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*

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

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- *Miscellaneous ... Misc*

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TESTIMONY
TO
WISCONSIN ASSEMBLY INSURANCE COMMITTEE
APRIL 21, 2005
PEDER A. LARSON

Summary Conclusion

Seven responsible parties polluted the Fox River by manufacturing and recycling carbonless paper. The State of Wisconsin should demand that those parties proceed without delay to implement the dredging, dewatering and disposal remedy that has been selected by the State of Wisconsin and the United States Environmental Protection Agency.

Wisconsin policy makers should not expect 2005 Assembly Bill 222 to expedite the remediation of the Fox River. Specifically, no Wisconsin legislator or regulator should tolerate any delay in cleaning up the river blamed on disputes over insurance coverage issues.

Experience:

Twelve years of Commissioner level government service and legal practice focused exclusively on environmental issues:

- Six years in the Minnesota Pollution Control Agency
  - 3½ Years as Assistant and Deputy Commissioner
  - 2½ Years as Commissioner
- Six Years in Private Law Practice focusing on Environmental Issues

Focus of Testimony:

- How is the Fox River cleanup going?
- Should the timing of remediation depend on resolution of insurance coverage disputes?

Fox River Cleanup:

The Fox River Remediation is currently proceeding very well. This observation is based on five factors:

1. Source of the contamination has been identified.

   The pollution is PCB contamination from the manufacturing and recycling of carbonless paper. The parties responsible for the activities cannot delay remediation by denying responsibility for the pollution.

2. Seven Responsible Parties have been identified and are participating.

3. Remedies for the pollution have been selected.

   The Record of Decision selecting the appropriate remedy to clean up the Fox River has been adopted by the State of Wisconsin and the federal government.

4. The remedy works, based on work in Operable Unit One.
   - The dredging technology works and results have been very good. Dredging as needed in remaining operable units still requires siting and permitting landfill for sediment or locating an existing landfill for disposal.
   - PCB contaminated sediments are stable and will be readily acceptable by landfills.

5. The Seven Responsible Parties are sufficiently solvent to implement the remedy.
   - Four parties hold over 99% of responsibility.

Should the timing of remediation depend on resolution of insurance coverage disputes?

Wisconsin policy makers and the public should categorically reject any delay by responsible parties. Such a delay is contrary to two core principles of the Superfund Process:

1. The cost of cleaning up toxic waste sites should be borne by the parties responsible for the waste.

2. Responsible parties are expected proceed with remediation as quickly as possible regardless of whether the remediation costs are paid from reserves, current profits or insurance coverage. The only exception to this rule is demonstrable financial hardships that do not exist for the Fox River Responsible Parties.

"Clean up first, litigate later" is the core policy purpose for Superfund. All of the Superfund mechanisms, from the establishment of joint and several liability for

responsible parties to creating a public fund to clean up orphan sites, are designed to achieve the singular goal of beginning remediation and completing without delay.

Paper Companies will not risk remediation under an USEPA Order:

USEPA has the authority to issue a Unilateral Administrative Order under §106 of CERCLA.

- Failure to comply can lead to penalties of $25,000/violation/day plus punitive damages of triple the amount spent from public funds.
- Unless parties have "sufficient cause" to ignore the order, parties must clean up site and then attempt to recover costs. Superfund's "Clean Up First Litigate Second" Policy.

EPA has broad discretion to issue the order as long as issuance is not arbitrary or capricious.

Background On Conclusions:

Primary Basis for my opinion is that the system is working as it should.

How the system should work:

- Identify the problem.
- Find the Responsible Parties.
- Identify the risks to human health and the environment.
- Identify possible solutions.
- Identify the best solution.
- Implement the solution.

For Fox River and Bay:

Identify the problem
- PCB's in the River and Bay
- Goals for selected remedies here are:
    - Remove fish consumption advisories.
    - Protect the fish and wildlife that use the river and bay.
    - Reduce PCB transport to the bay.

Find the Responsible Parties.
- Manufacturers and recyclers of carbonless paper.
- Seven Responsible Parties are the Fox River Group.

Identify the risks to human health and the environment.
- Done in numerous studies.

Identify possible solutions.
- Done in remedial investigation and feasibility studies, along with pilot programs.

Identify the best solution.
- Decisions set out in WDNR and EPA Record of Decisions.
- Dredging solution already tested and proven successful.
- Sediment disposal process is still being finalized.

Implement the solution.
- RP's get to work.

Conclusion: The clean up is going well.

Regarding Financing:

REPEAT: Policy makers should expect remediation to proceed. The Superfund laws allow later litigation to resolve insurance coverage and other disputes. CLEAN UP FIRST LITIGATE LATER.

Financing.

- First source is Responsible Parties.
- Responsible Parties are the first, last and only source in this case.
- Expenses Covered
  - EPA and WDNR expenses.
  - Remedial InvestigationI/Feasibililty Studies (and related studies and pilots)
  - Record of Decision expenses
  - Remediation
  - Natural Resource Damages
  - Monitoring

Allocation of costs between RP's.

- Basic premise is joint and several liabilities for costs.
- Allocation is normally resolved by negotiation between the parties.
- Our information is that four parties are determined to be over 99% responsible:
  - Gladfelter
  - GP
  - WTI
  - Appleton Paper/NCR
- The other two parties have less than one percent responsibility:
  - Riverside Paper
  - US Paper

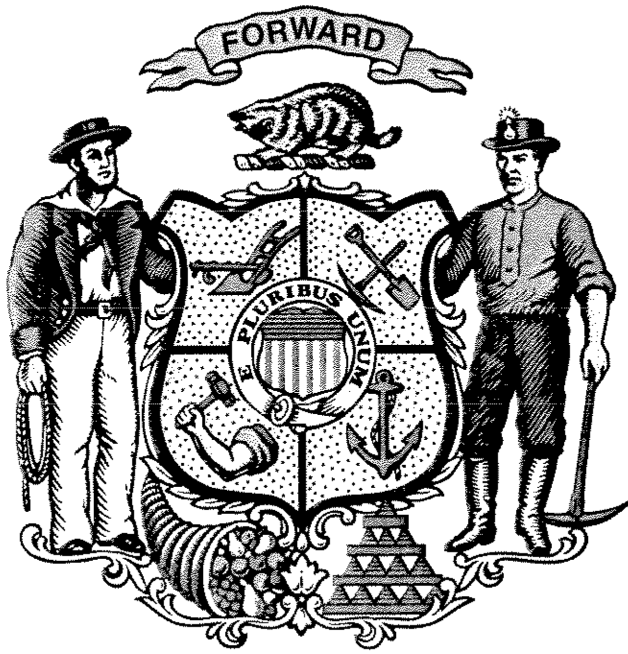
Alternatives to Voluntary RP Payment:

- First Option--Unilateral Administrative Order under §106 of CERCLA.
  - Failure to comply can lead to penalties of $25,000/violation/day plus punitive damages of triple the amount spent from the fund.
  - Unless parties have "sufficient cause" to ignore the order, parties must clean up site and then attempt to recover costs. Superfund's "Clean Up First Litigate Second" Policy.
    - EPA has broad discretion as long as issuance is not arbitrary or capricious.
- Second Option—Fund led cleanup followed by collection of costs from RP's. Unlikely here

Conclusion:

Based on my review, it would be incorrect to support this bill based on the expectation that the clean up of the Fox River and Green Bay will be delayed if it is not passed.

Thank You.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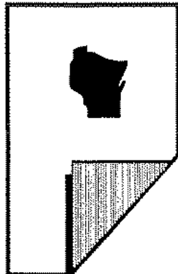

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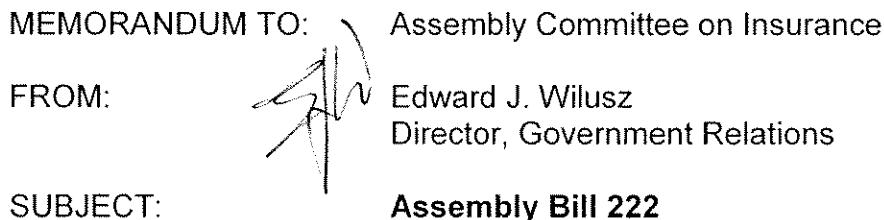


MEMORANDUM TO: Assembly Committee on Insurance

FROM: Edward J. Wilusz
Director, Government Relations

SUBJECT: **Assembly Bill 222**

The following comments are submitted on behalf of the members of the Wisconsin Paper Council regarding Assembly Bill 222, relating to environmental claims under general liability insurance policies.

The Wisconsin Paper Council supports Assembly Bill 222.

Our comments will not focus on the nuts and bolts of the bill. Rather, we want to emphasize the need to make progress on the Fox River cleanup and to make that progress at the least cost to the affected companies. Passage of AB 222 is critical to meeting both of these goals.

To put these goals in context, we want to briefly update you on the state of the industry. Global competition remains fierce. Controlling costs remains the number one priority for papermakers in the U.S. and in Wisconsin.

Progress has been made to bring supply and demand more into balance, but at a painful price. Wisconsin's paper industry has lost approximately 13,000 jobs in the past few years – jobs that pay $50,000 per year on average, the highest manufacturing wage in the state. Yet, we remain the number one papermaking state in the nation.

Consolidation continues, although at a slower pace, as companies seek to rationalize assets. This consolidation has resulted in corporate decision-making moving out of Wisconsin, in some cases, and has also resulted in intense intra-company competition for investment dollars as individual companies have more options in which to invest. Corporations evaluate these internal investment options with much more of an eye on costs and return on investment, and less of an eye on community or state loyalty.

The U.S. dollar has weakened, helping to stem the tide of cheap imports from Europe. However, low priced imports from China, and other areas, continue to challenge U.S. manufacturers.

Companies have been able to raise prices somewhat in the past 12-18 months. But, increased costs for energy, raw materials like wood, waste paper and chemicals, and health care have combined to offset these price increases and keep the economic pressure on the industry.

Within this context, paper companies affected by the Fox River cleanup give very close scrutiny to projects that, while socially positive, will cost hundreds of millions of dollars in total, and further challenge the companies economically. While these companies understand their cleanup responsibilities and are committed to meeting them, economic realities dictate that these responsibilities be fulfilled effectively, quickly, and at the least cost.

The key to meeting these goals is for the major affected parties – the mills, DNR and EPA – to reach a voluntary agreement this year that will allow the cleanup to begin. Everyone has understood from the beginning that reaching a voluntary cleanup agreement is a key cornerstone of the entire project. Everyone has worked toward the goal of avoiding the Superfund legal process – a process that will add years to the schedule and millions of dollars in legal fees to the cost as everyone on the Fox River sues everyone else on the Fox River.

The Johnson Controls decision by the Wisconsin Supreme Court in 2003 went a long way toward making a voluntary agreement a reality. By bringing a potentially significant pool of insurance resources into the picture, the cost to the mills is reduced to a more manageable level, making it easier to reach an agreement on cost allocation.

Despite the Johnson Controls decision, significant insurance resources have not materialized. Insurance companies appear unwilling to voluntarily settle with the mills for what the mills feel is a fair amount. The insurance industry contends that the legal system is the appropriate forum for determining a fair settlement when a disagreement like this exists.

In some cases, the courts may be a viable option for settling differences. Within the context of the Fox River cleanup, if the pool of potentially responsible parties is small, the time and cost of a lawsuit may be worthwhile. One of our members – the most upstream affected mill – is in this situation and has successfully sued its insurance carriers.

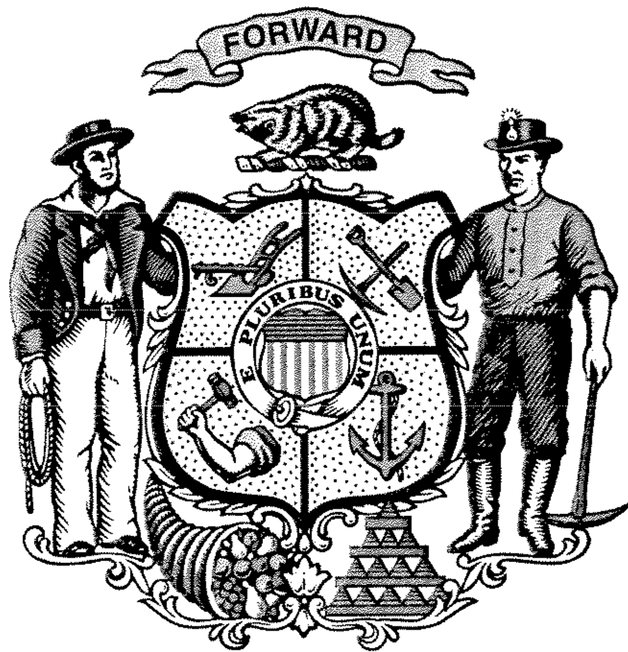
However, the courts are not likely to be a viable option for settling differences if the pool of potentially responsible parties is large. This is the situation on the downstream portion of the river from Appleton to Green Bay. In this situation, going to court with the insurance companies could become, for all practical purposes, the same as going to court under Superfund – everyone ends up suing everyone else, the cleanup process is delayed by years, and the ultimate cost is increased by millions of dollars.

This is exactly what everyone has been working so hard to avoid for all these years.

Assembly Bill 222 will result in insurance resources being made available for the cleanup – resources that the insurance companies are obligated to pay under the Johnson Controls decision. These resources will be timely, making a voluntary agreement this year more likely. This will get the cleanup moving more quickly. Finally, the bill will allow the cleanup to move forward at the least cost – but a significant cost – to the paper industry, an industry that is an economic cornerstone of Wisconsin's manufacturing base.

We urge your support for Assembly Bill 222.

rg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Testimony of Christopher R. Hermann
in Support of 2005 Assembly Bill 222

April 21, 2005

Not limited to waterways

Before the Assembly Committee on Insurance

Good morning, Madame Chairperson and members of the Committee. For the record, my name is Christopher R. Hermann. I am a partner with the Portland, Oregon based law firm of Stoel Rives LLP. I am here today representing the Wisconsin Paper Council. Since 1987 I have represented public and private entities nationwide in environmental cleanups as well as making insurance claims against their insurers under pre-1986 general liability policies to recover the costs arising out of environmental cleanups. I am also an adjunct professor of law at the Northwestern School of Law of Lewis and Clark College in Portland, Oregon. I have for many years taught a seminar there entitled 'Environmental Liability Insurance Coverage." I have authored numerous articles concerning environmental liability insurance, including an article focused on the "all-sums" allocation rule entitled "The Unanswered Question of Environmental Insurance Allocation in Oregon Law" Willamette Law Review, Vol. 39, pp. 1131-1162. I am also one of the principle authors of Senate Bill 297 (ORS 465.475-480), the environmental insurance bill adopted by the Oregon legislature and signed by Governor Kulongoski on September 24, 2003. This bill enacted policyholder favorable rules on allocation, lost policies and the definition of covered defense costs.

I am here today to testify in FAVOR of 2005 Assembly Bill 222. I greatly appreciate this committee's interest in this important legislation. As a lawyer currently for insureds who are

working hard to comply with federal and state environmental cleanup requirements in many states I wanted to give you my perspective on the bill and how it will expedite environmental investigations and cleanups in this state.

In summary, once the Oregon environmental insurance bill was introduced and following enactment insurance companies have accepted tenders of defense readily in Oregon allowing the investigation and cleanup process to proceed without the long delays that existed before the all-sums rule was adopted. In fact, since the bill was introduced in the Spring of 2003, 12 of our Oregon clients have had insurers accept tenders of defense and/or enter into settlements. Since that time litigation has declined too as the legislation resolved many key unanswered legal questions thereby causing insurers to be more likely to pay and/or settle rather than deny claims and/or sue. By the way, this is consistent with my experience representing policyholders in two other "all-sums" states, Massachusetts and Washington.

Rather than discuss the proposed legislation at an abstract level, I would like to offer you concrete evidence, based on my personal experience, of the positive impact in terms of promoting faster, better cleanups that will flow from the proposed legislation if adopted here in Wisconsin. In particular I want to focus on the experience I have had working as a lawyer for the Port of Portland in Oregon trying to obtain promised insurance coverage from the Port's insurers and the role this insurance has played in allowed for expedited cleanup of Oregon's major NPL site, the so-called Portland Harbor Superfund Site.

I began working with the Port of Portland in 2002. The Port is the single largest landowner along the Willamette River in downtown Portland The Port began to investigate properties it owned in and around the Willamette River in 1996. In 2000 the United States Environmental Protection Agency ("EPA") placed the so-called Portland Harbor Superfund Site in the Willamette River on the National Priority List. The Port and a small group of other PRPs entered into an Administrative Order on Consent ("AOC") with EPA in December 2000. The RI process started in 2002 and is still underway. The Record of Decision is not expected until 2008.

Prior to the introduction and ultimately the passage of the bill, the Port's insurers had refused to pay most of the Port's defense costs from 1996 through 2003 (they paid $3 million of $15 million in costs). The insurance bill was introduced in the Spring of 2003, passed in August and signed by Governor Kulongoski in September. The legislative effort had an immediate and substantial impact. In the six previous years the Port spent a great deal of time and effort to collect under its policies and was largely stonewalled. As soon as the "all-sums" and lost-policy provisions were introduced and then passed there was an immediate change in the carriers behavior. In fact, between the time the bill was introduced and December 2003, six of the Port's seven primary carriers fully and finally settled with the Port. This was because the statute made clear what carriers had to do and there was no need to litigate.

Based on these settlements the Port was able to become proactive in addressing cleanup. The Port and EPA entered into an AOC for early action for in-water cleanup at Terminal 4, the worst of the Port's own sites. Thus the availability of substantial funds will allow for a fast track cleanup—well ahead of the scheduled date for overall site remedy selection. Without the

insurance settlements the Port would not have been in a position to commit to signing an agreed order on consent to perform this work on a fast track basis. This lead to expedited completion of the RI/FS phase and the planned implementation of a major portion of the Willamette River cleanup years before it would otherwise have occurred. A copy of a letter from the environmental director of the Port of Portland confirming this is attached.

On a more general level, based on my experience and perspective as a lawyer specializing in environmental insurance law, I think the following points are essential to this committee's understanding of what this bill can do in Wisconsin:

- This Bill will promote fast track cleanups. On the Fox River, for instance, remediation would quickly proceed from investigation to actual environmental cleanup if the potentially responsible parties, including municipalities, were able to access general liability insurance that they purchased years ago rather than having to spend money fighting with their insurers to pay for cleanup costs.

- The public interest is served by legislative adoption of this bill and in particular the "all-sums" rule because it will set the ground rules for handling of environmental claims and minimize transaction time and costs that otherwise cause delay. The end result will be to make more money available faster for cleanups in Wisconsin. If the allocation issue in particular is left to be decided by the courts it will not be finally resolved for years. This will in turn delay cleanups for many years.

- This bill is about requiring insurers to fulfill their promises to their insureds. When insurers sold these "all risk" policies they told companies that they would respond to "all" liability claims arising out of occurrences during their policy period. An environmental claim is clearly a liability claim, so insurers should be responding.

- Much discussion and concern has focused on the "all-sums' language in the bill. This is really a simple concept, although it can be made to appear very complex by those opposed to the bill. The bill says that if a GL policy states that the insurance company has the duty to pay all sums pursuant to the terms of the policy, including its limit of liability, then it must do so independent of other coverage from other carriers that may be in effect for the same claim. This language puts money into cleanups at the front end of the process, allowing insurance carriers to later seek contribution from other potentially liable insurers.

- I have also heard it argued before that it is not "fair" to require insurers to adopt an "all-sums" rule. Let me address these arguments in detail.

The typical standard form printed comprehensive general liability policy issued prior to 1986 reads that:

> "The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of...property damage...to which this insurance applies, caused by an occurrence." (Emphasis added.)

It is fair because the very contract itself states that the insurer promises to pay "all-sums." The "all sums" rule is not a creation of the proponents of this bill, but rather the allocation approach

the insurers themselves promised to follow when they wrote and sold these policies years ago. The insurers made a promise and it is always fair to require someone to fulfill a promise, a written contractual promise, such as the one they made here.

It is fair because insurers are in the business of making money by taking risks, the insureds are not. Here one of the risks was that they would have to pay for their policyholders liability on an "all-sums" basis. They were paid substantial premiums for taking that risk. It is not unfair to require them to fulfill their contractual promise today. I discuss this issue at greater length in my law review article on pages 1159-1161. A copy is attached to this testimony.

It is fair because the insurers marketed their policies as covering "all risks," no matter what those risks turned out to be. Pre-1986 comprehensive general liability insurance policies were marketed as "all risk" liability insurance policies. The insurers told their customers that, if *anyone* said they were liable as a result of *any* occurrence during the policy period, they would be taken care of.

It is fair because the insurers themselves knew that, under their policy language, they signed up to be liable to the insured for "all sums," even if other insurers covered the same risk. When the insurers drafted their pre-1986 CGL policy language, they knew that a single CGL policy could be required to respond to gradual, long-term damages arising from the release of a pollutant, even if other insurance was available. The New Jersey Supreme Court catalogued some of the statements made by the insurers when they issued these policies:

> "[I]nsurance industry officials acknowledged that multiple policies of insurance would be triggered by a gradual release of contaminants causing progressive injury or damage. . . .

> [This was evidenced by statements made by] (1) Gilbert L. Bean, a drafter of the CGL policy: '[I]f the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.'; (2) a company claims manual: 'When the injury is gradual, resulting from continuous or repeated exposures, and occurs over a period of time, coverage may be afforded under more than one policy—the policies in effect during the period of injury'; and (3) another drafter of the CGL policy: '[T]here is no pro-ration formula in the policy, as it seemed impossible to develop a formula which would handle every possible situation with complete equity.'" (Emphasis added.)

Owens-Illinois, 650 A.2d at 990 (citing Eugene R. Anderson et al., *Liability Insurance Coverage for Pollution Claims*, 59 MISS. L.J. 699, 729-30 (1989)).

Some object to the bill on the grounds that it rewrites the policies. While there is no definition in the typical standard form policy of the term "all-sums," the policy language is clear and unambiguous. This bill simply clarifies the insurers' obligation under the existing "all-sums" policy language. It does not change or modify the agreement by using a different term or allocation approach. This is not a change only a clarification.

Some say, well even if this is true, how can it be fair where an insurer had only one year of coverage and the property damage occurred over many years. Once again it is fair because the insurance company wrote the policy and promised to pay all sums that the policyholders was liable to pay because of damage caused to other people's property, including surface water and sediments. It simply requires the insurers to pay, as the policy requires, for the dollar value of the liability the policyholder has for property damage it causes to others up to a maximum amount of the policy limit agreed to by the insurer and policyholder, years ago.

Remember, the insurers were writing and printing these policies with typically no negotiation over the standard terms of the policy. Had the insurers wanted to provide coverage on the so-

called "pro rata" basis they could and would have done so by inserting that language into the policies. They did not do so when they were written and sold and it would be unfair to the policyholders who paid premiums based on the actual language of the policies to allow the insurers to rewrite the policies today to save money.

The "all-sums" language does not change what was already agreed to in the policy between the policyholder and the insurance company. If the policyholder shows that property damage occurred during the policy period, then the insurance company must pay for the damage up to its limit of liability. In other words if there is $1 million in coverage but the cleanup cost is $500K, then the insurance carrier must pay $500K. Without this bill, the insurance companies can and do force the policy holder to make claims against, and reach agreement with all other carriers before receiving full payment. That process is time consuming, costly and litigious. Under the bill, it is up to the insurer to pay first and then allocate the costs among all applicable insurance policies that may also be in effect during the time period. The result: environmental cleanup funds can be out into action much earlier in the process than is otherwise typically the case.

One question that is frequently asked in Oregon and around the country is: "Has the Oregon environmental insurance law made a difference?" The answer is an unqualified "Yes."

Since the Oregon legislation was adopted the insurance industry's appetite for settlement of environmental insurance claims in Oregon has increased noticeably and the willingness of insurers to accept tenders of defense arising out of environmental liabilities has also grown. In the year and a half since the bill was passed ~~we have~~ my law firm alone has represented 12 policyholders in Oregon

whose claims have been accepted without the lengthy delay and skirmishing that occurred routinely prior to the law being passed.

On the other hand, based on my experience in Oregon prior to the adoption of SB 297 and my recent experience in Idaho, insurers are much less likely to accept the tender of defense and to make payments for investigation costs and are even less likely to agree to pay for substantial cleanup costs in the absence of litigation in states with no case law or statute adopting the "all-sums" rule. This is true because under the insurer-friendly "pro-rata" rule, the policyholder must seek to recover from each and every insurer providing coverage separately for a fractional share of the overall cost to which always results in lengthy delays due to having to wait for resolution of disputes with each carrier. In addition, the policyholder is responsible for periods when policies have been lost and where insurers have become insolvent.

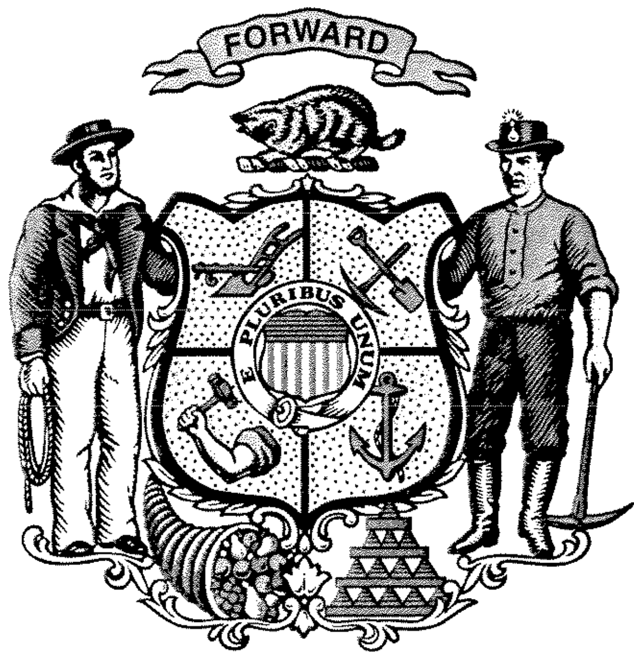
Despite the positive impact of the Oregon legislation in making more money available sooner for cleanups, in Wisconsin today, as was true two years ago in Oregon, the opponents of this legislation argue that the bill will cause commercial insurance rates to rise and ultimately lead to commercial insurers refusing to offer commercial insurance in the state. Despite the insurers' claims of unfairness and of the predicted negative impact on the insurance industry of legislation such as this bill, no such ill effects have emerged since the Oregon bill was passed. In fact the insurance industry has quickly adjusted to the new law as evidenced by the fact that no legal challenges have been brought against the statute since its passage almost two years ago and no attempt has been made to revise the law in the current Oregon legislative session.

The opponents also argue that the bill changes the law to impose coverage where it would otherwise not exist. This is not true. Assembly Bill 222 does not in any way change the law about whether or when an insurance company is liable for costs of remedying environmental contamination. That was established by the Johnson Controls decision and, to the extent that an insurance policy contains language different from the language at issue there, courts will have to determine whether a policy provides coverage. However, with respect to policies that provide coverage, Assembly Bill 222 eliminates many of the procedural and allocation related disputes that have held up the funding of necessary environmental investigation and remediation in Wisconsin.

In conclusion, the adoption of the environmental insurance bill, and in particular the "all-sums" rule in Oregon in 2003 has promoted settlement, rather than litigation of claims, thereby promoting faster cleanups and benefiting human health and the environment in the state. Based on my personal experience as outside counsel to the Port of Portland and numerous other policyholders in Oregon, Washington and Massachusetts (all three are "all-sums" states), I have no doubt you will experience a similar benefit in Wisconsin if this bill is passed.

I therefore strongly urge you to enact Assembly Bill 222.

Madame Chairperson, I thank you for the time you have afforded me and am available to answer questions.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AB 222 ??

Fair Claims Act
Testimony of Dennis Delie & Gary DeKeyser
Before the Assembly Committee on Insurance
Thursday, April 21, 2005

Good morning. Thank you for the opportunity to testify today. I am Dennis Delie, President of Local 213 of United Steelworkers International in Green Bay. Joining me is Gary DeKeyser, President of Local 327 of United Steelworkers International in Green Bay.

Together, we urge you to support the Fair Claims Act.

I represent 509 hard-working men and women who work in maintenance, secondary fiber and converting aspects of papermaking. The individuals care about their job, they care about Georgia-Pacific, and they care about the communities along the Fox River that they call home.

United Steelworkers International members are committed to working with Georgia-Pacific and with our community leaders to do everything possible to make the papermaking industry in Wisconsin a success. Our livelihoods depend on that commitment, as does the future of the Fox Valley and every citizen.

In my view, the issue before this committee is simply this: Are you willing to do whatever it takes to keep this industry viable?

We believe the Fair Claims Act is a reasonable and responsible approach to helping the paper industry survive a challenging period.

United Steelworkers International stands for high-paying wages, safe working conditions, and for the rights and fair treatment of every worker in our Local Chapters. We know a little something about fairness, and we think there is a good reason this bill is called the Fair Claims Act:

The companies and municipalities involved in this issue bought comprehensive general liability policies and paid premiums for decades. The Wisconsin Supreme Court determined the remediation expenses are covered under the old policies, and now the insurance companies either don't want to pay or want to drag the process through the courts for years before settling with the Fox Valley papermakers.

It is only FAIR that the insurance companies step up and pay their share.

Failing to pay off an obligation IS NOT FAIR. It IS NOT right, and everyone in this room knows it.

We support this bill because we believe it will let the paper companies focus their resources now on equipment, facilities and expanding production rather than on costly and lengthy litigation.

And take it from someone who works in the mills – we need everything to go right if the paper industry is going to stay in business in Wisconsin. This is a competitive industry – we face a multitude of challenges from every front. We can meet those challenges head on, and create new opportunities for the paper industry and the hard-working men and women who work in the Fox Valley mills by passing this legislation.

GARY DEKEYSER SPEAKS NOW:
Thank you, Dennis.

I am Gary DeKeyser and I represent 120 members in Local 327. We work primarily in paper production.

If this bill is not passed in this legislature, I fear the 729 jobs that we represent will be seriously jeopardized or lost. That is a risk we cannot accept.

We believe the Fair Claims Act is the best way to way to get the Fox River cleaned up quickly, while at the same time minimizing the threat of a huge negative impact on the state's manufacturing sector – a hit we can't afford to take at this time.

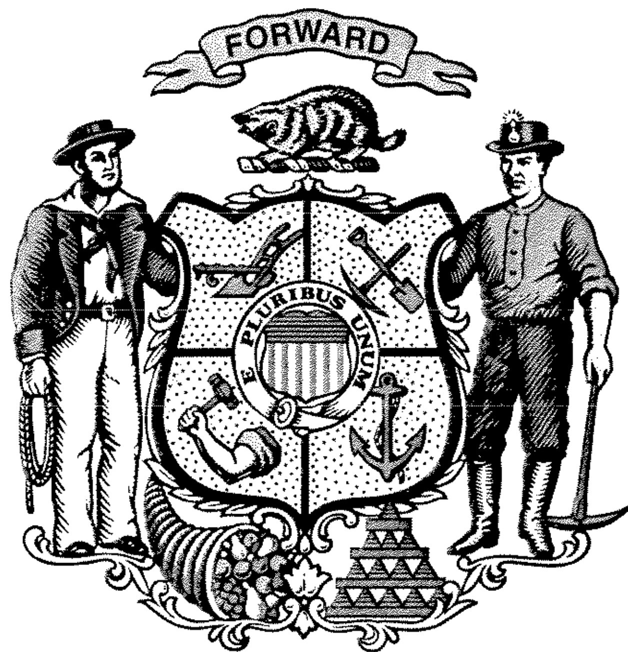
If the bill is not passed, we fear there will further delays to cleanup efforts as everyone heads to court. Everyone here knows what happens when disputes end up in court – valuable and substantial resources are wasted.

We want those resources to go toward papermakers becoming competitive and productive. United Steelworkers International knows that we are stronger as workers when we work together with the company.

We stand for the rights and fair treatment of every worker in Local 213 and 327 and everyone who depends on their earnings. We believe every one of our members, and every citizen, has to a right to a fair wage, a safe and healthy workplace, and to a safe and clean community.

The Fair Claims Act helps us achieve all of those.

On behalf of United Steelworkers International Local 213 and Local 327, we thank you again for the opportunity to testify and respectfully request your support of the Fair Claims Act.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Assembly Bill 222

"ALL SUMS"

21 April 2005

Madame chair, members of the committee, thank you for allowing me to testify before you. May name is David Cristan. I am the Environmental Claims Manager for Sentry Insurance Company, a domestic Wisconsin insurer since 1904.

There is little I can add to the testimony of the knowledgeable panel of witnesses that have testified today. I would, however, like to explain the effect of this Bill using a different scenario.

You have heard testimony for and against the proposition that one insurance policy should pay for an insured's liability, no matter when the damage occurred.

All of the testimony presented has been focused on commercial liability insurance policies. There are other insurance policies that contain "insuring agreements" that have language substantially similar to commercial liability insurance policies.

Some state:

> "We will pay damages for "bodily injury" or "property damage" for which the "insured" becomes legally responsible ....." so on and so forth.

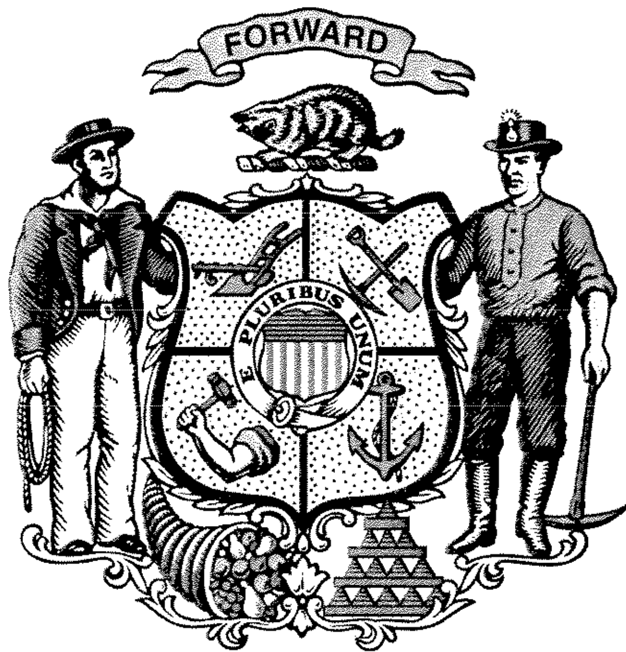
Although this wording is similar to the wording contained in the commercial liability insurance policy, it is actually wording from an AUTO policy.

When a person purchases an automobile they also purchase an AUTO policy, which not only includes coverage for damage to the vehicle but also for the negligence and resultant liability of the driver.

No one believes that the purchase of one insurance policy will provide coverage for the entire period the car is owned. It is understood, when policy wording is correctly interpreted, that an insurance policy only provides coverage for negligence, liability and damages that occur during the period of the insurance policy.

If this were not the case, an automobile owner could purchase a policy only once, and expect to be provided coverage for the entire ownership of the vehicle.

This is what is being proposed in Assembly Bill 222.


FORWARD
E PLURIBUS UNUM

Testimony of
David J Dybdahl, CPCU, ARM
April 21,2005

Re: AB 222

My name is David Dybdahl. I am an internationally recognized expert in environmental insurance. I am here today in opposition of the bill.

I will discuss the prospective effect of AB222 on the environmental insurance market and the residents of the State of Wisconsin.

I have worked in the environmental insurance industry for 25 years. I am a Chartered and Property Casualty Underwriter and I write the textbook chapter on environmental insurance for CPCU students. I am a resident of Middleton, Wisconsin and operate an environmental insurance brokerage firm with offices in New York, Chicago, Los Angles and Middleton. I am in the environmental insurance market place on a daily basis.

I have reviewed the proposed bill AB222 and in my opinion there will be negative unintended consequences that will severely restrict or eliminate the availability of prospective environmental insurance in the estate. Although the environmental insurance market in the state is relatively small and frail, the free market availability of environmental insurance plays an essential role in many parts of the state economy and in the environmental regulatory framework.

As used in AB222, the terms general liability insurance and environmental claims are sufficiently broad to ensnare the majority of prospective environmental insurance policies. A survey of the environmental insurance policies sold in the State of Wisconsin revealed that about half if them specifically contained the words "All Sums" in the insuring agreement and all of the policies had similar language. Therefore virtually all prospective environmental insurance policies would fall under the provisions of the proposed bill.

In my opinion if the State of Wisconsin passed a law that made new environmental insurance underwriters jointly and severally liable for preexisting pollution, without regard for policy terms and exclusions, the insurance market for environmental insurance in the state would quickly disappear. The unintended negative consequences of this law of this proposed law would be dramatic and rapid on businesses, taxpayers and the environmental regulators in the state.

Because AB222 overrides normal insurance industry protocols on policy terms and allocation of claims the impact of this bill on the environmental insurance market would be much more pronounced than merely a price increase for environmental insurance premiums. It is much more likely that the environmental insurance underwriters would abandon the state all together, refusing to issue any environmental insurance polices at all. Market abandonment in environmental insurance has happened in the past with Superfund clean up contractors in states that did not have favorable laws to protect the contractors from Superfund liability as an "operator" of the sites they were cleaning up. In the case of Superfund contractors, the USEPA needed to step in to create a tax payer subsidized contractors indemnity fund that indemnified (insured)contractors for any liabilities they might incur in cleaning up Superfund sites. The Federal government was forced into the hazardous waste contractor insurance business as an unintended negative consequence of the Superfund law. The same thing is a likely unintended consequence of AB222.

If the environmental insurance market place closed its doors to Wisconsin businesses, within one annual renewal cycle of the environmental insurance policies in force, in my opinion the following unintended things would occur.

There would be no underground storage tank insurance on thousands of gas stations in the state. This would require a state sponsored risk sharing pool bail out of the gas station operators in order for them to comply with federal and state laws which require them to provide proof of financial responsibility to operate a under ground storage tank. This fund exists within the state of Wisconsin today. The PECEFA fund is a taxpayer-subsidized source of insurance for underground storage tanks that are for the most part uninsurable. The impact of this bill would be to unwind 10 years worth of work to force UST owners out of a tax subsidized proof of financial responsibility system into the private insurance market. Without the taxpayer bail out to expand the PECEFA fund Wisconsin gas stations could be in mass non-compliance of a federal environmental law, which could lead to the de-certification of the WI DNR authority to administer this law by the USEPA.

With the passage of AB 222 no prospective environmental insurance would be available on landfills and factories. For regulated waste, treatment, storage and disposal facilities the unavailability of environmental insurance would throw them into regulatory noncompliance of proof of financial responsibility laws, potentially threatening the certification of the DNR as the enforcer of Federal environmental laws in this area as well. Without insurance availability many of these regulated sites could be forced to close or pay a $25,000 per day fine under federal law for operating without a permit.

Without access to environmental insurance waste treatment, storage and disposal facilities will also be unable to obtain closure and long- term care insurance for their proof of financial responsibility requirements. This would throw them into regulatory non-compliance with the Resource Conservation and Recovery Act. On a wide spread basis this would also threaten the DNR certification by the EPA for regulatory enforcement of these laws as well.

Environmental engineers and contractors would become uninsurable for their work performed in Wisconsin. Without environmental liability insurance, no financially responsible contractor would work to clean up the Fox River or any other contaminated site in the state without the creation of a state sponsored and funded risk-sharing pool for remedial action contractors. This approach was used by the USEPA in the first seven years of the Federal Superfund program. The EPA worked hard to eliminate their taxpayer funded contractors indemnity fund in 1987. I served on the task force in Washington DC that solved this problem for the USEPA by creating private purchased insurance for Superfund clean up contractors. By reverse engineering the process we used to get engineers and contractors out of the taxpayer funded indemnity program for the US EPA Superfund program an environmental contractors indemnity fund in the State of Wisconsin could be developed. Using $100,000,000 of taxpayer dollars, a fund could be created to provide up to $10,000,000 of coverage for each environmental contracting firm. My firm is the lead insurance consultant for the US Army for their procurements of environmental clean up contractors. From that experience I estimate that $10,000,000 limits of liability will not be sufficient to attract the best environmental remediation contractors to perform the work on the Fox River. They will want more protection from potential liability. Using the same financial ratios that the Wisconsin Insurance Commissioner uses to judge the solvency of insurance companies in the state, $20,000,000 limits could be provided if a $200,000,000 fund was established. Reinsurance capacity to reduce the cash funding requirements would be unavailable because of the AB 222 bill; so all amounts would need to be funded in cash or by an evergreen letter of credit issued by the state.

With the exit from the state of the environmental insurance market, fire and water restoration contractors and even carpet cleaners would be unable to obtain environmental insurance covering mold.

Plumbers, Roofers, Heating and Air Conditioning Contractors, General Contractors, and Home Builders would be unable to obtain environmental insurance covering them for mold, Bankers could become concerned about these firms being uninsured for toxic mold and deny these uninsured firms financing for future projects.

Environmental insurance policies are virtually all written on an excess surplus lines (E&S) basis. E&S policy forms and rates are relatively unregulated by the Commissioner of Insurance. Therefore the Wisconsin Insurance Commissioner could not force the insurance companies to continue to sell environmental insurance policies in Wisconsin.

All of these uninsurable environmental liability exposures could be aggregated into a new State of Wisconsin Environmental Risk Sharing pool which would fill in as the monopolistic environmental insurance company in the state. Capitalized and guaranteed by taxpayer dollars in the $300,000,000 to $400,000,000 range with annual administrative expenses in the $4,000,000 range, the pool could fill the needs of Wisconsin citizens for environmental insurance. To protect the solvency of the new Wisconsin Environmental Risk Sharing Pool a provision would need to be made to exempt it from the provisions of AB 222. Environmental insurance would be permanently unavailable in the state with the existence of AB222 therefore these funding levels would need to be maintained in perpetuity.