

2005 ASSEMBLY BILL 222

March 16, 2005 – Introduced by Representatives KAUFERT, HUEBSCH, OTT, HAHN, HUNDERTMARK, HINES, WOOD, FRISKE, TURNER, HONADEL, MUSSER, TRAVIS, TOWNS, VAN ROY, KRAWCZYK, KREIBICH, OWENS, BIES, ZEPNICK, YOUNG and ALBERS, cosponsored by Senators COWLES, A. LASEE and PLALE. Referred to Committee on Insurance.

1 **AN ACT** *to create* 20.370 (2) (dj), 292.71 and 632.28 of the statutes; **relating to:**
2 environmental claims under general liability insurance policies, fees related to
3 removal of contaminated material from a navigable water, and making an
4 appropriation.

Analysis by the Legislative Reference Bureau

This bill addresses various issues related to environmental claims under general liability insurance policies. An environmental claim is defined in the bill as a claim made by an insured under a general liability insurance policy for defense or indemnity based on the insured's liability or potential liability for bodily injury or property damage arising from the presence of pollutants on the bed or banks of a navigable water in this state as a result of a release of pollutants in this state.

The bill provides some general principles for interpreting a general liability insurance policy under which an environmental claim is made, including: 1) that Wisconsin law will be applied in all cases; 2) that any action taken by, or agreement made with, a governmental entity under which the insured is considered to be potentially liable for pollution in this state and that directs or requests the insured to take action with respect to the pollution is equivalent to a lawsuit under the terms of the policy; and 3) that the insurer may not deny coverage for reasonable fees, costs, or expenses incurred by the insured under a voluntary agreement between the insured and a governmental entity as a result of a directive or request by the governmental entity to take action with respect to pollution in this state on the ground that those expenses are voluntary payments by the insured.

ASSEMBLY BILL 222

The bill provides rules for interpreting an “all-sums” policy, which is defined as a particular type of general liability insurance policy under which the insurer agrees to indemnify or pay on behalf of the insured “all sums” that the insured becomes legally obligated to pay as a result of a covered risk. The bill provides that, if an environmental claim under an all-sums policy is based on an assertion by a governmental entity or other third person that the insured is liable for bodily injury or property damage as a result of a release of pollutants in this state and only part of the injury or damage occurred or is alleged to have occurred during the policy period of that all-sums policy, unless the policy expressly requires proration of losses in that case, the insurer may not reduce coverage under the all-sums policy because the insured may have other insurance that covers the injury or damage that occurred outside of the policy period. In addition, if the injury or damage may have occurred during two or more policy periods under one or more all-sums policies: 1) each insurer that provided coverage under a policy period and that has a duty to defend is jointly and severally liable, up to the insurer’s policy limits, for the full amount of the costs of defending the insured with respect to the claim; 2) each insurer that provided coverage and that has a duty to pay settlement or judgment costs is jointly and severally liable, up to the insurer’s policy limits, for the full amount of the settlement or judgment with respect to the claim; and 3) the insured may designate a policy period and the policy or policies providing coverage for that period must provide full coverage up to the policy limits and if the claim is not fully satisfied, the insured may designate the order of other policy periods and each policy providing coverage for the designated periods must provide full coverage in the order designated until the claim is fully paid.

The bill provides that in any lawsuit based on an environmental claim the insured may elect to file suit against fewer than all of the insurers providing coverage for the claim; that there are rebuttable presumptions that certain specified costs are defense costs, and certain other specified costs are indemnity costs, payable by an insurer; that the court must award certain costs and fees to an insured if the insured is successful in litigating a coverage issue for an environmental claim; that an insurer that has not entered into a good faith settlement is liable up to the policy limits to any governmental entity that seeks to recover against the insured; and that such an insurer may be proceeded against directly or joined in any action brought by a governmental entity against the insured. The bill also provides that any insurer that pays (or that has paid before the effective date of the bill) an environmental claim may seek contribution from any other insurer that is potentially liable for the claim and that has not entered into a good faith settlement of the claim with the insured.

The bill also addresses a lost policy that is subject to an environmental claim. It sets out duties for both the insurer and the insured in that situation, and provides that, if the insured is unable to produce evidence of the policy limits, the applicable limits will be the minimum limits that the insurer was offering at the time, but that, if the insured produces evidence of the limits, the insurer then has the burden to show that different limits apply.

ASSEMBLY BILL 222

Finally, the bill authorizes the Department of Natural Resources (DNR) to collect fees from a person who is responsible, under state or federal law, for an environmental cleanup requiring the removal of at least 10,000 tons of contaminated material from the bed or banks of a navigable water. The fee may not exceed 25 cents per ton. DNR may use the fees for activities related to environmental cleanups in and adjacent to navigable waters.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 20.370 (2) (dj) of the statutes is created to read:

2 20.370 (2) (dj) *Solid waste management — navigable waters.* All moneys
3 received under s. 292.71 for activities under ch. 292 related to remedial action in and
4 adjacent to navigable waters.

5 **SECTION 2.** 292.71 of the statutes is created to read:

6 **292.71 Fees related to removal of contaminated materials from a**
7 **navigable water.** The department may assess and collect fees from a person
8 responsible, under this chapter or the federal Comprehensive Environmental
9 Response, Compensation, and Liability Act, 42 USC 9601 to 9675, for remedial action
10 involving the removal of at least 10,000 tons of contaminated material from the bed
11 or banks of a navigable water. The department may not assess a fee under this
12 section that exceeds 25 cents per ton of contaminated material removed from the bed
13 or banks of a navigable water. Fees collected under this section shall be credited to
14 the appropriation account under s. 20.370 (2) (dj).

15 **SECTION 3.** 632.28 of the statutes is created to read:

16 **632.28 Environmental claims under general liability insurance**
17 **policies. (1) DEFINITIONS.** In this section:

ASSEMBLY BILL 222

1 (a) “All-sums policy” means a general liability insurance policy under which
2 the insurer agrees, using such words as “all sums,” “those sums,” “the total sum,” or
3 similar words, to indemnify or pay on behalf of the insured all sums that the insured
4 becomes legally obligated to pay as a result of a covered risk.

5 (b) “Environmental claim” means a claim for defense or indemnity that is
6 submitted under a general liability insurance policy by an insured and that is based
7 on the insured’s liability or potential liability for bodily injury or property damage
8 arising from the presence of pollutants on the bed or banks of a navigable water in
9 this state as a result of a release of pollutants in this state.

10 (c) “Extended underlying assertion” means an assertion by a governmental
11 entity or other 3rd person that a person who is or was insured under one or more
12 all-sums policies is liable for bodily injury or property damage arising from pollution
13 in this state as a result of a release of pollutants in this state and the injury or damage
14 occurred or is alleged to have occurred partially but not entirely during the policy
15 period of any one all-sums policy.

16 (d) “Governmental entity” means any federal, state, or local government, or any
17 instrumentality of any of them, or any trustee for natural resources designated
18 under 42 USC 9607 (f) (2) or 40 CFR part 300, subpart G.

19 (dm) “Navigable waters” has the meaning given in s. 30.01 (4m).

20 (e) “Pollutant” means any solid, liquid, or gaseous irritant or contaminant,
21 including smoke, vapor, soot, fumes, acids, alkalies, chemicals, asbestos, petroleum
22 products, lead, products containing lead, and waste.

23 (f) “Pollution” means the presence of pollutants in or on land, air, or water.

ASSEMBLY BILL 222

1 **(2) GENERAL INTERPRETATION PROVISIONS.** Except as otherwise provided in the
2 policy, all of the following provisions apply to the interpretation of general liability
3 insurance policies under which environmental claims are made:

4 (a) Wisconsin law shall be applied in all cases involving environmental claims,
5 regardless of the state in which the general liability insurance policy under which
6 the claim is or was made was issued or delivered. Nothing in this section shall be
7 interpreted to modify common law rules governing choice of law determinations for
8 claims for defense or indemnity that are submitted under general liability insurance
9 policies and that involve bodily injury or property damage arising from pollution
10 outside this state.

11 (b) Any action taken by a governmental entity against, or any agreement by a
12 governmental entity with, an insured in which the governmental entity, in writing,
13 notifies the insured that it considers the insured to be potentially liable for pollution
14 in this state, or directs, requests, or agrees that the insured take action with respect
15 to pollution in this state, is equivalent to a suit or lawsuit as those terms are used
16 in the general liability insurance policy.

17 (c) The insurer may not deny coverage for any reasonable and necessary fees,
18 costs, and expenses, including costs and expenses of assessments, studies, and
19 investigations, that are incurred by the insured under a voluntary written
20 agreement, consent decree, or consent order between the insured and a
21 governmental entity and as a result of a written direction, request, or agreement by
22 the governmental entity to take action with respect to pollution in this state, on the
23 ground that those expenses constitute voluntary payments by the insured.

24 **(3) RULES FOR INTERPRETING ALL-SUMS POLICIES.** In the absence of an express
25 provision requiring proration of losses for an environmental claim that is based on

ASSEMBLY BILL 222

1 an extended underlying assertion, all of the following rules apply to the
2 interpretation of all-sums policies under which environmental claims that are based
3 on extended underlying assertions are made:

4 (a) An insurer may not reduce coverage otherwise available to an insured under
5 an all-sums policy because the claim involves bodily injury or property damage that
6 occurred, in part, outside the policy period of that all-sums policy, regardless of
7 whether other valid or collectible insurance is available to the insured for the injury
8 or damage that occurred outside that policy period.

9 (b) If an environmental claim is submitted under one or more all-sums policies
10 and involves bodily injury or property damage that occurred, or that may have
11 occurred, during 2 or more policy periods, all of the following apply:

12 1. Each insurer that provided coverage for a policy period and that has a duty
13 to defend under the policy is jointly and severally liable to the insured for the full
14 amount of the insured's costs of defending against the extended underlying
15 assertion, subject to any applicable limits of liability.

16 2. Each insurer that provided coverage for a policy period and that has a duty
17 to pay any costs of a settlement or judgment under the policy is jointly and severally
18 liable to the insured for the full amount of the settlement or judgment for the
19 extended underlying assertion, subject to any applicable limits of liability.

20 3. The insured may designate a policy period, and the policy or policies
21 providing coverage for that period, including primary, umbrella, and excess
22 coverage, shall provide full coverage, subject to any applicable limits of liability. If
23 the environmental claim is not fully satisfied from policies covering that policy
24 period, the insured may designate the order of other policy periods, and the policy
25 or policies providing coverage for each of those periods, including primary, umbrella,

ASSEMBLY BILL 222

1 and excess coverage, shall provide full coverage, subject to any applicable limits of
2 liability, in that order until the environmental claim is fully paid.

3 4. If the insured makes a designation under subd. 3., the coverage available to
4 the insured under a policy providing coverage for a designated policy period,
5 including primary, umbrella, and excess coverage, may not be reduced by the actual
6 or potential availability of coverage for other policy periods.

7 **(4) SUIT ON ENVIRONMENTAL CLAIM.** In any lawsuit involving an environmental
8 claim, all of the following apply:

9 (a) The insured may elect to file suit against fewer than all insurers providing
10 coverage for the claim, notwithstanding ss. 803.03 and 806.04 (11).

11 (b) All of the following are rebuttable presumptions:

12 1. That the costs of preliminary assessments, remedial investigations, risk
13 assessments, feasibility studies, site investigations, or other necessary investigation
14 are defense costs payable by the insurer, subject to the provisions of the general
15 liability insurance policy under which there is coverage for the costs.

16 2. That the costs of removal actions, remedial action, or natural resource
17 damages are indemnity costs and that payment of those costs by the insurer reduces
18 the insurer's applicable limit of liability on the insurer's indemnity obligations,
19 subject to the provisions of the general liability insurance policy under which there
20 is coverage for the costs.

21 (c) The court shall award to an insured the sum of the costs, disbursements, and
22 expenses, including accounting fees and reasonable attorney fees notwithstanding
23 s. 814.04 (1), necessary to prepare for and participate in an action in which the
24 insured successfully litigates a coverage issue for an environmental claim.

ASSEMBLY BILL 222

1 (d) 1. An insurer under a general liability insurance policy under which an
2 environmental claim is made that has not entered into a good faith settlement and
3 release of the environmental claim with the insured is liable, up to the amounts
4 stated in the policy, to any governmental entity that seeks to recover against the
5 insured for pollution in this state, irrespective of whether the liability is presently
6 established or is contingent and to become fixed or certain by final judgment.

7 2. An insurer under subd. 1. may be proceeded against directly and may be
8 joined in any action brought by the governmental entity against the insured.

9 (5) EFFECT OF SETTLEMENT. An insurer that enters into a good faith settlement
10 and release of an environmental claim, or an insurer that has entered into a good
11 faith settlement and release of an environmental claim before the effective date of
12 this subsection [revisor inserts date], shall not be liable to any person for the
13 claim. Entering into a good faith settlement and release of an environmental claim
14 with an insurer does not reduce or otherwise impair the right of an insured to recover
15 the full balance of its actual loss as provided in this section from an insurer that has
16 not entered into a good faith settlement and release of the claim.

17 (6) CONTRIBUTION AMONG INSURERS. An insurer that pays an environmental
18 claim, or an insurer that paid an environmental claim before the effective date of this
19 subsection [revisor inserts date], may seek contribution from any other insurer
20 that is liable or potentially liable for the claim and that has not entered into a good
21 faith settlement and release of the environmental claim with the insured.

22 (7) LOST POLICY. (a) In this subsection, “lost policy” means all or any part of a
23 general liability insurance policy that is subject to an environmental claim and that
24 is ruined, destroyed, misplaced, or otherwise no longer possessed by the insured.

ASSEMBLY BILL 222

1 (b) If, after a diligent investigation by an insured of the insured's own records,
2 including computer records and the records of past and present agents of the insured,
3 the insured is unable to reconstruct a lost policy, the insured may provide notice of
4 the lost policy to the insurer that the insured believes issued the policy. The notice
5 must be in writing and in sufficient detail to identify the person or entity claiming
6 coverage, including the name of the alleged policyholder, if known, and any other
7 material facts concerning the lost policy known to the person providing the notice.

8 (c) An insurer must thoroughly and promptly investigate a notice of a lost policy
9 and must provide to the insured claiming coverage under the lost policy all facts
10 known or discovered during the investigation concerning the issuance and terms of
11 the policy, including copies of documents establishing the issuance and terms of the
12 policy.

13 (d) For facilitating reconstruction, and determining the terms, of a lost policy,
14 the insurer and the insured must comply with the following minimum standards:

15 1. Within 30 business days after receipt by the insurer of notice of a lost policy,
16 the insurer shall commence an investigation into the insurer's records, including
17 computer records, to determine whether the insurer issued the lost policy. If the
18 insurer determines that it issued the policy, the insurer shall commence an
19 investigation into the terms and conditions relevant to any environmental claim
20 made under the policy.

21 2. The insurer and the insured shall cooperate with each other in determining
22 the terms of a lost policy. The insurer and the insured shall provide to each other the
23 facts known or discovered during an investigation, including the identity of any
24 witnesses with knowledge of facts related to the issuance or existence of the lost

ASSEMBLY BILL 222

1 policy, and shall provide each other with copies of any documents establishing facts
2 related to the lost policy.

3 3. An insurer that discovers information tending to show the existence of an
4 insurance policy that applies to the claim shall provide an accurate copy of the terms
5 of the policy or a reconstruction of the policy. If the insured discovers information
6 tending to show the existence of an insurance policy that applies to the claim, the
7 insurer shall provide an accurate copy of the terms of the policy or a reconstruction
8 of the policy upon the request of the insured.

9 4. If the insurer is not able to locate portions of the policy or determine its terms,
10 conditions, or exclusions, the insurer shall provide copies of all insurance policy
11 forms issued by the insurer during the applicable policy period that potentially apply
12 to the environmental claim. The insurer shall identify which of the potentially
13 applicable forms, if any, is most likely to have been issued by the insurer to the
14 insured, or the insurer shall state why it is unable to identify the forms after a good
15 faith search.

16 (e) If, based on information discovered in the investigation of a lost policy, the
17 insured can show by a preponderance of the evidence that a general liability
18 insurance policy was issued to the insured by the insurer but cannot produce
19 evidence that tends to show the policy limits applicable to the policy, it shall be
20 assumed that the minimum limits of coverage, including any exclusions to coverage,
21 that the insurer offered during the period in question under such policies apply to
22 the policy purchased by the insured. If, however, the insured produces evidence that
23 tends to show the policy limits applicable to the policy, the insurer has the burden
24 of proof to show by a preponderance of the evidence that different policy limits,
25 including any exclusions to coverage, apply to the policy purchased by the insured.

