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The Paltry Power Of The Precautionary Principle

Law360, New York (January 27, 2014, 5:29 PM ET) -- The precautionary principle may be met anytime[1] an advocate wishes to secure any action or award she is unable to prove by traditional proof. Advocates have invoked it in environmental cases spanning natural resource damages, defense of regulation and even toxic tort style personal injury. But in litigation it has not proven a solution to inadequate proof of causation or actual risk.

The precise formulation of the precautionary principle varies. While related idioms, like "better safe than sorry," have long been in popular parlance, the modern formulation precautionary principle is relatively new, with origins generally traced to the 1992 Rio Declaration.[2] Principle 15 states, "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

A more reactionary version, unmoderated by requirements of "serious or irreversible" threats, "capabilities," or "cost-effectiveness" was forwarded at the Wingspread Conference on the Precautionary Principle in 1998.[3] Alternates regularly appear in the academic literature.[4] Indeed, much of the debate over the precautionary principle is over its operational definition and vagueness.[5] That said, the general sentiment behind it has been described as akin to a reversal of the typical burden of proof in litigation and regulation.[6]

While holding sway in the scientific and environmental literature, there are criticisms of the precautionary principle. It has been derided in some applications as anti-science because it can render risk identification scientific research superfluous.[7] It is operationally vague in that it can at times be called down on both sides of an issue or "acknowledged by all governments regardless of how well they protect the environment."[8] It is arguably incoherent since a regulatory ban or prohibition brought on by it may engender risks the precautionary principle could then be invoked to prohibit.[9]

Regardless of its substantive public policy merits, the precautionary principle is at fundamental odds with traditional requirements of proof; it appears seldom in cases and then fairs poorly. That was true when San Francisco invoked it to justify compelling the distribution of a cell phone warning that left the "overall impression" that "cell phones are dangerous and that they have somehow escaped the regulatory process." The court found it was "untrue and misleading, for all of the cell phones sold in the United States must comply with safety limits set by the FCC."[10]

The city based the ordinance on its policy of adhering to "the precautionary principle, which provides that the government should not wait for scientific proof of a health or safety risk before taking steps to

inform the public of the potential for harm[.]"[11] The problem with mandating a risk warning based on the precautionary principle, the court found, was its alteration of the concept of risk:

[T]he word "risk" is being used [differently]. Usually, for example, we say smoking presents a "risk" in the sense that smoking is a known carcinogen but may or may not produce cancer in any given smoker, so there is a statistical risk that smoking will lead to cancer for any given individual. As for anything in the "possibly carcinogenic" category, however, there is no known statistical correlation and the word "risk" is being used in a different way, namely that there is a "risk" that the "possible" may turn out to be a "definite."[12]

The court did hold open the imposition of disclosure obligations based on "the possibility that an agent may (or may not) turn out to be harmful."[13] However, a rule sustained but also bounded by the precautionary principle proved its own reward: the court ordered the inclusion of statements essentially undercutting the warning rather than permitting the city to "compel[] retailers to disseminate misleading statements."[14]

Likewise, the precautionary principle has proven little help in challenging government action. In Sancho v. United States DOE, the plaintiffs invoked "the European Council's 'precautionary principle,'" to enjoin operation of a supercollider because, they claimed, it "could lead to the end of all mankind."[15] The Ninth Circuit affirmed dismissal since "[s]peculative fear of future harm does not constitute an injury in fact sufficient to confer standing."[16]

The precautionary principle has fared a little better in damages cases. It was unsuccessfully deployed as a standard of conduct test in the welding fume litigation.[17] But the court excluded the ethicist who measured "prudent practices" by "whether the defendant complied with the 'precautionary principle'" because "the duties demanded by this principle are not coterminous with the legal obligations that are relevant in this case."[18]

The conceptually similar result followed when an expert witness for New Mexico invoked it to justify, for natural resource damage purposes, permanently abandoning a water supply.[19] Put differently, the precautionary principle was to attain for New Mexico "a lucrative damages award" for the permanent loss of water resources from the same defendants who were carrying out a state approved cleanup of the resource.[20] But the precautionary principle could not moot a remediation to render a resource impairment permanent since it was "necessarily a fact-driven determination, context-dependent, and inescapably empirical, based upon the nature and circumstances of the particular injury itself."[21] The incoherence of the precautionary principle cut against it too since it "counsel[s] as strongly in favor of effective remediation as it does abandonment[.]"[22]

While it has some prominence in the environmental literature, the precautionary principle's efficacy as a litigation argument has proven scant. A common strain through the opinions dismissive of it is the precautionary principle's inherent conflict with traditional framework of proof in litigation. So while the precautionary principle should be taken seriously when encountered, its persuasive value in court is not likely to be high.

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[1] Goldstein BD, Carruth RS. Implications of the precautionary principle to environmental regulation in the United States: Examples from the control of hazardous air pollutants in the 1990 Clean Air Act Amendments. Law Contemp Probl 2003;66:247–61.

[2] 1992 Rio Declaration on Environment and Development, Principle 15, available at http://www.gdrc.org/u-gov/precaution-7.html

[3] "Wingspread Conference on the Precautionary Principle". The Science and Environmental Health Network. Jan. 26, 1998 ("When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.")

[4] See e.g., P. Grandjean, Epidemiology. 2008 January; 19(1): 158–162 ("The key element of the PP is the justification for appropriate public health action in response to limited, but plausible and credible evidence of likely and substantial harm. The PP is thereby aimed at avoiding possible future harm associated with suspected, but not conclusive, environmental risks.").

[5] See Manson, N.A. Formulating the Precautionary Principle, Envir Ethics 24, 263 (1999) ("Versions of the precautionary principle are many, both in terms of wording and in terms of surface syntactic structure.")

[6] In re Welding Fume Prods. Liab. Litig., 2005 U.S. Dist. LEXIS 46164, 91-92 (N.D. Ohio Aug. 8, 2005)

[7] Goldstein BD, Carruth RS. Implications of the Precautionary Principle: is it a threat to science?, Int J Occup Med Environ Health. 2004;17(1):153-61 ("[W]e express concern that insufficient attention is being placed on the potentially negative consequences of the Precautionary Principle on science and technology.")

[8] Jordan, A. and T. O'Riordan (1999) "The precautionary principle in contemporary environmental policy and politics". In Protecting public health and the environment: implementing the precautionary principle, 15–35. C. Raffensberger and J. Tickner, eds. Washington, DC: Island Press

[9] Id

[10] CTIA v. City & County of San Francisco, 827 F. Supp. 2d 1054, 1062-1063 (N.D. Cal. 2011)

[11] Id.

[12] Id.

[13] Id. at 1061.

[14] Id. at 1062-63.

[15] Sancho v. United States DOE, 578 F. Supp. 2d 1258, 1260-61 (D. Haw. 2008)

[16] Sancho v. United States DOE, 392 Fed. Appx. 610, 611 (9th Cir. Haw. 2010)

[17] In re Welding Fume Prods. Liab. Litig., 2005 U.S. Dist. LEXIS 46164, 91-92 (N.D. Ohio Aug. 8, 2005)

[18] Id.

[19] New Mexico v. GE, 335 F. Supp. 2d 1185, 1220 (D.N.M. 2004)

[20] Id.

[21] Id. at 221.

[22] Id.
