



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-note

Regen

1 AN ACT *to amend* subchapter III (title) of chapter 632 [precedes 632.22]; and *to*  
2 *create* 632.28 of the statutes; **relating to:** environmental claims under general  
3 liability insurance policies *and granting rule-making authority*

*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:*

4 SECTION 1. Subchapter III (title) of chapter 632 [precedes 632.22] of the  
5 statutes is amended to read:

**CHAPTER 632**

**SUBCHAPTER III**

**LIABILITY GENERAL LIABILITY INSURANCE IN GENERAL**

9 SECTION 2. 632.28 of the statutes is created to read:

10 **632.28 Environmental claims under liability insurance policies. (1)**

11 DEFINITION. In this section, "environmental claim" means a claim for defense or

1 indemnity that is submitted under a general liability insurance policy by an insured  
2 and that is based on the insured's liability or potential liability for bodily injury or  
3 property damage arising from a release of pollutants onto land, or into air or water,  
4 in the state.

5 (2) RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE. For  
6 interpreting a general liability insurance policy under which an environmental  
7 claim is made in any action between the insured and the insurer to determine the

8 existence of coverage under the policy for the costs of investigating and ~~remediating~~  
9 environmental contamination, whether in response to governmental demand or  
10 under a voluntary written agreement, consent decree, or consent order, including the  
11 existence of coverage for the costs of defending a suit against the insured for  
12 investigation and remediation costs, the following rules apply:

Remediating

13 (a) State law shall be applied in all cases involving environmental claims.  
14 Nothing in this section shall be interpreted to modify common law rules governing  
15 choice of law determinations for sites located outside this state.

Consent 2-22

16 (b) Any action or agreement by the department of natural resources or the  
17 federal environmental protection agency against or with an insured in which the  
18 department of natural resources or the federal environmental protection agency, in  
19 writing, notifies the insured that it considers the insured to be a potentially  
20 responsible party, or directs, requests, or agrees that the insured take action with  
21 respect to contamination within this state, is equivalent to a suit or lawsuit as those  
22 terms are used in the general liability insurance policy.

23 (c) The insurer may not deny coverage for any reasonable and necessary fees,  
24 costs, and expenses, including costs and expenses of remedial investigations and  
25 feasibility studies, that are incurred by the insured under a voluntary written

1 agreement, consent decree, or consent order between the insured and the  
2 department of natural resources or the federal environmental protection agency and  
3 as a result of a written direction, request, or agreement by the department of natural  
4 resources or the federal environmental protection agency to take action with respect  
5 to contamination within the state, on the ground that those expenses constitute  
6 voluntary payments by the insured.

7 **(3) INSURER'S PAYMENT DUTY; INSURED'S NOTICE DUTY.** (a) An insurer with a duty  
8 to pay defense or indemnity costs, or both, to an insured for an environmental claim  
9 under a general liability insurance policy that provides that the insurer has a duty  
10 to pay all sums arising out of a risk covered by the policy must pay all defense or  
11 indemnity costs, or both, proximately arising out of the risk in accordance with the  
12 applicable terms of its policy, including its limit of liability, independent of and  
13 unaffected by any other insurance that may provide coverage for the same claim.

14 (b) 1. If an insured who makes an environmental claim under a general liability  
15 insurance policy that provides that the insurer has a duty to pay all sums arising out  
16 of a risk covered by the policy has more than one such general liability insurance  
17 policy insurer, the insured shall provide notice of the claim to every such insurer for  
18 whom the insured has a current address.

19 2. If the insured's claim is not fully satisfied under par. (a), the insured may  
20 elect to file suit on the remainder of the claim against only one insurer under subd.  
21 1., notwithstanding ss. 803.03 and 806.04 (11).

22 3. If requested by an insurer against which the insured files suit under subd.  
23 2., the insured shall provide information regarding other general liability insurance  
24 policies held by the insured that would potentially provide coverage for the same  
25 environmental claim.

1 4. An insurer against which the insured files suit under subd. 2. may not be  
2 required to pay defense or indemnity costs in excess of the applicable policy limits,  
3 if any, on such defense or indemnity costs.

4 (4) COSTS TO BE AWARDED TO INSURED. The court shall award to an insured the  
5 sum of the costs, disbursements, and expenses, including accounting fees and  
6 reasonable attorney fees, necessary to prepare for and participate in an action in  
7 which the insured successfully litigates a coverage issue for an environmental claim.

8 (5) CONTRIBUTION AMONG INSURERS. An insurer that pays an environmental  
9 claim may seek contribution from any other insurer that is liable or potentially liable  
10 for the claim, subject to s. 631.43.

11 (6) PRESUMPTIONS. (a) There is a rebuttable presumption that the costs of  
12 preliminary assessments, remedial investigations, risk assessments, or other  
13 necessary investigation, as those terms are defined by <sup>the</sup> rule ~~by the department of~~  
14 ~~natural resources~~, are defense costs payable by the insurer, subject to the provisions  
15 of the general liability insurance policy under which there is coverage for the costs.

16 (b) There is a rebuttable presumption that the costs of removal actions or  
17 feasibility studies, as those terms are defined by <sup>the</sup> rule ~~by the department of natural~~  
18 ~~resources~~, are indemnity costs and that payment of those costs by the insurer reduces  
19 the insurer's applicable limit of liability on the insurer's indemnity obligations,  
20 subject to the provisions of the general liability insurance policy under which there  
21 is coverage for the costs.

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.

*promulgated under par 6 (c)*

*Insert 4-21 ✓*

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

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

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

7 ~~4. If the insurer is not able to locate portions of the policy or determine its terms,~~  
8 ~~conditions, or exclusions, the insurer shall provide copies of all insurance policy~~  
9 ~~forms issued by the insurer during the applicable policy period that potentially apply~~  
10 ~~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  
16 insurance policy was issued to the insured by the insurer but cannot produce  
17 evidence that tends to show the policy limits applicable to the policy, it shall be  
18 assumed that the minimum limits of coverage, including any exclusions to coverage,  
19 that the insurer offered during the period in question under such policies apply to  
20 the policy purchased by the insured. If, however, the insured produces evidence that  
21 tends to show the policy limits applicable to the policy, the insurer has the burden  
22 of proof to show that a different policy limit, including any exclusions to coverage,  
23 apply to the policy purchased by the insured.

24 **SECTION 3. Initial applicability.**

1 (1) This act first applies to environmental claims made on the effective date of  
2 this subsection.

3 (END)

*D. vote*

*insert 2-22*

1 indemnity that is submitted under a general liability insurance policy by an insured  
2 and that is based on the insured's liability or potential liability for bodily injury or  
3 property damage arising from a release of pollutants onto land, or into air or water,  
4 in the state.

5 (2) RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE. For  
6 interpreting a general liability insurance policy under which an environmental  
7 claim is made in any action between the insured and the insurer to determine the  
8 existence of coverage under the policy for the costs of investigating and remedying  
9 environmental contamination, whether in response to governmental demand or  
10 under a voluntary written agreement, consent decree, or consent order, including the  
11 existence of coverage for the costs of defending a suit against the insured for  
12 investigation and remediation costs, the following rules apply:

13 (a) State law shall be applied in all cases involving environmental claims.  
14 Nothing in this section shall be interpreted to modify common law rules governing  
15 choice of law determinations for sites located outside this state.

16 (b) Any action taken by the department of natural resources or the federal  
17 environmental protection agency against, or any agreement by the department of  
18 natural resources or the federal environmental protection agency with, an insured  
19 in which the department of natural resources or the federal environmental  
20 protection agency, in writing, notifies the insured that it considers the insured to be  
21 potentially liable for a release of pollutants, or directs, requests, or agrees that the  
22 insured take action with respect to contamination within this state, is equivalent to  
23 a suit or lawsuit as those terms are used in the general liability insurance policy.

24 (c) The insurer may not deny coverage for any reasonable and necessary fees,  
25 costs, and expenses, including costs and expenses of remedial investigations and

*(end of ins 2-22)*



**2003-2004 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-4514/P2ins  
PJK:wjg

**INSERT 4-21**

1           (c) The department of natural resources shall promulgate a rule defining the  
2 terms specified in pars. (a) and (b) for purposes of the rebuttable presumptions under  
3 pars. (a) and (b).

**(END OF INSERT 4-21)**

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

LRB-4514/P2dn

PJK:wjaf

wlj

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This redraft makes a few changes in the terminology related to environmental remediation issues that were suggested by Becky Tradewell, who drafts in that area, and also requires the Department of Natural Resources to promulgate a rule under proposed s. 632.28 (6) (c). Do you want to place a time limit on the promulgation of the rule and delay the effective date of the bill until the rule is promulgated?

All other notes included with the P1 version of the draft still apply.

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-4514/P2dn  
PJK:wlj:rs

April 28, 2004

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This redraft makes a few changes in the terminology related to environmental remediation issues that were suggested by Becky Tradewell, who drafts in that area, and requires the Department of Natural Resources to promulgate a rule under proposed s. 632.28 (6) (c). Do you want to place a time limit on the promulgation of the rule and delay the effective date of the bill until the rule is promulgated?

All other notes included with the P1 version of the draft still apply.

Pamela J. Kahler  
Senior Legislative Attorney  
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**MEMORANDUM**

**TO:** Pamela J. Kahler, Legislative Attorney  
**FROM:** Representative Dean Kaufert  
**DATE:** May 17, 2004  
**RE:** Preliminary Legislative Drafts 4514/P1 and P2

Thank you for your preliminary legislative drafts 4514/P1 and P2 regarding environmental liability insurance claims. I have reviewed the drafts and your questions and I have the following concerns and suggested revisions.

**A. Responses to Drafter's Questions (LRB 4514/P1dn)**

**1. Applicability (Response to Drafter's Question 7 – proposed nonstatutory applicability section)**

My intent is that this legislation apply to environmental claims arising from events before, on or after the effective date of this legislation, but not with respect to claims which have been settled or otherwise resolved before the passing of this legislation. I do not believe that the nonstatutory applicability language contained in the current preliminary draft accomplishes this goal.

As I explained in my drafting request memorandum, <sup>(no memorandum)</sup> the problem addressed by this legislation arises where pollution damage occurred over a period of years and there are different insurers for various years. When an environmental claim is made, the multiple insurers cannot agree on how payment for the loss should be allocated among them. As a result, the policyholder does not get its claims paid until a court apportions the claim among the insurers.

Such claims often involve insurance policies from many years ago. In fact, the July 2003 decision of the Wisconsin Supreme Court in *Johnson Controls v. Employers Insurance of Wausau*, which I referenced in my memorandum, primarily opened up insurance coverage under pre-1986 policies which did not have an absolute pollution exclusion.

An example of an environmental problem arising over many years is pollution in the Fox River, which runs through part of my district. Pollutants from nearby industry entered the Fox River over a period of decades, beginning as early as the 1950's. During many of those years, the industries contributing to the pollution purchased general liability insurance policies that covered such environmental pollution. Because the pollution entered the river over many years, multiple insurers may have an obligation to cover the costs of the needed environmental remediation, but may not agree among themselves as to how to allocate those costs. This legislation is designed to promote fair treatment of insureds and to avoid unnecessary delay in resolution of such environmental claims.

The purpose of this legislation is to remedy a problem that was in existence prior to the Act's effective date and to provide a procedure or method for solving that problem. To achieve that remedial purpose, it is important that the legislation clearly apply to environmental claims even if the claims arise from events that occurred wholly or partially in the past. At the same time, I do not intend that the legislation would apply to environmental claims that have been fully resolved, either by settlement or final adjudication, before the effective date.

Accordingly, I request that you revise the applicability section of this legislation to state my explicit legislative intent that these provisions apply to any environmental claims that have not been *finally* adjudicated (in court or by arbitration) or settled, as of the effective date. Because I want my legislative intent to be clear in this regard, I would prefer a *statutory* applicability section.

✓ **2. DNR Rulemaking Directive**

In preliminary draft section 632.28 (6) (c) you direct the DNR to promulgate rules to define the terms contained in sections 632.26 (6) (a) and (b). I believe it is unnecessary and inappropriate to delegate this task to the DNR.

The terms in § 632.28 (6) (c) are widely used and generally understood in environmental law. The terms "preliminary assessment" and "remedial investigation" are defined in the National Contingency Plan, 40 CFR § 300.5 and are regularly part of guidance documents, orders and other communications in matters involving the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601, et seq. The term "risk assessment" is defined in Wis. Admin. Code § NR 700.03 (53). Two other terms not used in the initial draft, but that I would like included, are "site investigation" and "feasibility study." See Wis. Admin. Code § NR 716. These terms are part of the everyday language of environmental law.

To the extent that there may be an issue as to whether or how these terms apply to particular fact situations in an insurance coverage context, that determination is best left to the judiciary. Judges are well suited to make those kinds of decisions as long as the statute provides reasonable guidance. To best convey that guidance, I suggest that the section be modified to read: "There is a rebuttable presumption that the costs of necessary investigation, such as the costs of preliminary assessments, remedial investigations, risk assessments or site investigations, are defense costs payable by the insurer, subject to the provisions of the general liability insurance policy..." This should give the courts guidance while allowing flexibility in applying the presumption in varying factual situations.

a bit different from draft proposal

✓ **3. Elimination of the Definition of "General Liability Insurance Policy" (Response to Drafter's Question #2)**

I agree with your elimination of the definition of "general liability insurance policy."

✓ **4. Insurer's Payment Duty (Response to Drafter's Question 3 – proposed § 632.28 (3))**

It is my intention that an insured suing for unpaid costs, may elect to sue only one insurer, or more than one insurer, *but* is not required to join all other insurers. But, I agree that this section needs additional clarification. Please see Item B.3 below for my suggested new language

✓ 5. **Application of the Presumptions (Response to Drafter's Question 4 – proposed § 632.28 (6))**

Yes. A rebuttable presumption is a concept that applies only in the context of lawsuits.

✓ 6. **Exclusion of Coverage of Costs (Response to Drafter's Question 5 – proposed § 632.28 (6) (a))**

It is unlikely that a general liability policy would specifically exclude any of the costs delineated in section 632.28 (6) (a), but, to clarify you may add that these are defense costs unless specifically excluded in the policy.

✓ 7. **Information Showing Existence of Lost Policy (Response to Drafter's Question 6 – proposed § 632.28 (7) (d) 3.)**

In order to make §§ 632.28 (7) (d) 3. more clear, please redraft as follows: “If the insurer or insured discovers information tending to show the existence of an insurance policy that applies to the claim, the *insurer* shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insured.”

**B. Suggested Revisions to the LRB-4514/P2 Draft**

I have also attached a typed strikeout/underline draft of LRB-4517/P2, which illustrates all of my suggested revisions that are described below. In any section to which I added new language, I have indicated the page and line numbers in my explanation below, which corresponds to my attached revised (not your original) bill draft.

✓ 1. **New Section – Define the Terms “Governmental entity” and Pollutant (Page 1, lines 16-17, and Page 2, lines 1-3 )**

Upon further reflection, I would like the draft to address any action taken by a “governmental entity” rather than just “the department of natural resources or the federal environmental protection agency” because this provides better flexibility.

In addition, I would like to add a definition of pollutant. This definition comes from Wisconsin case law.

**Please include the following language in the P2 draft (Page 1, lines 16-17, and Page 2, lines 1-3):**

“Governmental entity” means any federal, state or local government, or any instrumentality thereof, and any trustee for natural resources.

“Pollutant” means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, oil, gasoline, petroleum products, lead or lead based products and waste.

✓ **2. Revision – Substitution of the Term “Governmental entity”**

Please substitute “governmental entity” for “the department of natural resources or the federal environmental protection agency” where indicated.

✓ **3. Revisions to “Rules of Construction” Section 632.28 (2)**

Please amend the introductory language to the “Rules of Construction” section as indicated on page 2, line 4-11 of the attached draft.

In addition, please amend sections 632.28(2)(a), (b) and (c) as indicated to more clearly state my intention.

✓ **4. Revisions – Section 632.28 (3) (a)**

Please delete the word “proximately” from section 632.28(3)(a) as indicated on page 3, line 16.

**5. Revision/New Language – Clarification of the Insurer Selection Process in § 632.28(3)(b)1. (Page 4, lines 1-5)**

I believe that we need a clearer mechanism by which an insured may choose an insurer to pay an environmental claim in § 632.28(3)(b)1.

**Please include the following language in the P2 draft (page 4, lines 1-5):**

The insured may designate a single policy period and the insurer or insurers for that policy period, including primary, umbrella and excess insurers, shall fully satisfy the environmental claim up to the policy limits. If the policy limits for all policies for that policy period are insufficient to fully satisfy the environmental claim, the insured may designate additional policy periods until the claim is fully satisfied.

**6. Revision – Allow for Suit Against Multiple Insurers in § 632.28(3)(b)2.**

It was my intention to allow, but not require, an insured to file suit against multiple insurers. Accordingly, please add “or against multiple insurers” on page 3, line 21, between the words “insurer” and “under subd.” (Page 4, lines 7-8.)

In addition, please delete the reference to “under subd. 1” (page 4, line 7.)

**7. New Section – Allow Direct Action by Department of Natural Resources Against Insurers (Page 4, lines 18-22, page 5, lines 1-3)**

Upon further reflection, I would like to add an additional provision to this draft that would allow the government to directly sue an insurer of an insured that is potentially liable for bodily injury or property damage arising from the release of pollutants in the state.

Wisconsin already has direct action statutes (§§ 632.24 and 803.04) for negligence claims. To promote judicial economy and the efficient administration of justice with regard to environmental remediation, I would like to extend this concept to allow the government to directly sue liability insurers of those insureds who may have liability arising from a release of pollutants to land, air or water in this state. The existing direct action statutes have functioned successfully and efficiently in negligence cases and should similarly promote the efficient administration of justice in the environmental area.

**Please include the following language in the P2 draft (Page 4, lines 18-22, page 5, lines 1-3):**

If the environmental claim is not fully satisfied under paragraph (3)(b), any insurer designated by the insured pursuant to paragraph (3)(b) that has not entered into a good faith settlement and release of the environmental claim is directly liable, up to the policy limits, to any governmental entity that seeks to recover against the insured for a release of pollutants onto or into land, air or water in the state, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment. Such insurer may be joined in any action brought by a governmental entity against the insured.

**8. Revision – Clarify the “Contribution Among Insurers” § 632.28(5) (Page 5, lines 4-10)**

One of the purposes of this legislation is to promote early settlement of environmental insurance disputes, thereby facilitating the early resolution of underlying environmental claims and accompanying remediation of contaminated sites. However, this purpose would be undercut if an insurer could pursue a contribution action against another insurer with whom the insured had previously reach a good faith settlement in which it recovered less than all of its environmental claim. The legislation should not impair an insured’s right to recover the full remaining balance of its actual loss from nonsettling insurers. According, I have drafted suggested clarifying language for this section.

**Please include the following language in the P2 draft (page 5, lines 4-10):**

An insurer that has previously entered into a good faith settlement and release of an environmental claim, shall not be deemed liable or potentially liable for that claim, and a good faith settlement and release of an environmental claim with such insurer shall not reduce or otherwise impair the right of an insured to recover



the full balance of its actual loss from a nonsettling insurer, as provided in (3)(a) and (b)

✓ **9. Revision – Additional Terms to the “Presumption” Section § 632.28(6) and Deletion of Rulemaking Directive**

I would like the terms “feasibility study, site investigations” added between the words “risk assessments,” and “or other” (page 5, lines 12-13).

In addition, I would like the phrase “or feasibility studies” replaced with the words “remedial action or natural resource damages” (page 5, lines 17-18).

In addition, as discussed in Item A.2 above, all of these terms are commonly used in the field of environmental law and all are defined in various federal and state laws. Accordingly, please *delete* the references to DNR rulemaking contained in this section as indicated in the draft attached.

✓ **10. Revisions – Section 632.28(7)(d)3.**

As noted in A.7. above, please delete the word “insured” from s. 632.28(7)(d)3. (page 7, line 9).

**11. New Section – Please Add a Statutory Applicability Section and a Private Cause of Action**

As discussed in detail in Item A.1. above, I would like a statutory applicability section added to this draft that will clearly indicate my intent.

In addition, I would like this legislation to allow individuals to be able to initiate a private cause of action if a person is injured as a result of violation of this bill, and I would like violations of this bill to constitute an unfair claim settlement practice as defined under current OCI rule.

Finally, I would like a severability clause included in this legislation that provides that if any provision of this statute is found to be invalid, such invalidity shall not affect the other provisions or applications of this law.

**Please include the following language in the P2 (page 8-9):**

(8) APPLICABILITY AND ENFORCEMENT. (a) This section applies to all environmental claims not finally resolved prior to the effective date of this section either by settlement or adjudication, whether arising before, on or after the effective date of this section.

(b) The commissioner shall enforce this section and any rules adopted by the office of the commissioner of insurance to implement this section.

NWS that rule, is an unfair claim practice

(c) Violation by an insurer of any provision of this section or any rule adopted under this section is an unfair claim settlement practice under Wisconsin administrative code ch. INS 6.11 (3).

is this the exclusive remedy? what is purpose? for penalty under (5)? if so, need to go on because rule would do it

(d) Any person who is injured as a result of violation by an insurer of this section may bring an action against the insurer for costs, disbursements and expenses, including accounting fees and reasonable attorney fees incurred in connection with such violation, including the costs, disbursements and expenses incurred in bringing such action.

(e) The provisions of this section are severable. If any provision of this section is found to be invalid, or if any application of this section either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

see

990.001 (11)

**12. New Section – Applicability of Other Statutes**

It is my intent to specify how this law will be applied with other statutes.

**Please include the following language in the P2 draft (page 9, lines 5-8):**

(9) APPLICABILITY OF OTHER STATUTORY PROVISION. Notwithstanding any provision of s. 631.01, this section shall apply to an environmental claim regardless of the state in which the general liability insurance policy was issued or delivered.

631.01 does not say only applies

1 AN ACT *to amend* subchapter III (title) of chapter 632 [precedes 632.22]; and *to create* 632.28  
2 of the statutes; **relating to:** environmental claims under general liability insurance  
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*Analysis by the Legislative Reference Bureau*  
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4 *The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

---

5 **SECTION 1.** Subchapter III (title) of chapter 632 [precedes 632.22] of the statutes is  
6 amended to read:

7 **CHAPTER 632**

8 **SUBCHAPTER III**

9 **GENERAL LIABILITY INSURANCE**

10 **SECTION 2.** 632.28 of the statutes is created to read:

11 **632.28 Environmental claims under liability insurance policies.** (1) DEFINITION.

12 In this section, “environmental claim” means a claim for defense or indemnity that is submitted  
13 under a general liability insurance policy by an insured and that is based on the insured’s liability  
14 or potential liability for bodily injury or property damage arising from a release of pollutants  
15 onto ~~land~~ or into land, air or water, in ~~the~~this state.

16 “Governmental entity” means any federal, state or local government, or any  
17 instrumentality thereof, and any trustee for natural resources.

1           “Pollutant” means any solid, liquid, gaseous or thermal irritant or contaminant, including  
2 but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, oil, gasoline,  
3 petroleum products, lead or lead based products and waste.

4           (2) RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE.

5 ~~For interpreting a~~The following rules of construction shall apply to the interpretation of general  
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12           (a) ~~State~~Wisconsin law shall be applied in all cases involving environmental claims.  
13 Nothing in this section shall be interpreted to modify common law rules governing choice of law  
14 determinations for environmental claims involving bodily injury or property damage arising  
15 from (a release of pollutants onto or into land, air or water) sites located outside this state.

16           (b) Any action taken by ~~the department of natural resources or the federal environmental~~  
17 ~~protection agency~~any governmental entity against, or any agreement by ~~the department of natural~~  
18 ~~resources or the federal environmental protection agency~~any governmental entity with, an  
19 insured in which the governmental entity, in writing, notifies the insured that it considers the  
20 insured to be potentially liable for ~~(a release of pollutants)~~, or directs, requests, or agrees that the  
21 insured take action with respect to ~~contamination~~a release of pollutants onto or into land, air or

1 water within this state, is equivalent to a suit or lawsuit as those terms are used in the general  
2 liability insurance policy.

3 (c) The insurer may not deny coverage for any reasonable and necessary fees, costs, and  
4 expenses, including costs and expenses of remedial investigations and feasibility studies, that are  
5 incurred by the insured under a voluntary written agreement, consent decree, or consent order  
6 between the insured and ~~the department of natural resources or the federal environmental~~  
7 ~~protection agency~~ governmental entity and as a result of a written direction, request, or  
8 agreement by the ~~department of natural resources or the federal environmental protection~~  
9 ~~agency~~ governmental entity to take action with respect to ~~contamination~~ a release of pollutants  
10 onto or into land, air or water within the state, on the ground that those expenses constitute  
11 voluntary payments by the insured.

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

19 (b) 1. If an insured who makes an environmental claim under a general liability  
20 insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk  
21 covered by the policy has more than one such general liability insurance policy insurer, the  
22 insured shall provide notice of the claim to every such insurer for whom the insured has a current

*select? ? limit claim to?*

1 address. The insured may designate a single policy period and the insurer or insurers for that  
2 policy period, including primary, umbrella and excess insurers, shall fully satisfy the  
3 environmental claim up to the policy limits. If the policy limits for all policies for that policy  
4 period are insufficient to fully satisfy the environmental claim, the insured may designate  
5 additional policy periods until the claim is fully satisfied.

*seems duplicative*

6 2. If the insured's claim is not fully satisfied under par. (a), the insured may elect to file  
7 suit on the remainder of the claim against only one insurer under subd. 1., or against multiple  
8 insurers, notwithstanding ss. 803.03 and 806.04-(11).

9 3. If requested by an insurer against which the insured files suit under subd. 2., the  
10 insured shall provide information regarding other general liability insurance policies held by the  
11 insured that would potentially provide coverage for the same environmental claim.

12 4. An insurer against which the insured files suit under subd. 2. may not be required to  
13 pay defense or indemnity costs in excess of the applicable policy limits, if any, on such defense  
14 or indemnity costs.

15 (4) COSTS TO BE AWARDED TO INSURED. The court shall award to an insured the  
16 sum of the costs, disbursements, and expenses, including accounting fees and reasonable  
17 attorney fees, necessary to prepare for and participate in an action in which the insured  
18 successfully litigates a coverage issue for an environmental claim. If the environmental claim is  
19 not fully satisfied under paragraph (3)(b), any insurer designated by the insured pursuant to  
20 paragraph (3)(b) that has not entered into a good faith settlement and release of the  
21 environmental claim is directly liable, up to the policy limits, to any governmental entity that  
22 seeks to recover against the insured for a release of pollutants onto or into land, air or water in

*only 2nd situation?  
reimbursement to govt?  
or trust, too → require to cleanup?*

*can this be covered under  
632.24?*

1 the state, irrespective of whether the liability is presently established or is contingent and to  
2 become fixed or certain by final judgment. Such insurer may be joined in any action brought by  
3 a governmental entity against the insured.

4 (5) CONTRIBUTION AMONG INSURERS. An insurer that ~~pay~~has paid an  
5 environmental claim may seek contribution from any other insurer that is liable or potentially  
6 liable for ~~the~~that claim, subject to s. 631.43. An insurer that has previously entered into a good  
7 faith settlement and release of an environmental claim, shall not be deemed liable or potentially  
8 liable for that claim, and a good faith settlement and release of an environmental claim with such  
9 insurer shall not reduce or otherwise impair the right of an insured to recover the full balance of  
10 its actual loss from a nonsettling insurer, as provided in (3)(a) and (b).

11 (6) PRESUMPTIONS. (a) There is a rebuttable presumption that the costs of  
12 preliminary assessments, remedial investigations, risk assessments, feasibility studies, site  
13 investigations or other necessary investigation, ~~as those terms are defined by the rule promulgated~~  
14 ~~under par. (e),~~ 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 (b) There is a rebuttable presumption that the costs of removal ~~action or feasibility~~  
17 ~~studies, as those terms are defined by the rule promulgated under par. (e),~~ actions, remedial action  
18 or natural resource damages are indemnity costs and that payment of those costs by the insurer  
19 reduces the insurer's applicable limit of liability on the insurer's indemnity obligations, subject  
20 to the provisions of the general liability insurance policy under which there is coverage for the  
21 costs.

1           ~~(e) The department of natural resources shall promulgate a rule defining the terms~~  
2 ~~specified in pars. (a) and (b) for purposes of the rebuttable presumptions under pars. (a) and (b).~~

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

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

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

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

19           1. Within 30 business days after receipt by the insurer of notice of a lost policy, the  
20 insurer shall commence an investigation into the insurer’s records, including computer records,  
21 to determine whether the insurer issued the lost policy. If the insurer determines that it issued the



1 policy, the insurer shall commence an investigation into the terms and conditions relevant to any  
2 environmental claim made under the policy.

3 2. The insurer and the insured shall cooperate with each other in determining the terms  
4 of a lost policy. The insurer and the insured shall provide to each other the facts known or  
5 discovered during an investigation, including the identity of any witnesses with knowledge of  
6 facts related to the issuance or existence of the lost policy, and shall provide each other with  
7 copies of any documents establishing facts related to the lost policy.

8 3. If the insurer or insured discovers information tending to show the existence of an  
9 insurance policy that applies to the claim, the insurer~~or insured~~ shall provide an accurate copy of  
10 the terms of the policy or a reconstruction of the policy, upon the request of the insurer or the  
11 insured.

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

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

1 apply to the policy purchased by the insured. If, however, the insured produces evidence that  
2 tends to show the policy limits applicable to the policy, the insurer has the burden of proof to  
3 show that a different policy limit, including any exclusions to coverage, apply to the policy  
4 purchased by the insured.

5 SECTION 3. Initial applicability.

6 ~~(1) This act first applies to environmental claims made on the effective date of this~~  
7 ~~subsection.~~

8 (8) APPLICABILITY AND ENFORCEMENT. (a) This section applies to all  
9 environmental claims not finally resolved prior to the effective date of this section either by  
10 settlement or adjudication, whether arising before, on or after the effective date of this section.

11 (b) The commissioner shall enforce this section and any rules adopted by the office of the  
12 commissioner of insurance to implement this section.

13 (c) Violation by an insurer of any provision of this section or any rule adopted under this  
14 section is an unfair claim settlement practice under Wisconsin administrative code ch. INS 6.11  
15 (3).

16 (d) Any person who is injured as a result of violation by an insurer of this section may  
17 bring an action against the insurer for <sup>the resulting damages and</sup> costs, disbursements and expenses, including accounting  
18 fees and reasonable attorney fees incurred <sup>in</sup> connection with such violation, including the costs,  
19 disbursements and expenses incurred in bringing such action.

(b) not needed  
(c)  
601.41(1)

1           (e) The provisions of this section are severable. If any provision of this section is found  
2 to be invalid, or if any application of this section either to any person or circumstance is invalid,  
3 such invalidity shall not affect other provisions or applications which can be given effect without  
4 the invalid provision or application.

5           (9) APPLICABILITY OF OTHER STATUTORY PROVISION. Notwithstanding any  
6 provision of s. 631.01, this section shall apply to an environmental claim regardless of the state  
7 in which the general liability insurance policy was issued or delivered.



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-vote  
SOON, please  
(in 6-4)

Regen

1 AN ACT *to amend* subchapter III (title) of chapter 632 [precedes 632.22]; and *to*  
2 *create* 632.28 of the statutes; **relating to:** environmental claims under general  
3 liability insurance policies ~~and granting rule-making authority~~

*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:*

4 SECTION 1. Subchapter III (title) of chapter 632 [precedes 632.22] of the  
5 statutes is amended to read:

CHAPTER 632  
SUBCHAPTER III

LIABILITY GENERAL LIABILITY INSURANCE IN GENERAL

9 SECTION 2. 632.28 of the statutes is created to read: <sup>Ⓟ</sup> general

10 632.28 Environmental claims under liability insurance policies. (1)

11 DEFINITION <sup>Ⓞ</sup> In this section, ~~environmental claim~~ <sup>insert 1-11</sup> "environmental claim" means a claim for defense or

1 indemnity that is submitted under a general liability insurance policy by an insured  
2 and that is based on the insured's liability or potential liability for bodily injury or  
3 property damage arising from ~~release of pollutants onto land or into air or water,~~  
4 in ~~the~~ state. *→ this*

pollution

Insert 2-4

(2) RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE. ~~But~~

5 ~~interpreting a~~ *→ insert 2-6* general liability insurance ~~policy~~ *→ policies* under which ~~the~~ environmental  
6 ~~claims~~ *→ claims are* made in any action between the insured and the insurer to determine the  
7 existence of coverage under the policy for the costs of investigating and remedying  
8 environmental contamination, whether in response to governmental demand or  
9 under a voluntary written agreement, consent decree, or consent order, including the  
10 existence of coverage for the costs of defending a suit against the insured for  
11 investigation and remediation costs, the following rules apply: *← \* ✓*

12  
13 (a) ~~State~~ *↑ Wisconsin* law shall be applied in all cases involving environmental claims.

14 Nothing in this section shall be interpreted to modify common law rules governing  
15 choice of law determinations for ~~events located~~ *→ insert 2-15* outside this state.

16 (b) Any action taken by ~~the~~ *→ a* department of natural resources ~~or the federal~~  
17 ~~environmental protection agency~~ *→ a* against, or any agreement by ~~the~~ *→ a* department of  
18 ~~natural resources or the federal environmental protection agency~~ with, an insured  
19 in which ~~the~~ *→ a* department of natural resources ~~or the federal environmental~~  
20 ~~protection agency~~ in writing, notifies the insured that it considers the insured to be  
21 potentially liable for ~~release of pollutants~~ *→ a*, or directs, requests, or agrees that the  
22 insured take action with respect to ~~contamination~~ within this state, is equivalent to  
23 a suit or lawsuit as those terms are used in the general liability insurance policy.

governmental entity

24 (c) The insurer may not deny coverage for any reasonable and necessary fees,  
25 costs, and expenses, including costs and expenses of ~~remedial investigations and~~

pollution

Insert 2-16

Insert 2-23

*assessments, studies, and investigations*

1 ~~feasibility studies~~, that are incurred by the insured under a voluntary written  
 2 agreement, consent decree, or consent order between the insured and ~~the~~<sup>a</sup>  
 3 ~~department of natural resources or the federal environmental protection agency~~ and  
 4 as a result of a written direction, request, or agreement by ~~the department of natural~~  
 5 ~~resources or the federal environmental protection agency~~ to take action with respect  
 6 to ~~contamination~~ within the state, on the ground that those expenses constitute  
 7 voluntary payments by the insured. *pollution*

*governmental entity*

8 (3) INSURER'S PAYMENT DUTY; INSURED'S NOTICE DUTY. (a) An insurer with a duty  
 9 to pay defense or indemnity costs, or both, to an insured for an environmental claim  
 10 under a general liability insurance policy that provides that the insurer has a duty  
 11 to pay all sums arising out of a risk covered by the policy must pay all defense or  
 12 indemnity costs, or both, proximately arising out of the risk in accordance with the  
 13 applicable terms of its policy, including its limit of liability, independent of and  
 14 unaffected by any other insurance that may provide coverage for the same claim.  
 15 (b) 1. If an insured who makes an environmental claim under a general liability  
 16 insurance policy that provides that the insurer has a duty to pay all sums arising out  
 17 of a risk covered by the policy has more than one such general liability insurance  
 18 policy insurer, the insured shall provide notice of the claim to every such insurer for  
 19 whom the insured has a current address.  
 20 2. If the insured's claim is not fully satisfied under par. (a), the insured may  
 21 elect to file suit on the remainder of the claim against only one insurer under subd.  
 22 1., notwithstanding ss. 803.03 and 806.04 (11).  
 23 3. If requested by an insurer against which the insured files suit under subd.  
 24 2., the insured shall provide information regarding other general liability insurance

1 policies held by the insured that would potentially provide coverage for the same  
2 environmental claim.

3 4. An insurer against which the insured files suit under subd. 2. may not be  
4 required to pay defense or indemnity costs in excess of the applicable policy limits,  
5 if any, on such defense or indemnity costs.

6 (4) COSTS TO BE AWARDED TO INSURED. The court shall award to an insured the  
7 sum of the costs, disbursements, and expenses, including accounting fees and  
8 reasonable attorney fees, necessary to prepare for and participate in an action in  
9 which the insured successfully litigates a coverage issue for an environmental claim.

10 (5) CONTRIBUTION AMONG INSURERS. An insurer that pays an environmental  
11 claim may seek contribution from any other insurer that is liable or potentially liable  
12 for the claim, subject to s. 631.43.

13 (6) PRESUMPTIONS. (a) There is a rebuttable presumption that the costs of  
14 preliminary assessments, remedial investigations, risk assessments, or other  
15 necessary investigation, as those terms are defined by the rule promulgated under  
16 par. (c), are defense costs payable by the insurer, subject to the provisions of the  
17 general liability insurance policy under which there is coverage for the costs.

18 (b) There is a rebuttable presumption that the costs of removal actions or  
19 feasibility studies, as those terms are defined by the rule promulgated under par. (c),  
20 are indemnity costs and that payment of those costs by the insurer reduces the  
21 insurer's applicable limit of liability on the insurer's indemnity obligations, subject  
22 to the provisions of the general liability insurance policy under which there is  
23 coverage for the costs.

Insert 5-3

1 (c) The department of natural resources shall promulgate a rule defining the  
2 terms specified in pars. (a) and (b) for purposes of the rebuttable presumptions under  
3 pars. (a) and (b).

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

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

14 (c) An insurer must thoroughly and promptly investigate a notice of a lost policy  
15 and must provide to the insured claiming coverage under the lost policy all facts  
16 known or discovered during the investigation concerning the issuance and terms of  
17 the policy, including copies of documents establishing the issuance and terms of the  
18 policy.

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

- 21 1. Within 30 business days after receipt by the insurer of notice of a lost policy,  
22 the insurer shall commence an investigation into the insurer's records, including  
23 computer records, to determine whether the insurer issued the lost policy. If the  
24 insurer determines that it issued the policy, the insurer shall commence an



1 investigation into the terms and conditions relevant to any environmental claim  
2 made under the policy.

3 2. The insurer and the insured shall cooperate with each other in determining  
4 the terms of a lost policy. The insurer and the insured shall provide to each other the  
5 facts known or discovered during an investigation, including the identity of any  
6 witnesses with knowledge of facts related to the issuance or existence of the lost  
7 policy, and shall provide each other with copies of any documents establishing facts  
8 related to the lost policy.

9 3. If the insurer or insured discovers information tending to show the existence  
10 of an insurance policy that applies to the claim, the insurer ~~or insured~~ shall provide  
11 an accurate copy of the terms of the policy or a reconstruction of the policy, upon the  
12 request of the ~~insurer or the~~ insured.

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

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

Insert 6-12

by a preponderance of the evidence

1 the policy purchased by the insured. If, however, the insured produces evidence that  
2 tends to show the policy limits applicable to the policy, the insurer has the burden  
3 of proof to show that a different policy limit, including any exclusions to coverage,  
4 apply to the policy purchased by the insured.

5 **SECTION 3. Initial applicability.**

6 (1) This act first applies to environmental claims made on the effective date of  
7 this subsection.

8

(END)

Insert 7-7 ✓

✓  
✓

2003-2004 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-4514/P3ins  
PJK:wjrs

INSERT 1-11

1 (a) "Environmental

(END OF INSERT 1-11)

INSERT 2-4

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

\*\*\*\*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.

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

8 (d) "Pollution" means a release of pollutants onto or into 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."

(END OF INSERT 2-4)

INSERT 2-6

↓

*Ins 2-6*

*wo ft*

1 The following rules of construction apply to the interpretation of

(END OF INSERT 2-6)

**INSERT 2-15**

*wo ft*

2 claims for defense or indemnity that are submitted under general liability  
3 insurance policies and that involve bodily injury or property damage arising from  
4 pollution

(END OF INSERT 2-15)

**INSERT 2-16**

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

(END OF INSERT 2-16)

**INSERT 2-23**

\*\*\*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?

(END OF INSERT 2-23)

**INSERT 5-3**

*10/4*

*41*

5 **(3) INSURER'S PAYMENT DUTY; INSURED'S DUTY TO INFORM OF OTHER INSURERS. (a)**  
6 An insurer with a duty to pay defense or indemnity costs, or both, to an insured for  
7 an environmental claim under a general liability insurance policy that provides that  
8 the insurer has a duty to pay all sums arising out of a risk covered by the policy must  
9 pay all defense or indemnity costs, or both, arising out of the risk in accordance with



ins 5-3 contd 2084

1 the applicable terms of its policy, including its limit of liability, independent of and  
2 unaffected by any other insurance that may provide coverage for the same claim.

3 (b) If requested by an insurer against which the insured makes a claim, the  
4 insured shall provide information regarding any other general liability insurance  
5 policies covering the insured that may potentially provide coverage for the same  
6 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.

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

12 (b) An insured under par. (a) may make a claim with respect to a single policy  
13 period. If the policy limits of all policies for that policy period are insufficient to fully  
14 satisfy the environmental claim, the insured may make claims with respect to  
15 additional policy periods until the claim is fully satisfied. All insurers, including  
16 primary, umbrella, and excess insurers, providing coverage for each policy period  
17 with respect to which the insured makes a claim are subject to the payment  
18 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?

19 (5) SUIT ON ENVIRONMENTAL CLAIM. (a) If the environmental claim of an insured  
20 under sub. (4) (a) is not fully satisfied, the insured may elect to file suit on the



*Ins 5-3 cont'd 3084*

1 remainder of the claim against fewer than all insurers providing coverage for the  
2 claim, notwithstanding ss. 803.03<sup>✓</sup> and 806.04 (11).<sup>✓</sup>

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  
13 is coverage for the costs.

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

22 (e) 1. An insurer under a general liability insurance policy under which an  
23 environmental claim is made that has not entered into a good faith settlement and  
24 release of the environmental claim with the insured is liable, up to the amounts  
25 stated in the policy, to any governmental entity that seeks to recover against the

*↓*

*Ins 5-3 cont'd 4074*

1 insured for pollution in this state, irrespective of whether the liability is presently  
2 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?

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

5 (6) CONTRIBUTION AMONG INSURERS. Subject to s. 631.43<sup>✓</sup>, an insurer that pays  
6 an environmental claim, or an insurer that paid an environmental claim before the  
7 effective date of this subsection ... [revisor inserts date], may seek contribution from  
8 any other insurer that is liable or potentially liable for the claim and that has not  
9 entered into a good faith settlement and release of the environmental claim with the  
10 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 "envrionmental 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?

(END OF INSERT 5-3)

**INSERT 6-12**

11 3. An insurer that discovers information tending to show the existence of an  
12 insurance policy that applies to the claim shall provide an accurate copy of the terms  
13 of the policy or a reconstruction of the policy. If the insured discovers information  
14 tending to show the existence of an insurance policy that applies to the claim, the  
15 insurer shall provide an accurate copy of the terms of the policy or a reconstruction  
16 of the policy upon the request of the insured.

*↓*

*Ins 6-12 contd*

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

(END OF INSERT 6-12)

**INSERT 7-7**

\*\*\*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.

1           **(8) ENFORCEMENT.** (a) Any person who is injured by a violation of this section  
2 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, violation by an insurer  
6 of any provision of this section or any rule promulgated under this section is an unfair  
7 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. 6.11 (5) ~~INS~~ 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). ✓

8           **(9) APPLICABILITY.** (a) This section applies to all environmental claims that are  
9 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),<sup>✓</sup> regardless of the state in which the general liability insurance  
13 policy under which the claim is or was made was issued or delivered.

*↓*



*Ins 7-7 contd*

\*\*\*\*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?

(END OF INSERT 7-7)

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

LRB-4514/P3dn  
PJK:wj:rs

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I have included a number of embedded notes in the draft so that it is easier to evaluate the specific provision to which the note relates.

I consulted with Becky Tradewell, who drafts environmental issues, on some of the language used in this draft.

Would simply stating that each insurer is jointly and severally liable up to its limits be an adequate substitute for stating an insurer's payment duty [proposed s. 632.28 (3) (a)] and an insured's ability to make a claim or file a lawsuit against fewer than all insurers [proposed s. 632.28 (4) (b) and (5) (a)]?

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

LRB-4514/P3dn  
PJK:wlj:pg

June 7, 2004

---

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Would simply stating that each insurer is jointly and severally liable up to its limits be an adequate substitute for stating an insurer's payment duty [proposed s. 632.28 (3) (a)] and an insured's ability to make a claim or file a lawsuit against fewer than all insurers [proposed s. 632.28 (4) (b) and (5) (a)]?

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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

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*Analysis by the Legislative Reference Bureau*

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

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*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:

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.

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

\*\*\*\*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 (c) "Pollutant" means 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 (d) "Pollution" means a release of pollutants onto or into 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 apply to the interpretation of general liability insurance policies  
8 under which environmental claims are made:

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

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

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 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 within the state, on  
13 the ground that those expenses constitute voluntary payments by the insured.

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?

15 (5) SUIT ON ENVIRONMENTAL CLAIM. (a) If the environmental claim of an insured  
16 under sub. (4) (a) 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:

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) 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           (e) 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?



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

3           (6) CONTRIBUTION AMONG INSURERS. Subject to s. 631.43, an insurer that pays  
4 an environmental claim, or an insurer that paid an environmental claim before the  
5 effective date of this subsection .... [revisor inserts date], may seek contribution from  
6 any other insurer that is liable or potentially liable for the claim and that has not  
7 entered into a good faith settlement and release of the environmental claim with the  
8 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?

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

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

19           (c) An insurer must thoroughly and promptly investigate a notice of a lost policy  
20 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).

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?