WISCONSIN STATE LEGISLATURE
COMMITTEE HEARING RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance (AC-In)

(Form Updated: 11/20/2008)

COMMITTEE NOTICES ...

➢ *Committee Reports* ... CR
**

➢ *Executive Sessions* ... ES
**

➢ *Public Hearings* ... PH
**

➢ *Record of Comm. Proceedings* ... RCP
**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL ...

➢ *Appointments* ... Appt
**

Name:

➢ *Clearinghouse Rules* ... CRule
**

➢ *Hearing Records* ... HR (bills and resolutions)

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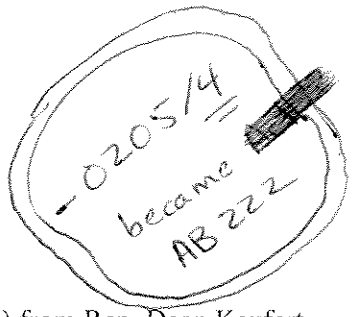
➢ *Miscellaneous* ... Misc
**

WISCONSIN INSURANCE ALLIANCE
44 EAST MIFFLIN STREET • SUITE 201
MADISON, WISCONSIN 53703
(608) 255-1749 FAX (608) 255-2178
wial@tds.net / www.wisinsal.org

To: Members of the Wisconsin Legislature
From: Eric Englund
Date: February 15, 2005
Subject: All Sums legislation
LRB-0205/3



You recently received a co-sponsorship memo (LRB-0205/3) from Rep. Dean Kaufert and Sen. Robert Cowles on proposed legislation that would directly affect how insurance claims are settled in Wisconsin.

WE STRONGLY OPPOSE THIS PROPOSED LEGISLATION AND RESPECTFULLY ASK THAT YOU NOT SUPPORT CO-SPONSORING THE BILL FOR THE FOLLOWING REASONS:

- This legislation is an unprecedented and unconstitutional effort to have the Wisconsin Legislature rewrite existing contracts in a way that is favorable to polluters. It has always been the role of the judicial system to resolve contract disputes.

- This legislation unfairly transfers the economic responsibility and burden of the Fox River clean up from certain paper companies onto insurance companies who had nothing to do with discharging PCBs into the river.

- Clean up of the Fox River is presently moving forward as scheduled and this legislation will only delay that process with additional, costly litigation.

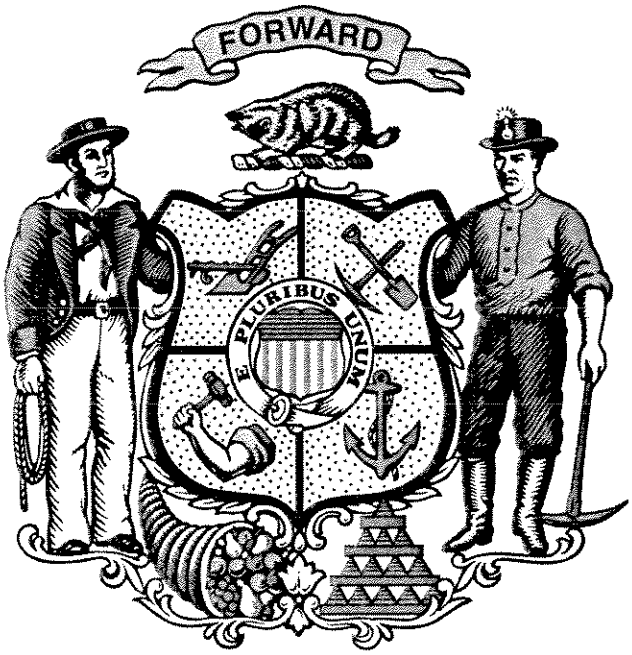
- Several paper companies in the Fox Valley are already receiving legitimate insurance claim settlements. In a recent filing with the federal Securities and Exchange Commission (SEC), the P.H. Glatfelter Paper Company headquartered in York, Pennsylvania with a paper mill in Neenah, acknowledges reaching "successful resolution" of insurance policies related to the Fox River environmental matter.

- Governmental entities are not protected by this legislation. In fact, it could be detrimental by driving up the costs of the clean up with endless litigation and delay. Local governmental entities in the Fox Valley have signed tolling agreements with the paper companies that protect them from lawsuits.

- Insurers are in the business of paying "legitimate claims". This legislation is significantly flawed and unfair public policy because it assumes that insurers refuse to pay legitimate claims. This is an unequivocally false and misleading assumption.

Again, we STRONGLY OPPOSE this legislation and ask that you not support co-sponsoring the bill. If I can be an informational resource to you or your staff, please do not hesitate to contact me anytime.

Thank you in advance for your consideration.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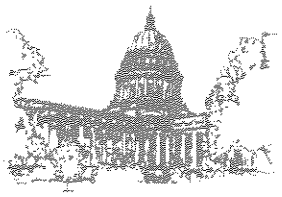
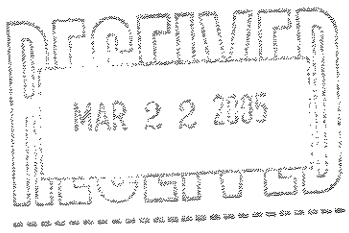


DEAN R. KAUFERT

WISCONSIN STATE REPRESENTATIVE



March 22, 2005

Rep. Ann Nischke
Chairperson, Assembly Insurance Committee
8 North State Capitol
HAND DELIVERED

Dear Rep. Nischke:

I am writing to respectfully request that you schedule Assembly Bill 222—relating to environmental claims under general liability insurance policies and fees related to removal of contaminated material from a navigable water, for a public hearing in the Assembly Insurance Committee.

Thank you for your consideration in this matter. Feel free to contact me personally if you have any questions or concerns.

Sincerely,

Dean

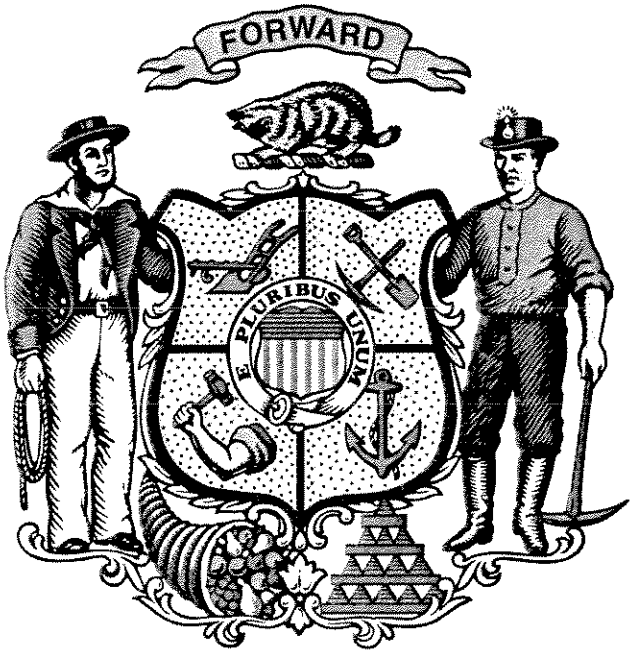
Thanks!

Dean. R. Kaufert
Wisconsin State Legislature
55th Assembly District

DRK/ljb

Member, Joint Committee on Finance

P.O. Box 8952 • State Capitol • Madison, WI 53708-8952 • Telephone: (608) 266-5719
Toll-Free Legislative Hotline: (800) 362-9472 • Rep.Kaufert@legis.state.wi.us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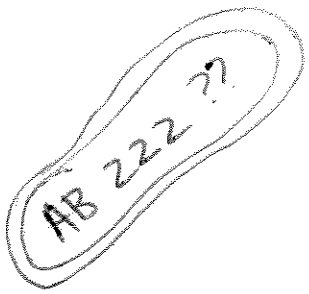
Rosenak, Mary Jan

From: Peer, Adam
Sent: Monday, April 04, 2005 10:15 AM
To: Nischke, Ann
Cc: Rosenak, Mary Jan
Subject: FW: Contrasting Poll Results of the Fox River Valley



FYI, already filed in bill folders.

-----Original Message-----
From: Tracie-Lee Calkins-Dellforge [mailto:tlcdellforge@zjs.com]
Sent: Monday, March 28, 2005 12:43 PM
To: Rep.Ainsworth; Rep.Albers; Rep.Ballweg; Rep.Bies; Sen.Brown; Sen.Cowles; Sen.Darling; Rep.Davis; Sen.Ellis; Sen.Fitzgerald; Rep.Freese; Rep.Friske; Rep.Gard; Rep.Gielow; Rep.Gottlieb; Sen.Grothman; Rep.Gunderson; Rep.Gundrum; Rep.Hahn; Sen.Harsdorf; Rep.Hines; Rep.Honadel; Rep.Huebsch; Rep.Hundertmark; Rep.Jensen; Rep.Jeskewitz; sen.kanazas@legis.state.wi.us; Sen.Kapanke; Rep.Kaufert; Sen.Kedzie; Rep.Kerkman; rep.kestel@legis.state.wi.us; Rep.Kleefisch; Rep.Krawczyk; Rep.Kreibich; Rep.Lamb; sen.lassee@legis.state.wi.us; Sen.Lazich; Sen.Leibham; Rep.LeMahieu; Rep.Loeffelholz; Rep.Lothian; Rep.McCormick; Rep.Meyer; Rep.Montgomery; Rep.Moulton; Rep.Mursau; Rep.Musser; Rep.Nass; Rep.Nerison; Rep.Nischke; Rep.Ott; Rep.Owens; Rep.Petrowski; Rep.Pettis; Rep.Pridemore; Sen.Reynolds; rep.rhoads@legis.state.wi.us; Sen.Roessler; Sen.Schultz; Sen.Stepp; Rep.Stone; Rep.Strachota; Rep.Suder; Rep.Towns; Rep.Townsend; Rep.Underheim; Rep.Van Roy; Rep.Vos; Rep.Vrakas; Rep.Vukmir; Rep.Ward; Rep.Wieckert; Ambiguous Address Rep.Williams; Rep.WoodJ; Sen.Zien; Craig Peterson
Subject: Contrasting Poll Results of the Fox River Valley

Zigman Joseph Stephenson

Memorandum

To: Interested Parties
Fr: Craig Peterson, CEO
Date: March 28, 2005
Re: Contrasting Poll Results of the Fox River Valley

Two Separate Polls, 900 Potential Voters, One Pollster...

In reviewing the results of two polls conducted by Public Opinion Strategies; one in support of the insurance industry and the other in support of the paper industry, it is clear to see important similarities of voters' needs in the Winnebago, Outagamie, and Brown Counties in Wisconsin. Both polls illustrate these historical key issues of the Fox River Valley; voters want their jobs protected and voters do not want higher taxes. Both polls have also found that Wisconsin's political mood is shifting in a more positive direction.

Outside of these similarities, the poll results show completely different mindsets of voters in the Fox River Valley regarding their attitudes toward the pollution and clean-up of the Fox River. There are several reasons for these differences.

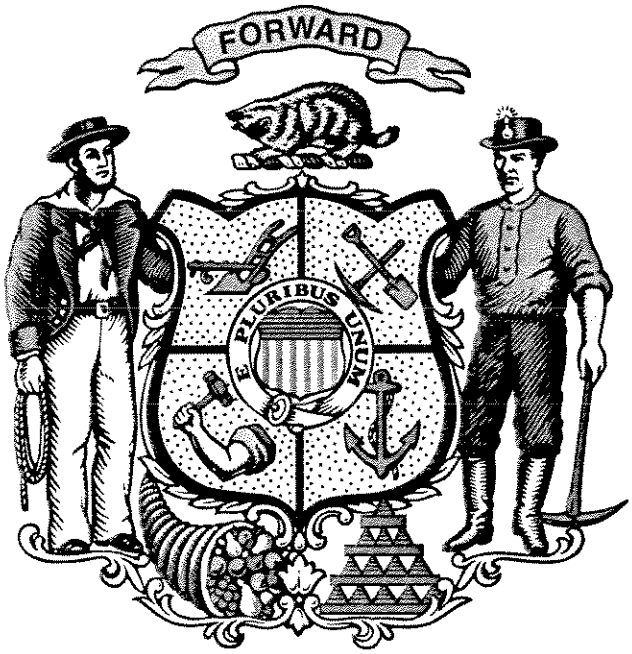
First, the poll conducted July 26-28, 2004, is centered on questioning voters about the "ALL SUMS" proposal. Both polls clearly state that 74% of the questioned voters are informed and concerned about the pollution of the Fox River, but the first poll fails to illustrate the general knowledge of the "ALL SUMS" proposal. If voters do not know about "ALL SUMS," other than the brief information that the insurance industry provides for them, how can they give an informed opinion?

Next, the second and more recent poll conducted August 23-24, 2004, clearly illustrates the voters' positive backing of politicians who create a Fox River clean-up plan that preserves and protects jobs while at the same time does not raise taxes. The "ALL SUMS" proposal doesn't affect either of these two historical key issues of the Fox Valley. Therefore, voters would have no reason to reject "ALL SUMS" as stated by the old poll, especially after they have all the facts about how "ALL SUMS" works.

Third, the time in which the polls were done is also a factor. The old poll was done a month prior to the Fox River Valley Survey. The information contained in the more recent poll is up to date and accurate according to the voters' views and opinions. Almost three-quarters of the Fox Valley are aware of and concerned about the pollution of the Fox River. The current data received in the Fox River Valley Survey clearly illustrates the voters' support of a new plan to clean up the Fox River after decades of failed attempts.

Please do not hesitate to contact ZJS with any questions or concerns.

Zigman Joseph Stephenson
735 W Wisconsin Ave • Suite 1200 • Milwaukee, WI 53233 • (414) 273-4680 • Fax: (414) 273-3158
E-Mail: Craig.Peterson@zjs.com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April 3

Rosenak, Mary Jan

From: Smyrski, Rose
Sent: Tuesday, April 05, 2005 4:24 PM
To: Rosenak, Mary Jan
Subject: First crack at a letter on the All Sums proposal.....thoughts

Importance: High

April XX, 2005

We are writing to respectively request that Assembly Bill 222 (AB 222) and Senate Bill 137 (SB 137), commonly referred to as All Sums, be allowed to progress through our respective Insurance committees.

The issues laid out in the proposals are complex and involve many stakeholders. We would strongly encourage you to allow our committees to hold public hearings on these topics so that all interested parties have an opportunity to indicate their views and allow committee members to ask questions.

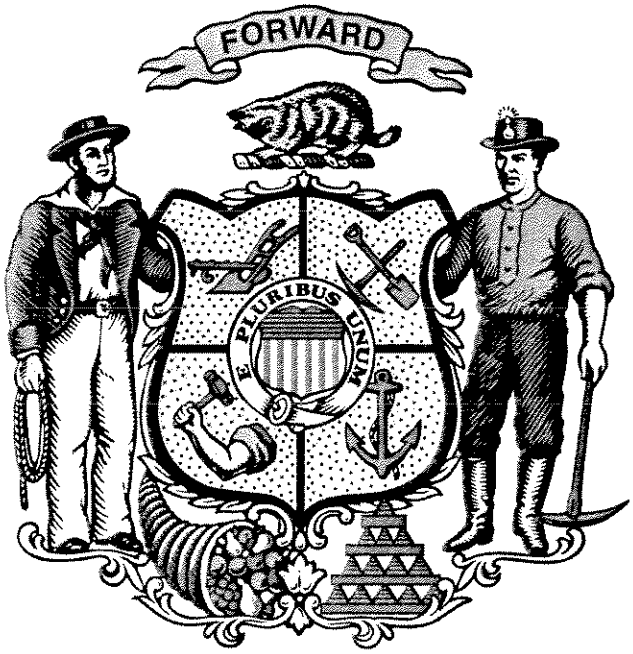
Complex proposals that impact several industries are best served through a full public vetting and the best method is through the legislative committee process.

Thank you for your time and consideration on this matter.

Sincerely,

Representative Ann Nischke
Assembly Insurance Committee, Chair
97 Assembly District

Senator Dan Kapanke
Senate Ag. & Insurance Committee, Chair
32 Senate District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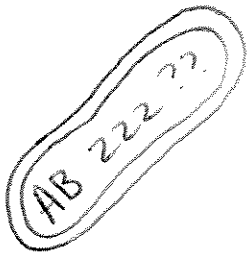
PORT OF PORTLAND

April 19, 2005



Representative Ann M. Nischke
Chair, Assembly Committee on Insurance
State Capitol Room 8 North
P.O. Box 8953
Madison, Wisconsin 53708

Dear Chairperson Nischke:

I am the Director of Environmental Affairs for the Port of Portland located in Portland, Oregon. I have held that position since 1999. I am also an attorney and have been involved in environmental law and management since 1981. I am responsible for all environmental matters affecting the marine, aviation and real estate functions of the Port. In addition, I am principally responsible for the Port's management of activities concerning the Portland Harbor Superfund Site.

The United States Environmental Protection Agency listed the Portland Harbor as a National Priority List site in 2000. A group of potentially responsible parties including the Port formed the ten member Lower Willamette Group to undertake the remedial investigation/feasibility study phase of work under a federal Administrative Order on Consent.

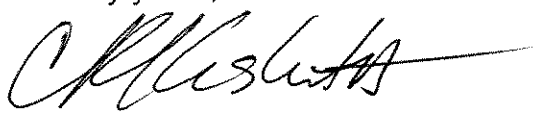
As a member of the Lower Willamette Group, the Port participates in the day to day management of the harbor wide remedial investigation/feasibility study process (RI/FS). The Port also conducts its own independent investigations and cleanups of its former and current marine operations in the Willamette River.

The Port has been participating in the harbor wide RI/FS study process since 2001. The current schedule calls for the RI/FS phase to conclude in 2007 and for the Record of Decision to be issued in 2008. However, in October 2003 the Port also entered into an Administrative Order on Consent with Environmental Protection Agency (EPA) to perform an early action investigation and cleanup of the Port's Terminal 4 located within the Superfund site. The Port was able to take this fast track approach because it had obtained funds for the early action through its insurance settlements.

The Port settled its claims for insurance coverage with six out of its seven primary general liability carriers during 2003. The settlements provided funds necessary for the Port to commit to and commence performance of the early action at Terminal 4, currently estimated to cost over $30 million.

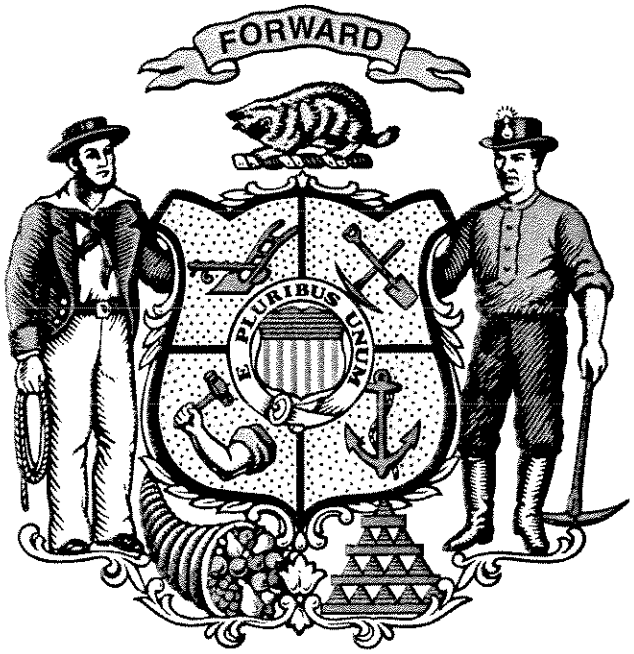
The Oregon environmental insurance legislation played a critical role in assisting the Port in obtaining the funds needed to commit to and perform the Terminal 4 early action. The insurance settlement proceeds put the Port in the position to clean up a seriously contaminated portion of the Willamette River years before the Harbor wide cleanup begins.

Sincerely yours,



Cheryl R. Koshuta
Director, Environmental Affairs

Port of Portland
121 NW Everett / Box 3529
Portland, OR 97208
Direct (503) 944-7236
Fax: (503) 944-7353
E-mail: koshuc@portptld.com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WISCONSIN
DEPT. OF NATURAL RESOURCES

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

Testimony on AB 222
Bruce Baker, Department of Natural Resources
Assembly Insurance Committee
April 20, 2005

My name is Bruce Baker, Deputy Administrator of the DNR Water Division. I also serve as the Project Manager for the Fox River PCB cleanup, which is the largest PCB cleanup in North America. Project costs are estimated to be in the range of $300-400 million. I have provided you with a handout that contains more details about the project and I am available to answer any additional project questions you might have at this time or subsequent to this hearing.

The Fox River cleanup is really two separate projects covering different segments of the Fox River. The first segment is the Little Lake Butte Des Mores portion and that project will be starting the second year of cleanup this summer. That specific project is dealing with about 5% of the PCBs in the River and is being done in accordance with a final cleanup settlement agreement with two of the paper companies.

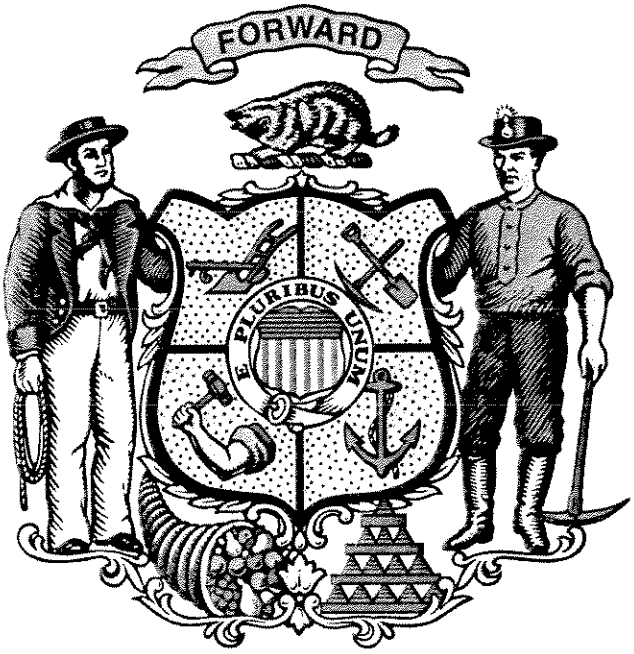
The second project is from the DePere Dam to Green Bay. Currently that project is in the design phase following the issuance of a selected remedy in a Record of Decision or ROD by the United States Environmental Protection Agency. The ROD was prepared jointly by the DNR and EPA in accordance with the Superfund procedures for cleanup of contaminated sites.

The Department's primary concern is that the cleanup be done as soon as possible. The threat to human health and the continuing release of PCBs to Green Bay has been well documented. The companies signed an agreement with the US Department of Justice, State Department of Justice, EPA and DNR to complete the design on an aggressive schedule. That schedule calls for the design to be complete enough next year to begin implementation of the cleanup.

The final major step to allow this project to be implemented is the completion of a settlement agreement with the responsible parties to fund the clean up. Even if an agreement was reached today it would take several months to finalize the agreement in federal court. Therefore, we are at a critical point where negotiations need to be finalized now to be assured that once the design is completed the project can immediately proceed to implementation.

This is a very complex settlement with a number of parties. While I am not an expert on insurance issues, and am here to provide information on the project only, it is clear that without some resolution of the financial issues, the cleanup may not be completed in a timely fashion. Jeopardizing the project at this point will pose a serious threat to human health, and will threaten the investment made by the state, federal and local governments through the taxpayers of Wisconsin.

I am happy to answer any questions you might have.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CHAIR:
Energy, Utilities and
Information Technology Committee

MEMBER:
Joint Committee on Finance
Joint Committee on Audit

ROBERT L. COWLES

Wisconsin State Senator • 2nd Senate District

Fair Claims Act (AB 222/SB 137)
Assembly Committee on Insurance
Testimony Submitted by State Senator Robert Cowles
April 21, 2005

Good Morning.

Thank you for the opportunity to appear before you and testify on Assembly Bill 222, legislation of great significance to every citizen in the Fox Valley.

The Fair Claims Act is an important bill for the papermaking industry, from both an economic development perspective and an environmental perspective.

Wisconsin is the number-one papermaking state in the nation and has been the leader for 50 years.

The industry employs approximately 40,000 men and women -- which represent one in every 12 manufacturing jobs in Wisconsin – with annual payroll of over 2.5 billion dollars.

Papermakers recognize they have a legal obligation to participate in cleaning up the Fox. But before that process can move into high gear, it is critical that legislation clarifies the insurance industry's obligation to cover damages of general liability policyholders – who in this case are the papermakers.

The paper companies want to proceed with a prompt and efficient design and cleanup program, but that won't be possible if there are years of litigation among the PRPs and the insurers to determine who has to pay how much for the cleanup.

The paper companies involved have already invested $130 million in the cleanup effort and are prepared to assume additional responsibility when their insurance companies honor their obligations under the insurance policies we have purchased.

Passing the Fair Claims Act means cleanup projects can move forward … and that means communities benefit.

It also means the papermaking industry in Wisconsin will be able to put its resources toward meeting tomorrow's challenges and opportunities rather than getting bogged down in costly and lengthy litigation.

The Fair Claims Act also protects local governments in the Fox Valley that have the same type of insurance policies as paper companies. Passage of this bill will reduce the exposure to lawsuits for local municipalities. I know we have some local officials here today who will address this threat in more detail.

Thank you for holding this hearing. I join Rep. Kaufert in asking for your support of this bill, which provides the best opportunity to speed up the process, clean up the Fox River and usher in a new generation of activity on our great river.

I'll be happy to answer any questions.

Thank you, and I can take questions at this time.

Office:
Room 122 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882
608-266-0484

Toll-Free Hotline: 1-800-334-1465
TDD Hotline: 1-800-228-2115
Fax: 608-267-0304

District:
300 W. St. Joseph Street
Green Bay, WI 54301-2328
920-448-5092
Fax: 920-448-5093

CHAIR:
Energy, Utilities and
Information Technology Committee

MEMBER:
Joint Committee on Finance
Joint Committee on Audit

ROBERT L. COWLES

Wisconsin State Senator • 2nd Senate District

Fair Claims Act (AB 222/SB 137)
Assembly Committee on Insurance
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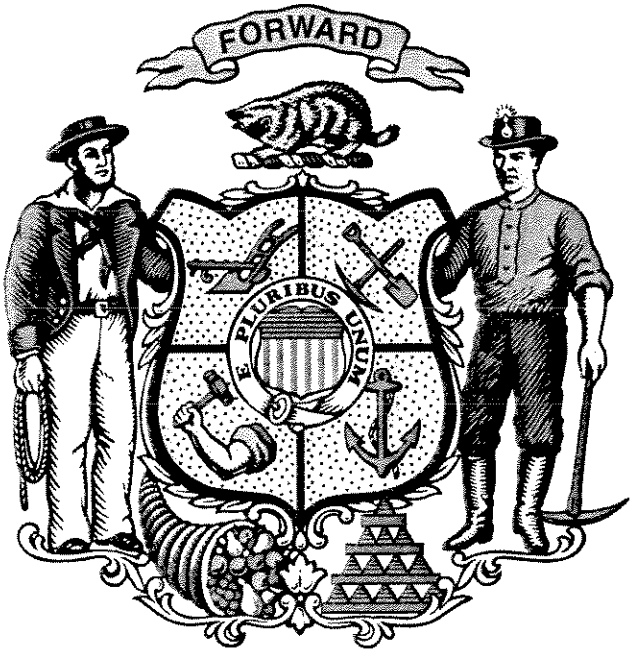
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STATE OF WISCONSIN
ASSEMBLY INSURANCE COMMITTEE HEARING
APRIL 21, 2005

TESTIMONY OF
LAURA A. FOGGAN
WILEY REIN & FIELDING, LLP
IN OPPOSITION TO ASSEMBLY BILL 222

Good Afternoon, Madam Chairperson and Members of the Committee. My name is Laura Foggan and I am testifying in opposition to Assembly Bill 222.

Assembly Bill 222 addresses complicated legal issues about the interpretation of insurance contracts and how they respond to multi-year environmental harm. Its is difficult for you to assess its effect when those testifying on either side contend precisely the opposite facts about whether the bill would unfairly and impermissibly alter the terms and application of insurance contracts.

To show that it would have that impermissible effect, I would like to start my testimony with two basic examples of how and why the proposed legislation actually would improperly expand insurers' liabilities and result in a windfall to the paper companies.

Example One: Effect of Settlements

Let's assume that the policyholder purchased coverage for two years. In Year 1, the policyholder purchased a policy with 20 million dollars in limits. In Year 2, the policyholder also purchased a policy with 20 million dollars in limits. The policyholder then becomes liable for 20 million dollars in property damage that occurs in equal parts in Years 1 and 2. How much must each insurer pay?

The correct answer is that, assuming the prerequisites to coverage are met, each insurer owes $10 million. In this example, $10 million dollars of damage took place in each policy period and each insurer must pay for the damage that took place during its policy period.

Now let's assume the same facts, except that the policyholder recognizes that there may be some difficulty in showing it satisfied the conditions to coverage (such as timely notice) under the policy in Year 2 and therefore elects to settle with Insurer 2 for $5 million dollars. Under these circumstances, how much must Insurer 1 pay?

The correct answer is still the same. It should be that Insurer 1 owes $10 million dollars. $10 million dollars of damage took place during the policy period of Insurer 1 and it must pay for the damage that took place during its policy period. Its obligations under the insurance policy issued for Year 1 are not altered – and should not be – by a settlement that the policyholder has independently chosen to make with Insurer 2 regarding the amount Insurer 2 will pay.

However, Assembly Bill 222 would impermissibly – and inequitably – change this result. Under Assembly Bill 222 (page 8, lines 9-16), the policyholder would now be able to force Insurer 1 to pay $15 million dollars under the facts above. This would expand the liability of Insurer 1 and would not simply "expedite" payment, with insurer shares to be resolved later. Although it would be forced to pay $15 million dollars instead of its fair share of $10 million, Insurer 1 would have no ability for to recoup the additional amounts paid. This is because Assembly Bill 222 (page 8, lines 9-13), releases Insurer 2 from any additional liability and provides (page 8, lines 13-16), that the policyholder can charge any insurer that hasn't settled

with the balance of the loss, which includes any amount of that the policyholder compromised away in settlement with another insurer.

That result is a windfall to the policyholder, which under general legal principles should step into the shoes of the insurer with whom it settled with respect to any compromise it makes as to that insurer's share. The remaining insurers should remain liable for their fair share of the loss – no more and no less.

The paper companies contend that Assembly Bill 222 is designed simply to "expedite" cleanups. As this example shows, that is demonstratively untrue. Assembly Bill 222 would retroactively expand insurers' liabilities and provide a windfall to environmental polluters.

Example Two: Effect of Uninsured Periods

Let's take another two-year example to keep things simple. Let's assume this time that the policyholder buys a policy with a $20 million dollar limit in Year 1. In Year 2, however, let's assume that the policyholder evaluates its options and makes a conscious decision not to buy insurance, but to self-insure for losses up to $20 million dollars. The company simply decides to keep and invest the premium dollars it would have paid for coverage in Year 2, recognizing that it thereby assumes the risk of a loss in Year 2.

Now let's assume that the company later becomes liable for $20 million dollars in property damage that takes place equally over Years 1 and 2. Under the majority rule (and equitable pro rata approach), Insurer 1 would be required to pay $10 million dollars and the paper company would be required to pay $10 million dollars. However, the wording of Assembly Bill 222 suggests that the paper companies could sue Insurer 1 for $20 million dollars

(i.e., "all sums" for property damage without regard to whether it takes place during the insurance policy period). That is at odds with the insurance contract language and intent. It is plainly inequitable to Insurer 1, as well as to competitors of the policyholder who paid for coverage every year. If this result were allowed, it would be a clear windfall to the paper company that gambled against losses in Year 2 and should now be required to accept the consequences of its decision to self-insure.

This is another example of how it appears that Assembly Bill 222 is not simply about seeking to "expedite" solutions, but instead is designed to provide an unfair advantage to the paper companies.

Examples like these are why the majority of courts considering the issue have ruled that "all sums" is the wrong approach and that insurers must pay their fair share of a multi-year loss – no more and no less. The weight of legal authority, including at least 10 state high courts and numerous federal and state intermediate appellate courts, has ruled in favor proportional or pro rata allocation of multi-year losses to insurers. These courts find that insurers should not be required to pay for damage that took place outside their policy period in a multi-year loss. This includes the state high courts in Alabama, Colorado, Connecticut, Kansas, Maryland, Minnesota, New Jersey, New York, Utah and Vermont.

We respectfully submit that the Wisconsin legislature should not supercede the Wisconsin state courts on this issue, particularly to endorse an approach that is inconsistent with the terms and intent of insurance policies and is fundamentally unfair. Although advocates of the bill contend that an Oregon statute provides a precedent for legislative action, the more telling

point is that the 49 remaining states have chosen not pass legislation overriding courts' ability to handle environmental coverage cases according to contract and common law principles.

Legislation on the issues at stake here is not necessary to effectuate environmental cleanups. For more than 25 years, at least since the 1980 enactment of the federal superfund law, clean ups have successfully proceeded while environmental-related insurance has been decided by the courts. In Wisconsin, there have been more than 11,000 contaminated properties cleaned up, and the Wisconsin DNR on average approves 500 completed clean ups per year. The system is working in Wisconsin and 48 other states that haven't taken legislative steps like the one proposed here. The Oregon statute is alone in attempting to supercede the courts' authority to decide the legal issues at stake and should not be viewed as a "model" for action here.

It is also important to recognize that the Oregon statute itself is in fact very different from Assembly Bill 222. For instance, the Oregon law provides that:

- If the insured is uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.
- If an insured is uninsured for any part of the time period included in the environmental claim, an insurer that otherwise has an obligation to pay defense costs may deny that portion of defense costs that would be allocated to the insured.

Provisions like these, which explicitly address uninsured periods, are not found in the proposal before this Committee today. In fact, Assembly Bill 222 differs from the Oregon statute in many respects. For instance, under the Oregon law an insured must first provide notice of an environmental claim and seek satisfaction from all relevant insurers before targeting any one insurer for "all sums" liability. Further, the Oregon law provides that the insured must

provide any targeted insurer with information regarding every policy that may potentially provide coverage for the claim. This bill does not include similar provisions.

It is wrong to contend that the Oregon statute is a precedent for this proposal when these and other key aspects of the Oregon approach are omitted. The Oregon statute also provides that an insured must use specific factors in choosing an insurer which it will seek to hold liable for "all sums" for a multi-year environmental claim. Those factors include the number of relevant years the insurer provided coverage; the limits of that coverage including any applicable exclusions; and the most appropriate type of coverage for the environmental claim. Assembly Bill 222 has no factors or guidance at all – so that an insurer that issued a single year of coverage during a 40 year loss could unfairly be targeted by the policyholder, even though others would owe a much larger share.

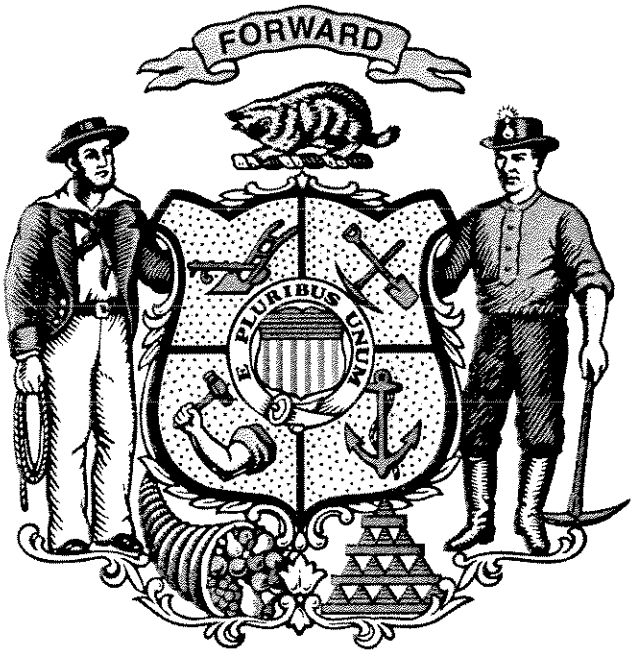
With respect to the "all sums" issue, Assembly Bill 222 is very much unlike the Oregon statute. It is even more unbalanced, and fundamentally unfair, than the Oregon statute. However, both Assembly Bill 222 and the Oregon statute seek to impose a legislative mandate that insurers be held jointly and severally liable for multi-year environmental damage. That approach, both here and in Oregon, is unwise and unconstitutional. Indeed, the Oregon statute is itself highly objectionable and currently is being challenged on constitutional grounds in the courts. For instance, the parties to Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London, No. A116662 (Or. Ct. App. January 26, 2005), questioned the constitutionality of the Oregon law, but that court side-stepped the issue by finding no coverage on other grounds. In other pending appeals, including Cascade Corp. v. American Home Assurance Co., No. A118185 (Or. Ct. App.) and ZRZ Realty Co. v. Beneficial Fire & Casualty Co., No. A121145 (Or. Ct. App.), the constitutionality of Oregon Senate Bill 297 is now at stake.

As these cases make clear, far from expediting cleanups, the Oregon statute has prolonged litigation by injecting a new issue into already controversial environmental coverage disputes. The approach of legislating "all sums" is untested and, we respectfully submit, unlikely to be upheld. The Wisconsin legislature should leave this issue to be resolved by the courts, which are well-equipped to decide the merits of the insurance contract and other legal issues that it presents.

I also want to point out that the proposal before you today contains a number of other "stealth" provisions – that is, important provisions that have been and hidden from discussion here. Examples are provisions addressing attorneys fees and creating direct rights of action by broadly defined government entities against any insurer that has not settled a claim. These are important issues that require careful study in their own right, but advocates behind the scenes of this proposal but almost seem to be trying to "sneak" them through.

Finally, there is a whole separate section of Assembly Bill 222 that also deserves careful study. These are the provisions addressing lost policy or proof-of-policy issues. The proof-of-policy provisions supplant Wisconsin law and would introduce new standards. They lower the standard of proof for missing policies in general, possibly opening the door to fraud. These proposals should be reviewed anew in light of new information and insights, which have been gained in many instances from the experience of insurers with offices in and around the World Trade Center in New York City after September 11. Those experiences, which may teach important lessons, have not yet been given any consideration here in developing rules to supplant the existing law on lost policies. The Assembly Insurance should not move forward on these proposals, as they exist here. There was no opportunity for these new issues which came to light after 9/11 to be considered in any forum prior to introduction of Assembly Bill 222.

For all the reasons noted, I urge the Committee not to support the passage of Assembly Bill 222. Thank you.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EMERITUS EVJUE-BASCOM PROFESSOR OF LAW, GORDON B. BALDWIN – STATEMENT ON AB 222 IN OPPOSITION - HEARING ON21 APRIL 2005

We know your committee seeks to promote the public interest. However, a fundamental public interest lies honoring and applying the rule of law in specific setting.. The rule of law depends upon several central qualities.

First, an orderly society requires people, and governmental institutions, to keep their legal promises. Respect for, and enforcement of, legal obligations distinguishes a civil society from one suffering in anarchy. Honoring legitimate societal expectations is a central feature of our constitutional system. An insurance contract records the expectations of the parties, and the insured pay a premium calculated on the risks covered. Your hearings revealed agreement among the bills supporters and the bills opponents that contracts bind the parties. They disagree, however, on whether the bill changes the terms of the insurance contracts.

Second, the rule of law applies to government as well as to individuals and other institutions. The Bill of Rights, harbored in the Wisconsin and United States Constitutions voices that value. Arbitrary and caprious law, however, well intentioned flunk constitutional values.

Third, we operate under a strong presumption that the rules governing our behavior will not change retroactively. The ex post facto clauses, the bill of attainder, and the obligation of contract clauses in the United States Constitution illustrate. So also does Article I §12 of the Wisconsin Constitution. The Due Process Clause of the 14th Amendment, and its Wisconsin equivalent also erect barriers to retroactive legislation.

Fourth , in a society treasuring freedom we must allow a wide variety of choice by individuals, by government, and by institutions. Choice necessarily involves assuming some risks. We make wise choices, but not always, and in a free society the consequences of bad choices are ordinarily borne by the chooser. For law to intervene to repair the consequences of poor choices requires a large burden of proof, if not significant consensus that the remedy works and is consistent with law.

The legislation proposed here does, I admit, have the virtue, dubious to be sure, of employing my former students, but we do not need, or want, an additional full employment for lawyer's act. The bill, if passed, will inevitably, in my opinion, trigger constitutional challenges by the insurance carrier obliged so sort out other carriers with insurance obligations. It may not be possible to avoid litigation, but I believe legislation can create more efficient alternatives to resolve the numerous disputes arising from the multiple insurance polcies covering environmental damages.

One does not have to challenge the decision in *Johnson Controls Inc. v. Employers Insurance of Wausau* (2003) to observe that the bill before this committee places a titantic burden on the insurer nailed by a policy holder. I observe no one challenging the liability of an insurance carrier for coverage required by the terms of a policy, but the terms of the policy, if construed as most courts have, do no demand payment of policy limits up front Limits of liability, the length of the coverage, the procedure to making claims - all are commonly included within the express terms of the bargained for coverage.

It is important to recognize the choices of the insurer and the insured made under the conditions known or reasonably anticipated when the insurance policies were negotiated. The policies here appear as the product of bargained for choices. Some of the insured changed their policies and their insurer as a matter of business choice. The setting here does not present the ancient picture of a powerful corporation exploiting the fears of the weak and poor. The typical insurance policy covering environmental damage imposes liability only for "legally obligated damages." The scope of legally obligated damages can only be measured by the terms of the insurance contract Perhaps the choices, the scope of liability, and the amount of the premium, of the insured and the insurer came out wisely, or perhaps they did not. In any event they were bargained for, and the Constitutions of the United States and of Wisconsin forbid their retroactive abolition.

Allowing an insured to nail the nearest or richest insurance carrier, and require that carrier to take on liability and hope for recovery or contribution from other insurance carriers raises serious and I believe fatal questions. The bill imposes new and unanticipated burdens – indeed the testimony of Attorney Mike Cohen demonstrates those burdens. For government to change the terms of an insurance contract retroactively surely violates the fundamental principle underlying the Obligation of Contracts Clauses of both the United States and Wisconsin Constitutions as well as the Due Process Clause of the 14th Amendment.

I do not purport to expertise in matters of civil procedure. The multiple insurance contracts covering environmental damages require a sorting out. The bill before you imposes the sorting obligation on the first carrier nailed. But the sorting might be done, more quickly, more efficiently and more persuasive if it were the product of the input of all parties, perhaps supervised or even judged by a single decision maker, a special mater, a receiver, or even a commission. Sorting may prove difficult, and require staff assistance. But sorting is necessary to fulfill the terms of the insurance policies; it is in the public interest, and could benefit all the parities. The sorting obligation has costs, but these should be borne more equitably than imposing them initially on the first carrier past the post.