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**Liability and Insurance after September 11th:
Embracing Risk Meets the Precautionary Principle**
Tom Baker¹

In the opening essay in *Embracing Risk: The Changing Culture of Insurance and Responsibility*, Jonathan Simon and I assert that western society is engaged in a transformation from a dominant paradigm of spreading risk to a paradigm that involves embracing risk. (Baker & Simon, eds. 2002) The core idea behind this trend is the recognition that too much protection against loss produces too much loss. Not all risks should be spread. For their own and society's good, individuals should embrace some risks. As we wrote: "As more of life is understood in terms of risk, *taking risks* is increasingly what one does with risk." (1)

Embracing Risk closes with a wonderful essay by Francois Ewald that also posits a paradigm shift. (Ewald 2002) But this paradigm shift revolves around the precautionary principle, an evolving principle in international law that calls for hesitating in the face of uncertainty, avoiding risk – "zero risk" rather than "embracing risk." Ewald identifies popular support for this principle as among the most important reactions to the failure of the insurance state to protect citizens from risk, a charge that surely resonates in the wake of September 11th.

The concept of embracing risk resonates much less well with September 11th. None of the victims made any relevant choices. No one, or at least no one we would want to emulate, is embracing terror risks. Precaution is the order of the day.

Yet, I continue to see evidence of the embracing risk thesis at work, though September 11th has made that claim a more measured one. My goal in this essay is to suggest how it might be that the insurance states spawned these two seemingly contradictory reactions, how those reactions are in fact less contradictory than they at first appear, and what the embracing risk thesis and the precautionary principle might portend for liability and insurance after September 11th. I will conclude by suggesting that part of the answer to some looming 21st century insurance problems is to resurrect two distinctly 19th century ideas: the assessment

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approach to insurance and the concept of insurance regulation as an antidote to destructive competition.

PART ONE: THE RISE OF THE INSURANCE STATE

When future historians reflect on the developments that transformed the world during the hundred years between 1890 and 1990, they are of course going to emphasize the internal combustion engine, the telephone, airplanes, nuclear weapons, medicine, and computers. But they are also going to emphasize insurance.

Insurance certainly was not invented in the 20th century. (Clark 2000) But the history of the 20th century is one in which insurance institutions protected more and more people from more and more kinds of risk. Pick almost any kind of private or social insurance in almost any developed country and you will find, at least well into the late 20th century, a steady expansion in the degree of protection that insurance provided.

The West never approached the frictionless, complete insurance of economists' theoretical models, but each kind of insurance became more "complete" in at least three senses:

- It protected a steadily increasing percentage of the population.
- It protected that population against an increasingly broad range of risks.
- It provided compensation for an increasingly large fraction of an insured loss.

While there were people and risks left out, domestic social policy in most of the west for most of the 20th century could be summed up in the phrase: "More insurance for more people."

Of course anyone transported from 1890 to 1990 would have been utterly amazed by the phones, planes, cars, medicines, computers and overall opulence in the West. But they would have been nearly as amazed by the degree to which ordinary workers were protected from the hard corners of life. This protection comes from what Francois Ewald has praised, and others have decried, as the "insurance state" – an approach to governing in which the main objective of government is protecting citizens from risk. (Ewald 1986)

One of my favorite 19th century insured documents is an essay by a French -American lawyer that appeared in 1849 in a leading American business journal: “Society on the Basis of Mutual Life Insurance.”

Consciously written against the French socialists who had so influenced the young Karl Marx, the essay imagines a world in which brotherhood and security come, not through collective ownership of the means of production, but rather through institutions that protect against the inevitable misfortunes of industrial society. This imagined “Society on the Basis of Mutual Life Insurance” would not require revolutionary changes in the ownership or control of private property, only the expansion of insurance beyond the narrow confines of marine, fire and life risks.

The author, D.R. Jacques, wrote:

Insurance [] takes from all a contribution; from those who will not need it, as well as from those who will.... But as it is uncertain who will, and who will not, it demands that it be distributed from all to the uncertainty of fate. And it is precisely the money thus given away by some, and these only, which supply the fund out of which the misfortune of those whose bad luck it is that their money has not been thrown away, are repaired.... From this point of view the whole beauty of the system of insurance is seen. It... presents society a union for mutual aid, of the fortunate and unfortunate, where the only who need it receive aid, and those only who can afford it are put to expense. Thus, while the aggregate of human suffering and calamity remains undiminished, thus, while the uncertainty of their visitation remains unremoved, human ingenuity and cooperation equalize the distribution of this fearful aggregate, and alleviate the terrors of uncertainty.

...By a system of mutual insurance thus generally established, embracing all callings, a great fund, as it were, for the benefit of society, would be created; a fund to which none could be said to contribute gratuitously, from which none but the needy should be aided; a great reserve fund, held in readiness for the uncertain case of want. We thus have the mechanic, the laborer, and the

merchant, joined hand in hand in mutual protection against the risks of their callings; we have the masses, above all, shielded from the most blighting evil of the inequality of human condition, the danger of destitution; we have society united on the basis of mutual insurance.

This is a far cry from Marx's slogans of the same era: "workers of the world unite" and "to each according to his needs and from each according to his abilities."

Looking back, it is very easy to see who had the better crystal ball. Although the institutional structure of our current insurance institutions is not precisely that of mid-19th century mutual life insurance companies, the West is far closer to "society united on the basis of mutual insurance" than even Jacques might have thought possible.

PART TWO: THE LIMITS OF THE INSURANCE STATE

Despite the successes of the insurance state, during the last two or three decades of the 20th century there grew an increasing dissatisfaction with the call for "more insurance for more people."

To understand this dissatisfaction and develop a sense of where it might be taking us, it is helpful to unpack the two components of the 20th century insurance state's responsibility toward risk.² The first component is preventing harm. The second is compensating those who suffer the harm that is not prevented. In short-hand terms, we can call these responsibilities preventing and spreading loss, or minimizing and spreading risk.

We so take for granted these twin responsibilities of the insurance state³ that it is easy to forget how relatively recently they have become goals and means of governing. The

²In this essay generally, and in what follows in particular, I am drawing on the work of Francois Ewald (1986, 1991, 2002) and, to a lesser extent, Ulrich Beck (1991).

³In referring to the "insurance state" I do not want to give the misleading impression that I am referring to a coherent set of institutions engaged in a clearly defined, centrally directed set of practices. The "insurance state" refers to a set of loosely connected institutions with varying relationships to the official branches of the "Government" described in high school civic textbooks. It includes private insurance groups, the Social Security Administration, health benefit trusts, the municipal public health department, risk management organizations, and any number of other institutions engaged in preventing and spreading loss. In writing about the "insurance state," I do not wish to invoke ideas about federalism, organizational charts or hierarchical relationships among branches, levels or types of government agencies. Instead, I refer to a set of practices and ideas about the goals and

foundational ideas, and to a lesser extent, the paradigmatic practices reach back in time, but they did not flower until the 20th century. (Ewald 1986. Moss 2002. Cf. Frierson 2002).

Yet it was over the course of that century that we came to a better understanding of the limits of the insurance state with regard to both these responsibilities. We discovered that the more completely people are protected from loss, the more social resources are consumed by loss – this is the crisis of the welfare state that led to the “third way,” “compassionate conservatism,” and the “end of welfare as we know it,” (all of which are forms of what in the social theory literature is referred to as “advanced liberalism”).

We also discovered that our efforts to prevent loss had created new kinds and magnitudes of loss. The asbestos nightmare that still threatens workers, employers and the insurance industry is my favorite example. Remember, asbestos was so ubiquitous because it *prevented* harm. Other people might point to the case of thalidomide, the AIDS blood transfusion crisis, Mad Cow disease or the threat of nuclear winter. In the financial markets, we might refer to Long Term Capital, the S&L crisis and perhaps even Enron, though the latter may be more a story about a classic “pump and dump” stock fraud than of financial risk reduction gone bad.

Neither of these two discoveries about how protection can create loss were truly new insights. As my research has shown, people in the early 19th century insurance trade (and earlier) worried about “moral hazard,” just as the authors of the poor laws worried about “pauperization.” (Baker 1996) And my colleague Carol Weisbrod has rediscovered a fascinating report by Franz Kafka that illustrates how prevention creates loss. (Weisbrod 2000) Written when Kafka was working as a clerk in the Accident Insurance Institute in Prague, the report described how efforts to design wood working machinery to prevent one kind of loss caused another kind of loss:

Although an extremely cautious operator could take care not to allow any joint of his finger to project from the timber when guiding it over the cutterhead, the

responsibilities of governing that are developed and enacted out in a wide variety of institutional settings, many of which lie well outside the official “government.” For those who are familiar with the work of Michel Foucault, the “insurance state” refers to governmentality – a governmental rationality, or, in plain English, an approach to governing – not a set of “Government” institutions. (Burchell et al 1991)

main danger defied all caution.... Not only every precaution but also all protecting devices seemed to fail in the face of this danger, as they either proved to be totally inadequate or, *whereas they reduced the danger on the one hand* (automatic covering of the cutters slot by a protecting slide, or by reducing the width of the cutter space), *they increased it on the other* by not allowing the chipping sufficient space to leave the machine, which resulted in choked cutter spaces and in injured fingers when the operator attempted to clear the slot of chippings.

(Weisbrod pp 419–20, quoting Brod 1960. Emphasis supplied.)

My favorite shorthand phrase for injury that results from trying to prevent harm is “iatrogenic injury” – a term made famous by Ivan Illich’s book, *Medical Nemesis*. (1976) In the medical context, “iatrogenic” injury is injury or sickness caused by the medical system itself, as when a patient gets infected in the hospital, undergoes an unnecessary hysterectomy, or receives a useless bone marrow transplant. Yet, iatrogenic injury is conceptually a much broader concept – encompassing the problem of asbestos, the risks of radioactive medical waste, and any other situation in which effort to prevent one kind of harm creates another. (Cf. Graham & Weiner 1995).

Historically, moral hazard and iatrogenic injury were localized concerns – a problem of underwriting and benefit design in the case of moral hazard and industrial or hospital risk management in the case of iatrogenic injury. What was new, with the rise of advanced liberalism and the Green Movement, was the recognition that moral hazard and iatrogenic injury are systemic problems embedded in the very foundations of the insurance state.

PART THREE: EMBRACING RISK AND THE PRECAUTIONARY PRINCIPLE

Both embracing risk and the precautionary principle are reactions to the limits of the insurance state. *Embracing risk* is a principally a reaction to the limits of the insurance state’s ability to deliver on its responsibility to spread loss, while the *precautionary principle* is a principally a reaction to the limits of the insurance state’s ability to deliver on its responsibility

to prevent loss. Embracing risk responds to the problem of moral hazard, the precautionary principle to the problem of fiatrogenic injury (though of course things are not entirely this tidy on close analysis). Taken together, embracing risk and the precautionary principle pose a tremendous challenge. They challenge us to do nothing less than re-imagine and therefore re-invent insurance.

Embracing Risk

Here are four examples of “embracing risk” phenomena in the U.S. context:

First, the shift from a “defined benefit” approach to employment based insurance – in which the employer guarantees the employee a specific retirement and health benefit – to a “defined contribution” approach – in which the employer provides the employee with a specific amount of money and leaves the employee with the responsibility of investing funds for retirement and selecting health benefits.

Second, the corresponding proposed shift in Social Security retirement benefits – the U.S. government provided retirement benefits – in which individuals will have a similar amount of control over a portion of the Social Security taxes they pay.⁴

Third, the rise in the commercial insurance market in large SIRs, captives, retrospective rating and other ways for corporate insureds to retain risk.

Fourth, the redesign of private and social welfare benefits to encourage individuals to use fewer benefits, return to work sooner, and in general bear more risk. One example of this

⁴ In discussions at the conference, Patrick Liedtke and David Moss observed that the first two examples can also be understood as efforts by a large institution to shed risk, and that the workers invited to “embrace” risk were (and in the case of Social Security are being) to some degree misled. I agree. Yet embracing risk is almost always about large institutions shedding risk. In addition, doubts about whether embracing risk is, objectively, the “correct” course to take do not call into question the existence of the cultural trend. (Cf. O’Malley 2002)

David Moss’ further observation that, in shifting to defined contribution approaches, people were led to believe that there really is “zero risk” in “embracing risk,” is also quite possible, though I believe that images of risk in popular culture do contain elements of danger as well as reward, as evidenced, for example, in the examples in the essay on extreme sports. Jonathan Simon wrote for *Embracing Risk*. (Simon 2002) Nevertheless, I agree with Moss’ broader point that the taken-for-granted security provided by the insurance state may have dulled people’s understanding of the downside of the risk/reward equation. Perhaps the collapse of the “dotcoms” and the unfolding Enron scandal will change that dynamic.

phenomenon is illustrated by the renaming of the main welfare program in the U.S. from “Aid to Families with Dependent Children” to “Temporary Assistance to Needy Families.” A second example comes from the late 20th century workers compensation reform movement, which deliberately cut workers compensation income benefits so that people would stay out of work for shorter periods. Other examples appear in the health insurance field with the rise of managed care and the use of financial incentives to affect patient and provider behavior.

These and many other related developments represent a retreat from solidarity. The retreat is motivated on the one hand by a decline in the belief in the risks spreading/canceling power of large institutions and on the other hand by a “bottom up” desire for individual control and autonomy.

I use the word “solidarity” here deliberately. Although the U.S. is supposed to be the land of the autonomous, competitive individual who rejects solidarity, in fact the enormous public and private insurance institutions built over the last 100 years represent a tremendous social commitment to de facto solidarity. These solidarities in many cases are narrower than they might be, and typically they are the collective result of relatively autonomous individuals acting in their self-interest rather than an expression of fraternal responsibility, but they are solidarities nonetheless. (Baker 2002)

As the phrase “retreat from solidarity” suggests, embracing risk threaten to bring about a de-pooling of risk, so that the social policy of “more insurance for more people” becomes one of “more insurance for some, but less for others.” (Cf., Heimer 2002, McCluskey 2002) Indeed, while some of the developments I cited may be salutary, the embrace of risk can also lead to an increased emphasis on risk-based pricing and risk-based competition, in which companies compete by developing new ways to identify “good” risks and shut out the “bad.” The increased emphasis on risk-rating in health insurance and the corresponding decline in community rating are both very real examples of the retreat from solidarity in the U.S. health insurance market. The shift to defined contribution health insurance benefits threaten to exacerbate the resulting de-pooling.

These and many other risk-rating threats make the design and regulation of insurance institutions more important than ever.

Embracing risk can be beneficial when it provides a manageable incentive to individuals in a position to control risk and prevent loss. It is counterproductive when it becomes an excuse for leaving expensive losses on powerless individuals. This is why embracing some risks can be beneficial in health insurance design, and why embracing risk would be a disreputable justification for error exclusions in property and casualty insurance.

Similarly, competing on the basis of risk can be beneficial when it provides useful incentives for risk management and loss prevention. But, just as embracing risk is counterproductive when it becomes an excuse for leaving large losses on individuals, so, too, is competing on the basis of risk over which individuals have no control or moral responsibility. (Cf. Hellman 1997) Competing on that basis has the inevitable consequence of forcing some individuals to “embrace” –surely not an apt word in this context –large losses over which they have no control.

Along with embracing risk, we need to reinvigorate a forgotten 19th century insurance idea –that of *destructive competition*. When insurance companies compete by “cream-skimming” the good risks and shutting out the bad risks, they destroy the safety net that insurance is supposed to provide.

Yes, not all risks are the same. No, the answer to every potential loss is not the spreading risk approach of the past. But, we need to distinguish among risks for the right reasons, so that we don’t deplete ourselves out of the security net that has been one of the wonders of the 20th century. We need to recognize that competition on the basis of risk selection, especially in personal lines of insurance and perhaps more broadly, is destructive and often pernicious –except when risk classification sends a useful signal that insureds can act upon to prevent loss, to their and society’s benefit.

Examples of destructive risk-based competition include classification on the basis of health status and –potentially –credit scoring.⁵ Examples of constructive risk-based competition include classification in the auto insurance market on the basis of the type of car and

⁵Credit scores are numerical ratings that consumer credit information organizations assign to individuals based on their credit history. Many insurance companies have found that credit scores are, in the aggregate, a good predictor of loss experience and, accordingly, use those scores in marketing, underwriting and pricing decisions.

the driving record of the insured and –perhaps, because this is more complicated than many people think –classification of life and health insurer risks on the basis of smoking and consumption of other harmful substances.

Embracing risk need not and should not mean a retreat from either the ideal of protecting individuals from risk or the role of official government institutions in that process. It does mean recognizing that not all risks are the same –some risks should not be fully shifted to the insurance pool. At the same time, however, it demands that we more aggressively police the risk-based distinctions made in the insurance market, so that they do not result in destructive competition.

We are stumbling in this direction already. The legislative activity in the U.S. surrounding the use of genetic testing and credit scoring in personal lines underwriting are both good examples. The challenge for those of us responsible for reflecting on the state of the world is to sort through these developments, organize and articulate them in ways that people can understand, and explain how eliminating destructive competition will work to the benefit of both insurance institutions and consumers.

The Precautionary Principle

Here are four examples of “precautionary principle” phenomena in the U.S. context:

First, the adoption of “strict liability” with regard to products liability, such that the risks and benefits of allegedly defective designs are determined, not on the basis of information that was or could have been available at the time the product was designed, but rather on the basis of information available at the time of trial.

Second, the “Delaney clause” in U.S. food law, which prohibits adding to food any substance which poses any risk of cancer. Although the “zero risk” approach of the Delaney Clause has faced tremendous opposition over the last 10 years, the underlying fear that it reflects remains an important force in environmental law and food and drug regulation.

Third, the massive liabilities imposed on Dow Chemical because of silicon breast implants, despite the almost complete lack of evidence meeting traditional scientific standards that the implants in fact caused the chronic fatigue syndrome and other ailments they were accused of causing.

Fourth, the increasing criminalization of environmental law in the U.S. As Francois Ewald has written, “The appearance of the precautionary principle is registered in the context of victims who are no longer satisfied with compensation, no matter how large, but who are only satisfied when those responsible are held criminally liable.” (2002 p.284).

Examples from abroad include the adoption of the precautionary principle as an explicit principle of international environmental policy at the Rio Summit in 1992, and, the refusal of France and Germany to permit the importation of British beef during the “mad cow” crisis and the related refusal of many Europeans to consume GMO’s –genetically modified organisms.

These and other similar developments reflect a retreat from the utopian belief that harm can be predicted and controlled in advance. (Cf. Beck 1992) They also represent a retreat from two related principles that follow from that belief:

- First, that liability and prevention are to be based on clear, relatively certain information available at the time of the decision in question.
- Second, liability after the fact for harm constitutes both an adequate incentive for prevention and an adequate social response to the appearance of the harm.

Because some catastrophic harm cannot in fact be predicted in advance –this is especially true with iatrogenic harm –the “efficient” level of prevention and the future cost of the harm also cannot be predicted in advance. ⁶This –the fundamental insight that underlies the precautionary principle –threatens an insurance system that is based on the idea that “insurance” involves fixed premiums paid in advance for guaranteed benefits in the event of loss.

⁶Cf. Geistfeld 2001, for a useful (and brief) review of the literature on the precautionary principle, as well as an attempt to confine the principle to situations in which there is at least a knowable range of possible outcomes.

But of course insurance need not involve fixed premiums paid in advance for guaranteed benefits in the event of loss. Indeed, early insurance arrangements addressed the problem of uncertainty by incorporating post-loss assessments, so that the premiums paid by members of the insurance pool were adjusted to reflect recent losses. The precautionary principle counsels us to return to this old-fashioned approach. Assessment insurance is tailor-made for the uncertainties upon which the precautionary principle rests.

Absent a mechanism for post-loss assessments, victims of inevitable and unpreventable risks –of advanced technology and the iatrogenic harm that results from our mistaken effort to prevent harm –will suffer their loss on their own, which only increases the calls for liability and that government clampdown on entrepreneurial activity.

Yet, because government experts do not have an accurate crystal ball, either, the result of clamping down will be a series of expensive Maginot lines against risk, each of which does a wonderful job of protecting society against a known risk, while doing nothing to protect society from the unknown. (Many of the post-September 11th security procedures at U.S. airports and other public facilities illustrate this phenomenon.) Pushing a bit further on the Maginot line metaphor, I would go far as to suggest that the effort taken in the name of the precautionary principle may even increase our vulnerability to the unknown.

The place where this dynamic seems most likely to develop in the short term is in the area of drugs and other health technologies. Especially in this area, the insurance state has not yet adequately addressed what in Europe is called “development risk” –the risk that a product will produce a kind of harm that is not foreseeable at the time of design but for which the manufacturer is liable under the principle of strict liability. If the risk is not foreseeable to the manufacturer, then it is not foreseeable to insurers, either. This means that liability insurance pricing is at best an estimate, coupled to the fervent hope that the good bets cancel out the bad and the future will not be too different than the past.

Because of this development risk, liability insurers design their insurance contracts so that they can run away from the loss at the earliest possible moment. As a result, limited liability and bankruptcy come to play too large a role in the management of development risk, so that victims do not in fact have the protection against loss that the law claims to provide them.

(Cf. LoPucki 1996) The inevitable consequences are uncompensated victims, a clamor for criminalization, and a call for extreme effort to prevent loss in the future.

CONCLUSION

As Francois Ewald writes toward the end of his essay in *Embracing Risk*, the new “age of precaution” will be an age of insurance no less than the earlier ages of responsibility and solidarity. The only question is how insurance institutions will adapt. I have tried to suggest that insurance institutions should adapt in two complementary ways.

First, insurance institutions should adapt to increase the incentives for individuals and institutions to prevent harm **while at the same time** working together –through government regulation –to prevent the destructive competition and de-risking that may otherwise result.

Second, insurance institutions should adapt to provide coverage for unpredictable loss by increasing the ability of insurers, or the system as a whole, to make assessments. That assessment element can come in the form of a government backstop –as developed for example in Florida following Hurricane Andrew and as suggested for terrorism. Or perhaps it will come in more creative ways that social scientists and lawyers will invent.

Re-inventing insurance to prevent destructive competition and to legitimate and facilitate assessment present real challenges. But those challenges are no more difficult than those successfully surmounted by the architects and engineers of the insurance state that served us so well in the last century. So, fellow architects and engineers, let’s get to work!

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