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Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages

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If litigation is theater, insurance coverage litigation is alternately *King Lear* and *King Richard III*. In any case, in any forum, insureds can be counted on to cast themselves as the betrayed King Lear, who, after giving his eldest daughters his kingdom in return for their promise to love and care for him, is cast outside in the storm.[1] Insurance companies can similarly be counted on to cast themselves as Richmond, the captain of the forces of good who finally stopped greedy King Richard.[2]

Lear and Richard—both far richer characters than my one-dimensional use of them—illustrate two contradictory forces underlying much of insurance coverage litigation. Lear shows the risk inherent in paying today for tomorrow's protection: the resulting power of the protector when that protection is needed. Once Lear chose which daughters to reward with his kingdom, he was dependent on them to fulfill their promise to provide for him in old age. Richard shows the danger of giving individuals a claim on collective resources. He schemes to control those resources and then uses them to the disadvantage of all. In the end he is prepared to sacrifice the entire kingdom to save himself: "A horse! A horse! My kingdom for a horse!"[3]

Like Lear with his daughters, insureds are stuck with, and dependent on, their chosen insurers in time of need. And, like Richard and his

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1. *See* WILLIAM SHAKESPEARE, KING LEAR.

2. *See* WILLIAM SHAKESPEARE, KING RICHARD III.

3. WILLIAM SHAKESPEARE, KING RICHARD III act 5, sc. 4, line 7 (Anthony Hammond ed., Arden ed. 1981).

kingdom, the interests of individual insureds are often opposed to the interests of insureds as a whole. In their extremes, Lear and Richard illustrate two pathological sides of the insurance relationship. Because the tensions underlying these pathologies are inescapably present in the insurance relationship, the stories of Lear and Richard are always available in a coverage case. Thus, insurance coverage litigation is simultaneously about abandonment and greed.

As this use of Lear and Richard epitomizes, one way to explain the obligations that exist within the insurance relationship is through stories. I tell stories when I teach insurance. Lawyers tell stories about insurance to judges and juries. Judges tell stories about insurance in their opinions. And insurance companies tell stories to consumers and claimants. Like *King Lear* and *King Richard III*, these insurance stories work by organizing experience into a narrative structure that has a recognizable and predictable outcome.[4] For example, if the story we are told about an insurance claim is one with a greedy and dishonest insured (Richard), we understand and applaud a careful, detailed investigation by the insurance company; if the story is one with a dependent, vulnerable insured (Lear), we may see in that investigation delay and extortion.

Typically, we use these insurance stories as advocacy tools, to persuade another to do what we want, whether that is buying insurance, accepting the denial of a claim, or deciding a case in our favor.[5] But these insurance stories have another use—a use that, while not unrelated to advocacy, aims more at understanding the insurance relationship. The stories we tell about insurance reveal our vision of the insurance relationship, including the promises and obligations of that relationship. While the stories I tell may be of interest to my students, the stories that insurance companies tell are of far greater interest. These stories reveal a vision of the insurance relationship that should matter to courts asked to determine the obligations that inhere in that relationship.

Lawyers already use the stories insurance companies tell as a source of obligation.[6] As excerpts from some judicial opinions reveal, judges do

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4. *See* Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) (arguing that narration can be used as persuasive authority "because it evokes meaning that is already institutionalized"). *See generally* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (discussing the use of storytelling in legal discourse and scholarship). A recent review of the legal narrative literature and responses to it is Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (arguing that criticism towards legal storytelling is misguided and positing that legal storytelling should he used to challenge definitions of terms that have been taken for granted).

5. *See generally* Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (discussing the use of "stock stories"—stories that rely heavily on characteristic people and their relationships rather than actual events—as a persuasive tool for lawyers).

6. *E.g.*, Thomas Baker & Eva Orlebeke, *The Application of Per-Occurrence Limits From Successive Policies*, 3 ENVTL. CLAIMS J. 411, 412-19 (1991) (using statements by insurance industry

too[7]—as they should. It is through these stories that insurance companies tell people what to expect from insurance, insurance companies, and insurance claims.[8] Examining these stories, and the competing visions of insurance that they project, can help judges decipher the unwritten obligations of the insurance relationship. Moreover, analyzing the way judges use the stories can serve another, equally important purpose, that of understanding the doctrinal lines drawn in insurance cases.

Insurance companies tell two different sets of stories about insurance at two distinct points in the insurance relationship. When marketing their services, insurance companies tell what I will call "sales stories." This first set of stories, drawn from insurance advertising, responds to the fears of dependency that are epitomized by *King Lear*. When handling claims, insurance companies tell a second set of stories, which I will call "claims stories." This second set of stories, drawn from fieldwork with adjusters and from insurance adjustment trade literature, stresses the need to protect the insurance fund from overreaching, as dramatized (perhaps overdramatized) by *King Richard III*. These two sets of stories evoke quite different visions of the insurance relationship. The continuing trouble of the courts in defining the obligations of the insurance relationship stems in part from this duality, which is also apparent in judicial opinions.[9] In the abstract at least, both visions are equally "right" (and just as equally "wrong").

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spokesmen and records of insurance policy drafting sessions as "stories" in arguing for horizontal "stacking" in continuous injury cases under a standard form comprehensive general liability policy).

7. *See, e.g.*, Irion v. Prudential Ins. Co., 765 F. Supp. 337, 338 n.2 (N.D. Tex. 1991) ("[T]his case can be summed up as follows: Plaintiff, at the inducement of Prudential, got herself a 'piece of the rock,' and now that it's time for the insurance company to pay, Prudential wants to take its rocks and go home."), *rev'd* 964 F.2d 463 (5th Cir. 1992); State Farm Fire & Casualty Co. v. Nicholson, 777 P.2d 1152, 1156 n.6 (Alaska 1989) ("It is noteworthy that the insurance company involved in this appeal promotes itself in national advertisements with the slogan, 'Like a good neighbor, State Farm is there.'"); D'Ambrosio v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 396 A.2d 780, 786 (Pa. Super. Ct. 1978) ("The insurer's promise to the insured to 'simplify his life,' to put him 'in good hands,' to back him with 'a piece of the rock' or to be 'on his side' hardly suggests that the insurer will abandon the insured in his time of need."), *aff'd*, 431 A.2d 966 (Pa. 1981); *see also* Marshal S. Shapo, *Advertising and the Liability of Product Sellers* (pt. 2), 8 Toxics L. Rep. (BNA) 477, 477 (Sept. 22, 1993) (describing how judges and lawyers use manufacturers' "image" advertising as a source of legal obligation in products liability cases). Of course, judges sometimes decide not to impose such obligations. *E.g.*, Rodio v. Smith, 587 A.2d 621, 624 (N.J. 1991) ("However persuasive, 'You're in good hands with Allstate' is nothing more than puffery.").

8. *See* Robert H. Jerry, II, *Remedying Insurers' Bad Faith Contract Performance: A Reassessment*, 18 CONN. L. REV. 271, 299, 298-99 (1986) (arguing that insurers "often emphasize" the effects of casualties and the "peace of mind" that insurance provides when "attempting to convince the consumer to purchase insurance"); ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 6.3, 635 & n.25 (student ed. 1988) ("[T]here are circumstances in which an insured's reasonable expectations may result from the conduct of the insurance industry as a whole. As for example, by similar advertisements of several insurance companies.").

9. *See infra* notes 77-96 and accompanying text.

Yet, the choice of lens can determine whether the insured in a particular case is seen as poor King Lear or wicked King Richard.

This conception of legal institutions as mediating between incompatible narratives that are both (or all) "true" is a profound, but by no means new, insight.[10] Identifying the sales and claims stories and their conflicting visions of the insurance relationship may help us understand the dynamics of insurance coverage litigation, but is unlikely to answer the hardest question: when to use which vision. Nevertheless, as I hope this Paper demonstrates, the exercise has more than mere academic interest.

We should consider this source of insight into the nature of the insurance relationship because the traditional sources—the standard form insurance policy, statutory and administrative provisions, and even modern insurance law doctrine—have not been enough. As the various approaches taken by contributors to this Symposium demonstrate, the traditional sources have not answered satisfactorily the remedies questions posed by insurance coverage cases: (1) when and why insureds who prevail in insurance coverage litigation should receive as compensation the "three-quarter loaf" that "normal" contract damages doctrine supplies; (2) when and why insureds should be fully compensated[11] for an insurance company's failure to pay or defend a claim; and (3) when and why insurance companies should pay damages even beyond that amount (*viz.*, punitive damages).

At present, most courts draw the line between (1) and (2)—between classical contract damages and complete compensation—by looking at the intent of the insurance company.[12] If the insurance company denied the claim in "good faith," the insured gets the three-quarter loaf; only if the insurance company denied the claim in "bad faith" does the insured get complete compensation (and in some cases not even then).[13] In this

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10. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 9 (1983) ("Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."); Nomi M. Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 582, 584 (1993) (addressing the paradox of liberal law's "tolerance for the intolerant" and the irreconcilable nature of liberal and fundamentalist claims on public education).

11. Full compensation includes attorneys' fees and compensation for emotional distress and other harms thought to run afoul of traditional contract doctrine. *See* E. Allan Farnsworth, *Contracts* § 12.8 n.3 (2d ed. 1990) (noting that a party injured by breach of contract "generally cannot recover costs of litigation"); *id.* § 12.17 (acknowledging a general rule denying recovery for mental distress resulting from breach of contract).

12. *See* Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REF. 1, 33-40 (1992) (surveying jurisdictions that recognize the tort of bad faith breach and describing the different standards of intent that trigger the tort).

13. *See id.* at 2-3 (noting that in bad faith cases insurers are exposed to damages beyond the traditional contract measures, including consequential damages for economic losses, emotional distress, and punitive damages).

Paper, I use the stories insurance companies tell to suggest why courts draw this intent-based line and also to question the damage rules typically applied on either side of that line. In the process, I provide one answer to at least the "when" portions of questions (1) and (2) above and one answer to both the when and why of question (3). I conclude that courts should award complete compensatory damages in the ordinary insurance coverage case and that some award beyond that amount is called for in the true "bad faith" case, as punishment for the intentional betrayal of the trust without which the insurance relationship cannot exist.

One could certainly reach the same doctrinal conclusions without paying attention to the stories that insurance companies and judges tell. Nevertheless, these stories help answer an important question that a contracts professor or appellate judge is sure to raise: "What is it about insurance that justifies this 'special' rule?" Or, put differently, "How can you limit the application of these arguments so that you are not calling for a revision of contract damages doctrine generally?"

My approach to insurance contract damages is so deeply grounded within the insurance stories that it should not threaten whatever goals are achieved by maintaining the three-quarter loaf rule for contract damages generally. Although the damages rule that I advocate is likely to have broader application beyond insurance cases, I make no such claim here, and my sources—the insurance stories—provide no basis for that claim. Extending this rule beyond insurance would require detailed analysis of other contractual relationships and a demonstration that those relationships involve comparable vulnerability and need. The stories that banks tell about banking, that automobile companies tell about cars, or that brokerage houses tell about securities, may help define the obligations that inhere in banking, automotive, or brokerage relationships, but the stories that insurance companies tell about insurance do not address those relationships.[14]

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14. My knowledge of these other commercial relationships is much less extensive than my knowledge of the insurance relationship. Furthermore, my method in this Paper does not require me to set forth the explanation that follows within this note. But because enough people have asked for a definitive statement of the "difference" between the insurance relationship and these other commercial relationships, I will explain what I think may be the differences between insurance and at least some other "bureaucratic goods" marketed using similar advertisements. *See* Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5, 17, 14-17 (1984) (explaining that a "bureaucratic good"—a good with a bureaucratic function—is a good which affects the actions of consumers). Those differences may be (1) the extreme nature of the "dependency dynamic," a dynamic which, as I explain in Part I, is marked both by a long delay between payment and performance and by a great disparity between the payment and the value of the performance; (2) the historical evolution of the insurance function that is sketched at *infra* note 62 and accompanying text; and (3) the tight link between current and future beneficiaries of the insurance contract which supports the idea, asserted in Part III, that the insured who prevails in an insurance coverage case will increase the value of the insurance company's promise to all of its insureds. My purpose in this Paper is not to explain what is unique about the insurance relationship, but rather to study that relationship by, among other things, closely examining the stories that insurance companies tell about what it is that they are selling.

Part I of this Paper presents the insurance stories. In the first set of stories—the sales stories—insurance companies promise complete protection from the risks addressed by any given line of insurance. In the second set of stories—the claims stories—insurance companies explain why it is that "complete protection" sometimes amounts to a little less; why it is, in other words, that some risks are *not* shifted to the insurance company.

Part II shows that judges already use the insurance stories in judicial opinions. What I call the "insurance as contract" claims story is clearly the baseline, but judges use the sales stories too. The judicial versions of the sales stories appear in two sets of cases: those that use doctrines establishing rights "at variance with," to use Robert Keeton's formulation,[15] or supplemental to, standard form insurance policy provisions; and those that punish insurance companies for acting in bad faith.

Part III analyzes the damages available in the ordinary insurance case through the lens of the insurance stories. Both the sales stories' promise of complete protection and the claims stories' explanation of the limits of that promise call for complete compensation in the ordinary insurance case. The sales story side of this equation focuses on the real promise of the insurance relationship, the promise to "be there" in a time of great vulnerability and need. The claims story side focuses on the overriding theme of insurance as a public trust. Just as the insurance company acts on behalf of the public trust when it denies an illegitimate claim, insureds, too, act on behalf of that trust when they press the insurance company to expand its recognition of what is a covered claim. Good faith late payments are a necessary result of determining insurance companies' obligations under their contracts, and the harm insureds suffer as a result of those late payments is part of the cost of determining those obligations. That cost is appropriately borne by insurance companies, who, as the claims stories emphasize, stand in the shoes of the future beneficiaries of those contracts.

In concluding, I express some support for punishing the betrayal that the bad faith case represents. I also stress, however, that providing complete compensatory damages in the ordinary insurance case should reduce the importance of the resulting punitive damages line in most insurance coverage litigation.

I. Insurance Stories

I will begin with a highly compressed (and admittedly functionalist) restatement of some basic aspects of insurance that underlie the Lear and Richard tensions in the insurance relationship: Insurance is a means by

15. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 961 (1970) (explaining the reasons for the variance in insurance law between policy provisions and policyholders' rights).

which individuals and organizations share the risk of misfortune. We each pay a little (sometimes not so little) so that there will be money to pay for the losses of the unfortunate few. This arrangement involves the exchange of money for a promise, the promise to be paid in the future in the event of a loss. Specialized organizations—usually insurance companies—fill this function, collecting premiums, holding the funds for the benefit of insureds, and paying claims. These organizations strive to make money in this process by collecting more money in premiums than they pay out and by investing the money during the lag time between collection and payout. Because of the importance of insurance companies' claims-paying function, there is an elaborate insurance industry and governmental apparatus for ensuring that insurance companies have enough money to pay (and do pay) those who are entitled to be paid. The major role that the courts play in this apparatus is to enforce insurance companies' promises (including, of course, defining the scope of these promises).

There are inescapable tensions in the relationship between insurance companies and their insureds. Consider first the tension within the money-for-promise arrangement. All that an insurance company has to sell is its promise to pay. Yet, all other things being equal, the better an insurance company is at avoiding that promise, the more money it makes.[16] The power that the money-for-promise arrangement gives an insurance company after a loss and the opportunity an insurer has to use that power are best illustrated by an example:

> Some time ago, you bought a disability insurance policy from Good Friend Insurance Company. As you understand the policy, Good Friend will pay you seventy-five percent of your annual income if you are unable to practice your profession because of a disability. Since then, you have paid your premiums regularly.
>
> Last week, you learned that you had a progressive illness that could result in the permanent loss of your vision over the next year or so. The doctor told you about a clinic in San Francisco that has, on an experimental basis, treated other people with your condition, using a treatment that takes a year to complete and requires you to be in San Franciseo the entire time. The clinic estimates a fifty percent chance of retaining a functional amount of vision if you begin the treatment immediately.

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16. This too-neat formulation obscures other important ways insurance companies strive to increase their profits. The first and most obvious way is by developing new insurance services, packages, and marketing plans to increase the amount of insurance premiums that the company collects. A second, less obvious way is by identifying people who are unlikely to make a claim, thereby reducing the likelihood of having to make good on the promise to pay. The existence of these other ways to improve profits does not, however, eliminate the incentive to withhold or delay payment at the time of claim.

> When you called your disability insurer to make arrangements for payments during the time that you would be unable to work because of the treatment, the claims representative demurred. She explained that, according to the policy, the disability payments would not begin until you were unable to work *because of an actual disability*. Because you proposed to stop working so that you could obtain a treatment (and an unproven one at that) that may prevent a *potential disability*, you were not yet entitled to any payments.
>
> What do you do? You cannot shop around for a new disability policy, and going to court will not get you the money in time for the treatment in San Francisco.

As this hypothetical illustrates, the insurance relationship is a relationship of dependence. Before deciding which insurance company to choose, you are a free agent; once you have a claim, you depend on the company you chose to honor its promise. This dependence and the incentives it creates are what make King Lear a potential protagonist in any insurance case.

Consider next the tension between the insurance company's role as trustee of the insurance "trust fund" and its role as protector of individual insureds. Payment is almost always in the interest of individuals who have suffered losses, but in the aggregate those losses may overwhelm the insurance trust fund. The insurer insolvencies following Hurricane Andrew provide a ready example.[17] An insurance company that is too free with the fund today may jeopardize the future well-being of other insureds who have relied on its promise, while an insurance company that holds on to that fund too tightly devalues the worth of its promise to those others. Thus, the insurance relationship is also a relationship of balance in which the insurance company mediates between those currently in need and those who may be in need in the future.

Consider finally the tension inherent in any situation in which one person's losses are covered by another.[18] Because it is the insurance

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17. *See* TOM GALLAGHER, FLORIDA DEP'T OF INS., HURRICANE ANDREW'S IMPACT ON INSURANCE IN THE STATE OF FLORIDA 22 (1993) ("Andrew directly caused six insurer insolvencies, affecting an estimated 88,000 policyholders.").

18. The term "moral hazard" is sometimes used in connection with this tension. Although moral hazard as defined in economic theory is an interesting and sometimes useful concept, I avoid using the term except when referring to economic literature. The problem with the term is twofold. First, the overtones of the label *moral* hazard are troubling, given the structural nature of the phenomenon economists use it to describe. *See* Mark V. Pauly, *The Economics of Moral Hazard*, 58 AM. ECON. REV. 531, 531 (1968) ("[T]he problem of 'moral hazard' in insurance has, in fact, little to do with morality, but can be analyzed with orthodox economic tools."); *cf.* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 942 (1963) (discussing the normative aspects of the label "optimality theorem" and introducing the term "moral hazard" into neoclassical economic discourse). Second, the economists' definition of moral hazard does not map the use of the term in the insurance literature or in judicial opinions. *Compare* Steven Shavel, *On*

company that pays, an insured who could prevent or minimize a loss may not do so: the owner of a run-down building may prefer that it burn down; the owner of a house ravaged by a hurricane may be indifferent to what a contractor charges to rebuild. In some circumstances, this reduced incentive to exercise care can lead to outright fraud: arson in the first instance, kickbacks in the second. Thus, the insurance relationship includes the possibility of exploitation by insureds. It is this possibility and the resulting need to limit the individual's claim against the collective resources that make King Richard a potential protagonist in any insurance case.

Not surprisingly, insurance companies stress different aspects of the insurance relationship in different contexts. When selling insurance, companies address the dependent nature of the relationship, palliating the fears that dependency arouses in prospective insureds. When paying claims, on the other hand, insurance companies stress the need to balance and limit overreaching. These sales and claims stories "work" in their place because each corresponds to core aspects of insurance. But because the two sets of stories stress different core aspects, their visions of the insurance relationship conflict.

A. Sales Stories: Trusting the Insurance Relationship

Most people can recite a few of the more salient insurance advertising slogans. Examples include: "You're in good hands with Allstate";[19]

Moral Hazard and Insurance, 93 Q.J. ECONOMICS 541, 541 (1979) ("Moral hazard refers . . . to the tendency of insurance protection to alter an individual's motive to prevent loss.") *with* Pedersen v. Life of Mid-Am. Ins. Co., 164 N.W.2d 337, 340 (Iowa 1969) ("'Moral hazard' means any personal habit or activity of the insured that would cause him to be something less than a standard risk for insurance.") *and* EDWIN J. FAULKNER, HEALTH INSURANCE 327 (1960) ("Moral hazard reflects the hazard that arises from the failure of individuals who are or have been affected by a contract of insurance to uphold the accepted moral qualities.") *and* CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS 29 (1985) ("[In insurance literature,] [m]oral hazard is generally taken to be a character trait existing prior to insurance coverage . . . .") *and* JOHN D. LONG, ETHICS, MORALITY AND INSURANCE: A LONG-RANGE OUTLOOK 40-45 (1971) (equating the concept of moral hazard with the risk of unethical behavior by the insured) *and* G.F. MICHELBACHER, MULTIPLE-LINE INSURANCE 220 (1957) ("Moral hazard is every deviation from correct human behavior that may pose a problem for an insurer."). Thus, the use of the term "moral hazard" in insurance law is ripe for further study. *See* Tom Baker, The Genealogy of Moral Hazard (Oct. 1994) (unpublished manuscript, on file with the *Texas Law Review*) (describing the adoption of the "moral hazard" concept beyond the field of insurance into the larger context of the rhetoric of economics in law).

19. *See* NEWSWEEK, Sept. 6, 1993, at 6 (advertisement for Allstate Insurance). [The print advertisements cited by Professor Baker in this Paper were verified to the extent possible using magazines available through the various libraries at The University of Texas at Austin. However, modern technology has allowed a number of magazine publishers to distribute regional editions, each containing different advertisements specifically selected for the regional markets. A researcher in a different region, therefore, may be unable to find a particular advertisement using the citation appearing in this Paper. The *Texas Law Review* will maintain a file of all print advertisements cited in this Paper.—Eds.].

"Like a good neighbor, State Farm is there";[20] "Nationwide is on your side";[21] "A piece of the rock";[22] and my favorite, "Get Met. It pays."[23] That we can recall these slogans so easily is no surprise. The insurance industry, and these companies in particular, are among the largest volume advertisers in the United States.[24]

What is so interesting about these slogans, and about insurance advertising generally, is how directly they address the dependency dynamic in the insurance relationship. A recent magazine advertising campaign for life insurance with the theme of "Promises" is particularly illustrative. On the left page of each two-page spread is a beautiful, informal picture of a man or woman with children. The right page is mostly white space, with three lines of text in the middle of the page and two smaller lines of text at the bottom with the company logo and registered slogan, "We help you keep your promises."[25]

Throughout the series, the three lines of text opposite the picture each begin with the words "A promise." Here is a representative example that appears opposite a picture of (presumably) a father with his three little boys:

> A promise never to say, "Chris, I mean Bobby, I mean Tim."
> A promise matching sailor suits will never come near your closet.
> A promise to be there for you. And you. And you.[26]

In each ad, the text at the bottom of the page reads:

> Nothing binds us one to the other like a promise kept. Nothing divides us like a promise broken. At MassMutual we believe in keeping our promises. That way all the families and businesses that rely on us can keep theirs.[27]

No approach could be more direct: You need insurance because of the promises you have made in life. You should buy that insurance from us

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20. *See* PARENTS, Sept. 1994, at 60 (advertisement for State Farm Insurance Company).

21. *See* S. LIVING, July 1994, at 6 (advertisement for Nationwide Insurance).

22. *See* BUS. WK., June 17, 1972, at 107 (advertisement for Prudential Insurance Company).

23. *See* NEWSWEEK, Jan. 31, 1994, at 34-35 (advertisement for Metropolitan Life Insurance Company).

24. *See* Kate Fitzgerald, *A New Policy: Life Insurers Tout Strength Amid Bad Press*, ADVERTISING AGE, Sept. 2, 1991, at 3 (describing the large advertising budgets of the major insurance companies); Joe Mandese, *Top TV Advertisers Beef Up Spending*, ADVERTISING AGE, Mar. 11, 1991, at 4 (reporting that the top 10 network television advertisers increased spending 14% from 1989 to 1990); *Top 100 Entry Price: $104 Million in Ads*, ADVERTISING AGE, Sept. 26, 1990, at 61 (Chart: Top 25 Network Radio Advertisers) (ranking State Farm Mutual Auto Insurance as the twenty-second highest national spender in network radio advertising for 1989).

25. *E.g.*, FAMILY FUN, Nov.-Dec. 1992, at 4-5 (advertisement for Massachusetts Mutual Life Insurance Company).

26. *Id.* at 5.

27. *Id.*

because "we believe in keeping our promises."[28] How good is our promise? As good as the promise that an ideal parent makes to a child. The insurance relationship may place you (or your family or business) in a dependent position, but there are other relationships of dependency in life that work out, and this one will too.

Many other advertising campaigns tell a similar story of trust and dependence. Allstate Life Insurance Company's "good hands" campaign, which builds on powerful images of God and father, is one.[29] Others include Travelers Insurance Company's "taking care of one another" campaign,[30] State Farm's "good neighbor" campaign,[31] Nationwide Mutual Insurance Company's "on your side" campaign,[32] and Cigna Property and Casualty Insurance Company's new "a business of caring" campaign.[33] A recent State Farm Life Insurance Company print campaign targeted at mothers is particularly direct. Superimposed over a picture of a mother holding her daughter, the advertising copy tells a story about a State Farm agent who is also a mother. The copy concludes, "So when it comes to life there are two things you can always count on. A mother's love and your State Farm agent."[34] What do our images of good neighbors, mothers, fathers, and God have in common? Much more than simply having been pressed into service by Madison Avenue on behalf of the insurance industry.

Other insurance advertising campaigns address the theme of dependency and keeping promises indirectly. One group of advertisements touts insurance companies' financial stability and, thus, their ability to keep promises. The Prudential Insurance Company of America's "rock" symbol is perhaps the most recognizable example of the financial stability advertisement: "In a changing world, one thing remains rock solid."[35] Prudential recently began making the point even more directly, promising that "Peace of mind . . . comes with every piece of the rock."[36]

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28. *Id.*

29. *See, e.g.*, NEWSWEEK, Oct. 4, 1993, at 9 (advertisement).

30. *See, e.g.*, FORBES, July 19, 1993, at 179 (advertisement); *see also, e.g.*, BUS. INS., Sept. 6, 1993, at 9 (advertisement for Travelers Insurance Company) ("With 129 years in the insurance business, we know about lasting relationships.").

31. *See, e.g.*, NEWSWEEK, Nov. 15, 1993, at 60 (advertisement). Farmers Insurance Group combines the familiar images of retirees playing golf and hard-working farmers to convey its message that it is a "company you can trust." *See, e.g.*, NEWSWEEK, July 26, 1993, at 26-27 (advertisement) ("Up at dawn, out till last light. It's a Farmers Life.").

32. *See, e.g.*, TIME, July 25, 1994, at 70 (advertisement) ("Nationwide is on your side.").

33. *See, e.g.*, NEWSWEEK, Nov. 15, 1993, at 5 (advertisement).

34. *E.g.*, PARENTS, June 1993, at 121 (advertisement).

35. *See, e.g.*, NEWSWEEK, Nov. 2, 1992, at 16-17 (advertisement).

36. *E.g.*, Elizabeth Jensen, *Ad Notes*, WALL ST. J., Mar. 26, 1993, at B7 (describing Prudential's "peace of mind" television campaign). For other examples, see FORBES, July 19, 1993, at 111 (advertisement for American Family Life Assurance Company) (employing the slogan "safest insurance

A second group of indirect campaigns stresses the company's commitment to traditional values, the link to the golden past when people could be trusted. One such campaign comes from the Cincinnati Insurance Companies: "Quality . . . it still holds meaning for us."[37] Another campaign comes from Wausau, whose "Wausau Story" may be the longest running example of this type of advertising campaign. As Wausau's former advertising director explains, the Wausau Story "draw[s] heavily upon the attributes of our home town, steeped in Midwestern values and small town friendliness."[38] A more recent example comes from a Mutual of America print ad with the heading "Our Commitment" and the following text:

> The Spirit of America. It's determination and dedication. It's people and principle. It's savvy. And it's sensitivity. The Spirit of America.
>
> . . . .
>
> We share it as a company and a country. A commitment to our policyholders' futures. The Spirit of America.[39]

Like the ads addressing insureds' dependence, this "values" advertising lays claim to a world beyond self-interest, a community in which people take care of each other without regard to the precise contribution each has made.

A final group of advertising campaigns plays on the images contained in rival advertising. "[L]eadership," says Unum Corporation, "is more than just providing a handful of policies and a promise to be there."[40] Leadership is "tailoring coverage to fit people's lives . . . [and] making sure every conceivable aspect of a disability plan is taken care of."[41] Mutual of Omaha takes a similar approach with the theme "Protecting you in ways no one ever thought of before."[42] Instead of ideal parents or good neighbors, these advertisements feature wise professionals. But the message is still the same: You can depend on us.

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company in America"); FORBES, Sept. 28, 1992, at 81 (advertisement for ITT Hartford Group, Inc.) ("In these uncertain times, policyholders and investors seek financial strength and stability."); J. AM. SOC'Y CLU & CHFC, Nov. 1993, at 13 (advertisement for Mutual Life Insurance Company of New York) ("[F]or 150 years, we've been helping people keep their futures secure."); NEWSWEEK, Jan. 31, 1994, at 34-35 (advertisement for Metropolitan Life Insurance Company) ("Our financial strength is legendary."); NEWSWEEK, Oct. 18, 1993, at 68-69 (advertisement for Transamerica Corporation) ("The power of the pyramid is working for you.").

37. *E.g.*, TIME, Mar. 29, 1993, at 66 (advertisement).

38. ROBERT W. GUNDERSON, THE WAUSAU STORY 193 (1992).

39. *E.g.*, TIME, July 19, 1993, at 55 (advertisement).

40. *E.g.*, SPORTS ILLUSTRATED, July 12, 1993, at 55 (advertisement).

41. *Id.*

42. *See, e.g*, NAT'L GEOGRAPHIC, Sept. 1992, at 145 (advertisement).

It is easy to parody insurance advertising and to belittle the promise "to be there." After all, insurance companies are not mothers, fathers, neighbors, teammates, heroes, demigods, rocks, pyramids, repositories of traditional values, or any of the myriad of other images that Madison Avenue employs. Yet, there is something to the story that Madison Avenue tells. Insurance is the real safety net for middle America.[43] When Hurricane Andrew hit southern Florida in 1992,[44] when the winter storm of 1993 blanketed the East Coast,[45] and when the fires roared through Malibu in the fall of 1993,[46] insurance companies for the most part did take care of their policyholders. Children are educated with the proceeds of life insurance; paraplegics are rehabilitated with the assistance of health and disability insurance; businesses are saved by liability insurance. "A world beyond self-interest" may be an exaggeration, but there is no denying that these examples are remarkable achievements of people taking care of one another. In no small measure, insurance companies often deserve the trust that is placed in them.

B. Claims Stories: Limiting the Insurance Relationship

If the sales stories stress the trust without which the insurance relationship could not exist, the claims stories emphasize the limits of that relationship. The claims stories enable those handling insurance claims to say "no" to the insurance claimant, and they also enable claimants to accept that "no" without losing the trust in the insurance company that the sales stories attempt to foster.[47]

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43. As a result, of course, a great many people, especially the poor, are left out. *See* Tom Baker & Karen McElrath, Inequality and the Private Safety Net: The Home Insurance Example (Oct. 1994) (unpublished manuscript, on file with the *Texas Law Review*) (concluding that disasters increase inequality because members of historically disadvantaged groups purchase less insurance than the comparatively advantaged).

44. *See* GALLAGHER, *supra* note 17, at 4-5 (1993) (describing insurance adjusters' efforts to reach insureds and to process their claims expeditiously).

45. *See* John N. Maclean, *Insurers' Quake, Cold Costs Rise*, CHI. TRIB., Feb. 4, 1994, at Bus. 1, *available in* Westlaw, CHITRIB database (discussing the economic ramifications on insurers of the Eastern freeze of 1993); Bill Montague, *Disasters Slam Insurance Firms*, USA TODAY, Mar. 1, 1994, at B1, *available in* Westlaw, USATDY database (pointing out that, although the winter storms were "a financial catastrophe for the insurance industry," all proper claims were being paid); Dee DePass, *Quake, Storms to Cost the St. Paul*, STAR TRIB. (Minneapolis, Minn.), Feb. 11, 1994, at D3, *available in* Westlaw, STARTRIB database (observing that, while the eastern storms were costing the insurance industry a great amount, it was financially secure).

46. *See* Judith Schroer, *Calm in a Firestorm: Insurance Adjusters Bring Relief*, USA TODAY, Nov. 10, 1993, at B1, *available in* Westlaw, USATDY database (reporting that insurance companies opened temporary disaster offices to deal with their insureds' claims as the fires continued to burn).

47. *Cf.* Benjamin Horton, *Column XXXVII—Let It Be Fun*, INS. ADJUSTER, May 1971, at 10 (explaining that in a "no coverage" situation, the goal of the insurance adjuster is the "handling of this demand or request . . . so effectively that [the] insured voluntarily withdraws [the] claim while maintaining complete good will and respect for both company and adjuster").

Advertisements touting insurance companies' reliability, responsibility, and concern are everywhere. In contrast, insurance companies rarely advertise their limits. They do, however, need to teach their limiting stories to industry newcomers. Thus, insurance trade journals and textbooks are ready sources of these stories. Another helpful source is field research conducted with insurance adjusters, such as Ross's study of automobile accident claims[48] and my ongoing study of Hurricane Andrew property damage claims.[49]

Somewhat arbitrarily (and certainly preliminarily), I have grouped these claims stories into three overlapping sets. The first set stresses the contractual nature of insurance and the insurance company's responsibility to define (and enforce) who and what is encompassed within the protection offered by the contract. The second set emphasizes the responsibility of the insurance company to future claimants: because the insurance company has to be there for people tomorrow, it must limit claims today. The third set highlights the corrupting potential of insurance and the responsibility of the company in rooting out that corruption: because insureds do not risk their own money, those who make claims are irresponsible and often fraudulent. The unifying image that weaves through all of these claims stories is the insurance company as the guardian of the public trust.

1. Insurance as Contract: The Responsibility to Define and Enforce Limits.—The insurance-as-contract claims story is a deceptively simple one. It says that, despite what policyholders might think, insurance is not just some "thing" one buys. Rather, insurance is a *contract* between an insurance company and its policyholder, and the terms of that contract are spelled out in the standard-form insurance policies and supplemented, when necessary, with the standard operating procedures of the insurance company. Insurance is complicated because the forms are long and difficult to understand; but insurance is also clear once you learn the forms. While there are gray areas like valuing property damage and determining its cause, the insurance contract itself is black and white.[50]

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48. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (1970) (analyzing the results of a study in which the author interviewed 67 insurance adjusters and observed them in claims negotiations).

49. Following Hurricane Andrew, I began interviewing claimants and insurance adjusters and observing insurance claim mediations as part of an effort to understand insurance law in action. As a condition of all the interviews, I agreed to maintain the confidentiality of the subjects.

50. It is important to distinguish between the insurance-as-contract claims story, on the one hand, and both the "law on the books" and the "law in action," on the other. The insurance law applied by the appellate courts—the "law on the books"—differs significantly from that of the insurance law of the insurance-as-contract claims story. *See infra* Part II. Perhaps less obviously, the contract law applied by adjusters—the "law in action"—also differs from that of the insurance-as-contract claims story. *See* PIERRE BOURDIEU, THE LOGIC OF PRACTICE 103 (Richard Nice trans., 1990) ("[T]he rule

The job of the adjuster is to apply the contract to the claim. As Benjamin Horton, former president of the National Adjuster Training School, wrote,

> [T]he adjuster did not prepare the contract and should only think in terms of interpreting and implementing it. He should have no desire to either expand or reduce the promises of the company. The primary goal of the claimsman in first party situations should be to assist the insured in submitting a proper claim according to the terms of the policy. It is the function of the underwriters to determine the coverage to be afforded. The adjuster works with the contract which was provided rather than that which he believes should have been in existence.[51]

This story teaches adjusters that insureds typically are not familiar with the precise terms of the insurance policy, and may not even realize that insurance involves a contract between the insured and the insurance company. Thus, confusion and resistance to the concept are to be expected:

> What then causes the problems? The problems and the causes are age old. Probably the basic cause, at least as far as a claimant is concerned, is lack of knowledge of what he or she is covered for

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. . . is the obstacle *par excellence* to the construction of an adequate theory of practice."). While it is very difficult to describe with any rigor the "law in action" of the insurance adjuster, that law is far less mechanical than the claims story would suggest. Adjusters have significant discretion to deviate from, and in fact do deviate from, the formal rules that nominally govern them. This discretion is similar to that of "street-level bureaucrats." public service workers who interact directly with citizens. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13 (1980) (describing the ability of policemen, judges, teachers, and prison guards, among other professionals, to exercise "considerable discretion in determining the nature, amount, and quality of benefits and sanctions provided by their agencies"). For example, one adjuster told me that he deviated from company policy disallowing claims if it made economic sense to pay the claims. He said: "[If] I have a $500 claim for something that's not covered, I'm going to pay it to avoid the $1000 legal expense." Interview with anonymous independent adjuster, at the Florida Department of Insurance Mediation Center, Homestead, Fla. (July 22, 1993) (on file with author); *see also* ROSS, *supra* note 48, at 204-09 (reporting in a study of the automobile insurance industry that adjusters frequently pay small but invalid claims despite the company's official policy not to do so); William C. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 141 (reporting that, as a practical matter, automobile manufacturers' products liability claims were handled on a strict liability basis even before the rise of strict liability in consumer protection law).

51. Benjamin Horton, *Human Relations?*, INS. ADJUSTER, Dec. 1970, at 12 [hereinafter Horton, *Human Relations?*]; *see also* Ben Horton, *Has the Thrust Changed?*, INS. ADJUSTER, Oct. 1971, at 10, 10 ("This idea involves a careful study of the policy and any and all forms and endorsements with the end in mind that the adjuster is better informed than any other single person concerning the contents of the contract."); Benjamin Horton, *Coverage Under Property Policies*, INS. ADJUSTER, Mar. 1970, at 8, 36 ("It is necessary on every assignment that the decision be made—whether consciously realized or not—as to whether or not coverage for the particular loss is provided for by the individual contract under which [the] claim is filed.").

> or entitled to when they suffer a loss. It is very rare to find a policyholder in a first party loss situation that knows what the policy covers them for. It is equally as rare to find one that has read the policy. Actually the policy is a contract and the insured should be aware of the terms of the contract. Many insureds will make the outright statement that they don't need to understand the contract—that's why they have an agent.[52]

The job of the adjuster, then, is not only to adjust the loss, but also to educate the insured about the nature of insurance and the limits of the contract:

> I tell them that if we covered every conceivable risk, premiums would be sky high, so we have to except certain things. No insurance company in the world covers everything. Then I show them where in the contract it says what the company will and won't pay for.[53]

First and foremost, the job of the adjuster is to enforce the contract. Those insureds who persist in the face of the adjuster's efforts at education are to be vigorously resisted. "Millions for defense," the slogan goes, "but not one cent for tribute."[54]

2. The Responsibility to Future Claimants.—In explaining the denial of claims, insurance adjusters confront the reality that the insurance company keeps the money that the claimant wants. All the claims stories address this aspect of the tension in the money-for-promise arrangement, but none so directly as those that emphasize the insurance company's responsibility to future claimants.

The extreme form of this story asserts that wrongly paid claims threaten the very existence of insurance. One adjuster explained how he would respond to a claimant who challenged a denial of coverage:

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52. Albert Conte, INS. ADJUSTER, Aug. 1974, at 40 (letter to the editor); *see also* Robert Kopta, *Just Reflecting*, INS. ADJUSTER, Dec. 1974, at 5 ("Those who work in the claims field are acutely aware of the lack of knowledge of the average consumer with respect to even the basics of insurance.").

53. Interview with anonymous in-house adjuster, at the Florida Department of Insurance Mediation Center, Homestead, Fla. (July 1, 1993) (on file with author); *see also* Horton, *Human Relations?*, *supra* note 51, at 13 (describing the clash between the "cold blooded terminology" of the insurance policy and the expectations of the policyholder, who "probably was not previously aware of the fact that an insurance contract, just like all others, places obligations on both parties").

54. Robert G. Harper, Toast at Banquet for John Marshall (June 18, 1878), *in* FAMILIAR QUOTATIONS 416 (Emily M. Beck ed., 15th ed. 1980); *cf.* Richard L. Neumeier, *Serving Two Masters: Problems Facing Insurance Defense Counsel and Some Proposed Solutions*, 77 MASS. L. REV. 66, 79 (1992) (noting that ethics rules and case law do not provide "that an insured or defense counsel may demand that the insurer spend millions for defense but not a penny for tribute"). An independent adjuster put it as follows: "Millions for defense, not one penny we don't owe." Interview with anonymous independent adjuster, in Coral Gables, Fla. (June 8, 1993) (on file with author).

> [F]ortunately, most insurance companies are solvent—and I'm sure you'll agree that that's the way we want to keep them. The only way we can do this is to provide for fair and equitable payment of all losses and claims. If a company overpays its losses, it will fail. I'm sure you wouldn't appreciate having a loss or claim that couldn't be paid because the company had gone broke, would you?[55]

An insurance company president provided a similar explanation in an address to adjusters, stating that the adjuster's role is to

> explain that we are in the business to pay claims, but that this business can survive only so long as those payments are fair, reasonable, and just. That attempts to exaggerate or inflate claims can lead only to higher insurance costs or the ultimate collapse of this man-made system.[56]

A more common version of the story highlights the less dramatic link between claims payments and insurance premiums. For example, as I noted in describing the educational role of the adjuster, one in-house adjuster explained how she responds to insureds who assert that they should be paid for an excluded loss: "I tell them that if we covered every conceivable risk, premiums would be sky high, so we have to except certain things."[57] Both versions of the "responsibility to other claimants" story nicely obscure the insurance company that keeps the money and highlight instead a public that wants affordable insurance. The "fine print" of the insurance "contract" protects not the insurance company, but the premium-paying public.

3. The Immoral Insured.—

> [T]he normally decent, law-abiding American . . . , if left to his own devices, "has a little larceny in his soul."[58]

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55. *Winning Replies: Policyholders' Complaints Answered at Chicago*, INS. ADJUSTER, May 1970, at 38 [hereinafter *Winning Replies*] (quoting an award-winning response to a typical policyholder complaint about high premiums).

56. Tom O'Day, *Just Reflecting*, INS. ADJUSTER, June 1969, at 5 (quoting Howard A. Baker, Address at the National Association of Independent Insurance Adjusters Annual Convention (May 1969)).

57. Interview with anonymous in-house adjuster, *supra* note 53. As my use of this same statement in describing the insurance-as-contract claims story should make clear, the claims stories are interrelated and overlapping. For another story demonstrating the link between claims and premiums, see *Winning Replies*, *supra* note 55, at 38 ("Handling an excluded loss is always unpleasant, but I'm sure you understand that a policy, like any business contract, has to have some limitations. Otherwise, the premium would be prohibitive." (quoting an award-winning response to a typical policyholder complaint about high premiums)).

58. Tom O'Day, *Just Reflecting*, INS. ADJUSTER, Apr. 1969, at 5 (quoting George M. Lynch, Jr., Address at the Mutual Loss Managers' Conference (1969)).

> And really, people can't see it as anybody's money. The insurance company and the federal government—people like that—they are fair game where the public is concerned.[59]

The story of the immoral insured teaches that the role of the "adjuster at the loss" is that of the "'cop on the corner' . . . [,] the best deterrent to overpayment."[60] Or, to put it even more succinctly, "It's a dirty job, but somebody has to keep them honest."[61] The story of the immoral insured complements the stories that stress the insurance company's responsibility to future claimants. Insurance companies deny claims, not only because paying excluded claims threatens the public interest, but also because the claims are not worthy of payment. As such, the story of the immoral insured is a permutation of the archetypal story about the depravity of those who threaten the public interest (with "public," of course, being defined by the narrator).

The link between the two sets of stories is made explicit in this account by a claims manager from American Family Insurance Group:

> Alertness to the possibility of fraud is one of the basic ingredients in being a claimsman . . . .
>
> "Unjust claims under liability coverage are resisted, even though they may be small. . . . We have an obligation to the public and to our policy holders to detect fraud and resist fraudulent claims" . . . .[62]

Therefore, a central part of the job of an adjuster is checking facts and

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59. Interview with anonymous independent adjuster, *supra* note 54; *see also* Robert Kopta, *Just Reflecting*, INS. ADJUSTER, Jan. 1970, at 5 ("As virtually everyone—particularly claims personnel—knows, the insurance company is 'fair game.'").

60. O'Day, *supra* note 58, at 5 (quoting George M. Lynch, Jr., Address at the Mutual Loss Managers' Conference (1969)); *see also* ROSS, *supra* note 48, at 45 ("The adjuster typically believes that few people cut false claims from whole cloth, but that nearly everyone exaggerates his loss. This exaggeration is expected, and the adjuster sees his job as being to reduce the valid claim to an appropriate size.").

61. Michael H. Boyer, *Some People are Dishonest*, CLAIMS, Oct. 1993, at 9, 10 (letter to the editor); *cf.* SAMUEL MARSHALL, TREATISE ON THE LAW OF INSURANCE 685 (1805). Although less pessimistic about the frequency of fraudulent claims, Marshall was determined that those who seek to defraud insurance companies should be unsuccessful in their efforts:

> Where a loss has happened, and there is no colour to suspect any unfair practice on the part of the insured, I think the offices ought not to content themselves with being merely just: They ought to be generous and liberal towards a fair sufferer. But where there is any reasonable ground to suspect fraud, it is to be hoped that the managers of no office will, from any false notion of generosity, or any wish to acquire popular favour, so far forget what they owe to the public, as well as to their own characters, as to suffer the claim to be satisfied, without the most scrupulous investigation.

Id.

62. *Where Attorneys' and Adjusters' Methods Differ*, INS. ADJUSTER, Jan. 1969, at 24 (quoting Bert Hutchison, Milwaukee branch claims manager, American Family Insurance Group).

looking out for fraud, an effort that benefits not only the insurance company but also those in the insurance pool.[63]

The story of the immoral insured plays an important role in the self-definition of the adjuster. Without the story, the adjuster would be a clerk; with the story, the adjuster is a detective. As Benjamin Horton noted,

> [e]very adjuster likes to tell success stories, that includes me. My favorite ones center around those occasions where I have been involved with fraud. There are few thrills greater in loss work than to spot a crooked claim, investigate from that standpoint, prove the fraud and make it possible for the company to avoid payment.[64]

While the image of the insurance adjuster as detective may have been more salient a generation ago,[65] it still is an important archetype. In my interviews with adjusters, their pride in catching fraudulent claimants is evident, as is their conviction that a great deal of exaggeration, or "soft fraud," exists, about which they can do nothing.[66]

The story of the immoral insured also provides a backstop for the insurance-as-contract claims story. Adjusters hear the sales stories too, and they confront insureds' expectations on a daily basis. In that sense, adjusters live the conflict between the claims stories and the sales stories. The presumption that many insureds are exaggerating their claims provides comfort to the adjuster who denies or reduces a claim.

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63. *See* Robert Kopta, *Just Reflecting*, INS. ADJUSTER, Feb. 1974, at 5 ("In large measure verifying the facts is a protection for all insureds to prevent payment of false or excess claims. Even a beginning student of insurance will recognize that rates and premiums will be elevated by over payment [sic] of claims.").

64. Horton, *supra* note 47, at 10.

65. For a time in the 1960s, *Insurance Adjuster* ran a regular feature on fictional fraud cases that featured the insurance adjuster as detective. *See, e.g.*, *The Case of the Injured Jaguar*, INS. ADJUSTER, Apr. 1969, at 59. Advertisements for adjusting services from that time featured men in trench coats, fedoras, and other accouterments of that generation's view of the detective. *E.g.*, INS. ADJUSTER, Apr. 1969, at 12 (advertisement for Scott Wetzel Company); INS. ADJUSTER, May 1969, at 19 (advertisement for Scott Wetzel Company). A fictional claims manager in a 1944 motion picture described adjusters ("claims men") as "a doctor and a bloodhound and a cop and a judge and a father confessor all in one." DOUBLE INDEMNITY (Paramount 1944) (relating the tale of a shifty insurance salesman and a beautiful woman who become involved in a scheme to kill the woman's husband and cash in on his insurance policy).

66. The sense of frustration that this conviction engenders has long been used to justify an alleged reluctance to pay claims. As Samuel Marshall noted nearly 190 years ago,

> With us, if there are a few underwriters, who, under the guidance of ill advisers, sometimes set up unworthy objections, there are many who are the victims of their own good faith and easy credulity . . . . The most cautious find it extremely difficult to escape the snares which knavery prepares for them. No wonder, then, if they are sometimes tempted to make captious exceptions, when it is considered that they can only see with the eyes of the insured, that, in general, they can only defend themselves by such papers, and other scraps of evidence as they can obtain from the same quarter; and that, with all the precautions they can employ, they often pay what they might justifiably dispute.

MARSHALL, *supra* note 61, at 40.

C. *Sales Stories Versus Claims Stories*

The longevity of the sales stories suggests that insurance marketers believe the stories help sell insurance, and the small percentage of litigated insurance claims[67] is at least consistent with the theory that the claims stories persuade claimants to acquiesce in the insurance law of the adjuster. While it is impossible to be certain why the stories work, their responsiveness to the fundamental tensions in the insurance relationship must play a part. By linking insurance to other comfortable relationships of dependency, the sales stories soften the "Lear" tensions in the money-for-promise arrangement.[68] And, by characterizing the insurance adjuster who says "no" as the guardian of the public trust, the claims stories mediate the tensions between present and future claimants.

Nevertheless, any business that sells itself as a good neighbor and then acts like a suspicious and parsimonious trustee is bound to disappoint expectations, even among those who consciously discount the sales stories. Consider, for example, the disjuncture between the relationships conjured up by the sales stories' "parent" and "neighbor" on the one hand and the claim stories' "contract" on the other. As this contrast suggests, the sales and claims stories contain quite different visions of the insurance relationship. In the claims stories, the help available to the insured is precisely defined by a legal document. The type and level of that help is a function of the insured's prior contribution to the insurance fund, and the claimant's interests are largely opposed to those of the insurance company (and, through the company, to those of the public trust).[69]

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67. *See* Gallagher, *supra* note 17, at 29 (reporting that the Florida Department of Insurance received complaints regarding only 21,293 of 635,874 total hurricane claims following Hurricane Andrew, and that complaints filed against solvent insurers represented 2.7% of total claims volume).

68. As Ken Casebeer has reminded me, the sales stories may also work because of the historical evolution of the insurance function, in which the composition of the group cushioning the impact of individual catastrophes shifted over time from kinship networks to church and guild, to ethnic and trade based mutuals, and to the immediate precursors of the insurance giants that protect us today. *See* GEORGE CLAYTON, BRITISH INSURANCE 20 (1971) (discussing secular and religious guilds and noting that one major purpose of guilds was to secure members from risks, including risks of property loss). Thus, the references to kin, neighborhood, community, and God may respond to and invoke historically embedded cultural expectations about the kind of relationship we have with the entity that protects us from catastrophes.

69. When an insurance company defends an insured against a claim by a third party, the interests of the insurer and insured are aligned to a significant extent, in that both would like the claimsnt to lose. Notwithstanding this alignment, there are significant conflicts within the third-party insurance relationship that become salient most commonly in cases involving settlement offers or allegations of intentional torts. *See* Parsons v. Continental Nat'l Am. Group, 550 P.2d 94, 98 (Ariz. 1976) (en banc) (holding that when an attorney who has been retained by an insurer to represent the insured obtains information that could be detrimental to the insured's interest under the policy, that attorney should notify the insurer that he can no longer represent its interests); Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200 (Cal. 1958) (en banc) (holding that when an insurer wrongfully refuses to defend an insured and wrongfully refuses to accept a settlement offer within the policy limits, the insurer is liable for the entire judgment, even if it exceeds the policy limits).

The sales stories, in contrast, concern relationships in which interests are aligned and help is given in an open-ended fashion, with little attention given to the prior contribution of the person in need.[70] That is not to say that relationships in a family, between neighbors, or within a religious community always ignore the relative contributions of the individuals within them, but simply that the role of exchange within those relationships is understood to be subordinate.[71]

Examining the sales stories' description of the claims process makes this contrast particularly sharp. The primary image guiding real adjusters is "contract." Yet that image is nowhere present in the sales stories' description of the claims process. The insurance advertisements that contain these stories feature the insurance company as a hero rescuing the policyholder in distress, often through superhuman powers. For example, a recent radio campaign for an automobile insurance company in Florida features claims adjusters who arrive at the scene of the accident *before* the police, to calm the policyholder and, among other things, offer a rental car without asking whether the policyholder had purchased rental car coverage and without discussing the daily rate limitation.[72] A USF&G Insurance print campaign with the theme "Another case for USF&G" reports actual claims experiences that are nearly as incredible.[73] A Cigna Property and Casualty Insurance Company print advertising campaign opens with the claim that "[e]very day, someone calls us from inside a nightmare," and reports how Cigna takes care of nightmares.[74] The point: we will take care of you, with money and compassion. The omission: terms of the contract.

Insurance companies minimize the potential for direct conflict between the sales and claims stories by separating the organizational responsibility

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70. The sales stories align well with Duncan Kennedy's standards/substance/altruism formula, and the claims stories with his rules/form/individualism concept. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-22 (1976) (introducing two paradigms for analyzing substantive law: *individualism*, which focuses solely on the form of a transaction, and *altruism*, which focuses on the substance of the transaction or contract). As will be discussed below, the visions of the insurance relationship reflected in the sales and claims stories also appear in judicial opinions in insurance coverage cases. This Paper can therefore be regarded, to that limited extent, as a case study of the "private law" rhetorical modes that Kennedy identified. *See* Kennedy, *supra*, at 1713-22.

71. *See* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 250-51 (John G. Richardson ed. & Richard Nice trans., 1986) (describing the role of exchange within social groups and explaining that the most powerful person or entity within a social group is responsible for defending the weaker members of the group whenever they are threatened).

72. *Unexpected w/800#* (radio advertisement for Progressive Car Insurance, Oct. 26, 1993) (transcript on file with the *Texas Law Review*).

73. *E.g.*, NEWSWEEK, Nov. 16, 1992, at 78-79 (advertisement for USF&G Insurance Company).

74. *E.g.*, BUS. INS., Apr. 11, 1994, at T12 (advertisement for Cigna Property and Casualty Insurance Company).

for the narration of the two sets of stories. The sales and marketing departments tell the sales stories, and the claims department tells the claims stories. The head of one insurance claims department explained the reason for making claims departments independent of the "production" (*i.e.*, sales) department:

> There is no question but what the ultimate goal of any profit-making organization is to satisfy as many good customers as possible. There are, however, occasions when "no" must be said. . . .
>
> . . . .
>
> . . . [W]hen the producer can point to the claim department as the "culprit" who makes coverage decisions, the heat is off of him.[75]

Nevertheless, this division of responsibility cannot eliminate the conflict between the sales and the claims stories. At least some insureds whose understanding of insurance reflects that of the sales stories will rebel against the contract-oriented law of the adjuster. At that point, litigation begins.

II. Judging the Insurance Relationship

The conflicting images of the insurance relationship reflected in the sales and claims stories carry over into litigation. Instead of the insurance marketing department, the insured now tells the sales story, while the insurance company repeats the claims story told during negotiation. Because judges are sometimes persuaded by insureds' versions of the sales stories and at other times by insurance companies' claims stories (and because judges already hold these competing understandings of insurance), both sets of stories appear in their opinions. Like the other participants in the litigation, judges use these stories both to understand and to explain the obligations of parties in an insurance relationship.[76]

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75. Patrick Magarick, *Status Among Departments: "Pressured" Claims Dept. Is Bad for Business*, INS. ADJUSTER, June 1969, at 13, 13-14. Robert Kopta, an editor of *Insurance Adjuster*, described one source of conflicts between producers and claims departments as follows:

> One of the most annoying sources of unnecessary claims problems is the agent (not the usual agent) who knowingly refers a claim to his company that is not covered by the policy.
>
> This situation becomes extremely uncomfortable for all parties involved when the insured believes in good faith that he has coverage for the loss and he is encouraged in this belief by the producer.

Robert Kopta, *Just Reflecting*, INS. ADJUSTER, Jan. 1972, at 5.

76. *Cf.* Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79, 91 (1991) (reviewing DAVID R. PAPKE, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (1991)) ("Lawyers, clients and judges are, after all, human. To solve legal problems, they will draw not only on specialized technical legal skills, but also on their general competence as

It would be misleading, however, to imply that the sales and claims stories are equally represented in published insurance decisions. The "insurance-as-contract" story is typically the baseline.[77] Many, if not most, courts—whether deciding in favor of insurance companies or insureds—rely heavily on a straightforward interpretation of the insurance company's printed form.[78] While less common, the "immoral insured" and "responsibility-to-others" claims stories appear as well.[79]

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human beings. A significant component of that competence involves using stories as devices through which they can understand and explain the world." (footnote omitted)).

77. In addressing general insurance contract doctrine, insurance casebooks typically give as much, if not more, attention to cases containing sales stories as to cases containing claims stories. *See, e.g.*, SPENCER L. KIMBALL, CASES AND MATERIALS ON INSURANCE LAW 8-31 (1992); KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 33-52 (1990); ALAN I. WIDISS, INSURANCE MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND REGULATORY ACTS 599-654 (1989) (all presenting cases in which the court construed ambiguities against the insurer, honored the expectations of the insured, and required good faith by the insurer). For that reason, some insurance law teachers may find jarring my assertion that the insurance-as-contract story is the judicial baseline. As the cases cited *infra* note 78 suggest, however, some judges are likely to find even more jarring the assertion that the cases containing the sales stories present a reasonably coherent and defensible alternative vision of the insurance relationship.

A detailed analysis of the relative frequencies of the stories in judicial opinions is beyond the scope of this article. Which set of stories—sales or claims—is the "baseline" in insurance case law, and which set is the "exception," may depend on who is selecting the sample from which the baseline-exception judgment is made. It is more than sufficient for my purposes to note that the baseline is contested. *See* Peter N. Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1047-58 (1991) (describing competing theories in insurance cases of judicial formalism and judicial functionalism and disagreeing with commentators about the extent of the alleged decline of formalism in insurance contract cases). The existence of even a weak claim on either side of the argument demonstrates that there are competing visions of the insurance relationship in the judicial decisions.

78. Examples of insurance-as-contract opinions include Brown v. Equitable Life Insurance Co., 211 N.W.2d 431, 435 (Wis. 1973) ("We think the theory of strict contractual construction of insurance contracts followed by a majority of jurisdictions is consistent with the philosophy of this court."); California State Auto. Ass'n Inter-Ins. Bureau v. Warwick, 550 P.2d 1056, 1058 (Cal. 1976) ("[T]he determinative issue is whether [the insurance policy] language is sufficiently clear to put the policyholder on notice."); Ryan v. Harrison, 699 P.2d 230, 233 (Wash. Ct. App. 1985) (construing an insurance policy based solely on its contractual language, without consideration of reasonable expectations). The Supreme Court of Wyoming recently gave this forceful statement of its formalist position:

> If the policy language is clear and unambiguous, the rule of strict construction against the insurer does not apply, and the policy must be interpreted in accordance with the ordinary and usual meaning of its terms. The parties to an insurance contract are free to incorporate within the policy whatever lawful terms they desire, and the courts are not at liberty, under the guise of judicial construction, to rewrite the policy.

St. Paul Fire & Marine Ins. Co. v. Albany County Sch. Dist. No. 1, 763 P.2d 1255, 1258 (Wyo. 1988) (citations omitted).

79. For the "immoral insured" story, see Future Realty, Inc. v. Fireman's Fund Insurance Co., 315 F. Supp. 1109, 1116 (S.D. Miss. 1970) (dismissing a coverage suit on a fire policy that had been suspended due to the abandonment of the premises and the corresponding increase in moral hazard, defined by the court as "any change in the insured property that increases the probability of destruction by the owner or others"); Davenport v. Firemen's Insurance Co., 199 N.W. 203, 205 (S.D. 1924) (upholding the suspension of an insurance policy because of an increase in moral hazard, defined by

The quantitative dominance of the claims stories notwithstanding, there are important competing stories—the judicial versions of the "sales" stories—found in cases. Two consistent patterns can be found in these competing stories: First, they appear in cases favoring insureds, typically after it becomes clear that the "insurance-as-contract" story would have produced a different result.[80] This pattern confirms that the "insurance-as-contract" claims story is at least the rhetorical norm.[81] Second, they appear in damages discussions only in bad faith cases.

A. The Sales Stories in Judicial Opinions

The vision of insurance reflected in the judicial versions of the sales stories stands in marked contrast to the images invoked by the insurance-as-contract claims story. In the judicial sales story, insurance is less a "contract" than a "relationship." While there clearly is a contract involved, that contract is defined only in part by the insurance company's printed form.[82] It is also defined by the "special relationship" between insurance companies and their policyholders, a relationship, the opinions

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the court as "the risk, the danger, or probability that the insured will destroy or permit to be destroyed the insured property for the purpose of collecting the insurance"). *Cf.* Bollinger v. Nat'l Fire Ins. Co., 154 P.2d 399, 403 (Cal. 1944) (en banc) ("When claims are honestly made care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits." (citations omitted)). For the "responsibility-to-others" story, see Brakeman v. Potomac Insurance Co., 371 A.2d 193, 205 (Pa. 1977) ("[T]he purpose of the requirement of notice is to give the insurer reasonable opportunity to protect its rights. In so doing, however, the insurer . . . often is serving the best interests of its insureds as a group." (quoting ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW § 7.2(a), at 445 (1971)).

80. An exception to this pattern is Gray v. Zurich Insurance Co., 419 P.2d 168 (Cal. 1966) (en banc). In *Gray*, Justice Tobriner first finds for the insured under a "reasonable expectations" approach that I would describe as a "sales story," but then states that the insured would also prevail under a *contra proferentem* analysis (interpreting ambiguities against the insurer), which is in line with the insurance-as-contract story. *Id.* at 171.

81. The court in one of the leading sales-story cases, C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169 (Iowa 1975), described its version of the rhetorical norm, and why that norm has persisted, as follows:

> In fairness to the often-discerned ability of the common law to develop solutions for changing demands, it should be noted appellate courts take cases as they come, constrained by issues the litigants formulated in trial court—a point not infrequently overlooked by academicians. Nor can a lawyer in the ordinary case be faulted for not risking a client's cause on an uncharted course when there is a reasonable prospect of reaching a fair result through familiar channels of long-accepted legal principles, for example, those grounded on ambiguity in language, the duty to define limitations or exclusions in clear and explicit terms, and interpretation of language from the viewpoint of an ordinary person, not a specialist or expert.

Id. at 175 (citation omitted).

82. *See* Zuckerman v. Transamerica Ins. Co., 650 P.2d 441, 446 (Ariz. 1982) (en banc) ("The rules pertaining to the enforcement of the 'bargain' made by the parties evolved at a time when the parties negotiated an insurance contract; they have little or no relevance to the present methods of transacting most insurance business.").

stress, through which policyholders seek "security" and "peace of mind," not commercial advantage.[83]

The courts' descriptions of this special relationship resonate strongly with the vision of insurance portrayed in insurance advertising. As in the advertisements, the special relationship begins with the purchase of a "good" called "insurance," not with the negotiation of a contract.[84] Within this relationship, the insurance company is the stronger party, responsible for taking care of the weaker, dependent insured.[85] At no time is the insurance company stronger and the insured more vulnerable than when the insured suffers a loss.[86] If the insurance relationship is to

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83. As one court noted:

> [The] plaintiff did not seek by the contract involved here to obtain a commercial advantage but to protect herself against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss, and recovery of damages for mental suffering has been permitted for breach of contracts which directly concern the comfort, happiness or personal esteem of one of the parties.

Crisci v. Security Ins. Co., 426 P.2d 173, 179 (Cal. 1967); *see also* Rawlings v. Apodaca, 726 P.2d 565, 575 (Ariz. 1986) (en banc) ("When dealing with an innkeeper, a common carrier, a lawyer, a doctor or an insurer, the client/customer seeks service, security, peace of mind, protection or some other intangible. These types of contracts create special, partly noncommercial relationships . . . ."); Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 95 (Ct. App. 1970) (quoting *Crisci*, 426 P.2d at 179, and stating that the "considerations are particularly cogent in disability insurance"); Spencer v. Aetna Life & Casualty Ins. Co., 611 P.2d 149, 152 (Kan. 1980) ("When an insured purchases insurance, he is purchasing more than financial security; he is purchasing peace of mind."); McCorkle v. Great Atl. Ins. Co., 637 P.2d 583, 588 (Okla. 1981) ("[O]ne of the primary reasons a consumer purchases any type of insurance (and the insurance industry knows this) is the peace of mind and security that it provides in the event of loss."); Beck v. Farmera Ins. Exch., 701 P.2d 795, 802 (Utah 1985) ("[I]t is axiomatic that insurance frequently is purchased not only to provide funds in case of loss, but to provide peace of mind for the insured or his beneficiaries.").

84. *See* State Sec. Life Ins. Co. v. Kintner, 185 N.E.2d 527, 532 (Ind. 1962) (declaring that "[t]here is some analogy between the sale of goods and the sale of an insurance policy as a package"); *C & J Fertilizer*, 227 N.W.2d at 178-79 (observing that "[t]he typical applicant buys 'protection' much as he buys groceries" and noting that "[w]e would be derelict in our duty to administer justice if we were not to judicially know that modern insurance companies have turned to mass advertising to sell 'protection'" (quoting WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 900, at 34 (3d ed. 1963))); *cf.* Macneil, *supra* note 14, at 17 (arguing for a reconception of contracts of adhesion as bureaucratic goods).

85. *See* Grand Sheet Metal Prods. Co. v. Protection Mut. Ins. Co., 375 A.2d 428, 430 (Conn. Super. Ct. 1977) (stating that "the unequal bargaining power of the parties" is a "paramount consideration[ ]" in the adoption of a rule allowing recovery of consequential damages on a showing of bad faith).

86. *See* Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972) (remarking that "[t]he very risks insured against presuppose that upon the death of the insured the beneficiary might be in difficult circumstances and thus particularly susceptible and vulnerable to high pressure tactics by an economically powerful entity"); Noble v. National Am. Life Ins. Co., 624 P.2d 866, 868 (Ariz. 1981) (noting that because an insurance policy is obtained as a "protection against calamity," "[o]ften the insured is in an especially vulnerable economic position when . . . a casualty loss occurs"); Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1273 (Colo. 1985) (asserting that "once a calamity has befallen . . .

work, insureds must be able to count on insurance companies to come through in that vulnerable moment with "the basic insurance protection which it has held out to the insured."[87]

While these insurance stories do not feature the parents, neighbors, and demigods of insurance advertising, the insurance relationship they describe is that of the sales stories—a relationship in which policyholders need to be able to trust and depend on insurance companies to take care of them in a time of need. The role of the courts in these stories is to make sure that insurance companies provide the complete protection they promised, even when that promise conflicts with the printed form.[88] Whether the doctrinal concept is reasonable expectations,[89] latent ambiguity,[90] contract of adhesion,[91] or warranty of fitness,[92] the

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an insured covered under a private insurance contract, the injured party is particularly vulnerable because of the injury or loss").

87. Gray v. Zurich Ins. Co., 419 P.2d 168, 179 (Cal. 1966). The Arizona Supreme Court described the power of the insurance company in that vulnerable moment as follows:

> [T]he nature of the [insurance] relationship effectively give[s] the insurer an almost adjudicatory responsibility. The insurer evaluates the claim, determines whether it falls within the coverage provided, assesses its monetary value, decides on its validity and passes upon payment. Although the insured is not without remedies if he disagrees with the insurer, the very invocation of those remedies detracts significantly from the protection or security which was the object of the transaction.

Rawlings, 726 P.2d at 570.

88. *See C & J Fertilizer*, 227 N.W.2d at 178 (remarking that "[a] person who has been incessantly assured a given company's policies will afford him complete protection is unlikely to be wary enough to search his policy"); Sparks v. St. Paul Ins. Co., 495 A.2d 406, 414 (N.J. 1985) (asserting that the court's goal in insurance policy interpretation is to foster the reasonable expectations of the average buyer); Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 670 (N.D. 1977) (discussing insurer obligations that may exist even though they are in conflict with the terms of the contract).

89. *See* Kievit v. Loyal Protective Life Ins. Co., 170 A.2d 22, 30 (N.J. 1961) (declaring that "the court's goal in construing an accident insurance policy is to effectuate the reasonable expectations of the average member of the public who buys it"); Keeton, *supra* note 15, at 961 (stating that courts that address the rights of insurance policyholders often base their decisions on the principle of honoring the reasonable expectations of the applicants and intended beneficiaries).

90. *See* Estrin Constr. Co. v. Aetna Casualty & Sur. Co., 612 S.W.2d 413, 421 & n.7 (Mo. Ct. App. 1981) (stating that courts use the "latent ambiguity device" as a method to overcome the constraint against extrinsic evidence by allowing the introduction of evidence of the insured's understanding of the adhesion agreement).

91. *See* United States Fire Ins. Co. v. Colver, 600 P.2d 1, 3 (Alaska 1979) (commenting that because insurance policies are treated as "contracts of adhesion" when the court is interpreting the language of the policy, the policy is to be construed "to provide that coverage which a layperson would have reasonably expected from a lay interpretation of the policy terms"); *see also* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964) (describing the concept "contract of adhesion" as a rule of construction in which the court favors the weaker party whenever "it appears that the drafting party was in the stronger bargaining position"); *cf.* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (advocating judicial reconstruction of adhesion contracts to restore freedom of contract).

92. *See C & J Fertilizer*, 227 N.W.2d at 177-79 (holding that the insured should prevail because the insurer "breached an implied warranty that the policy later delivered would be reasonably fit for its intended purpose").

insurance company's obligations are rooted, not in its standard form, nor even in the particular situation of the insured in the case at hand, but rather in the court's conception of the insurance relationship.

Consider the much maligned doctrine of reasonable expectations.[93] As Professor Keeton made clear in his articulation of the doctrine, the "expectations" that govern the contract are not those of the particular insured in the particular case, but rather those of the "reasonable" insured.[94] Judges are to determine these "objectively" reasonable expectations, not through fact-finding, but through the exercise of a considered judgment that Karl Llewellyn would have found congenial.[95] When, almost by definition, the standard-form insurance policy does not provide proper guidance, where else can judges turn but to some alternative vision of insurance? Given the ubiquity of the insurance companies' sales stories, the stories' congruence with the Lear tensions in the insurance relationship, and their resonance with the cultural residue of pre-insurance arrangements,[96] it is no surprise that the courts' "alternative" vision turns out to be at least consistent with, if not derived from, these stories.

That judges find obligations in insurance stories, rather than in rigorously demonstrated social facts, is hardly cause for consternation. There is little alternative. The "social facts"—what people actually think they are getting when they buy insurance or, alternatively, the breadth of insurance coverage that insurance companies can provide at a price that people are willing to pay—are as yet unknown (and may be unknowable).[97] Moreover, as in so many other arenas, the formalist

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93. *Compare* Rakoff, *supra* note 91, at 1268-69 (attacking the reasonable expectations doctrine as a fiction that courts have created to avoid addressing the implications of contracts of adhesion) *with* Stephen J. Ware, Note, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1487-93 (1989) (criticizing the doctrine as limiting the freedom of contract and interfering with market control of insurance companies).

94. Keeton, *supra* note 15, at 967-69.

95. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 121 n.154 (1960) (referring to the "frequent determinative character" of a hunch or insight); K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939) [hereinafter Llewellyn, Book Review] ("[T]he conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.").

96. *See supra* note 68.

97. I have tried to find out the first social fact (*i.e.*, what people think they are getting when they buy insurance), through both a survey of 7000 University of Miami employees following Hurricane Andrew and in-depth interviews with claimants. I have reached the tentative conclusion that neither project will provide information that will be useful in guiding a "reasonable expectations" analysis. The second social fact (*i.e.*, the breadth of coverage that insurance companies can provide at a price that people can pay) would be even more difficult to determine. While we can (relatively) easily determine the breadth of coverage sold by insurance companies, and can safely infer that the coverage was offered at a price people could pay, institutional constraints and a cooperative drafting of standard forms by insurance companies make it highly unlikely that the market has disciplined insurance companies to the point that existing policies are optimal.

result—adhering to the terms of the standard-form policy—sometimes generates outcomes that judges are (and should be) unwilling to accept.[98] Indeed, what would be cause for consternation would be an insurance law that failed to reflect the duality of our everyday construction of the insurance relationship.

B. The Insurance Stories and the Bad Faith Case

While courts differ in the precise standard they apply when determining bad faith, the standards all focus on the insurance company's intent (whether subjectively or objectively determined) in denying the claim. For example, under the widely adopted *Anderson* standard,[99] the insured must prove

> the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.[100]

The debate over the tort or contract nature of the insurance bad faith action is still simmering.[101] While the balance of judicial authority clearly favors a tort theory,[102] the resolution of that debate need not affect this analysis. Even jurisdictions that favor a contract-based bad faith action use an intent test for bad faith damages.[103]

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98. *See* Kennedy, *supra* note 70, at 1689 (stating that a cost of the certainty that formalist rules promote is the "sacrifice of precision in the achievement of the objectives lying behind the rules"); *see also* Rakoff, *supra* note 91, at 1176 (arguing that the terms of adhesion contracts should be declared presumptively unenforceable because, contrary to the assumption of equal bargaining power in ordinary contract law, contracts of adhesion are the result of one party's commercial dominance).

99. Henderson, *supra* note 12, at 40 ("Of the twenty-nine jurisdictions that now permit extra-contractual damages in first-party insurance cases on some basis akin to the tort of bad faith, ten purport to follow the *Anderson* test." (footnotes omitted)).

100. Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978).

101. *See, e.g.*, Independent Fire Ins. Co. v. Lunsford, 621 So. 2d 977, 980-81 (Ala. 1993) (Maddox, J., dissenting in part) (arguing against the majority's adopting the "bad faith" tort and in favor of providing only contractual remedies). *See generally* Jerry, *supra* note 8 (evaluating two competing viewpoints and positing a new approach in which the duty of good faith would be treated as a contractual duty, but the range of remedies in insurance cases would be broader than usual contractual remedies).

102. *See* McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 857 & n.5 (Wyo. 1990) (citing cases from over 25 jurisdictions that recognize a tort theory of recovery for bad faith conduct of the insurer); Linda Curtis, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161, 173 (1986) ("[T]he courts in a majority of the states [have found] that a breach of the duty of good faith and fair dealing sufficiently involves a public policy interest to be treated as a tort.").

103. *See also McCullough*, 789 P.2d at 857 (noting that some jurisdictions label bad faith as a contractual theory, but allow recovery of punitive damages when an insurer possesses a culpable mental state); *see also e.g.*, Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73, 80 (W. Va. 1986) (recognizing that "an insurer is not liable for punitive damages by its refusal to pay on a claim unless such a refusal is accompanied by a malicious intention to injure or defraud").

But why care about intent in a contract case? Doesn't this, or even a tort-based bad faith action, confuse "tort" and "contract"? My answer, it will be no surprise to learn, is that the intent question makes perfect sense in the context of the sales stories, and that these stories, not the logical niceties of contract (or tort) doctrine, drive the development of the bad faith action. We do not have "contracts" with the kin, friends, neighbors, and religious communities in whose images we have (partially) constructed the insurance relationship. When they let us down, we care intensely whether they did so "by mistake" or "on purpose." It is, for example, the callous, deliberate nature of Regan's and Goneril's abandonment of King Lear that exposes their evil and presages the fate that awaits them. We do not expect perfection from the people we trust, but we do expect them not to betray us.

When the Arizona Supreme Court asserted in *Rawlings v. Apodaca*[104] that we expect insurance companies to make mistakes, and that intent matters, the court was reflecting these stories.[105] Intent matters because we try to punish those who betray us. Where that court (and others) went wrong, however, was not in confusing tort and contract but, rather, in confusing compensatory and punitive damages. As the next discussion attempts to show, awarding complete compensatory damages only as punishment for betrayal, and not for an ordinary mistake, violates the practical logic that calls for distinguishing between mistake and betrayal in the first place. Because the bad faith action is about betrayal, the purpose of its damages should be punishment, not compensation. Compensation should be the province of the ordinary insurance action, and that compensation should be as complete as the courts can make it.

III. Reconstructing Insurance Contract Damages

In the typical opinion in the ordinary insurance coverage case, there is little or no discussion of the damages the insured will recover. When there is a discussion about damages, it usually consists of an invocation of the contract damages "rule" of the jurisdiction and a statement that the additional damages the insured requested—usually for emotional distress or attorney fees—are excluded by that rule.[106] In that regard, the insurance

104. 726 P.2d 565 (Ariz. 1986).

105. *Id.* at 573 ("Insurance companies, like other enterprises and all human beings, are far from perfect. Papers get lost, telephone messages misplaced, and claims ignored because paperwork was misfiled or improperly processed.").

106. *See* Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 53 (Mich. 1980) ("[I]t is generally held that damages for mental distress cannot be recovered in an action for breach of contract."); Holmes v. Nationwide Life Ins. Co., 258 S.E.2d 924, 926 (S.C. 1979) (invoking the "rule in contract actions" to limit an award of damages (quoting Hutson v. Continental Assurance Co., 237 S.E.2d 375, 379 (S.C. 1977))). Many courts, of course, provide complete compensatory damages and,

coverage cases follow the pattern of contract cases generally. As Timothy Sullivan has suggested, common-law contract damage limitations appear to rest on a surprisingly narrow foundation.[107] Peeling away the onion of precedent reveals a final core of nineteenth-century treatises that simply recite the classical contract damages "rules" without analysis.[108]

The elements of harm to an insured that are typically left out by the classical contract damages rules include: the cost of hiring an attorney to bring an action enforcing the policy,[109] the emotional distress associated with the denial of the claim and the prolonged delay before payment,[110] and financial losses that run afoul of the court's (narrow) interpretation of the requirement that consequential damages be foreseeable at the time of contracting.[111] While prejudgment interest is commonly available by statute,[112] such interest is a poor measure of the insured's lost utility, because the financial straits that can accompany casualty or property losses can make the claimant a poor credit risk.[113] Statutory provisions for the

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in some cases, punitive damages in bad faith insurance cases. *See, e.g.*, Brandt v. Superior Court, 693 P.2d 796, 800 (Cal. 1985) (permitting recovery of attorney fees in a bad faith case); Bibeault v. Hanover Ins. Co., 417 A.2d 313, 319 (R.I. 1980) (holding that damages for economic loss and emotional distress are recoverable in a bad faith case).

107. *See* Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 221 (1977) ("One of the principle impediments to analysis of contract cases treating the question of punitive damages is the consistent absence, particularly in the early cases, of any meaningful judicial discussion of the philosophy of damage law.").

108. *See id.* at 221 (asserting that older cases cited treatises that, when examined, "produce no more enlightenment than the opinion which invoked its authority"). A recent survey of cases denying recovery for mental or emotional distress in contract cases concluded that "[t]he cases denying damages obviously accept the general prohibition. However, there is little or no consistency in the opinions as to why the proscriptive rule should be followed." Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. PITT. L. REV. 867, 893 (1985).

109. *See* Mustachio v. Ohio Farmers Ins. Co., 118 Cal. Rptr. 581, 584 (Ct. App. 1975) (holding that, absent a finding of "bad faith," attorney fees are not recoverable in a breach of insurance contract action); AFA Protective Sys., Inc. v. Atlantic Mut. Ins. Co., 549 N.Y.S.2d 783, 786 (App. Div. 1990) (holding that the insured "is not entitled to reimbursement for legal fees incurred in connection with the prosecution" of an action to declare the rights of the insured under an insurance policy).

110. *See* Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980) (holding that, absent proof that compensation for mental anguish was contemplated by the parties at the time the contract was made, "the damages recoverable do not include . . . mental anguish").

111. *See* Holmes v. Nationwide Life Ins. Co., 258 S.E.2d 924, 927 (S.C. 1979) (finding that interest on loans taken out to pay bills that should have been paid by the insurer is not recoverable). *But see* Hochman v. American Family Ins. Co., 673 P.2d 1200, 1203 (Kan. Ct. App. 1984) (holding that interest paid on loans taken out to cover delay in payment by the insurance company is foreseeable and hence recoverable). For a listing of cases in which insureds recovered consequential pecuniary losses, see ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 6.37, at 376 (2d ed. 1988).

112. *See* Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 193 n.6 (1982) (listing state prejudgment interest statutes).

113. In a jurisdiction in which attorneys' fees are available as an element of recovery, an insured who has ready access to other sources of money may well be compensated adequately by prejudgment interest. The insurance company's breach harms the insured only by depriving her of the use of the

recovery of attorney fees in insurance coverage cases provide a more significant supplement to common-law contract damages in many states,[114] but other states, including California and New York, do not have such statutes.[115]

These prevailing limits on insurance contract damages are not, however, universal. The Supreme Court of Alabama recently awarded compensation for mental anguish in an ordinary insurance coverage case.[116] A Michigan Supreme Court justice, strongly dissenting in *Kewin v. Massachusetts Mutual Life Insurance Co.*,[117] would have affirmed an intermediate appellate court decision that reached the same result.[118] The West Virginia Supreme Court of Appeals has permitted damages in an ordinary insurance case for "aggravation and inconvenience,"[119] an approach that, if anything, allows recovery broader than an approach based on emotional distress. The highest courts of Washington, West Virginia, and Minnesota have permitted the recovery of attorney fees as contract damages in insurance cases.[120] The Utah Supreme Court has stated that it will permit recovery for mental anguish "in unusual cases."[121] And the

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money that she diverts; prejudgment interest is an imperfect, but not terrible, measure of that opportunity cost. *See id.* at 205 (noting that "in Texas, prejudgment interest is correctly viewed as compensation for the use or detention of money"). Anybody who does not bave ready access to money, however, is going to do without in the interim; prejudgment interest is a poor measure of the "aggravation and inconvenience" inherent in that. *Cf.* Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73, 80 (W. Va. 1986) (upholding an award of damages for "aggravation and inconvenience" suffered by an insured as the result of insurer's delay in settlement).

114. *See* Dianne K. Ericsson, *Declaratory Judgment: Is It a Real or Illusory Solution?*, 23 TORT & INS. L.J. 161, 170-77 (1987) (summarizing the availability of recovery of attorney fees in insurance cases).

115. *See supra* note 109.

116. Independent Fire Ins. Co. v. Lunsford, 621 So. 2d 977, 979 (Ala. 1993).

117. 295 N.W.2d 50 (Mich. 1980).

118. Justice Williams wrote that:

> [I]t is common knowledge that disability insurance is obtained to promote peace of mind and avoid the insecurity and anguish of being disabled and without a paycheck to meet the normal demands of life. Consequently, that failure to provide such contracted-for peace of mind promotes emotional distress requires no argument.

Id. at 57 (Williams, J., dissenting).

119. Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73, 80 (W. Va. 1986) (giving as an example of compensable aggravation and inconvenience the case of "a family of five that is required to live for four years in a trailer because an insurance company has declined to pay the fire policy").

120. Olympic S.S. Co. v. Centennial Ins. Co., 811 P.2d 673, 681 (Wash. 1991) (allowing recovery of attorney fees incurred when an insurer refuses to defend or pay for the justified claim of an insured); *Hayseeds*, 352 S.E.2d at 79 (holding insurers liable for attorney fees when an insured is successful in an action against the insurer); Lanoue v. Fireman's Fund Am. Ins. Co., 278 N.W.2d 49, 55 (Minn. 1979) (allowing recovery of attorney fees when the insurance contract is "intended to relieve the insured of the financial burden of litigation" and the insurer has failed to defend).

121. Beck v. Farmers Ins. Exch., 701 P.2d 795, 802 (Utah 1985) ("[I]t is axiomatic that insurance frequently is purchased not only to provide funds in case of loss, but to provide peace of mind for the

New Hampshire Supreme Court has declared that it would permit the recovery of financial losses that might otherwise be excluded under the traditional approach.[122] Of course, these cases are in addition to non-insurance contract cases awarding such damages.[123]

Thus, because courts in some contract cases *do* award compensation for the costs of bringing suit and for mental distress (or inconvenience and aggravation), it is no longer true (if it ever was) that contract damages necessarily do not include such things. The best that can be said is that sometimes, even most times, contract damages do not include those things. A court that honestly faces up to this situation is going to have to provide something more than the rote "insurance-as-contract" answer to justify drawing an intent-based line between those victims of late payments who are compensated for their trouble and those who are not.[124] The claims stories and the sales stories provide one way to begin, by grounding insurance contract damages rules in the descriptions of insurance used by those in the insurance business.

A. The Sales Stories and Insurance Contract Damages

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. Thus, while the act that breaches the insurance contract may be the failure to pay "*Y* dollars" when "*X* happens," the promise that is broken is the promise to "be there." The *foreseeable* consequences of breaking that promise are manifold. As our public and private mass-

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insured or his beneficiaries. Therefore, . . . we find no difficulty with the proposition that, in unusual cases, damages for mental anguish might be provable." (citations omitted)).

122. *See* Lawton v. Great Sw. Fire Ins. Co., 392 A.2d 576, 579 (N.H. 1978) (refusing to hold as a matter of law that the insured cannot recover for financial injuries which result from the insurer's failure or delay in the payment of policy proceeds).

123. *See* Charlotte K. Goldberg, *Emotional Distress Damages and Breach of Contract: A New Approach*, 20 U.C. DAVIS L. REV. 57, 59 (1986) (arguing that damages for emotional distress should be recoverable when there is an "emotional aspect" to a contract); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 29 (1984) (discussing the common benefit theory, "under which those receiving what the court consider[s] to be benefits from a suit can be required to help pay its expenses," as an example of non-traditional measures of damages); John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1592-93, 1601-09 (1986) (giving example of non-insurance situations in which courts have been willing to award non-traditional contracts damages); Tomain, *supra* note 108, at 904 (suggesting that "[d]amages for nonpecuniary losses should be awarded for breach of contract when the parties enter into a bargain which has as its principal function the exchange of a nonpecuniary interest").

124. *Cf.* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

disaster-relief efforts demonstrate, lives and businesses fall apart when disaster strikes. The consequences of individual disaster—disability, sickness, fire, and death—are no less profound. Given the real promise of the insurance relationship, it does little disservice to *Hadley v. Baxendale*[125] and its progeny to award an insured compensation for the emotional and financial consequences of the insurance company's absence.

Contract law is replete with exceptions to the traditional rule against damages for emotional distress.[126] Such damages are permitted for breaches of burial contracts,[127] contracts for long-term care,[128] contracts for repair of family heirlooms,[129] contracts for the construction or improvement of family homes,[130] contracts related to memorable events like weddings and vacations,[131] and other contracts in which emotional distress is a foreseeable consequence of breach.[132] The sales stories

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125. 156 Eng. Rep. 145 (Ex. Ch. 1854). The *Hadley* court held:

> Damages . . . should be such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of breach of it.

Id. at 151.

126. *See* Goldberg, *supra* note 123, at 59-66 (discussing jurisdictions that allow relief for emotional damages in contract cases); Sebert, *supra* note 123, at 1585 (providing examples of contract cases involving emotional distress awards).

127. *See, e.g.*, Ross v. Forest Lawn Memorial Park, 203 Cal. Rptr. 468, 473 (Ct. App. 1984) (awarding emotional distress damages for the breach of a burial contract with the mother of the deceased that had "put respondent on notice that a breach would result in emotional and mental suffering by appellant").

128. *See, e.g.*, Guerin v. New Hampshire Catholic Charities, Inc., 418 A.2d 224, 227 (N.H. 1980) (allowing emotional distress damages for mental suffering resulting from a nursing home's alleged breach of long-term care contract on the basis that such damages were within the contemplation of the parties).

129. *See, e.g.*, Windeler v. Scheers Jewelers, 88 Cal. Rptr. 39, 44, 44-45 (Ct. App. 1970) (affirming an award for "physical suffering," including general nervousness and emotional deterioration, proximately caused by breach of a bailment contract for "cherished mementos").

130. *See, e.g.*, B & M Homes, Inc. v. Hogan, 376 So. 2d 667, 672 (Ala. 1979) (allowing damages for mental distress in an action for breach of construction contract when contractor could have reasonably foreseen that faulty construction would cause severe mental anguish); B & B Cut Stone Co. v. Resneck, 465 So. 2d 851, 859-60 (La. Ct. App. 1985) (allowing damages for mental distress for breach of a contract to install a fireplace based on the particular aesthetic objective of the fireplace and the homeowners' showing of inconvenience and disappointment).

131. *See, e.g.*, Deitsch v. Music Co., 453 N.E.2d 1302, 1304 (Ohio Mun. Ct. 1983) (allowing recovery for mental distress when the parties contemplated that damages resulting from a band's failure to appear at a wedding reception would be greater than the amount of the deposit); Odysseys Unlimited, Inc. v. Astral Travel Serv., 354 N.Y.S.2d 88, 92 (Sup. Ct. 1974) (allowing recovery for inconvenience, discomfort, and humiliation resulting from the breach of a contract to provide accommodations for a holiday vacation).

132. *See generally* Goldberg, *supra* note 123 (asserting that emotional distress damages should be allowed as a consequence of a breach of contract when that contract had emotional aspects); Amy H. Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 U. HAWAII L. REV. 1, 13 (1986) (discussing contracts for which emotional distress damages are awarded in case of breach).

demonstrate that emotional distress is at least a foreseeable, if not inevitable, result of an insurance company's failure to "be there" in time of need.

As the sales stories make clear, a primary reason for buying insurance is to avoid emotional distress. Remember, "peace of mind" comes with every "piece of the rock."[133] Emotional support is perhaps the most significant support we receive from the ideal mothers, fathers, neighbors, and teammates (not to mention God), whose images the sales stories appropriate. No less than the images, insurance companies' words—"trust,"[134] "security,"[135] "strength,"[136] "promise,"[137] "commitment"[138]—also address deep emotional needs. When insurance companies so directly trade in emotion, courts should not permit them to deny the centrality of that aspect of life when disputing claims.

B. The Claims Stories and Insurance Contract Damages

The typical "good faith" insurance contract damage case fits well within the insurance-as-contract claims story. Insurance is a contract. The damages available for breach are contract damages, and contract damages do not include compensation for emotional distress or attorney fees. This incarnation of the insurance-as-contract claims story has had undeniable impact: real harm has gone uncompensated. But it rests on a false premise. All the story says is that whatever the contract damages are, the insurance company will pay. Because sometimes contract damages *do* include compensation for emotional distress and attorney fees, the insurance-as-contract claims story provides little substantive guidance.[139]

The claims stories' vision of insurance as a public trust, however, can provide such guidance. The claims stories stress that it is in the public interest to incur, and then to spread, the cost of challenging claims. Whether claims are denied because the written policy does not provide for payment, because the insurance company has a responsibility to future claimants, or because the claimants are undeserving, the claims stories justify the denial by invoking the vision of the insurance company as guardian of the public trust, preserving the fund for the victims of tomorrow. The slogan "millions for defense, not one penny for trib-

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133. *See supra* note 36 and accompanying text.

134. *See supra* note 31 and accompanying text.

135. *See supra* note 36 and accompanying text.

136. *See supra* note 36 and accompanying text.

137. *See supra* note 25 and accompanying text.

138. *See supra* notes 37-39 and accompanying text.

139. *Cf.* Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985) ("Although the policy limits define the amount for which the insured may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.").

ute"[140] may be honored in the breach,[141] but it expresses a vision of the insurance company that permeates the claims stories.

Yet, as the legal realists have explained, in enforcing the limits of a contract the courts also define those limits.[142] While that lesson hardly seems revolutionary after cases like *Henningsen v. Bloomfield Motors, Inc.*[143] and *C & J Fertilizer v. Allied Mutual Insurance Co.*,[144] it adds an important gloss to the claims stories' vision of insurance as a public trust: The costs of insurance coverage litigation are appropriately borne by the insurance fund, not only because that litigation helps reject improper claims, but also because that litigation defines what is a proper claim.

Courts cannot possibly resolve all disputed insurance claims, but they can, and do, through insurance coverage litigation, set standards for insurance companies' resolution of claims.[145] Thus, the insurance companies' "millions" are not just for defense, they are also for the maintenance of the regulatory structure that makes the insurance enterprise possible. The millions spent by policyholders who prevail in insurance coverage litigation are no less essential to this structure.

Put perhaps more concretely, an insured who prevails in a coverage case increases the value of the insurance company's promise to all its policyholders. Each of these other policyholders faces the risk of later being in the position of the insured in the coverage case. Thanks to the efforts of that insured, that position has become far stronger. The costs of successful insureds are appropriately borne by the premium-paying public because, as the claims stories stress, it is the members of that public who are the beneficiaries of the insurance contract constructed through this effort.[146]

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140. *See supra* note 54 and accompanying text.

141. *See supra* note 50 and accompanying text.

142. *See* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) ("[T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves."); Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 712 (1931) (describing how courts create new legal obligations by enforcing previously unenforceable promises).

143. 161 A.2d 69 (N.J. 1960). The *Henningsen* court invalidated an express warranty that limited remedies to the repair and replacement of the damaged parts because the limitation on liability was "inimical to the public good." *Id.* at 95.

144. 227 N.W.2d 169 (Iowa 1975). The *C & J Fertilizer* court permitted the insured to recover, despite the literal language of the contract, under the doctrines of "reasonable expectations" and "unconscionability." *Id.* at 179.

145. As discussed in *supra* note 50, the connection between appellate courts and claims adjusters is not mechanical. *See supra* note 50. That the law of the adjuster differs from the law of the appellate courts does not mean, however, that standards set by appellate courts do not affect insurance claims practice. *Cf.* BOURDIEU, *supra* note 50, at 108 ("[T]he official definition of reality is part of a full definition of social reality . . . .").

146. *Cf.* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1600-01 (1974) ("[N]o policy is undermined by allowing recovery [for attorney fees]

C. *Beyond the Claims Stories*

In their "for-public-consumption" form, the claims stories feature insurance companies who offer to pay what they owe, "not one penny more or less." These insurance companies never engage in strategic behavior designed to reduce their liability from that which a court might decide is owed, especially when dealing with their insureds. Yet the money-for-promise arrangement makes delay a powerful strategic tool insurance companies can use against claimants, a tool that under the prevailing application of contract damages doctrine is nearly cost free.[147] In a state adhering to traditional insurance contract damages limitations and an intent-based bad faith standard, an insurance company with a weak, but colorable, defense to a claim will almost never have to pay more in real dollars than was owed at the time the claim was presented.

Not surprisingly, there is good evidence that insurance companies do engage in strategic behavior with claimants. A careful study of civil jury trials in California strongly suggests that insurance companies systematically engage in strategic behavior with third-party claimants.[148] The available evidence of strategic behavior with insureds is more anecdotal, but still significant. The fact patterns reported in the bad faith decisions indicate such strategic behavior,[149] as do my interviews of adjusters.[150]

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where the claim for reimbursement can be deflected toward a stranger—where a litigant, suing on a cause of action of his own, has succeeded and it then appears that his success has ensured gains of nonparty strangers.").

147. The recovery of prejudgment interest complicates, but does not change in any fundamental way, this analysis. While there may be times when the statutory interest rate exceeds the market interest rate (as in Florida in late 1993), that phenomenon is likely to be short lived. In any event, for every insured who litigates and collects prejudgment interest, there are undoubtedly many in the same position who do not.

148. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 378 (1991) (discussing evidence of strategic behavior by civil defendants).

149. *See supra* notes 82, 83, 86, and 103; *supra* note 100 and accompanying text; *see also* MFA Mut. Ins. Co. v. Flint, 574 S.W.2d 718, 722 (Tenn. 1978) (describing the insurance company representative's purposeful failure to inform the insureds of the extent of coverage prior to negotiating a settlement).

150. While only one (former) adjuster said he paid insureds less than they were entitled to in order to save the company money, Interview with anonymous former independent adjuster, in Coral Gables, Fla. (May 24, 1994) (on file with author), others reported practices that amount to the same thing. For example, one adjuster acknowledged that insureds with property damage claims are paid more when they are represented by a public adjustor. Interview with anonymous independent adjuster, Florida Department of Insurance Mediation Center, Homestead, Fla. (July 14, 1993). One adjuster stated that some (other) adjusters act like their job is to save the insurance company money and underpay claims to achieve that result. Interview with anonymous in-house adjuster, Florida Department of Insurance Mediation Center, Homestead, Fla. (July 14, 1993). A third adjuster offered that it is common practice for some adjusters to use estimates of the value of damage as "a starting point to work down from." Interview with anonymous independent adjuster, Florida Department of Insurance Mediation Center, Homestead, Fla. (July 27, 1993) (on file with author). In addition, I have observed adjusters in mediations taking "legal" positions that were contrary to the public position of their company. In his

Perhaps most significantly, insurance trade literature reveals, maybe inadvertently, a "shadow" side of claims handling that differs significantly from the for-public-consumption claims stories.[151]

The presence of strategic behavior with insureds provides an important answer to the criticism that increasing insurance contract damages will lead insurance companies to pay many claims that they should not.[152] That criticism is based on the implicit assumption that insurance adjuster "errors"[153] are equally distributed in favor of and against insurance companies. If, as the strategic behavior suggests, such errors are more heavily weighted in favor of insurance companies, then imposing a cost on those that favor the insurance company would tend to correct the imbalance.

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study, Ross noted that adjusters frequently fail to mention legal rules that are favorable to insureds, and he observed that "the adjuster sees his job as being to reduce the valid claim to an appropriate size." ROSS, *supra* note 48, at 45, 166-70.

151. Space limitations in this Symposium prohibit a detailed analysis of this literature. One striking example comes from the March 1970 Mutual Loss Managers' Conference, as reported in *Winning Replies*, *supra* note 55, at 38. Before the conference, a set of typical policyholder complaints was circulated to members of the Mutual Loss Research Bureau, who competed to draft the best answers. At the conference, the complaints and the winning answers were read aloud. "A highlight of the complaint answering session was the insertion of a 'mystery voice' answer to each question, delivered from a hidden microphone and prepared 'strictly for fun' . . . ." *Id.* One example follows:

> "What do you mean it's excluded? You give it to us in the big print, and the small print takes it away."
>
> *Mystery Voice—"I thought I recognized you. You're the same guy who accused me last year of getting a percentage of every dollar I saved the company, and then wrote to my boss and got my percentage reduced."*
>
> Winning answer by J.T. Posey, Kemper Cos.—"Handling an excluded loss is always unpleasant, but I'm sure you understand that a policy, like any business contract, has to have some limitations. Otherwise, the premium would be prohibitive . . . ."

Id. (emphasis in original); *cf.* SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS 102-03 (James Strachey trans. & ed., 1960) (describing how "hostile" jokes "achieve in a roundabout way the enjoyment of overcoming [an enemy]"). Other indications of this shadow side include a steady stream of articles and letters in *Insurance Adjuster* decrying the settlement practices of the unethical adjuster. *See, e.g.*, B. David Hinkle, *The Great Consumer Swell and the Adjuster*, INS. ADJUSTER, July 1974, at 43, 44 (recounting common examples of unethical handling of claims by adjusters of "yesteryear"); Benjamin Horton, *Consumerism and Adjusting*, INS. ADJUSTER, Mar. 1971, at 14, 16 ("Unfortunately for the rest of us, some adjusters reach arbitrary conclusions without any adequate justification for their position."); Kopta, *supra* note 75, at 5 ("The insurance industry can no longer afford to risk the serious consequences of public reaction certain to result from other than the most scrupulous treatment of all claimants . . . ."); Tom O'Day, *Just Reflecting*, INS. ADJUSTER, Mar. 1969, at 5 (noting that the unethical behavior of some insurance adjusters can reflect poorly on the entire industry because the public tends to generalize insurance adjusters); Tom O'Day, *Just Reflecting*, INS. ADJUSTER, Feb. 1969, at 5 ("Like one bad apple in a basketful, one cheap, unfair settlement can cause ripples of discontent and therefore create a bad public image for the industry."); Clif Ross, INS. ADJUSTER, Feb. 1971, at 43 (letter to the editor) (condemning "a small hard core segment of claims people who never say 'pay' till [sic] they see the whites of the juries [sic] eyes").

152. *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 184-88 (1986) (positing that the strategic behavior of insurers puts the risk of nonpersuasion on insureds and that increasing damages in the bad faith case merely equalizes the insurer's advantage with the risk of payment of unworthy claims).

153. In this Paper, I assign to the term "error" the admittedly problematic definition, "a result significantly different from that a court would provide."

While providing complete compensatory damages in the ordinary coverage case cannot end strategic behavior (that would be more than any court could do), a broader contract damages rule allowing recovery for attorneys' fees and emotional damages can alter the strategic calculus, so that a mistaken refusal to pay imposes a cost on the insurance company as well as the insured. Modest as that goal may be, it does seem worth attempting.

IV. Conclusion

In this Paper, I have argued that insurance companies tell stories about insurance that courts can use (and implicitly have used) as a source for the "unwritten" obligations of the insurance relationship. Studying these insurance stories can help flesh out those obligations and can also help explain why courts draw the doctrinal lines that they do. My discussion of insurance contract damages illustrated, in a concrete way, both functions of this analysis. The insurance stories help explain why judges distinguish between good and bad faith in deciding insurance coverage cases. The stories also suggest that the damages available on the good faith side of the line ought to be broadened and that the damages available on the bad faith side ought to be about punishment, not compensation.

Although I largely have confined my arguments about damages doctrine to those suggested by the insurance stories, the damages rule the stories would apply—complete compensation in the good faith insurance case—is desirable for at least one reason that goes beyond the logic of the stories. Providing complete compensatory damages in the good faith insurance case should reduce the extent of insurance bad faith actions and, thus, the costly struggle for the rhetorical high ground epitomized by my use of *King Lear* and *King Richard III*. If this Paper has accomplished anything, it has demonstrated that both *King Lear* and *King Richard III* represent, at least potentially, equally accurate visions of the insurance relationship. Insurance coverage litigation is, as I have said, simultaneously about abandonment and greed. Deciding which vision best captures the dynamics of a particular case is a profoundly difficult (and therefore time consuming and expensive) question. Any legal rule that reduces the need to answer that question, without undercutting the insurance relationship, bears serious examination on that ground alone.

If insureds can obtain complete compensation without proving bad faith, at least some should forgo that claim, notwithstanding the punitive-damages pot of gold that sometimes awaits. Furthermore, if judges know that insureds can get complete compensation without showing bad faith, they should feel more free to limit that cause of action to cases involving true betrayal, thereby reducing the likelihood of the pot of gold (and

further reducing the number of those who seek to prove bad faith).[154] The salutary result should be less concern about the intent of insurance adjusters, more concern about the harm suffered by people who do not get paid when they should, and maybe even (though this might be too much to hope for) less insurance coverage litigation.[155]

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154. *Cf.* Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73, 81 (W. Va. 1986). The *Hayseeds* court stated:

> Our reading of the cases throughout the United States on bad faith settlement leads us to conclude that the result that we have just articulated concerning attorneys' fees and damages for economic loss and inconvenience are what many other courts have been trying to achieve by indirect means. But by achieving these desirable results through the *ad hoc* manipulation of highly subjective criteria [*i.e.*, bad faith], the rules have become unpredictable and confusing.

Id.

155. Having just read Professor Stone's very thought-provoking commentary, *Promises and Public Trust: Rethinking Insurance Law Through Stories*, 72 TEX. L. REV. 1435 (1994), I have three comments in response.

First, I agree that the insurance stories can be used to make a persuasive case for state intervention in the insurance relationship. *See id.* at 1435 (asserting that "a regime of markets and contracts cannot adequately handle the inescapable tensions revealed by the stories"). Where I differ here is principally in the focus of the argument. I have two goals for this Paper: to tell the stories (so that others, like Professor Stone, can use them) and to describe how they play out in a narrow doctrinal setting. I see my primary audience as a particular aspect of the state: judges and people who try to influence judges. I do not think that Professor Stone means to suggest that judges should do nothing to address "the inescapable tensions revealed by the stories," but rather that judicial solutions alone are not enough. *Id.* I agree. Nevertheless, it would be a profound mistake for one importsnt group of people who constitute the state—judges—to abdicate their responsibility for helping to construct (through contract and tort law) an adequate insurance relationship on the grounds that some other group of people, who also constitute the state, might also have some responsibility for the adequacy of that relationship. *See id.* at 1440 (observing that it is "hard to imagine that case-by-case damages—either in contract or in tort—will induce general good faith and fair dealing").

Second, Professor Stone's observation that insurance companies switch from paternalistic (bilateral) to democratic (multilateral) rhetoric during the move from the sales to the claima moment in the insurance relationship is a signifieant contribution. *Id.* at 1443-44. I am not sure that the term "profit-seeking" captures the "private" goal of insurance companies, or that they all have the same goal. *See id.* at 1444 ("As a profit seeker, the insurer has no inherent incentive to preserve the common purposes of the community of policyholders it serves."). But there is no doubt that there is a private goal (or goals) that both the sales and claims stories help to mask and that this rhetorical move plays an important part in that masking.

Finally, with respect to the boundary between tort and contract law, I intended to be more agnostic than Professor Stone reads me. *See id.* at 1437 ("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."). My goal here is less to take a position with respect to the boundary than to speak to judges who have decided that insurance lies on the contract side. I am troubled that courts do not award complete compensation without proof of an insurer's bad intent. I prefer the label "contract" over the label "tort" simply because courts traditionally have not conditioned contract damages on findings of bad intent. A strict liability tort action might obtain the same result, but it would be a much harder sell. Nor do I understand that my method here is radical. *See id.* at 1437 (characterizing Baker's approach as "a radical step"). The fact that the "form" and the "contract" are not necessarily coextensive was extensively discussed by the Legal Realists in the early part of this century and had been recognized (while perhaps not acknowledged) by judges long before then. *See, e.g.*, Llewellyn, Book Review, *supra* note 95, at 704 (asserting that unreasonable elements in form contracts may be voided by judges). All I have done is articulate what judges are already doing when they look beyond the form.