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)*

05hr_ab0222_AC-In_pt05

➢ *Miscellaneous* ... *Misc*
**

REINHART
BOERNER • VAN DEUREN s.c.
ATTORNEYS AT LAW

April 25, 2005

Raymond M. Roder, Esq.
Direct Dial: 608-229-2206
rroder@reinhartlaw.com

Answered by call in Jessica & By email 4/27/05

The Honorable Ann Nischke
Wisconsin Assembly, Room 8 North
State Capitol Building
P.O. Box 8953
Madison, WI 53708

Dear Representative Nischke: Re: Hearing on AB 222

I was informed by Todd of Senator Robert Cowles' staff that the Insurance Committee held a public hearing on the above bill on April 21, 2005. I was also informed that you (or your staff) serve as clerk to the Committee and, in that capacity, keep copies of all written testimony or comments provided to the Committee. In the expectation that the information I received is correct, I am hereby requesting a copy of each submittal to the Committee regarding AB 222, including those that may have been sent before or after the public hearing.

If you are not the person who retains the documents I am requesting, I ask that your staff contact me and, if reasonably convenient, provide this letter to the respective document custodian. I would appreciate a response on these matters within the next 3-8 business days. If there are photocopying or other charges, please make them payable by our firm, Reinhart Boerner Van Deuren s.c. If it would speed matters, we can send a messenger to pick up the copies. In that circumstance, please call my assistant, Jessica, at 229-2268.

ROUTING
☑ AP
☐ MAIL

Comments:
Website should have it all, let me know if we need to add anything A.P

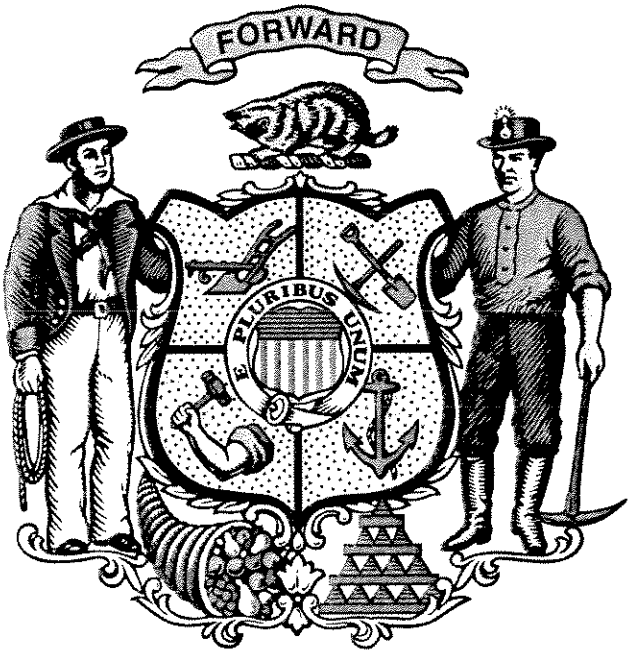
Thank you in advance for your assistance.

Sincerely,

Raymond M. Roder

Madison\143400RMR:KC

cc John Van Lieshout, Esq.


FORWARD
E PLURIBUS UNUM

Joseph A. Gilles
President & Chief Operating Officer

WAUSAU
Member of Liberty Mutual Group

April 26, 2005

Honorable State Rep. Ann Nischke
Chairwoman, Assembly Insurance Committee
P. O. Box 8953
Madison, WI 53708

Re: AB 222 and SB 137

Dear Rep. Nischke,

I am contacting you on behalf of Wausau Insurance and the Liberty Mutual Group to urge you to vote against AB 222 and SB 137. This legislation is an unprecedented and, I believe, unconstitutional effort by the Wisconsin Legislature to retroactively interpret and thereby rewrite existing contracts between insurers and their policyholders.

It is the judicial system's function in our system of government to resolve contract disputes. It is fundamental and elementary that the legislature should not seek to replace the role of the legal system in an attempt to change existing and valid contracts to obtain a result or process different than that called for under the terms of those contracts; but that is what is happening here.

This legislation improperly and unfairly seeks the wholesale transfer of economic responsibility and burden of the Fox River cleanup and certain paper companies onto a potentially very limited number of insurance companies. Insurers had nothing to do with discharging PCBs or any other waste into the Fox River Valley. Notwithstanding this fact, the proposed legislation is a clear attempt to override the duties and responsibilities established by contracts drafted and entered into many years ago by insurers and their policyholders for some legislatively now deemed "better way to do things."

Contrary to what you may have heard or been told, paper companies in the Fox Valley have or are in the process of receiving proper insurance claim settlements under longstanding court-established law and procedure. In a recent filing with the Federal Securities and Exchange Commission, the P.H. Glatfelter Paper Company, headquartered in York, Pennsylvania, with a paper mill in Neenah, acknowledges reaching "successful resolution" of insurance coverage related to the Fox River environmental matter.

Insurers are in the business of paying claims owed under the terms of their contracts. This legislation is being promoted, at least partially, on the assertion that insurers are refusing to pay legitimate claims. This is unequivocally false and, at best, misleading as cleanup of the Fox River presently is moving forward in a manner that necessarily and properly recognizes the contractual rights and obligations of all the parties involved.

Completely contrary to what I understand is being communicated to you and your colleagues by the proponents of this legislation, passage of this legislation almost certainly will bring the current insurance claim payment process for the Fox River cleanup to a dead stop causing very significant delays to the payment and reimbursement of claim costs covered by insurance and will result in costly litigation which likely will go on for years.

WAUSAU INSURANCE COMPANIES
2000 WESTWOOD DRIVE • WAUSAU WI 54401-7881 • (715) 842-6598
MAILING ADDRESS: PO BOX 8017 • WAUSAU WI 54402-8017 • FAX: (715) 842-6469 • JOSEPH.GILLES@LIBERTYMUTUAL.COM

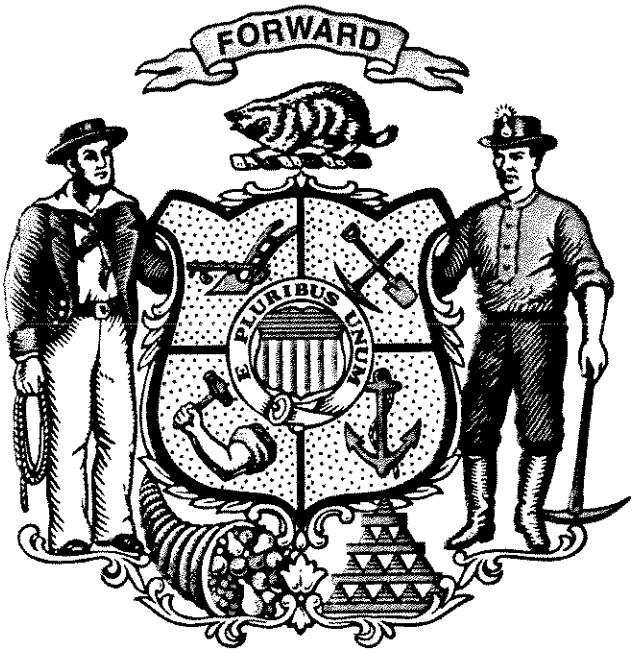
At its most fundamental, seeking passage of the subject legislation is an attempt to improperly use the legislative process to override existing rights, duties and obligations of the parties to this cleanup process; and such passage would unequivocally damage the assumption of risk insuring mechanism in Wisconsin.

Simply put, this legislation and its promotion is the anthesis of making good public policy by a legislative body.

I respectfully urge you to vote "No" on AB 222 and SB 137.

Sincerely,

Joseph A. Gilles
President & Chief Operating Officer
lsk


FORWARD
PLURIBUS UNUM

LAFOLLETTE
GODFREY
& KAHN
ATTORNEYS AT LAW

ONE EAST MAIN STREET
POST OFFICE BOX 2719
MADISON, WI 53701-2719
TEL 608-257-3911
FAX 608-257-0609
www.gklaw.com

GODFREY & KAHN, S.C.
MILWAUKEE
APPLETON
GREEN BAY
WAUKESHA

MEMORANDUM

TO: Representative Ann Nischke, Chairperson
Assembly Insurance Committee

FROM: James A. Friedman
LaFollette Godfrey & Kahn

DATE: May 5, 2005

RE: Summary of Testimony – AB 222

INTRODUCTION

I want to thank Chairperson Nischke and the entire Assembly Insurance Committee (the "Committee") for the opportunity to testify during the April 21, 2005 public hearing on Assembly Bill 222. As I indicated during my testimony, I am a shareholder with LaFollette Godfrey & Kahn in Madison, and my practice focuses on both insurance law and constitutional law. I have written extensively on both topics, and I have taught constitutional law at the University of Wisconsin Law School as an adjunct faculty member. The following summarizes my testimony before the Committee.

TESTIMONY

The Contracts Clause is found in article I, § 10 of the U.S. Constitution: "No state shall pass any law impairing the obligation of contracts." (Ellipsis omitted.) The Wisconsin

Constitution, similarly, in article I, § 12 prohibits the State Legislature from passing "any law impairing the obligation of contracts ...." This constitutional prohibition is a matter of fairness. When two parties enter a valid contract, government should not retroactively change the terms of the parties' agreement.

But the prohibition is not absolute. The United States Supreme Court has established the following three-part test to determine whether state action unconstitutionally impairs the obligation of a contract:

1. The legislation must impair an existing contractual relationship. In this case, there is no question that AB 222 does. Typical CGL insurance policies provide coverage for "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." The policies then define "property damage" as "physical injury to or destruction of tangible property *which occurs during the policy period.*" (Emphasis added.) Pursuant to the proposed legislation, to the contrary, "[a]n insurer may not reduce coverage otherwise available to an insured under an all-sums policy because the claim involves bodily injury or property damage that occurred, in part, *outside the policy period* of that all-sums policy ...." (Emphasis added.) AB 222 would ignore the definition of "property damage" in CGL policies, and it would force insurers to cover losses that did not occur during the policy period. With respect to cleaning up the Fox River, for example, the property damage did not all occur during one policy period, yet the legislation could place the remediation burden on a single insurance policy. Furthermore, AB 222 ignores "other insurance" or "excess insurance" clauses that dictate the order in which stacked insurance policies apply.

Proponents of the legislation claim that it would not impair existing contracts because it is consistent with them. Nonsense! If that were true, then why would insureds need AB 222? The issue of how to divide up responsibility for environmental clean up among insurers and insureds currently is working its way through the Wisconsin court system. Wisconsin's courts, not the Wisconsin Legislature, should determine how to interpret insurance contracts entered years or even decades ago.

2. The contractual impairment must be substantial. It certainly would be if the Legislature passed AB 222. The following example demonstrates my point: assume that a paper mill discharged pollutants into a river over a ten-year period, causing $1 million in damage. Each of those ten years, the paper mill purchased $1 million worth of CGL insurance coverage, but from a different insurer each year. If the discharge of pollutants was consistent over time, it would be reasonable to assume that the paper mill caused approximately $100,000 of damage to the river each of the ten years. Under a pro-rata distribution approach, each of the ten insurers could be responsible (subject to the other terms of their policies) for paying $100,000 to remediate the pollution. Under AB 222, however, the paper mill could choose any one of the ten insurance policies and seek the entire $1 million loss from that carrier. That carrier then would have a potential exposure of its entire $1 million policy limits, or ten times a much as it otherwise could have been responsible for under the express terms of the policy. That is a substantial impairment of contract.

3. If the contractual impairment is substantial, then the legislation will fail unless there exists a significant and legitimate public purpose behind the legislation, and the challenged legislation is based on reasonable conditions and is appropriate to the public purpose justifying the legislation. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 242-47 (1978); *Chappy v.*

LIRC, 136 Wis. 2d 172, 187-89, 401 N.W.2d 658 (1987). AB 222 would not solve any significant public problem. It would not clean up the Fox River. Rather, it would unfairly shift the burden of doing so to one or a small number of insurance companies, rather than placing the burden on the parties who are contractually or otherwise liable. The concerns of the proponents of AB 222 are purely economic, and the economic concerns of a few private companies do not constitute a significant public purpose under the Contracts Clause test. *See, e.g.*, *Ketcham v. King County Medical Service Corp.*, 502 P.2d 1197, 1200 (Wash. 1973) ("It is an amendment which appears *prima facie* to effect fiscal matters only and thus to impair the obligation of existing contracts ...."; holding unconstitutional a statute requiring health care providers to cover services performed by optometrists, contrary to the express language in the health care contracts).

The proponents of AB 222 claim that Wisconsin's Public Trust Doctrine, based on article IX, § 1 of the Wisconsin Constitution, saves the legislation from its constitutional demise under the Contracts Clause. The Public Trust Doctrine does not trump the United States Constitution. In fact, federal constitutional law virtually always pre-empts state law. The public purpose behind the legislation, according to the U.S. Supreme Court, is merely one element of the impairment of contracts test.

Wisconsin appellate courts have had few opportunities to review legislative efforts to impair existing insurance contracts. In a related case involving a dispute between an insurer and its insured over what type of occurrence would trigger coverage under a policy's uninsured motorist provision, the Wisconsin Supreme Court stated that, because of the contracts clause, the State could not, "even through legislative means, bind the parties to a contract they had not

bargained for ...." *Amidzich v. Charter Oak Fire Insurance Co.*, 44 Wis. 2d 45, 53, 170 N.W.2d 813 (1969).

Outside of the insurance context, Wisconsin courts have been just as protective of contractual rights. In *Burke v. E.L.C. Investors, Inc.*, 110 Wis. 2d 406, 329 N.W.2d 259 (Ct. App. 1982), for example, the Court of Appeals held that applying a statute that expands to 12 months the redemption period for mortgage foreclosures would have impaired a mortgage contract requiring redemption within six months. *Id.* at 409.

Courts throughout the country consistently have refused to enforce statutes that retroactively increase an insurer's obligations under a contract with its insured. *See, e.g., Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987). The Florida Legislature enacted a Tort Reform and Insurance Act that, among other things, required commercial liability insurers to provide special credit or premium rebates based on anticipated benefits of tort reform provisions in the Act. The legislation, in other words, would have retroactively decreased the premium agreed to by the insurer and the insured. The Florida Supreme Court held that provision unconstitutional, in violation of the impairment of contract clause. *Id.* at 1095. The New York Court of Appeals, similarly, held unconstitutional a statute requiring health insurers to retroactively provide maternity coverage. *Health Ins. Assoc. of America v. Harnett*, 376 N.E.2d 1280 (N.Y. 1978).

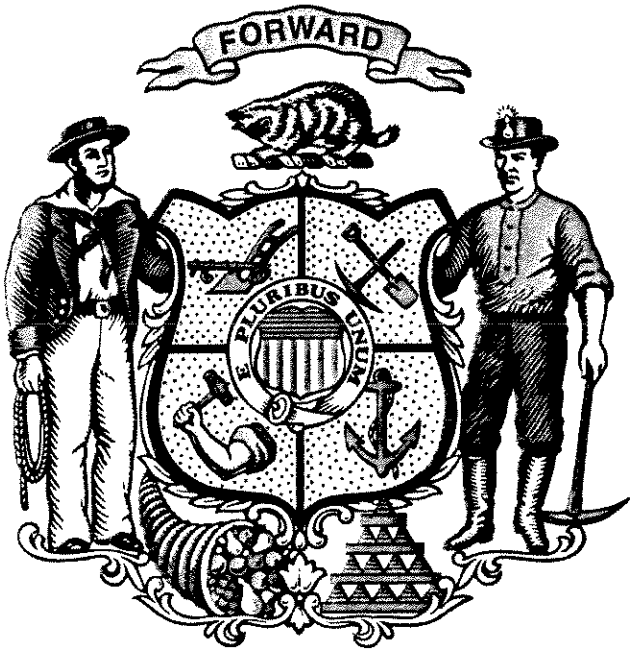
The Georgia Court of Appeals, in *Gulf American Fire & Cas. Co. v. McNeal*, 154 S.E.2d 411 (Ga. App. 1967), held that a statute requiring all automobile insurance policies to provide uninsured motorist protection could not retroactively be applied to contracts already in effect. *See Ketcham*, 502 P.2d at 1203 ("Legislatures may not under the guise of the police power impair the specific guarantee of freedom of contract.... A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value, and this, we think, is precisely what

the statute in issue does to existing health care contracts."); *Davenport Osteopathic Hospital Assoc. v. Hospital Service, Inc. of Iowa*, 154 N.W.2d 153 (Iowa 1967) (holding unconstitutional insurance commissioner's enforcement of revised fee schedule contrary to contract between hospital and health insurer); *Kee v. Shelter Ins.*, 852 S.W.2d 226 (Tenn. 1993) and *Algee v. State Farm General Ins. Co.*, 890 S.W.2d 445 (Tenn. App. 1994) (both holding unconstitutional a statute that would have extended period to file suit beyond limitation period in insurance contract); *State Farm Mut. Automobile Ins. Co. v. Hassen*, 650 So. 2d 128 (Fla. 1995) (holding that retroactive application of new uninsured motorist statute would violate constitutional prohibition against impairment of contracts; "Although retroactive application of a statute is not necessarily invalid, it becomes so 'in those cases where invested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated.'" (Citation omitted.)); *see also Prudential Prop. and Cas. Ins. Co. v. Scott*, 514 N.E.2d 595 (Ill. App. 1987) (holding unconstitutional the retroactive application of a new statute that would have required coverage for additional insureds under an existing automobile insurance policy).

In each of those cases, an appellate court struck down the retroactive application of a statute or administrative rule that would have added to an insurers obligations or reduced its benefits under existing contracts with its insureds. Yet in each of those cases, the impairment of contract was relatively insignificant compared to the proposed legislation here.

CONCLUSION

AB 222 is in direct conflict with core, standard terms of countless existing CGL and related insurance policies. The legislation would substantially impair those contracts and, accordingly, it would violate state and federal prohibitions against the impairment of contract.


FORWARD
E PLURIBUS UNUM

RURAL MUTUAL INSURANCE COMPANY
www.ruralins.com
A Farm Bureau® Service

Donald Haldeman
Executive Vice President & CEO

1212 Deming Way
P.O. Box 5555
Madison, WI 53705-0555
608/828-5400
FAX: 608/836-5815

May 6, 2005

Representative Ann Nischke
Post Office Box 8953
Madison, WI 53708

Dear Representative Nischke:

As the insurer of almost 30% of the farms in the State of Wisconsin, I write on behalf of Rural Mutual Insurance to raise a serious and strenuous objection to the legislation called Fair Claims/All Sums (AB 222/SB 137).

This piece of legislation retroactively changes insurance policies we issued decades ago in a way which is unfair, unconstitutional and unprecedented.

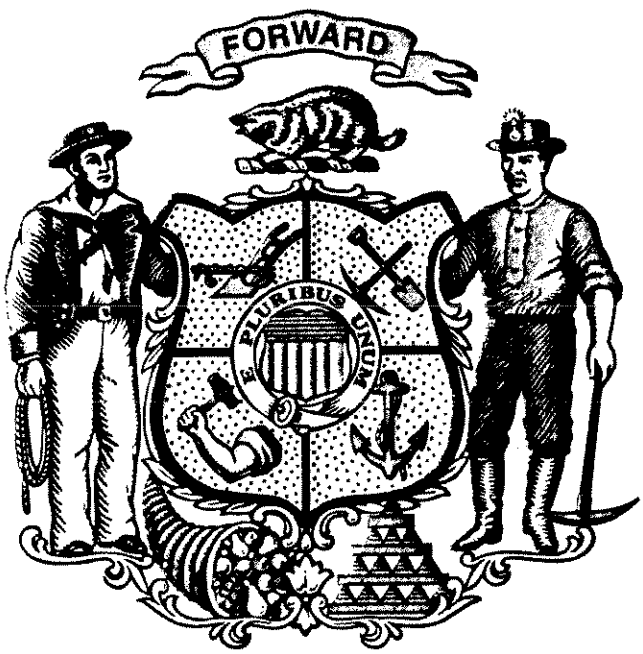
Proponents of this legislation say it "only" applies to the Fox River. That's wrong. Passage of these bills could have a devastating financial impact on our company.

Please vote no on these bills. If you would like additional information, please feel free to contact me.

Respectfully submitted,

Don Haldeman

Don Haldeman
Executive Vice President and CEO
Rural Mutual Insurance


FORWARD
E PLURIBUS UNUM

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: MEMBERS OF THE ASSEMBLY COMMITTEE ON INSURANCE

FROM: Joyce L. Kiel, Senior Staff Attorney

RE: 2005 Assembly Bill 222, Relating to Environmental Claims Under General Liability Insurance Policies and Fees Related to Removal of Contaminated Material from a Navigable Water

DATE: May 16, 2005

2005 Assembly Bill 222, relating to environmental claims under general liability insurance policies and fees related to removal of contaminated material from a navigable water, was introduced by Representative Kaufert and others; cosponsored by Senator Cowles and others. Senator Cowles and others also introduced a companion bill, 2005 Senate Bill 137. Assembly Bill 222 was referred to the Assembly Committee on Insurance, which held a public hearing on the bill on April 21, 2005.

This memorandum, prepared at the request of Representative Ann Nischke, Chair of the Assembly Committee on Insurance, describes Assembly Bill 222 and responds to questions raised at the public hearing and questions later presented by Representative Nischke. The memorandum is organized as follows:

1. General Background Information Relating to Environmental Claims Under General Liability Policies.

2. Description of 2005 Assembly Bill 222.

3. Constitutional Issues That May Be Raised Relating to Assembly Bill 222.

4. Comparison of Assembly Bill 222 and the Oregon Statute Relating to Environmental Claims Under General Liability Policies.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

GENERAL BACKGROUND INFORMATION RELATING TO ENVIRONMENTAL CLAIMS UNDER GENERAL LIABILITY POLICIES

2005 Assembly Bill 222 pertains to certain "general liability insurance policies." That term is currently used in several statutes but is not explicitly defined in current statutes or the bill. General liability insurance policies typically cover risks of liability for third-party bodily injury, property damage, personal injury, and advertising injury, unless an exclusion applies. They are distinguished from liability policies that cover a specified risk, such as product liability or liability for medical malpractice.

General liability policies are available to businesses and other enterprises as commercial liability policies. However, the fiscal estimate for the bill prepared by the Office of the Commissioner of Insurance indicates that: "[w]hile the phrase 'general liability insurance policy' often refers to a commercial general liability policy, the bill does not define the term and it could easily be interpreted to mean any policy that covers 'general liability' such as a homeowner or farmowner policy rather than to apply only to commercial policies."

There are two primary features of general liability insurance policies: (1) agreement by the insurer to defend a lawsuit against the insured seeking damages covered by the policy; and (2) agreement by the insurer to indemnify the insured against a loss covered by the policy. This coverage is extended only in accordance with policy provisions, including any exclusions.

Insurers typically use standard-form policies drafted by an industry organization. From the early 1970s to around 1985, comprehensive general liability (CGL) insurance policies typically contained a pollution exclusion for property damage and bodily injury coverage, but provided an exception to the exclusion for pollution that was "sudden and accidental." Thus, coverage typically was provided for bodily injury or property damage that was caused by the discharge, dispersal, release, or escape of pollutants that was "sudden and accidental." In interpreting a policy that included this provision, the Wisconsin Supreme Court held that the phrase "sudden and accidental" was ambiguous; the court then interpreted the phrase to mean that the damages were unexpected and unintended. [*Just v. Land Reclamation*, 115 Wis. 2d 737, 456 N.W.2d 570 (1990), *recon. denied and amended*, 157 Wis. 2d 407, 461 N.W.2d 447 (1990).] Thus, the pollution exclusion applied only if the damages were expected and intended. If the damages from pollution were unexpected and unintended, the exclusion did not apply.

In 1985, the standard-form CGL policy was changed to contain an absolute pollution exclusion. Policies issued or renewed after the change (which typically would have first been issued or renewed in 1985 or 1986) typically contain this absolute pollution exclusion. However, questions continue to arise regarding coverage for pollution under policies that did not include an absolute pollution exclusion, that is, for policies issued before about 1986.[1]

In 1994, the Wisconsin Supreme Court decided the case of *City of Edgerton v. General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), which held that: (1) environmental cleanup costs in

---

[1] This memorandum refers to "about 1986." While a policy form using language including the absolute pollution exclusion was developed in 1985, the exact date that a particular insurer began using that policy form and the exact date that the policy applied to a particular insured varied.

response to a government directive or request under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, and popularly known as "Superfund") were not "damages" and, thus, were not covered by the typical general liability policy;[2] and (2) a letter from the government to the potentially responsible party (PRP) demanding cleanup was not a lawsuit that triggered the insurer's duty to defend.

In 1997, the Wisconsin Supreme Court held in *General Casualty Co. v. Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), that so long as there was no request or directive by the government, the insured was covered under a CGL policy for compensatory monetary relief sought by a third party for a loss incurred due to the insured's past contamination of property.

In 2003, the Wisconsin Supreme Court decided the case of *Johnson Controls v. Employers Insurance of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257 (2003), *recon. denied*, 2003 WI 140, *cert. denied*, 541 U.S. 1027 (2004), which overruled its *Edgerton* decision. The court held that: (1) environmental cleanup costs incurred in response to a government demand were "damages" and, thus, were covered by the insured's liability policies; and (2) a letter from the government demanding that a PRP clean up triggered the insurer's duty to defend. The *Johnson Controls* court did not decide the issue of whether its decision applied retroactively (as is typically the case when a decision is overruled) or met the criteria established in caselaw for prospective application only (sunbursting).

The *Johnson Controls* decision did not address all issues that could be raised in a case involving a claim for environmental damage under a general liability policy. However, that decision opened the door for those issues to be debated with regard to policies that did not have an absolute environmental pollution exclusion, which typically means policies that were issued before about 1986.[3]

Environmental claims may involve allegations of property damage caused by contamination by pollution over a period of time. This typically would involve multiple policy periods. During these different policy periods: different insurers may have provided coverage; different limits of coverage may have applied; and there may have been times during which the entity was not insured.

Although the issue has not yet been decided by the Wisconsin Supreme Court, the Wisconsin Court of Appeals dealt with the issue of which policies were triggered in a case involving pollution and resulting damage over a period of time. [*Society Insurance v. Town of Franklin*, 2000 WI App. 35, 233 Wis. 2d 207, 607 N.W.2d 342 (2000).] The Town of Franklin had used an area as an open dump and subsequently as a licensed landfill. Several years after the site was closed, nearby residents complained that contaminated liquid from the site was seeping onto their property. During part of the years the Town used the site and for some subsequent years, the Town had general liability coverage with the same insurer for about 15 years. During 11 of those years, the Town had a policy each year that had a $10,000 maximum liability per occurrence; during four of those years, the Town had a policy each year that had a $100,000 maximum liability per occurrence.

---

[2] This is based on the rationale that the government was seeking "equitable relief," not damages.

[3] Even with respect to policies that have an absolute pollution exclusion for bodily injury and property damage, questions arise in some cases as to whether there is coverage for personal injury caused by pollution.

The *Franklin* court held that Wisconsin uses the ***continuous trigger*** theory, which means that an injury occurring during a policy period triggers coverage, and if the exact date of harm is uncertain or the injury occurred continuously from exposure until manifestation of the injury, all policies in effect while the occurrence was ongoing are triggered. The court noted that its holding applied to a policy that defined "occurrence" as including "continuous or repeated exposure to conditions which results...in property damage."[4] The court held that there was one occurrence and continual, recurring damage to the property. Because there was injury each year until the remediation, the court held that each policy was triggered, even policies in effect after the landfill was closed.[5]

The *Franklin* case did not involve multiple insurers or periods during which the entity was without coverage. Thus, an issue not decided by that court is how to allocate the amount of liability that may be attributable to an insurer under a policy period that is triggered under a continuous trigger theory when there are multiple insurers or periods without insurance.[6] Since any insurer from which recovery is sought likely will seek contribution from other insurers, this remains a critical issue.

DESCRIPTION OF 2005 ASSEMBLY BILL 222

Assembly Bill 222 does the following: (1) addresses various issues related to certain environmental claims under certain general liability policies; and (2) provides for fees for certain environmental cleanups.

Provisions Relating to General Liability Insurance Policies

The bill includes the following provisions relating to general liability insurance policies:

1. The bill defines an "environmental claim" as a claim made by an insured under a general liability insurance policy for defense or indemnity based on the insured's liability or potential liability for bodily injury or property damage arising from the presence of pollutants on the bed or banks of a navigable water in Wisconsin as a result of a release of pollutants in Wisconsin.

While much attention has been focused on the effect of the bill with regard to the cleanup of the Fox River, the bill's language is not limited to the Fox River and applies to the bed or banks of all navigable water in Wisconsin.

---

[4] This implies that had the policy language been different, the court may have reached a different result. Thus, policy language should be closely examined before this holding is extended to a particular policy. Other issues that can arise with respect to claims involving pollution include: (a) the known loss doctrine, which generally means that insurers are not obligated to cover losses that have already occurred or already occurring when the coverage is written; and (b) an exclusion for property damage to an insured's own property.

[5] However, a policy with an absolute pollution exclusion should not be triggered.

[6] *Franklin*, 233 Wis. 2d at 220, n. 1. Various law review articles discuss issues relating to allocating liability in such cases, for example: Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 B.Y.U.L. Rev. 1215 (1999) and Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L. Rev. 257 (1997).

The bill does not extend its provisions to insurance claims relating to pollution that occurs elsewhere, for example, pollution in groundwater or pollution on land that is not on the bed or banks of a navigable water. Rather, the bill states that its provisions are not intended to change Wisconsin common law (caselaw decided by the courts) with respect to interpreting general liability insurance policies that are not subject to the bill's provisions.

2. The bill specifies the following general principles for interpreting a general liability insurance policy under which an environmental claim is made, ***unless the policy specifies otherwise***:

- Wisconsin law will be applied in all cases. (If the insurance contract includes a choice of law provision and specifies a state other than Wisconsin, the contract will be interpreted under the laws of the state specified.)

- Any action taken by, or agreement made with, a governmental entity under which the insured is considered to be potentially liable for pollution in Wisconsin and that directs or requests the insured to take action with respect to the pollution is equivalent to a suit or lawsuit under the terms of the policy. (This would mean that the duty to defend is triggered if there is coverage under the policy or if coverage is determined to be fairly debatable.)

- The insurer may not deny coverage for reasonable fees, costs, or expenses incurred by the insured under a voluntary agreement between the insured and a governmental entity as a result of a directive or request by the governmental entity to take action with respect to pollution in Wisconsin on the ground that those expenses are voluntary payments by the insured. (General liability policies typically specify that, except at the insured's own cost, the insured cannot voluntarily make a payment, assume an obligation, or incur any expense, other than first aid, without the insurer's consent. Thus, the insured risks forfeiting coverage if the insured settles a claim without the consent of the insurer.)

3. The bill defines an "all sums policy" as a general liability insurance policy under which the insurer agrees, using such words as "all sums," "those sums," "the total sum," or similar words, to indemnify or pay on behalf of the insured all sums that the insured becomes legally obligated to pay as a result of a covered risk.

The bill then provides that if an environmental claim under an all-sums policy is based on an assertion by a governmental entity or other third person that the insured is liable for bodily injury or property damage as a result of a release of pollutants in this state and only part of the injury or damage occurred, or is alleged to have occurred, during the policy period of that all-sums policy, unless the policy expressly requires proration of losses in such a case, the following apply in interpreting the policy:

- An insurer may not reduce coverage because the claim involves bodily injury or property damage that occurred, in part, outside of the policy period, regardless of whether other insurance is available for the injury or damage that occurred outside that policy period. (This would mean that coverage cannot be reduced because part of the damage occurred during a period in which the entity did not have such coverage.)

- If the bodily injury or property damage occurred, or may have occurred, during two or more policy periods and an environmental claim is submitted under one or more all-sums policies, the bill provides that:

  a. Each insurer that provided coverage for a policy period and that has a duty to defend under the policy is jointly and severally liable, up to the insurer's policy limits, for the full amount of the costs of defending the insured with respect to the claim.

  b. Each insurer that provided coverage for a policy period and that has a duty to pay settlement or judgment costs is jointly and severally liable, up to the insurer's policy limits, for the full amount of the settlement or judgment with respect to the claim.

  c. The insured may designate a policy period, and the policy or policies providing coverage for that period (including primary, umbrella, and excess coverage) must provide full coverage up to the policy limits. If the claim is not fully satisfied, the insured may designate the order of other policy periods and each policy providing coverage for the designated periods (including primary, umbrella, and excess coverage) must provide full coverage in the order designated until the claim is fully paid. If a designation is made under this provision, the coverage cannot be reduced by coverage for other policy periods.

4. The bill provides that in any lawsuit based on an environmental claim, the following apply:

   - The insured may elect to file suit against fewer than all of the insurers providing coverage for the claim, notwithstanding the statutes on mandatory joinder of parties and joinder of parties for declaratory relief.[7]

   - It is a rebuttable presumption[8] that, subject to the provisions of the policy, the costs of preliminary assessments, remedial investigations, risk assessments, feasibility studies, site investigations, or other necessary investigation are defense costs. (As noted above, an insurer has a duty to defend a lawsuit if there is coverage or coverage is fairly debatable.)

   - It is a rebuttable presumption that, subject to the provisions of the policy, the costs of removal actions, remedial action, or natural resource damages are indemnity costs, (As noted above, the insurer has a duty to pay indemnity costs if there is coverage, up to the policy limit.)

   - If an insured is successful in litigating coverage, the court must award to the insured the costs, disbursements, and expenses (including accounting fees and reasonable attorney

---

[7] However, it appears likely that other insurers will be brought into the legal action by the insurer named in the lawsuit under various civil procedure statutes.

[8] A rebuttable presumption means that the presumption can be overturned with the showing of sufficient proof.

fees (notwithstanding the statute limiting attorney fees)) necessary to prepare for and participate in the action.

5. The bill includes the following provisions relating to settlements and releases from liability:

- In any lawsuit based on an environmental claim, if an insurer has not entered into a good faith settlement and release of the environmental claim with the insured, the insurer is liable, up to the policy limits, to any governmental entity that seeks to recover against the insured for pollution in Wisconsin. This applies regardless of whether the liability is presently established or is contingent and to become fixed or certain by final judgment. A governmental entity may proceed directly against such an insurer in a legal action, or the insurer may be joined in any legal action brought by the governmental entity against the insured.

- If an insured enters into a good faith settlement and release of an environmental claim (or has done so before the effective date of the bill), the insurer is not liable to any person for the environmental claim. (This apparently means that another insurer would not be able to seek contribution from such an insurer.)

6. The bill provides that any insurer that pays (or that has paid before the effective date of the bill) an environmental claim may seek contribution from any other insurer that is liable, or potentially liable, for the claim and has not entered into a good faith settlement of the claim with the insured. (However, the bill does not specify how the allocation and contribution levels will be determined between insurers.)

7. The bill addresses a lost policy that is subject to an environmental claim. It sets out duties for both the insurer and the insured in that situation, generally requiring that they investigate the matter, disclose information to each other, and cooperate in determining the terms of a lost policy. If information is discovered that tends to show the existence of a policy, the insurer must provide a copy of the policy terms or a reconstruction of the policy. If the insured can show by a preponderance of the evidence that a general liability insurance policy was issued but cannot produce evidence that tends to show the policy limits, it is assumed that the minimum levels of coverage that the insurer was offering at the time were in force. However, if the insured produces evidence that tends to show the policy limits, then the insurer has the burden of proof to show by a preponderance of the evidence that different limits apply.

8. The bill provides that, in applying any of the above provisions, any party or court must ensure that public rights and interests are considered for the purpose of furthering the public trust in navigable waters.

9. The bill provides that any person who is injured by an insurer's violation of any of the above provisions may bring a civil action against the insurer to recover damages, together with costs, disbursements, accounting fees, if any, and reasonable attorney fees incurred in bringing the action, notwithstanding the statute that limits attorney fees. (This appears to permit the insured, the government, another insurer, or other entity to bring such an action if the violation injured this person. In addition, under current law, the Commissioner of Insurance has general authority to secure

compliance with insurance laws, which would include s. 632.28, as created by the bill. [s. 601.41, Stats.])

10. The bill specifies that its provisions apply regardless of the state in which the policy was issued or delivered.

11. The bill specifies that it applies to all environmental claims that are not settled or finally adjudicated on or before the effective date of the bill, regardless of when the claim arose.

Provisions Relating to Fees for Certain Environmental Cleanups

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

CONSTITUTIONAL ISSUES THAT MAY BE RAISED RELATING TO ASSEMBLY BILL 222

This part of the memorandum discusses potential constitutional issues that may be raised relating to Assembly Bill 222. It is possible that, in any lawsuit, litigants may raise additional or other constitutional issues. Representative Nischke specifically asked about: (1) impairment of contract; (2) retroactive effect; and (3) the public trust doctrine.

Impairment of Contract

Both the U.S. Constitution and the Wisconsin Constitution prohibit the state from enacting a law "impairing the obligation of contracts." [U.S. Const. art. I, s. 10; Wis. Const. art I, s. 12.] There is no absolute right to a contract; if there is a significant and legitimate public purpose and the law is based on reasonable conditions and is appropriate to the public purpose, a contract may be impaired. [*Chappy v. Labor and Industry Review Commission*, 136 Wis. 2d 172 (1987).] The analysis used by a court involves addressing three questions:

- Was there substantial impairment of a contract?
- If so, is there a significant and legitimate public purpose behind the impairment?
- If so, was the adjustment of the terms of the contract appropriate and reasonable for the public purpose used to justify the law impairing the contract?

Information distributed to Committee members at, and subsequent to, the Committee's public hearing indicates that there is disagreement about the answers to these questions, including the first question as to whether a contract is actually impaired. The exact language of each contract that may be involved would have to be carefully examined to analyze whether there is an impairment under the terms of the bill. It is beyond the scope of this memorandum to conduct such an analysis, and any discussion would be speculative. If this bill is enacted, it appears likely that a court will be called on

ultimately to make a determination as to whether there has been an unconstitutional impairment of a contract.

Substantive Due Process--Retroactive Effect

Representative Nischke asked if the bill has a retroactive effect and, if so, whether that would make the bill unconstitutional. The bill does not state that its effect is retroactive. However, because it appears that the bill would primarily affect the interpretation of general liability policies issued before about 1986, it is possible that a challenge could be raised that the bill had an unconstitutional retroactive effect in violation of the Due Process Clause of the 14th Amendment of the U.S. Constitution.

If a court determined that the bill's effect was retroactive, the court would then determine whether the legislation was procedural or substantive. A statute that simply prescribes the method used in enforcing a right or remedy is procedural. A statute that creates, defines, or regulates rights or obligations is substantive. [See *City of Madison v. Town of Madison*, 127 Wis. 2d 96, 377 N.W.2d 221 (Ct. App. 1985).] It is possible that a court would hold that, by defining or regulating obligations, including the bill's provisions specifying joint and several liability, and defining a "lawsuit" under the policy, the bill has a substantive effect.

If a court held that the bill retroactively had a substantive effect, the court likely would apply a balancing of interests test--balancing the public interest served by the retroactive effect against the private interests overturned by it to determine if the bill was unconstitutional. [See, e.g., *Martin by Scopter v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995).] The Wisconsin Supreme Court has stated: "The public purpose supporting retroactivity under a due process analysis must ... be substantial, valid and intended to remedy a general economic or social issue." [*Neiman v. American National Property and Casualty Co.*, 236 Wis. 2d 411, 613 N.W.2d 160, 166 (2000).]

It appears that arguments can be made about whether the bill has a retroactive effect; if so, whether that effect is substantive; and, if so, whether the public purpose outweighs any private interests. The Wisconsin Supreme Court has made clear that retroactive legislation enjoys a presumption of constitutionality, and the challenger bears the burden of overcoming that presumption. Again, if this bill is enacted, it appears likely that a court will be called on ultimately to make these determinations, and any discussion would be speculative.

Public Trust Doctrine

Representative Nischke specifically asked about the public trust doctrine. The bill specifies that: "any party or court acting under this section shall ensure that public rights and interests are considered for the purpose of furthering the public trust in navigable waters." [Proposed s. 632.28 (8) in Assembly Bill 222.] Again, the bill applies its provisions relating to environmental claims under a general liability insurance policy only to bodily injury or property damage arising from the presence of pollutants on the bed or banks of a navigable water in Wisconsin.

The public trust doctrine refers to the Wisconsin Supreme Court's numerous statements that the navigable waters in the state are held in trust by the state for the benefit of the public, including the beds of lakes and streams. Navigation is the primary public right in navigable waters, but the public also enjoys recreational rights, such as the right to fish, hunt, sail, swim, ice-skate, and enjoy the scenic

beauty of navigable waters. In addition, the public trust doctrine has been interpreted by the Wisconsin Supreme Court to mean that the state has a duty to eradicate pollution and prevent pollution in its navigable waters. [*Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).]

As discussed above, a challenge to the bill's constitutionality may include challenges under the impairment of contract provision or the substantive due process provision because of an alleged retroactive effect. In both instances, it is possible that a court could reach a point in its analysis when the public purpose is to be evaluated or the public interests are to be weighed against private interests. An argument likely would be made that the court's analysis as to the public purpose or public interests should include (or, under the bill, must include) a consideration of the public trust doctrine. It may be argued that the bill promotes eradication of pollution for the public good by facilitating cleanup efforts. On the other hand, it may be argued that the bill does not eradicate pollution but addresses a contract dispute between private parties. The manner in which a court will analyze the impact of the public trust doctrine and the outcome of any possible litigation is speculative.

COMPARISON OF ASSEMBLY BILL 222 AND OREGON STATUTE RELATING TO ENVIRONMENTAL CLAIMS UNDER GENERAL LIABILITY POLICIES

Representative Nischke asked for a comparison of the Oregon Environmental Cleanup Assistance Act (ORS ss. 465.475 to 465.482, as amended by 2003 Chapter 799) and the insurance provisions in Assembly Bill 222. A comparison of the key features is set forth in the attached table.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JLK:rv

COMPARISON OF INSURANCE PROVISIONS IN 2005 ASSEMBLY BILL 222 AND OREGON ENVIRONMENTAL CLEANUP ASSISTANCE ACT

ISSUE	*2005 ASSEMBLY BILL 222*	*OREGON STATUTE*
Definition of General Liability Insurance Policy	Defines an "all-sums" policy as a "general liability insurance policy" which includes the words "all sums" or similar words. Does not define a "general liability insurance policy."	Defines a "general liability insurance policy" and specifies that it includes a pollution liability policy, commercial general liability policy, comprehensive general liability policy, excess liability policy, umbrella liability policy, or other kind of liability policy. Specifies that it does ***not*** include a homeowner or motor vehicle policy or a specialty line liability coverage. [s. 465.475 (2).]
Type of Environmental Claim to Which Law Applies	Bodily injury or property damage arising from pollutants on the bed or banks of a navigable water in Wisconsin as a result of a release of pollutants in Wisconsin.	Bodily injury or property damage arising from a release of pollutants onto or into land, air, or water. [s. 465.475 (1).]

ISSUE	*2005 ASSEMBLY BILL 222*	*OREGON STATUTE*
Indemnity	In absence of express proration of loss provision in policy, specifies if environmental claim submitted under one or more all-sums policy involving bodily injury or property damage during two or more policy periods, insurer may not reduce coverage under all-sums policy because claim involves bodily injury or property damage that occurred, in part, outside policy period.	Insurer must pay all indemnity costs proximately arising out of risk, pursuant to policy terms, independent and unaffected by other insurance that may provide coverage for same environmental claim. [s. 465.480 (3) (a).]
	In absence of express proration of loss provision in policy, specifies if claim submitted under one or more all-sums policy involving bodily injury or property damage during two or more policy periods, then: (a) joint and several liability for full cost of settlement or judgment, subject to liability limits; and (b) insured may designate a policy period and all policies for that period must provide "full" coverage, subject to liability limits. If claim not satisfied, insured may designate order of other policy periods and those insurers must provide "full" coverage until claim fully paid.	No similar provision.
	Rebuttable presumption that costs of removal actions, remedial action, or natural resources damage are indemnity costs.	Same only with respect to removal actions. Also includes feasibility studies as indemnity costs. [s. 465.480 (6) (b).]

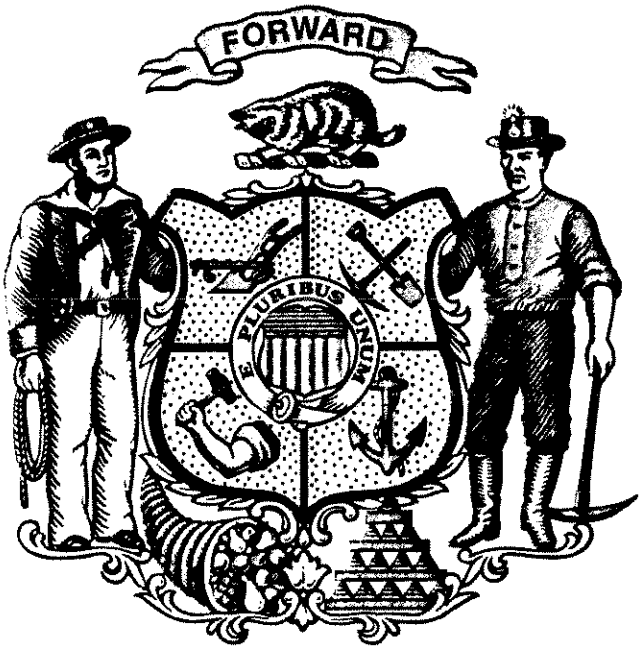
ISSUE	*2005 ASSEMBLY BILL 222*	*OREGON STATUTE*
Duty to Defend and Defense Costs	In absence of express proration of loss provision in policy, specifies if claim submitted under one or more all-sums policy involving bodily injury or property damage during two or more policy periods, insurer may not reduce coverage under all-sums policy because claim involves bodily injury or property damage that occurred, in part, outside policy period. ("Coverage" presumably refers to defense costs also.)	Insurer must pay all defense costs proximately arising out of the risk, pursuant to policy terms, independent and unaffected by other insurance that may provide coverage for same environmental claim. [s. 465.480 (3) (a).]
	In absence of express proration of loss provision in policy, specifies if claim submitted under one or more all-sums policy involving bodily injury or property damage during two or more policy periods, then: (a) joint and several liability for defense costs, subject to liability limits; and (b) insured may designate a policy period and all policies for that period must provide "full" coverage, subject to liability limits. If claim not satisfied, insured may designate order of other policy periods and those insurers must provide "full" coverage until claim fully paid. ("Coverage" presumably refers to defense costs also.)	No similar provision.
	Rebuttable presumption that preliminary assessments, remedial investigations, risk assessments, feasibility studies, or other necessary investigations are defense costs.	Same with respect to preliminary assessments, remedial investigations, risk assessments, or other necessary investigations. [s. 465.480 (6) (a).] (However, as noted above, feasibility studies are considered indemnity costs, not defense costs.)
	No similar provision.	If entity uninsured for part of time period included in claim, insurer may deny that portion of defense costs that would be allocated to insured under allocation for contribution (described below). [s. 465.480 (5).]

ISSUE	*2005 ASSEMBLY BILL 222*	*OREGON STATUTE*
	Unless policy provides otherwise, action by "governmental entity" against or agreement by governmental entity with insured notifying insured that insured is considered to be potentially liable or directing, requesting, or agreeing that insured take action regarding pollution is equivalent to suit or lawsuit under the policy. "Governmental entity" is defined as federal, state, or local government (or any of their instrumentalities) or any trustee for natural resources under federal law.	Similar provision, but is limited to action or agreement with Oregon Department of Environmental Quality (DEQ) or U.S. Environmental Protection Agency (EPA). [s. 465.480 (2) (b).]
Contribution Levels Among Insurers and Insured	Specifies that an insurer that pays a claim or has paid environmental claim before effective date of bill may seek contribution from other insurer that has not entered into settlement and gotten release.	Insurer that has paid environmental claim may seek contribution from other insurer that is liable or potentially liable. [s. 465.480 (4).]
	No similar provision.	If court determines apportionment of recoverable costs between insurers appropriate, court must allocate covered damages between insurers before court based on the following factors: (a) total period of time each solvent insurer issued policy applicable to claim; (b) policy limits of policies providing coverage; (c) most appropriate type of coverage for claim; and (d) considering any time uninsured as if the insured were the insurer. [s. 465.480 (4).] (In addition, see above regarding contribution for defense costs for uninsured periods.)

ISSUE	*2005 ASSEMBLY BILL 222*	*OREGON STATUTE*
Insured's Notification of Other Insurers	No similar provision.	If insured makes environmental claim against insurer but has more than one insurer, insured must provide notice of claim to all insurers for whom insured has current address. [s. 465.480 (3) (b).]
Insured's Naming Only One Insurer in Lawsuit	Insured may name only one insurer in lawsuit, notwithstanding other statutes.	If insured's claim is not fully satisfied and insured sues only one insurer, insured must choose that one insurer based on the following factors: (a) total period of time insurer issued policy applicable to claim; (b) policy limits of each policy that cover claim; or (c) policy that provides most appropriate type of coverage for claim. [s. 465.480 (3) (b).] Upon request, insured must provide information to that one insurer about policies of other insurers.
Liability to Government	Specifies that if, no good faith settlement and release from insured, insurer is liable to any governmental entity that seeks to recover for pollution; also governmental entity may proceed directly against insurer, and insurer may be joined in action brought by governmental entity against insured.	No similar provision.
Lost Policy	Extensive provisions applying to insured and insurer to: investigate lost policies; disclose information to each other; and cooperate in determining policy terms. Also includes provisions relating to assumptions about limits of coverage.	Similar provisions. [s. 465.479.]
Choice of Law	Applies Wisconsin law, except as otherwise provided in policy. However, also states that insurance provisions apply regardless of state in which policy issued. Does not modify choice of law determinations for sites outside Wisconsin.	Applies Oregon law if contaminated property is located in Oregon, unless this would be contrary to intent of parties. Does not modify choice of law determinations for sites outside Oregon. [s. 465.480 (2) (a).]

ISSUE	*2005 ASSEMBLY BILL 222*	*OREGON STATUTE*
Voluntary Payments Provision	Except as otherwise specified in policy, prohibits insurer from denying coverage for reasonable and necessary fees, costs, and expenses (including for assessments, studies, and investigations) incurred by insured under voluntary written agreement, consent decree, or consent order between insured and governmental entity as a result of written direction, request, or agreement by governmental entity to take action on pollution on the grounds that those expenses constitute voluntary payments.	Similar provision, but: (a) "including" list refers to remedial investigations, and feasibility cost studies; and (b) applies only with respect to Oregon DEQ and U.S. EPA, not all "government entities" as defined in Assembly Bill 222, as noted above. [s. 465.480 (2) (c).]
Effect of Settlement	Specifies that insurer that has entered into a good faith settlement and release prior to effective date of bill is not liable to any person for the claim.	No explicit provision about settlement.
Enforcement	Creates right of civil action for any person injured by violation of bill's insurance provisions. (This is in addition to provisions in current law giving the Commissioner of Insurance broad powers to ensure compliance with Insurance Code.)	Oregon Director of Department of Consumer and Business Services enforces lost policy provisions; violation of lost policy provisions is also enforceable as an unfair claim settlement practice under Oregon insurance law. [s. 465.479 (8) and (9).] No similar provision creating right of civil action by injured person.

Prepared by Joyce L. Kiel, Senior Staff Attorney
Legislative Council Staff
JLK:rv
May 16, 2005


FORWARD
PLURIBUS UNUM

MEISSNER TIERNEY
FISHER & NICHOLS
S.C.
ATTORNEYS AT LAW
THE MILWAUKEE CENTER
19TH FLOOR
111 EAST KILBOURN AVENUE
MILWAUKEE, WISCONSIN 53202-6622
TELEPHONE (414) 273-1300
FACSIMILE (414) 273-5840

Michael J. Cohen
Attorney-At-Law

Extension 140
mjc@mtfn.com

May 27, 2005

HAND DELIVERED
Rep. Ann Nischke
Chairperson
Assembly Insurance Committee
State Capitol
Madison, WI 53702

Re: 2005 Assembly Bill 222 ("AB222")

Dear Chairperson Nischke:

Please let this serve as a follow-up summary of my testimony at the Assembly Insurance Committee hearing on AB222 held on April 21, 2005.

To fully appreciate the numerous flaws in the "all-sums" allocation theory that AB222 is premised on, I presented a coverage chart of a coverage profile from 1960 through 1986. The coverage chart contained several features not atypical of many of the environmental coverage cases in our state, including a large self-insured retention (self insurance) by the policyholder, insolvencies by insurers, gaps in coverage and a large number of settlements with other insurers. I used the coverage chart and a blow up of the definition of the term "occurrence" from a standard comprehensive general liability policy to demonstrate that the proposed bill would allow an insured to inequitably shoehorn all of the continuous and indivisible property damage that occurred over the 26 year coverage period in my hypothetical into one year (1975-1976 in my example) and hold all the policies issued by the insurer (Insurer B in my hypothetical) in that year responsible for the full amount of all damages left after the insured settled for less than policy limits with numerous other insurers whose policies attached at layers of coverage below that insurer. The coverage chart and policy language blow up effectively illustrated just how inequitable and overreaching the "all-sums" allocation theory is.

As I explained during my testimony, there are a myriad of problems with the "all-sums" allocation theory. I addressed a number of these problems in my testimony and will summarize some of them here.

First, the "all-sums" allocation theory is not consistent with the clear and unambiguous policy language. It is a fundamental principle of insurance law and practice that insurance policies are written to assume specified risks for well-defined policy periods and that the duration of the policy is an essential term of the insurance contract. In exchange for a premium that was calculated on the basis of the potential risks posed to the insurers for a particular period of time, policyholders obtain insurance against bodily injury or property damage that takes place within, and only within, that discrete period. The definition of "occurrence" in the standard comprehensive general liability policy clearly and unambiguously limits coverage to property damage that occurs "***during the policy period***." The "all-sums" allocation theory rewrites the policy (without the insurer obtaining the benefit of additional premiums) to cover property damage resulting from exposure to contaminants which occurred ***outside*** the insurer's stated policy period, in my example some 15 years before the inception of the policies and some 10 years after they lapsed. As the Supreme Court of Colorado aptly observed in *Public Serv. Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 939 (Colo. 1999):

> We do not believe that these policy provisions can reasonably be read to mean that one single-year policy out of dozens of triggered policies must indemnify the insured's liability for the total amount of pollution caused by events over a period of decades, including events that happened both before and after the policy period.

Id. Unlike the "all-sums" allocation method, pro-rata allocation is consistent with the property damage requirement and the application of the "other insurance" clauses contained in standard commercial general liability policies, as interpreted under long-standing Wisconsin law. Contrary to the testimony of others at the hearing, AB222 would clearly impair the contract rights of insurers who entered into contracts with their insureds, in many cases, including the Fox River, as many as three or four decades ago.

Second, the "all-sums" allocation theory is not consistent with existing Wisconsin law. Wisconsin courts have repeatedly held that covered property damage must take place ***during the policy period***. *See Society Insurance v. Town of Franklin*, 2000 WI App 35 ¶¶ 8, 9, 233 Wis. 2d 207, 607 N.W.2d 342 ("An injury occurring during the policy period triggers coverage . . . . It is the time of the injury, not the time of the occurrence, that determines which policies are triggered"); *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2 ¶ 75, 268 Wis. 2d. 16, 673 N.W.2d 65, 84 ("The 'continuous trigger' theory generally applies where an *injury* or *damage* occurs over more than one policy period.") (emphasis added); *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 226, 52 N.W.2d 261 (Ct. App. 1994) (policyholders have the burden of "setting

forth specific facts to show that covered bodily injury or property damage occurred during the policy period.").

Third, "all-sums" allocation is not consistent with the reasonable expectations of the insured. As the Supreme Court of Colorado noted in the *Public Service* case:

> At the time [the insured] purchased each individual insurance policy, we doubt that [it] could have had a reasonable expectation that each single policy would indemnify [it] for liability related to property damage occurring due to the events taking place years before and years after the term of each policy.... [T]here is no logic to support the notion apportionment when continuous injury occurs over multiple years.

650 A.2d at 989.

Fourth, "all-sums" allocation has been rejected and soundly criticized by numerous courts and commentators as illogical, unreasonable and contrary to clear policy language. Contrary to the testimony of others, "all sums" allocation is not the majority view. Ten state high courts (Alabama, Colorado, Connecticut, Kansas, Maryland, Minnesota, New Jersey, New York, Utah and Vermont) and numerous federal and state intermediate appellate courts have ruled in favor of pro-rata allocation. In contrast, six state high courts have imposed "all-sums" liability on the insurers. Importantly, pro-rata allocation has been adopted by Wisconsin's neighboring states of Minnesota, Illinois and Michigan.

Fifth, the "all-sums" allocation theory unfairly fails to hold the insured liable for deductibles, periods of self-insurance and periods of no insurance. As many courts and commentators have noted, the "all-sums" allocation method creates a false equivalence between an insured who purchased insurance coverage continuously for many years and an insured who has purchased insurance coverage for only one year. *See, e.g., Public Service*, 986 P.2d at 939-40; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980). The application of "all-sums" allocation in cases, where self-insurance is significant, like my hypothetical, ignores the reality of the insurance market. Companies decide to self-insure when they conclude that self-insurance costs less than third-party insurance. The "all-sums" allocation theory relieves the insured of all liability, even during periods of self-insurance, where the insured should have a reasonable expectation of liability for injuries caused during the self-insured period. This method allows self-insurers to improperly externalize costs to insurers (without a corresponding premium payment) and relieves the self-insurer of any incentive to internalize the costs of its actions or take precautions against causing progressive injuries during self-insured periods.

Sixth, "all-sums" allocation improperly shifts to insurers the financial burden of the insured's decision to purchase insurance from insurers who are no longer solvent. Under the "all-sums" allocation theory, the insured can "pick and choose" whom it wants to collect from, leaving that insurer economically saddled with the insured's decision to contract with an insurer who is no longer in business.

Seventh, "all-sums" allocation does not actually allocate damages and only increases litigation costs. In fact, "all-sums" allocation is not an allocation system at all, but a means to delay that decision to a later date. As one leading commentator on the issue noted:

> Indeed, the joint and several method divides the case into two separate suits: in the first suit, the insured selects and sues one of the triggered insurers; in the second suit, the selected insurer then sues other triggered insurers for contribution. Litigation costs do not decrease, courts lack a method for allocating liability, and insurers still need to factor the costs of uncertain liability into their premiums.

Michael Doherty, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L. Rev. 257, 271(1997). If the insured settled with any of its insurers, it most likely would be a party to a subsequent contribution action by the insurer it chose to collect the balance of its damages from because the insured most likely agreed to indemnify the settling insurers, at least up to the amount of the settlements. It makes no sense to duplicate effort in this fashion and foster delay and the needless waste of party and judicial resources.

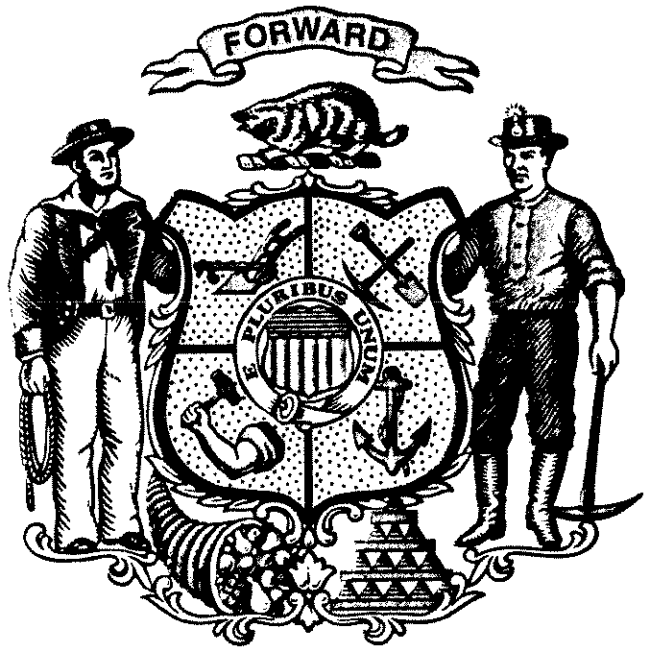
Eight, pro-rata allocation has been recognized as the only appropriate allocation method to properly give meaning to contract terms as written. Unlike the "all-sums" allocation theory, the pro-rata time-on-the-risk allocation method is recognized by numerous courts as the most sensible, logical and efficient way to allocate damages across successively-triggered policies in environmental cases like Fox River, where the property damage is long-term, continual and indivisible. This method properly allocates damages among insurance policies, self-insured retentions and uninsured periods. Insured's are only responsible for their share of the damage that occurred during the period of time that they assumed the risk. The specific dollar amount for which each party is responsible is determined by simply dividing the gross amount of damages by the number of years during which the damage is ongoing. This approach is clearly the most predictable, administrable, and fundamentally fair approach to allocation.

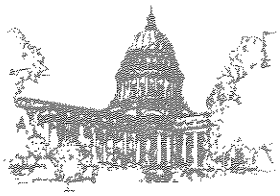
Once again, thank you for the opportunity to present testimony and provide you with this summary letter. If the Committee would like further information or analysis, I would be pleased to provide it.

Sincerely,

Michael J. Cohen

Mjc4304.doc;1


FORWARD
E PLURIBUS UNUM



DEAN R. KAUFERT

WISCONSIN STATE REPRESENTATIVE

June 14, 2005

Ann Nischke, State Representative
State Capitol, 8 North
Madison, WI 53708

Dear Representative Nischke:

I greatly appreciate the public hearing you held on AB222, relating to liability issues surrounding the Fox River clean-up project. At this time, I am asking you to please consider scheduling executive action on the proposal at the next available opportunity.

As you know, this legislation is vitally important to both the Fox Valley and me, personally, as the representative from that area. Over 20,000 jobs depend on the vitality of Wisconsin's paper industry and I want to ensure this legislative body is doing everything possible to protect their existence.

I strongly considered adding this proposal to the 2005-07 State Budget. On the advice of my colleagues and my own desire to put the good of the budget ahead of my personal agenda, I have foregone the opportunity in the hope that my objectives can still be achieved through AB222.

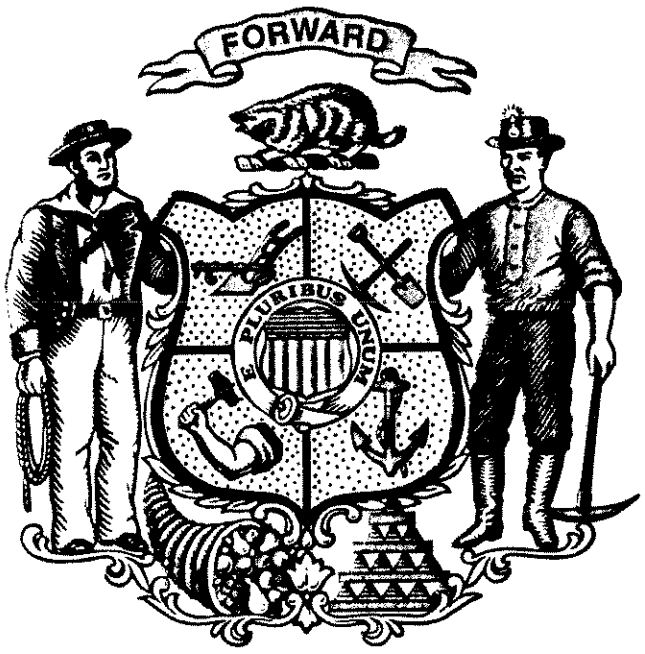
Thank you for considering my request. I look forward to working with you on this legislation. Please feel free to contact me if you have any questions or concerns.

Sincerely,

Dean R. Kaufert
State Representative

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


FORWARD
E PLURIBUS UNUM

Nischke, Ann

From: Jeffrey Kirk [jeffrey@kirks.us]
Sent: Monday, June 20, 2005 9:47 PM
To: Rep.Nischke
Cc: Peer, Adam
Subject: Re: Assembly Insurance Committee Meeting

Hi Ann,

Sorry this comment is so late. I've been thinking about the Bill 222 discussion and have some specific feelings, but cannot necessary quantify those feelings or the ramifications. In summary, I think it would be wrong to make insurance companies pay for 30 year old damages, when those damages would not have been provided for in the insurance anyway.

I am not a fan of insurance companies. I view insurance as necessary because it helps spread the risk of one person from suffering catastrophic disaster. It's an acceptable gamble for me.

But, insurance companies are businesses. They should be permitted to run in a manner that helps them succeed as long as they are not violating certain standards of law or morality. I don't think they should be legislatively forced to pay large clean up bills when those bills are not for something they should have covered.

The problem here is that society made a bad decision. The manufacturers used a process which damaged the environment. We (society in whole) did not realize the mistakes at the time. Those mistakes were a result of another profitable business, the paper industy. The beneficiaries of that industry would be the businesses, employees of those businesses, customers of those businesses, vendors to those businesses, cities around those businesses, and more. Basically the economy benefitted because of the manufacturing performed. If anyone has to pay, it should, therefore be society. To say that all those parties gained from an act and now the insurance companies are responsible does not logically follow.

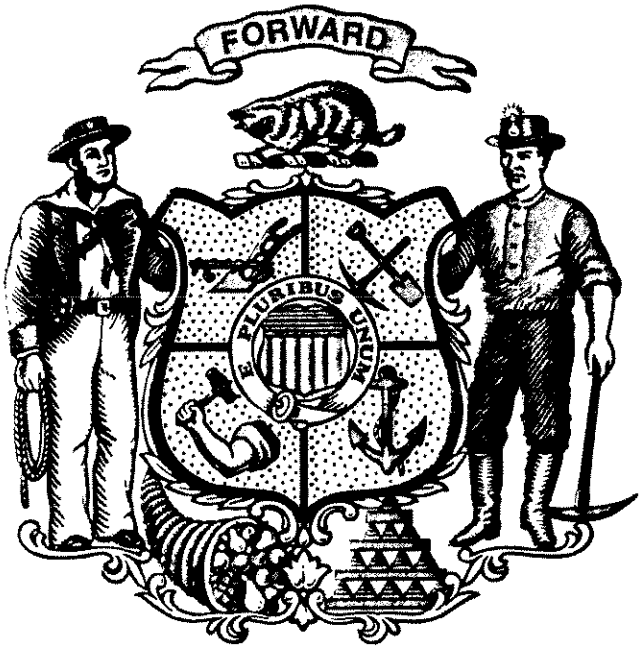
In a perfect world, this situation would not have arisen. In a nearly perfect world, we could track down everyone who received benefit and spread the cost out in proportion to the damages they were responsible for (that's the opposite of insurance; insurance is not retroactive). But overall, society and the economy were beneficiaries at the time. It seems that this is who should pay now. In my mind, having the state pay instead of insurance companies makes more sense. I don't like the thought of increasing state expenses and the resulting tax increase that might have to happen, but that might be the most sensible response in this case.

If, on the other hand, it is decided that insurance companies have to cover it, they will, no doubt, cover their collective butts in the future. If liability insurance has to cover things that have never been considered then the price would become unreasonable. In order to survive an insurance company would have to assume that they will be liable for huge expenses in the future. After all, what are we doing now that is damaging the environment or people? I don't know, but if they have to pay for that then they better start saving money now. To do that they'll be charging us more.

I'm not sure that what I've stated makes complete sense. This issue is new to me and I'm not sure I've explained my feelings in the best manner. I guess to distill it down, my thought is this:
1. Society was stupid.
2. Society wants it cleaned up.
3. Society should pay to fix it.

Good luck.

Sincerely,
Jeffrey Kirk


FORWARD
E PLURIBUS UNUM

JIM KREUSER

State Representative • 64th Assembly District

DEMOCRATIC LEADER-WISCONSIN STATE ASSEMBLY

June 20, 2005

Speaker John Gard
211 West, State Capital
Madison, WI HAND DELIVERED

AB 222 ??

Dear Speaker Gard,

Representative Berceau will be unable to attend the Committee on Insurance scheduled for tomorrow. As you know she had by-pass surgery and will be home recuperating.

Please be advised that Representative Molepske will temporarily replace Representative Berceau. If you have any questions, comments, or concerns please feel free to call my office.

Sincerely

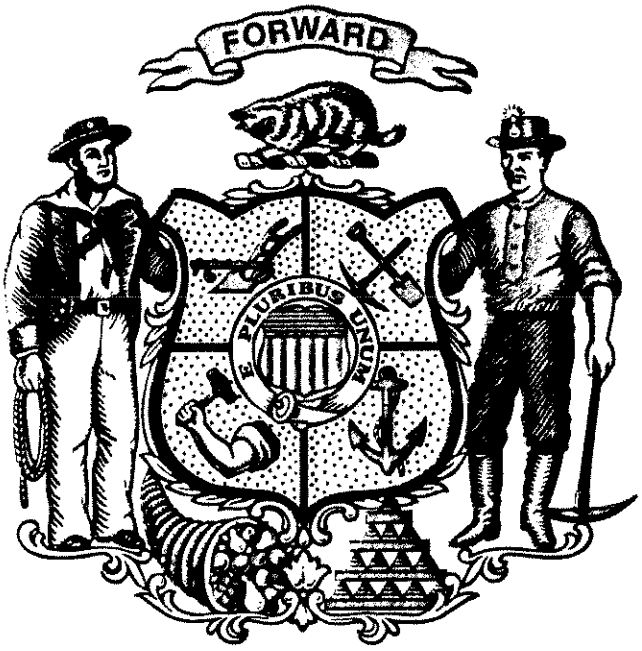
Jim

Jim Kreuser
Assembly Democratic Leader

Cc: Representative Nischke

JK/nk

MADISON: P.O. Box 8952, Madison, WI 53708-8952 • (608)266-5504
FAX: (608) 282-3664 • Toll-Free: 1-888-534-0064 • E-MAIL: Rep.Kreuser@legis.state.wi.us
DISTRICT: 3505 14th Place, Kenosha, WI 53144 • (262)553-5555


FORWARD
E PLURIBUS UNUM

Dale R. Schuh FSA, MAAA
Chairman of the Board and
Chief Executive Officer

1800 North Point Drive
Stevens Point, WI 54481

715 346-6879
715 346-6161 Fax

SENTRY INSURANCE

June 20, 2005

The Honorable Ann Nischke
Wisconsin State Assembly
PO Box 8953
Madison, WI 53708

Dear Representative Nischke:

I am writing to urge you to oppose AB 222. The "All Sums" proposal is bad public policy and bad legislation.

Out-of-state and foreign paper companies are pushing the Wisconsin legislature to retroactively rewrite insurance contracts that the paper companies signed years ago. "All Sums" would allow a paper company to target a single insurance company to pay for all of its pollution cleanup – regardless of the number of years the paper company polluted, regardless of the number of insurance companies that wrote policies during those years, and regardless of whether the paper company even had insurance for each of those years. The paper companies are simply trying to abuse the legislative process for their own ends.

"All Sums" would do great harm to Sentry Insurance, Sentry's 3,800 employees, and the entire Wisconsin property and casualty insurance industry.

On behalf of Sentry Insurance, I ask that you oppose AB 222.

Sincerely,

Dale R. Schuh
Chairman of the Board & CEO

Proud To Be A Wisconsin Company

STRENGTH • PROTECTION • VIGILANCE®