual against the good of the group. The public trust story uses appeals to the common good to purchase policyholder assent to claims rejections that benefit the insurer first and foremost. The interest of the insurer in profits is rendered invisible by these stories. The stories persuade people that their interests lie not in mutual aid and solidarity, but in support of healthy private enterprise from which one can purchase protection for oneself and one's own family. Together, these stories serve to fragment the constituencies for insurance, when the very essence of insurance is the aggregation of interests into a common arrangement of risk-sharing. Perhaps it is this destruction of communal values in the general cultural understanding of insurance that is most harmful and most resistant to change through judicial oversight of individual contract disputes.

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41. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1449 (3d ed. 1992) defines a promise as a "declaration assuring that one will or will not do something; a vow." Ordinary understanding of a promise is that the person making such a declaration will honor her word and fulfill the promise.