

2005 DRAFTING REQUEST

Bill

Received: **09/15/2004**

Wanted: **Soon**

For: **Dean Kaufert (608) 266-5719**

This file may be shown to any legislator: **NO**

May Contact:

Subject: **Insurance - other insurance**

Received By: **pkahler**

Identical to LRB:

By/Representing: **Matt Kussow**

Drafter: **pkahler**

Addl. Drafters: **mglass
btradewe**

Extra Copies: **CMH**

Submit via email: **YES**

Requester's email: **Rep.Kaufert@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Environmental claims coverage under liability insurance

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pkahler 09/17/2004	wjackson 09/17/2004		_____			
/P1	pkahler 11/18/2004	wjackson 12/02/2004	rschluet 09/17/2004	_____	lemery 09/17/2004		
/1			rschluet 12/03/2004	_____	lnorthro 12/03/2004		

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/2	pkahler 01/27/2005	wjackson 01/29/2005	jfrantze 01/31/2005	_____	lemery 01/31/2005		State
/3	btradewe 02/02/2005	wjackson 02/03/2005	jfrantze 02/03/2005	_____	sbasford 02/03/2005	sbasford 03/01/2005	State
/4	btradewe 03/03/2005	wjackson 03/03/2005	pgreensl 03/03/2005	_____	lnorthro 03/03/2005	lnorthro 03/03/2005	

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Jb 2/3 *JH/Ch 2/3*

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/1		1/2 WJ 1/29	rschluet	_____	Inorthro		
			<i>Jb 1/31</i>	<i>Jb 1/31</i>			

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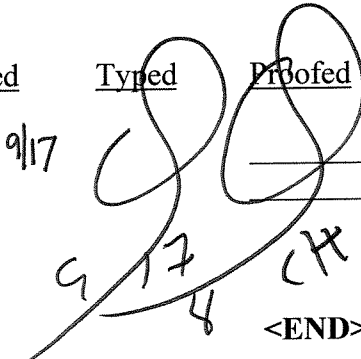
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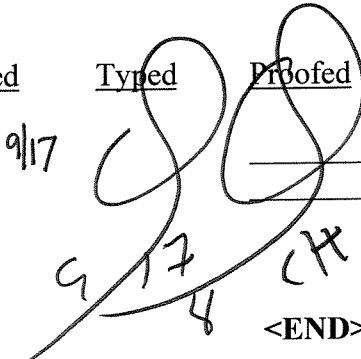
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FE Sent For:  **<END>**

Matt Kussow by phone 9-14-04

Rep Kaufet

need redraft of ~~PSB~~ 03-4514

use memo sent over by Sen Cowless office
as the redraft instructions

MEMORANDUM

TO: Pamela Kahler, Legislative Reference Bureau

FROM: Senator Robert Cowles

DATE: August 18, 2004

RE: Request for Revisions to LRB-4514/P3

Thank you for your preliminary legislative draft, LRB-4514/P3 ("P3 draft"), which addresses environmental liability insurance claims. It is apparent from both your drafter's note (LRB-4514/P3dn) and the embedded notes in the P3 draft that this legislation can be simplified and clarified.

Accordingly, I suggest the following revisions. In addition to the following narrative description of my suggestions, I have attached a strikeout/underline re-draft of the P3 draft to clearly illustrate my intent.

1. Definitions – 632.28 (1).

- a. *New Definition: "All Sums Policy."* I have added a new definition of "all sums policy" because this term is used in my revised section (3). (See 3.b. below.)
- b. *Revised Definition: "Environmental Claim."* I have slightly revised your suggested definition of "environmental claim" in order to clarify that this refers only to claims based on pollution occurring within this state as a result of a release of pollutants in this state.
- c. *New Definition: "Extended Underlying Claim."* I have added a new definition of "extended underlying claim" because this term is used in my revised section (3). (See 3.b. below.)
- d. *Revised Definition: "Governmental Entity."* In your embedded note in the P3 draft following the definition of "governmental entity," you indicate that under 42 USC § 9607 (f) (2) "trustees for natural resources are federal or state officials, so they do not need to be mentioned separately". I do not believe that this is accurate. The provision in the superfund statute that you cite only gives a government official the authority to *designate* a trustee for natural resources. Accordingly, I request that you add back "any trustee for natural resources" to this section.

- e. *Revised Definition: "Pollutant."* In your embedded note in the P3 draft you raised a number of concerns about the definition of "pollutant." Please see my suggested revisions to this definition, which addresses those concerns.
 - f. *Revised Definition: "Pollution."* I suggest a minor revision to the definition of "pollution" such that it is not duplicative of the language used to define "environmental claim."
2. **General -- § 632.28 (2).** In the P3 draft, this section was titled "Rules of Construction of Policy Under Which Claim is Made." I suggest that this is retitled "General," as that better describes these provisions.
- a. *Suggested Revision to Acknowledge Language of Policy.* In order to address your concern in your embedded note at the bottom of page 2 in the P3 draft regarding policies that designate a choice of law, I suggest adding a phrase at the beginning of § 632.28 (2) that states that these rules apply only in the absence of an express provision to the contrary.
 - b. *Suggested Revision to § 632.28 (2) (a).* The proposed revision in this section more clearly allows the other statutory provisions of Chapters 631 and 632 to apply to general liability insurance policies.
 - c. *Suggested Revision to § 632.28(2)(b).* I have added the phrase "in this state" to this section to clarify what is meant by pollution.
3. **Rules of Construction of All Sums Policies -- § 632.28 (3).**
- a. *Deletion of Sections 632.28 (3) and (4) from the P3 Draft.* I have deleted, in their entirety, sections 632.28 (3) and (4) from the P3 draft. I have suggested an alternative section (3) that I believe more clearly accomplishes my intent. (See below.)
 - b. *Suggested Creation of NEW Section 632.28(3).* As you will notice in the attached strikeout/underline version of the P3 draft, I suggest creating a new section 632.28 (3), which more clearly expresses my intent. This new section delineates several rules of construction that will apply in the absence of an express provision authorizing proration of losses from an "extended underlying claim." These rules are intended to clearly express the process by which an insured can make claims against multiple insurers for an extended underlying claim. In addition, in response to your Drafter's Note, this section clearly indicates that insurers under any triggered policies are jointly and severally liable for defense costs and payment of any settlement or judgment, subject to any applicable policy limits.
4. **Suit on Environmental Claim – Renumbered § 632.28 (4).** I suggest two revisions to this section. The first, in subsection (a), is intended to clarify that this provision applies to any lawsuit involving an environmental claim. Second, I deleted subsection (c), as I believe that it is unnecessary.

5. **Contribution Among Insurers – Renumbered § 632.28 (5).** First, I have deleted the reference to Wis. Stat. § 631.43 and instead reference sub. (3), because new sub. (3) makes this statutory reference unnecessary. In addition, I suggest adding language to this section that is similar to the language included in P3 section (4)(e) (renumbered (4)(d)), which will acknowledge previous good faith settlements and releases of environmental claims into which insurers and insureds may have already entered. This provision makes it clear that insurers cannot thwart the objectives of the all sums legislation by using past settlements to unfairly reduce an insured's recovery from nonsettling insurers. Use of past settlements in that manner would undercut the public policy encouraging settlements.

6. **Enforcement – Renumbered § 632.28 (7) (b).** I believe that the “notwithstanding” qualification at the beginning of this section is confusing and unnecessary. Please amend as indicated.

2003 – 2004 LEGISLATURE

LRB-4514/P3

PJK:wlj:pg

Suggested Revisions

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

AN ACT to create 632.28 of the statutes; relating to: environmental claims under general liability insurance policies.

1 SECTION 1. 632.28 of the statutes is created to read:

2 **632.28 Environmental claims under general liability insurance policies.**

3 (1) DEFINITIONS. In this section:

4 (a) “All sums policy” means a general liability insurance policy that provides,
5 using words such as “all sums,” “those sums,” “the total sum” or other similar words,
6 that the insurer shall indemnify or pay all sums on behalf of the insured which the
7 insured shall become legally obligated to pay as a result of a covered risk.

8 (ab) “Environmental claim” means a claim for defense or indemnity that is
9 submitted under a general liability insurance policy by an insured and that is based on
10 the insured’s liability or potential liability for bodily injury or property damage
11 arising from pollution ^{resp} ~~in this state~~ occurring within this state as a result of a release of
12 pollutants in this state.

13 (c) “Extended underlying claim” means a claim by a governmental entity or
14 other third person that the insured is liable for bodily injury or property damage

add to def of pollution
Pres
See (2)(a)

1 arising from pollution in this state, where such injury or damage occurred or is
2 alleged to have occurred partially but not entirely during the policy period of any one
3 all sums policy period.

4 (bd) "Governmental entity" means any federal, state, or local government, or
5 any instrumentality of any of them and any trustee for natural resources.

6 (ee) "Pollutant" means ~~heat or~~ any solid, liquid, or gaseous irritant or
7 contaminant, including smoke, vapor, soot, fumes, acids, alkalies, chemicals,
8 asbestos, ~~oil, gasoline,~~ petroleum products, lead, products containing lead, and waste.

9 (d) "Pollution" means ~~a release~~ the presence of pollutants ⁱⁿ onto or ^{on} into land,
10 air, or water.

11 (2) ~~RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE~~ GENERAL.
12 In the absence of an express provision in the policy to the contrary, the following
13 shall rules of construction apply to the interpretation of general liability insurance
14 policies under which environmental claims are made:

15 (a) Notwithstanding s. 631.01, Wisconsin law shall be applied in all cases
16 involving environmental claims, regardless of the state in which the general liability
17 insurance policy under which the claim is or was made was issued or delivered.

18 Nothing in this section shall be interpreted to modify common law rules governing
19 choice of law determinations for claims for defense or indemnity that are submitted
20 under general liability insurance policies and that involve bodily injury or property
21 damage arising from pollution outside this state.

22 (b) Any action taken by a governmental entity against, or any agreement by a
23 governmental entity with, an insured in which the governmental entity, in writing,

1 notifies the insured that it considers the insured to be potentially liable for pollution in
2 this state, or directs, requests, or agrees that the insured take action with respect to
3 pollution within this state, is equivalent to a suit or lawsuit as those terms are used in
4 the general liability insurance policy.

5 (c) The insurer may not deny coverage for any reasonable and necessary fees,
6 costs, and expenses, including costs and expenses of assessments, studies, and
7 investigations, that are incurred by the insured under a voluntary written agreement,
8 consent decree, or consent order between the insured and a governmental entity and
9 as a result of a written direction, request, or agreement by the governmental entity to
10 take action with respect to pollution within the state, on the ground that those
11 expenses constitute voluntary payments by the insured.

12 ~~(3) INSURER'S PAYMENT DUTY; INSURED'S DUTY TO INFORM OF OTHER INSURERS. (a)~~
13 ~~An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an~~
14 ~~environmental claim under a general liability insurance policy that provides that the~~
15 ~~insurer has a duty to pay all sums arising out of a risk covered by the policy must pay~~
16 ~~all defense or indemnity costs, or both, arising out of the risk in accordance with the~~
17 ~~applicable terms of its policy, including its limit of liability, independent of and~~
18 ~~unaffected by any other insurance that may provide coverage for the same claim.~~

19 ~~(b) If requested by an insurer against which the insured makes a claim, the~~
20 ~~insured shall provide information regarding any other general liability insurance~~
21 ~~policies covering the insured that may potentially provide coverage for the same~~
22 ~~environmental claim.~~

1 **(b) Where a duty to defend is triggered under all sums policies in two or more**
2 **policy periods, the insurers in each policy period shall be jointly and severally liable**
3 **to the insured for the full amount of the insured's costs of defending the extended**
4 **underlying claim, subject to any applicable limits of liability.**

5 **(c) Where a duty to pay any costs of a settlement or judgment is triggered**
6 **under all sums policies in two or more policy periods, the insurers in each policy**
7 **period shall be jointly and severally liable to the insured for the full amount of the**
8 **settlement or judgment for the extended underlying claim, subject to any applicable**
9 **limits of liability.**

10 **(d) Where all sums policies in more than one policy period have been**
11 **triggered by an extended underlying claim, the insured may designate a policy period**
12 **and the policy or policies covering that period shall provide full coverage, subject to**
13 **any applicable limits of liability. If the environmental claim is not fully satisfied from**
14 **policies in that policy period, the insured may designate the order in which policies in**
15 **other policy periods shall provide coverage, up to the applicable limits of liability,**
16 **until the environmental claim is fully paid.**

17 **(e) Where the insured has selected a policy period under (d), the coverage**
18 **available to the insured under policies during that period, including primary, umbrella**
19 **and excess coverage, shall not be reduced by the actual or potential availability of**
20 **coverage in other policy periods.**

21 **(54) SUIT ON ENVIRONMENTAL CLAIM. (a) If the**~~In any lawsuit involving an~~
22 ~~environmental claim of an insured under sub. (4) (a) is not fully satisfied, the insured~~

what remainder?

1 may elect to file suit on (the remainder of the claim) against fewer than all insurers
2 providing coverage for the claim, notwithstanding ss. 803.03 and 806.04 (11).

3 (b) In any lawsuit involving an environmental claim, all of the following are
4 rebuttable presumptions:

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

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

14 ~~(e) An insurer against which the insured files suit may not be required to pay~~
15 ~~defense or indemnity costs in excess of the applicable policy limits, if any, on such~~
16 ~~defense or indemnity costs.~~

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

21 (ed) 1. An insurer under a general liability insurance policy under which an
22 environmental claim is made that has not entered into a good faith settlement and
23 release of the environmental claim with the insured is liable, up to the amounts stated

1 in the policy, to any governmental entity that seeks to recover against the insured for
2 pollution in this state, irrespective of whether the liability is presently established or is
3 contingent and to become fixed or certain by final judgment.

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

6 **(65)** CONTRIBUTION AMONG INSURERS. Subject to ~~s. 631.43~~sub. (3), an insurer
7 that pays an environmental claim, or an insurer that paid an environmental claim
8 before the effective date of this subsection [revisor inserts date], may seek
9 contribution from any other insurer that is liable or potentially liable for the claim and
10 that has not entered into a good faith settlement and release of the environmental
11 claim with the insured. An insurer that enters or has entered before the effective date
12 of this subsection [revisor inserts date] into a good faith settlement and a release of an
13 environmental claim, shall not be liable or potentially liable for that claim, and a good
14 faith settlement and release of an environmental claim with such insurer shall not
15 reduce or otherwise impair the right of an insured to recover the full balance of its
16 actual loss from a non-settling insurer under sub. (3).

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

20 (b) If, after a diligent investigation by an insured of the insured’s own records,
21 including computer records and the records of past and present agents of the insured,
22 the insured is unable to reconstruct a lost policy, the insured may provide notice of
23 the lost policy to the insurer that the insured believes issued the policy. The notice

1 must be in writing and in sufficient detail to identify the person or entity claiming
2 coverage, including the name of the alleged policyholder, if known, and any other
3 material facts concerning the lost policy known to the person providing the notice.

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

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

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

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

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

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

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

1 **(87)** ENFORCEMENT. (a) Any person who is injured by a violation of this
 2 section by an insurer may bring a civil action against the insurer to recover damages
 3 together with costs, disbursements, accounting fees, if any, and reasonable attorney
 4 fees incurred in bringing the action, notwithstanding s. 814.04 (1).

5 (b) ~~Notwithstanding s. INS 6.11 (3), Wis. Adm. Code, A~~ violation by an
 6 insurer of any provision of this section or any rule promulgated under this section is
 7 an unfair method and practice in the business of insurance. 628.34 (11), (12)?

8 **(98)** APPLICABILITY. (a) This section applies to all environmental claims that
 9 are not settled or finally adjudicated on or before the effective date of this subsection
 10 [revisor inserts date], regardless of when the claim arose.

11 (b) Notwithstanding s. 631.01, this section applies to all environmental claims
 12 specified in par. (a), regardless of the state in which the general liability insurance
 13 policy under which the claim is or was made was issued or delivered.

14 **(END)**

unfair trade practices?
unfair method of competition
unfair act or practice in
the bus. of ins.?



State of Wisconsin
2003 - 2004 LEGISLATURE

0205/p1
LRB-4514/P3
PJK:wlp:pg
WJ

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Mon PM
D-note

~~LPS: Please
proof amended
Stats w/ Folio~~

Regen

1 AN ACT *to create* 632.28 of the statutes; **relating to:** environmental claims
2 under general liability insurance policies.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

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

3 SECTION 1. 632.28 of the statutes is created to read:
4 **632.28 Environmental claims under general liability insurance**
5 **policies.** (1) DEFINITIONS. In this section:

Insert 1-5

6 (a) "Environmental claim" means a claim for defense or indemnity that is
7 submitted under a general liability insurance policy by an insured and that is based
8 on the insured's liability or potential liability for bodily injury or property damage
9 arising from pollution in this state.

Insert 1-9

10 (b) "Governmental entity" means any federal, state, or local government, or any
11 instrumentality of any of them.

as a result of a release of
Insert 1-11
pollutants in this state

***NOTE: Under 42 USC 9607 (f) (2), trustees for natural resources are federal or state officials, so they do not need to be mentioned separately in the definition above.

1 (1) "Pollutant" means ^{the presence} heat or any solid, liquid, or gaseous irritant or
2 contaminant, including smoke, vapor, soot, fumes, acids, alkalies, chemicals,
3 asbestos, oil, gasoline, petroleum products, lead, products containing lead, and
4 waste.

***NOTE: Aren't oil and gasoline petroleum products? On the other hand, do you mean a different type of oil, such as vegetable oil? Are acids and alkalies chemicals? If so, some redundancies could be removed from this definition. Becky Tradewell advised using "heat" instead of "thermal irritant or contaminant." See the use of "heat" in the definition of "pollutant" in s. 283.01 (13).

5 (2) "Pollution" means a release of pollutants ~~into~~ ^{the presence} land, air, or water.

***NOTE: I created a definition for "pollution" so that the word could be used throughout the draft in place of the phrase that makes up the definition. Note that the definition does not include the location of the land, air, or water so that a limitation to "this state" or "another state" can be added in the draft text if necessary and as appropriate.

Incidentally, it is not crystal clear whether "in this state" or "in another state" refers to where the release occurred or where the land, air, or water is located. I do not know if it matters in this draft. See especially proposed s. 632.28 (2) (a). Note that "environmental claim" is defined as a release onto or into land, air, or water in this state. Could that be interpreted to mean a release of pollutants in another state that ultimately reach air or water in this state? Please review the draft to make sure there are no unintended consequences as a result of this ambiguity. If the location definitely does not refer to the release, something like "in this state or elsewhere" could be added after "release" in the definition of "environmental claim."

6 (2) ~~RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE.~~ The following

7 ~~rules of construction~~ ^{insert 2-7} apply to the interpretation of general liability insurance policies
8 under which environmental claims are made: ^{insert 2-9}

9 (a) Wisconsin law shall be applied in all cases involving environmental claims

10 Nothing in this section shall be interpreted to modify common law rules governing
11 choice of law determinations for claims for defense or indemnity that are submitted
12 under general liability insurance policies and that involve bodily injury or property
13 damage arising from pollution outside this state.

***NOTE: The term "environmental claim" cannot be used as proposed in the second sentence because the term, by definition, is limited to pollution in this state.

What if a policy specifies the state law that will be applied in all cases resolving claims under the policy and the state is not Wisconsin? Does requiring that Wisconsin

insert 2-13 →

in or on

General interpretation provisions

law be applied in all cases involving environmental claims unconstitutionally impair a contract in that case?

in this state

1 (b) Any action taken by a governmental entity against, or any agreement by a
2 governmental entity with, an insured in which the governmental entity, in writing,
3 notifies the insured that it considers the insured to be potentially liable for pollution
4 or directs, requests, or agrees that the insured take action with respect to pollution
5 *in* within this state, is equivalent to a suit or lawsuit as those terms are used in the
6 general liability insurance policy.

****NOTE: The location (inside or outside this state) of the pollution is not specified in the first instance above (government entity notifies insured that it may be liable for pollution). Do you want it to be limited to in this state?

7 (c) The insurer may not deny coverage for any reasonable and necessary fees,
8 costs, and expenses, including costs and expenses of assessments, studies, and
9 investigations, that are incurred by the insured under a voluntary written
10 agreement, consent decree, or consent order between the insured and a
11 governmental entity and as a result of a written direction, request, or agreement by
12 the governmental entity to take action with respect to pollution *in this* within the state, on
13 the ground that those expenses constitute voluntary payments by the insured.

Insert 3-13

~~14 (3) INSURER'S PAYMENT DUTY; INSURED'S DUTY TO INFORM OF OTHER INSURERS. (a)
15 An insurer with a duty to pay defense or indemnity costs, or both, to an insured for
16 an environmental claim under a general liability insurance policy that provides that
17 the insurer has a duty to pay all sums arising out of a risk covered by the policy must
18 pay all defense or indemnity costs, or both, arising out of the risk in accordance with
19 the applicable terms of its policy, including its limit of liability, independent of and
20 unaffected by any other insurance that may provide coverage for the same claim.
21 (b) If requested by an insurer against which the insured makes a claim, the
22 insured shall provide information regarding any other general liability insurance~~

1 policies covering the insured that may potentially provide coverage for the same
2 environmental claim.

****NOTE: The requirement to provide information about other policies previously applied only if the insured filed a lawsuit. It seems more appropriate for the requirement to apply if the insured makes a claim, since contribution among insurers applies if an insurer pays a claim, presumably even before a lawsuit.

3 (4) CLAIMS WHEN INSURED HAS COVERAGE UNDER MORE THAN ONE POLICY. (a) If an
4 insured with an environmental claim has coverage under more than one general
5 liability insurance policy that provides that the insurer has a duty to pay all sums
6 arising out of a risk covered by the policy, the insured shall provide notice of the claim
7 to every such insurer for whom the insured has a current address.

8 (b) An insured under par. (a) may make a claim with respect to a single policy
9 period. If the policy limits of all policies for that policy period are insufficient to fully
10 satisfy the environmental claim, the insured may make claims with respect to
11 additional policy periods until the claim is fully satisfied. All insurers, including
12 primary, umbrella, and excess insurers, providing coverage for each policy period
13 with respect to which the insured makes a claim are subject to the payment
14 requirement under sub. (3) (a).

****NOTE: What if the limits for a policy period are sufficient but the insured settles for less than the limits? Is the insured precluded from making further claims against other insurers?

Insert 4-14

15 (3) 4 (a) ~~If the~~ environmental claim ~~of the insured~~
16 ~~under sub. (a) (1) is not fully satisfied,~~ the insured may elect to file suit on the
17 remainder of the claim against fewer than all insurers providing coverage for the
18 claim, notwithstanding ss. 803.03 and 806.04 (11).

19 (b) In any lawsuit involving an environmental claim, all of the following are
20 rebuttable presumptions:

Insert 4-18

In any lawsuit involving an

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

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

10 (c) An insurer against which the insured files suit may not be required to pay
11 defense or indemnity costs in excess of the applicable policy limits, if any, on such
12 defense or indemnity costs.

13 ~~(d)~~ (d) The court shall award to an insured the sum of the costs, disbursements,
14 and expenses, including accounting fees and reasonable attorney fees
15 notwithstanding s. 814.04 (1), necessary to prepare for and participate in an action
16 in which the insured successfully litigates a coverage issue for an environmental
17 claim.

18 ~~1~~ 1. An insurer under a general liability insurance policy under which an
19 environmental claim is made that has not entered into a good faith settlement and
20 release of the environmental claim with the insured is liable, up to the amounts
21 stated in the policy, to any governmental entity that seeks to recover against the
22 insured for pollution in this state, irrespective of whether the liability is presently
23 established or is contingent and to become fixed or certain by final judgment.

***NOTE: Does this apply only if the governmental entity has conducted the
cleanup and seeks reimbursement, or does it also apply if the governmental entity seeks
to require the insured/insurer to conduct the cleanup?

Insert 6-2

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

Insert 6-8

(6) CONTRIBUTION AMONG INSURERS. ~~Subject to 1631AB~~ an insurer that pays an environmental claim, or an insurer that paid an environmental claim before the effective date of this subsection ... [revisor inserts date], may seek contribution from any other insurer that is liable or potentially liable for the claim and that has not entered into a good faith settlement and release of the environmental claim with the insured.

****NOTE: Has an insurer "paid an environmental claim" regardless of whether the payment results from a settlement before any lawsuit, from a lawsuit brought by the insured, or from a lawsuit brought by a governmental entity under sub. (5) (e)? Currently in the draft, an "environmental claim" by definition must be submitted under a general liability insurance policy by an insured. Therefore, an insurer that pays a governmental entity as a result of a lawsuit under sub. (5) (e) has not paid an "environmental claim" and is not authorized to seek contribution. Is this okay?

****NOTE: The redraft instructions changed "an insurer that pays an environmental claim" to "an insurer that has paid an environmental claim." Did you intend the language that I have added above?

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

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

(c) An insurer must thoroughly and promptly investigate a notice of a lost policy and must provide to the insured claiming coverage under the lost policy all facts

1 known or discovered during the investigation concerning the issuance and terms of
2 the policy, including copies of documents establishing the issuance and terms of the
3 policy.

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

6 1. Within 30 business days after receipt by the insurer of notice of a lost policy,
7 the insurer shall commence an investigation into the insurer's records, including
8 computer records, to determine whether the insurer issued the lost policy. If the
9 insurer determines that it issued the policy, the insurer shall commence an
10 investigation into the terms and conditions relevant to any environmental claim
11 made under the policy.

12 2. The insurer and the insured shall cooperate with each other in determining
13 the terms of a lost policy. The insurer and the insured shall provide to each other the
14 facts known or discovered during an investigation, including the identity of any
15 witnesses with knowledge of facts related to the issuance or existence of the lost
16 policy, and shall provide each other with copies of any documents establishing facts
17 related to the lost policy.

18 3. An insurer that discovers information tending to show the existence of an
19 insurance policy that applies to the claim shall provide an accurate copy of the terms
20 of the policy or a reconstruction of the policy. If the insured discovers information
21 tending to show the existence of an insurance policy that applies to the claim, the
22 insurer shall provide an accurate copy of the terms of the policy or a reconstruction
23 of the policy upon the request of the insured.

***NOTE: Does the rewording of this subdivision reflect your intent?

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

8 (e) If, based on information discovered in the investigation of a lost policy, the
9 insured can show by a preponderance of the evidence that a general liability
10 insurance policy was issued to the insured by the insurer but cannot produce
11 evidence that tends to show the policy limits applicable to the policy, it shall be
12 assumed that the minimum limits of coverage, including any exclusions to coverage,
13 that the insurer offered during the period in question under such policies apply to
14 the policy purchased by the insured. If, however, the insured produces evidence that
15 tends to show the policy limits applicable to the policy, the insurer has the burden
16 of proof to show by a preponderance of the evidence that different policy limits,
17 including any exclusions to coverage, apply to the policy purchased by the insured.

****NOTE: I added "by a preponderance of the evidence" for the insurer's burden of
proof for consistency with the level required of the insured.

18 (8) ENFORCEMENT. (a) Any person who is injured by a violation of this section
19 by an insurer may bring a civil action against the insurer to recover damages
20 together with costs, disbursements, accounting fees, if any, and reasonable attorney
21 fees incurred in bringing the action, notwithstanding s. 814.04 (1).

1

(b) Notwithstanding s. INS 6.11 (3), Wis. Adm. Code, violation by an insurer

2

of any provision of this section or any rule promulgated under this section is an unfair

3

method and practice in the business of insurance.

***NOTE: I used "unfair method and practice in the business of insurance" because that is the language used in the rule; "unfair claim settlement practice" is only a title. If the reason you want to designate a violation of this section as an "unfair claim settlement practice" is because you want the penalties under s. INS 6.11 (5), Wis. Adm. Code, to apply to the violation, you should simply provide those penalties in this statute. The rule states that an act under s. INS 6.11 (3) (a) or (b), Wis. Adm. Code, subjects the violator to revocation of license to transact insurance, as well as to s. 601.64. The penalties under s. 601.64 automatically apply to a violation of this section, and because a violation of this section cannot be an act under s. INS 6.11 (3) (a) or (b), Wis. Adm. Code, unless the rule itself is amended, the penalty in s. INS 6.11 (5), Wis. Adm. Code, cannot apply to a violation of this section.

***NOTE: I did not include a provision that requires the commissioner of insurance to enforce this section. That requirement already exists in s. 601.41 (1).

***NOTE: I also did not include a severability provision because one already exists. See s. 990.001 (11).

Insert 9-4

4

(9) APPLICABILITY. (a) This section applies to all environmental claims that are

5

not settled or finally adjudicated on or before the effective date of this subsection

6

[revisor inserts date], regardless of when the claim arose.

7

(b) Notwithstanding s. 631.01, this section applies to all environmental claims

8

specified in par. (a), regardless of the state in which the general liability insurance

9

policy under which the claim is or was made was issued or delivered.

***NOTE: Do you want to make an exception to par. (b) for policies that contain inconsistent provisions, such as policies that specify the choice of law for adjudicating claims or policies that contain pro rata coverage provisions?

10

(END)

Insert 9-9

Note

2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0205/ins
PJK:.....

INSERT 1-5

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.

(END OF INSERT 1-5)

INSERT 1-9


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

****NOTE: Does this work? I wasn't sure if there must necessarily be more than one
all-sums policy under which the insured (or former insured) had coverage, or if there
could have been just one all-sums policy but the injury did not necessarily occur entirely
during that policy period?

****NOTE: I used "assertion" instead of "claim" because of the confusion created by
calling both an "environmental claim" and an "extended underlying assertion" *claims*
when they are not both insurance claims. If you prefer something other than "assertion,"
please let me know.

(END OF INSERT 1-9)

INSERT 1-11

11 , or any trustee for natural resources designated under 42 USC 9607 (f) (2)

(END OF INSERT 1-11)

~~INSERT 2-7~~

Insert 2-7

WJH

1 Except as otherwise provided in the policy, all of the following

(END OF INSERT 2-7)

INSERT 2-9

WJH

2 , regardless of the state in which the general liability insurance policy under
3 which the claim is or was made was issued or delivered

(END OF INSERT 2-9)

INSERT 2-13

****NOTE: I don't think it is necessary or correct to notwithstand s. 631.01 because of s. 631.01 (1) (c).

(END OF INSERT 2-13)

INSERT 3-13

****NOTE: These provisions apply to general liability insurance policies and are not limited to all-sums policies. Okay?

(END OF INSERT 3-13)

INSERT 4-14

4 (3) RULES FOR INTERPRETING ALL-SUMS POLICIES. In the absence of an express
5 provision authorizing proration of losses for an environmental claim that is based on
6 an extended underlying assertion, all of the following apply to the interpretation of
7 all-sums policies under which environmental claims that are based on extended
8 underlying assertions are made:

****NOTE: Is "authorizing proration" ^{STEP} correct? It certainly may be, ^{WJH as} I don't know what the policies actually say, but "authorizing proration" seems so vague and discretionary. Does the policy simply authorize the insurer to prorate in any way the insurer sees fit or does it set out the method for prorating?

9 (a) An insurer may not reduce coverage otherwise available to an insured under
10 an all-sums policy because the claim involves bodily injury or property damage that



Ins 4-14 contd

1 occurred, in part, outside the policy period of that all-sums policy, regardless of
2 whether other valid or collectible insurance is available to the insured for the injury
3 or damage that occurred outside that policy period.

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

***NOTE: This language assumes that the provision may apply if more than one
policy period, but only one insurer, is involved. Is that your intention?

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

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

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

***NOTE: Do you want to specify how the insured "designates" a policy period or
the order of policy periods?



ins 4-14 contd

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

(END OF INSERT 4-14)

INSERT 4-18

****NOTE: I removed "on the remainder of the claim" after "the insured may elect to file suit."

(END OF INSERT 4-18)

INSERT 6-2

****NOTE: Do all of the paragraphs in sub. (4) apply in any lawsuit involving an environmental claim? If so, this subsection could be restructured so that "In any lawsuit involving an environmental claim" is stated once as an introduction to every following paragraph. Let me know if you would like that change made.

5 **(5) EFFECT OF SETTLEMENT.** An insurer that enters into a good faith settlement
6 and release of an environmental claim, or an insurer that has entered into a good
7 faith settlement and release of an environmental claim before the effective date of
8 this subsection [revisor inserts date], shall not be liable to any person for the
9 claim. Entering into a good faith settlement and release of an environmental claim
10 with an insurer does not reduce or otherwise impair the right of an insured to recover
11 the full balance of its actual loss as provided in sub. (3) from an insurer that has not
12 entered into a good faith settlement and release of the claim.

(END OF INSERT 6-2)

INSERT 6-8

****NOTE: You requested that "sub. (3)" be substituted for "s. 631.43" in the "Subject to" clause. I did not add it at this point because I'm not sure that sub. (3) is really relevant to contribution among insurers. Subsection (3) addresses the insurer's duty with respect

of the previous draft

↓

ins 6-8 contd

among them

to the insured; it does not seem to be a limitation or condition on seeking contribution. Subsection (3) makes each insurer jointly and severally liable and does not address relative liability.

(END OF INSERT 6-8)

INSERT 9-4

***NOTE: I don't know what the intent is for this provision. Without any provision, any violation of proposed s. 632.28 would fall under s. 601.64 for enforcement and penalties. The statutes do not define "an unfair method and practice in the business of insurance," nor do they define "an unfair claim settlement practice," as was proposed for a previous version of this draft. What do you expect or hope to accomplish by giving a special name to a violation of the section?

(END OF INSERT 9-4)

INSERT 9-9

***NOTE: I removed "Notwithstanding s. 631.01" because s. 631.01 (1) (c) makes it unnecessary and even incorrect.

(END OF INSERT 9-9)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0205/dn

PI
.....
PJK:WJ:

I have removed all of the embedded notes from the previous draft, because I assume that you have reviewed them and that your redraft instructions take them into account. This version of the draft adds many new embedded notes.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: pam.kahler@legis.state.wi.us

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0205/P1dn
PJK:wj:rs

September 17, 2004

I have removed all of the embedded notes from the previous draft, because I assume that you have reviewed them and that your redraft instructions take them into account. This version of the draft adds many new embedded notes.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: pam.kahler@legis.state.wi.us

MEMORANDUM

TO: Pamela Kahler, Legislative Reference Bureau 205
FROM: Senator Robert Cowles and Representative Dean Kaufert
DATE: October 8, 2004
RE: "All Sums" Legislation Draft LRB-0204/P1

Thank you for providing us with LRB-0204/P1, a revised draft of the "all sums" legislation. We have reviewed the draft and are providing the following responses to your embedded questions, as well as two suggested revisions.

A. Responses to Embedded Questions

1. (Page 2, note 1) *NOTE: Does this work? I wasn't sure if there must necessarily be more than one all-sums policy under which the insured (or former insured) had coverage, or if there could have been just one all-sums policy but the injury did not necessarily occur entirely during that policy period?*

RESPONSE: Yes.

2. (Page 2, note 2) *NOTE: I used "assertion" instead of "claim" because of the confusion created by calling both an "environmental claim" and an "extended underlying assertion" claims when they are not both insurance claims. If you prefer something other than "assertion," please let me know.*

RESPONSE: No. Your use of "assertion" is fine.

3. (Page 3, note 1) *NOTE: I don't think it is necessary or correct to notwithstanding s. 631.01 because of s. 631.01(1) (c).*

RESPONSE: We agree.

4. (Page 3, note 2) *NOTE: These provisions apply to general liability insurance policies and are not limited to all-sums policies. Okay?*

RESPONSE: Yes.

5. (Page 4, note 1) *NOTE: Is "authorizing proration" correct? It certainly may be, as I don't know what the policies actually say, but "authorizing proration" seems so vague and discretionary.*

RESPONSE: "Requiring proration" would be preferable.

Does the policy simply authorize the insurer to prorate in any way the insurer sees fit or does it set out the method for prorating?

RESPONSE: Policies with explicit language on proration are rare and the language varies according to the individual policy.

6. (Page 4, note 2) *NOTE: This language assumes that the provision may apply if more than one policy period, but only one insurer, is involved. Is that your intention?*

RESPONSE: Yes.

7. (Page 5, note 1) *NOTE: Do you want to specify how the insured "designates" a policy period or the order of policy periods?*

RESPONSE: No.

8. (Page 5, note 2) *NOTE: I removed "on the remainder of the claim" after "the insured may elect to file suit."*

RESPONSE: This change is acceptable.

9. (Page 6) *NOTE: Do all of the paragraphs in sub. (4) apply in any lawsuit involving an environmental claim?*

RESPONSE: Yes.

If so, this subsection could be restructured so that "In any lawsuit involving an environmental claim" is stated once as an introduction to every following paragraph. Let me know if you would like that change made.

RESPONSE: Please make this change.

10. (Page 7) *NOTE: You requested that "sub. (3)" be substituted for "s. 631.43" in the "Subject to" clause of the previous draft. I did not add it at this point because I'm not sure that sub. (3) is really relevant to contribution among insurers. Subsection (3) addresses the insurer's duty with respect to the insured; it does not seem to be a limitation or condition on seeking contribution. Subsection (3) makes each insurer jointly and severally liable and does not address relative liability among them.*

RESPONSE: This change is acceptable.

11. (Page 9) *NOTE: I don't know what the intent is for this provision. Without any provision, any violation of proposed s. 632.28 would fall under s. 601.64 for enforcement and penalties. The statutes do not define "an unfair method and practice in the business of insurance," nor do they define "an unfair claim settlement practice," as was proposed for a previous version of this*

draft. What do you expect or hope to accomplish by giving a special name to a violation of the section?

RESPONSE: We understand your concern that this additional language is not needed. Please delete section (8)(b).

12. (Page 10) *NOTE: I removed "Notwithstanding s. 631.01" because s. 631.01(1) (c) makes it unnecessary and even incorrect.*

RESPONSE: This change is acceptable.

B. Additional Requested Revisions

1. *Suggested Revision to Definition of Governmental Entity* (page 2, lines 9-12). We are concerned that the definition of "governmental entity" may not capture trustees for tribal natural resources. Trustees for tribal natural resources are not expressly referenced under 42 USC 9607 (f)(2). Rather, the express reference for their designation is in 400 CFR 300 Subpart G. Accordingly, we request that you revise this definition (s. 632.28(1)(d)) as follows:

(d) "Governmental entity" means any federal, state, or local government, or any instrumentality of any of them, or any trustee for natural resources designated under 42 USC 9607 (f) (2) or 40 CFR 300 Subpart G.

2. *Suggested Revisions to "Effect of Settlement" Section* (page 6, lines 15-22). The following are two minor suggested changes to section 632.28(5). First, we suggest the addition of the words "or potentially liable" to this section in order to maintain consistency with the language in the next paragraph of the bill, section 632.28 (6). Second, we suggest adding the words "or sub. (4)" in order to maintain an insured's right to file a lawsuit on an environmental claim as provided in section 632.28(4). Accordingly, we ask that you please revise the "Effect of Settlement" section (s. 632.28(5)) as follows:

(5) EFFECT OF SETTLEMENT. An insurer that enters into a good faith settlement and release of an environmental claim, or an insurer that has entered into a good faith settlement and release of an environmental claim before the effective date of this subsection [revisor inserts date], shall not be liable or potentially liable to any person for the claim. Entering into a good faith settlement and release of an environmental claim with an insurer does not reduce or otherwise impair the right of an insured to recover the full balance of its actual loss as provided in sub. (3) or sub. (4) from an insurer that has not entered into a good faith settlement and release of the claim.