

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_pt06

➤ Miscellaneous ... Misc
**



Sentry® Insurance

44 East Mifflin, Suite 305
Madison, WI 53703

608 255-7115
715 346-7168

Fax: 608 255-2178
Fax: 715 346-7028
mishalee@tds.net

TO: Assembly Insurance Committee

FROM: Misha Lee
Director of Government Relations

DATE: June 20, 2005

RE: **OPPOSITION to Assembly Bill 222**
“All Sums” legislation

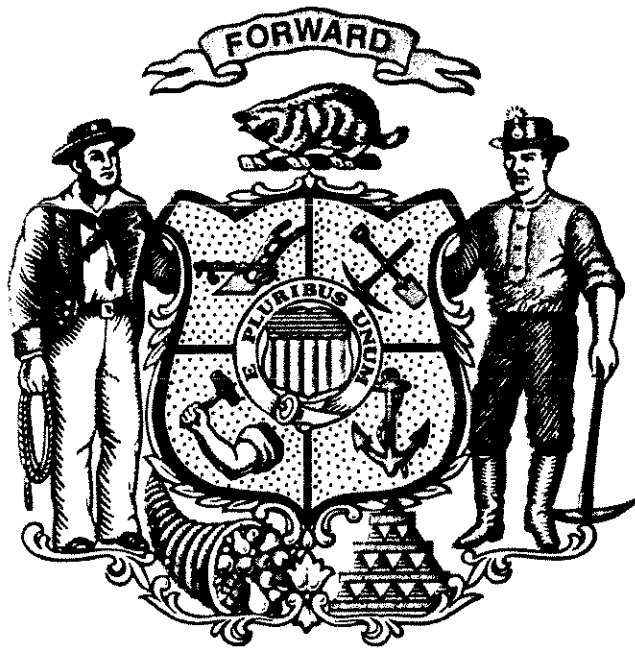
On behalf of Sentry's 3,800 employees, we urge you to **OPPOSE** Assembly Bill 222 (AB 222). This legislation would be detrimental to Sentry Insurance and the entire Wisconsin property and casualty insurance industry.

Out-of-state and foreign paper companies are attempting to persuade the Legislature to retroactively rewrite insurance contracts that the paper companies signed years ago. AB 222 would allow a paper company to target a single insurance company to pay for its entire 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.

This legislation is unconstitutional and it completely undermines Wisconsin contract law. When there are contract disputes, businesses and constituents in your district expect to have their matter resolved through our legal system. The same process should be expected of large, sophisticated paper companies when there is disagreement over what's contained in their contracts.

Please **OPPOSE** Assembly Bill 222 and vote to protect the sanctity of a contract.

Thank you for your consideration.





John Gard

Speaker of the Assembly

June 21, 2005

Representative Ann Nischke
Chair, Assembly Committee on Insurance
8 North, State Capitol
Madison, Wisconsin

In
AB 222
folder

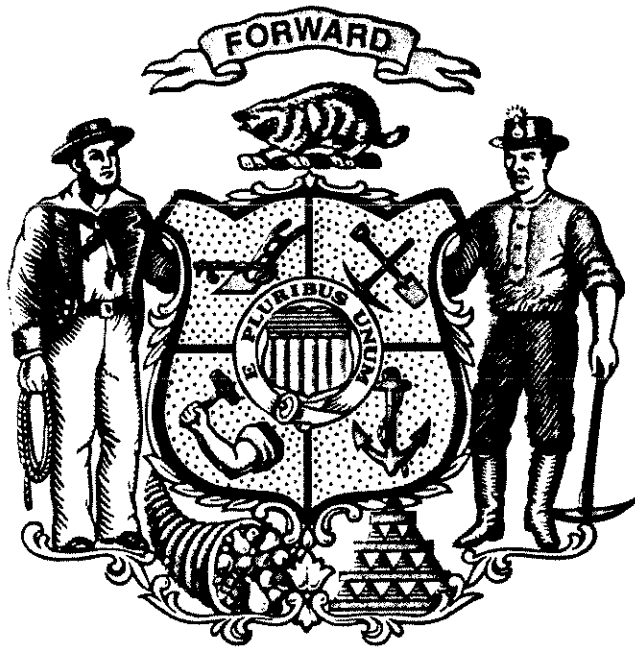
Dear Representative Nischke:

Representative Steve Wieckert is unable to attend today's meeting of the Assembly Committee on Insurance due to his attendance at a funeral. In his absence, I have appointed Representative Don Friske.

Sincerely,

A handwritten signature in cursive script that reads "John G. Gard".

John G. Gard



Rosenak, Mary Jan

From: Thomas Timm [tom.timm@sentry.com]
Sent: Wednesday, June 22, 2005 8:13 AM
To: Rep.Nischke
Subject: Opposition to AB 222 & SB 137 Legislation

Dear Representative Nischke:

I have written before but I again ask that you do not support AB 222 or SB 137. The rewriting of legitimate insurance contracts is just one step away from rewriting any legitimate contract for the benefit of a few and the detriment of many.

How long would it be before a powerful lobby group came to the legislature and asked for their employment contract or a governmental procurement contract to be rewritten.

A simple example might help illustrate. You wish to purchase a vehicle and agree on the price. Some time later after the vehicle was purchased, the dealer comes to you and says I want an additional \$100,000 for the vehicle purchased. You have already had it for sometime and you had paid for it under the original contract agreement. You feel the the dealer if being unfair, but the dealer has had the legislature change the original contract and now he has the 'legal right' to ask for and receive more than was agreed on.

I don't believe this example, in concept, is really any different that what the paper companies are asking.

Please OPPOSE Senate Bill 137 (SB 137) and Assembly Bill 222 (AB 222), otherwise known as All Sums legislation.

This is unconstitutional special interest legislation that would benefit a few powerful out-of-state paper companies at the expense of Wisconsin consumers and businesses.

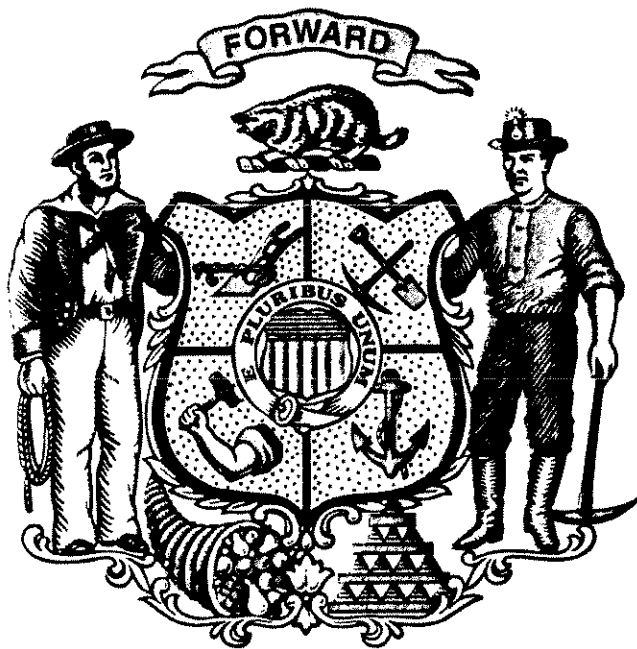
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Please oppose SB 137 and AB 222. All Sums jeopardizes the strength of the insurance industry in Wisconsin and will ultimately hurt all insurance consumers in Wisconsin.

Thank you for your time and consideration.

Sincerely,

Thomas Timm
4925 White Pine Dr
Stevens Point , WI 54481



Rosenak, Mary Jan

From: klug.john@partnersmutual.com
Sent: Wednesday, June 22, 2005 1:02 PM
To: Rep.Nischke
Subject: Opposition to All Sums Assembly Bill 222

Representative Nischke:

Please vote against passage of Assembly Bill 222 which has no logical, business or ethical merit. Passage would be to the detriment of Wisconsin and society in many ways. It would be an unjust abuse of the legislative system to override contracts made in good faith.

Our society is governed by and depends on the validity, integrity and defensibility of contracts, whether a business contract, a marriage contract, a sales contract or an insurance contract. Assembly Bill 222 is an attempt to invalidate contracts.

Responsibility for ones actions is the basis of order and accountability in our society. Sadly in our society today the attitude is increasingly one of not taking responsibility for ones own actions. This attitude is undermining family values and the Wisconsin and American economy.

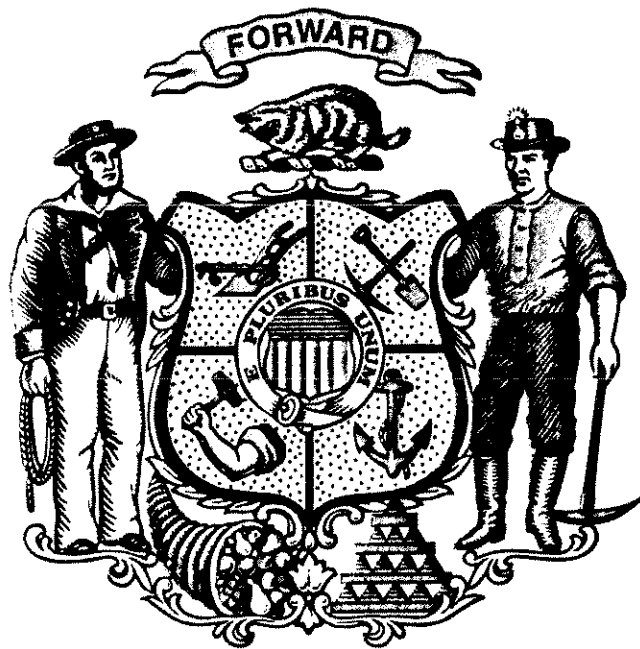
You cannot allow passage of Assembly Bill 222 which would allow the polluters of our waters to shirk taking responsibility for their abuses. It is hard to comprehend that the method proposed is to pass legislation that will throw out bona fide insurance contracts made in good faith. If a bona fide contract can be broken by a change in law, where does that leave contract law in the state of Wisconsin?

The problem of pollution is not to be ignored, but invalidating contractual agreements to solve the problem is an unconscionable attempt at a solution. Do not undermine the insurance industry which did not pollute our rivers when it is not contractually responsible for solving another industries abuses. Wisconsin's taxpayers will pay the costs through higher insurance premiums if this Bill is passed.

As my representative, your responsibility is to uphold a valid contract and not permit this horrendous and unjust Bill 222 to be passed. Instead hold the wrongdoers financially, morally, and legally accountable for their actions. Don't pass the buck to the insurance industry. Where the wrongdoers are Wisconsin based businesses who cannot pay for their damages, if the pollution is cleaned up, then **EVERY** business and individual in the state should pay for it proportionately through a tax assessment, not the insurance industry.

Thank you.

Sincerely,
John H Klug
3167 Madison St
Waukesha WI 53188
262-549-1017



Rosenak, Mary Jan

From: Pat Salmon [psalmon@wisafclcio.org]
Sent: Wednesday, June 22, 2005 2:40 PM
To: Little, Sharon; Rep.Kestell; Merkel, Kelly; Rep.Krawczyk; Rep.Kreibich; Rep.Kreuser; Rep.Krusick; Michel, James; Rep.Lasee; Rep.LehmanJ; Rep.LeMahieu; Rep.Loeffelholz; Rep.Loethian; Rep.McCormick; Rep.Meyer; Rep.Molepske; Rep.Montgomery; Rep. Moulton; Potts, Andrew; Rep.Musser; Rep.Nass; Rep. Nelson; Loomans, Scott; Rep.Nischke; Rep.Ott; Rep.Owens; Whitmore, Lori; Rep.Petrowski; Rep.Pettis; Rep.Pocan; Rep.Pope-Roberts; Savage, Bill; Rep.Rhoades
Subject: Support for AB 222 - "Fair Claims Act"

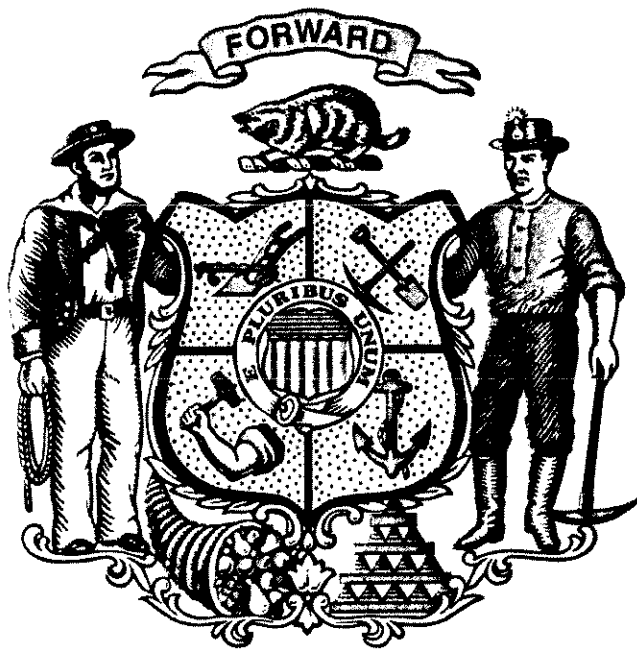
 Wisconsin State AFL-CIO

To: Members of the Assembly
From: Phil Neuenfeldt, Secretary-Treasurer
Date: June 21, 2005
Re: **Support for Assembly Bill 222**
"Fair Claims Act"

Wisconsin is the top papermaking state in the nation with thousands of workers employed in every aspect of production. However, due to fierce global competition, some 13,000 jobs have been lost in the past few years and the industry is facing some difficult times. The vitality of the papermaking industry is a central part of the state's economy. The industry is trying to address a major challenge in the necessary cleanup of PCB contamination in the Fox River, but this environmental remediation project is being made more difficult by insurance companies that are now resisting liability for cleanup costs.

Assembly Bill 222 "Fair Claims Act" would require the insurers of paper companies in the Fox Valley to pay for environmental remediation of the Fox River under previous comprehensive general liability policies held by the companies. Passage of this bill would relieve the papermaking companies of major costs in a time of financial difficulty and allow those resources to be devoted to making the industry more competitive and productive. It would also end any delays in the remediation process which employs a significant number of workers in the building trades.

We urge your support for AB 222.



Rosenak, Mary Jan

From: Judy Bickel [bickels@gdinet.com]
Sent: Wednesday, June 22, 2005 3:09 PM
To: Rep.Nischke
Subject: Opposition to AB 222 & SB 137 Legislation

Dear Representative Nischke:

As a lifetime resident of the area and the manager of a small Mutual Insurance Company, I can envision this bill as setting precedent for local pollution charges against farmers and again the contract could be changed to put coverage where there was limited or no coverage by policy language and term.

Please OPPOSE Senate Bill 137 (SB 137) and Assembly Bill 222 (AB 222), otherwise known as All Sums legislation.

This is unconstitutional special interest legislation that would benefit a few powerful out-of-state paper companies at the expense of Wisconsin consumers and businesses.

Both the Federal and State Constitutions specifically provide protections against legislative interference with existing contracts. All Sums legislation rewrites contracts that were written years ago to the benefit of the paper companies. Clear and simple, the paper companies that polluted the Fox River want the Wisconsin Legislature to bail them out with unconstitutional, special interest legislation. Having the legislature take this action is bad not just for insurers, but Wisconsin businesses and consumers.

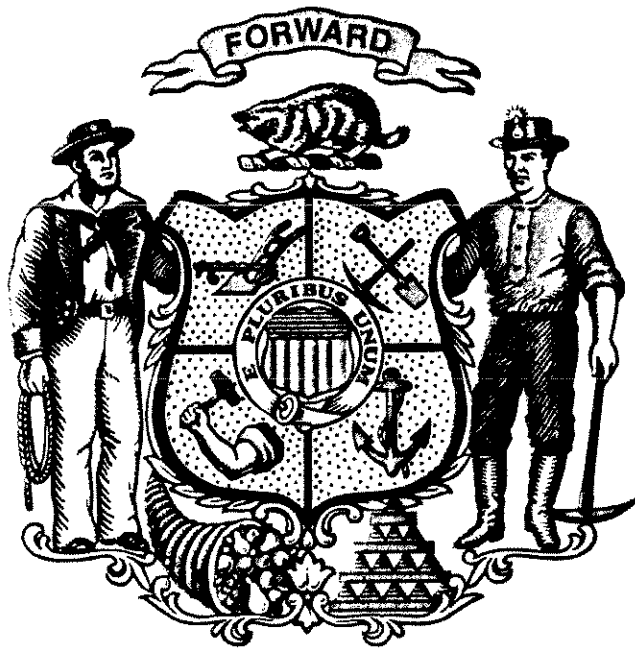
Please oppose SB 137 and AB 222. All Sums jeopardizes the strength of the insurance industry in Wisconsin and will ultimately hurt all insurance consumers in Wisconsin.

Thank you for your time and consideration.

I believe pollution must be cleaned up but not at the expense of changing contracts after the fact.

Sincerely,

Judy Bickel
N9689 Shady Ln
Watertown, WI 53094



Rosenak, Mary Jan

From: Bryan Phillips [bryan.phillips@stpaultravelers.com]
Sent: Wednesday, June 22, 2005 3:27 PM
To: Rep.Nischke
Subject: Opposition to AB 222 & SB 137 Legislation

Dear Representative Nischke:

Please OPPOSE Senate Bill 137 (SB 137) and Assembly Bill 222 (AB 222), otherwise known as All Sums legislation.

This is unconstitutional special interest legislation that would benefit a few powerful out-of-state paper companies at the expense of Wisconsin consumers and businesses.

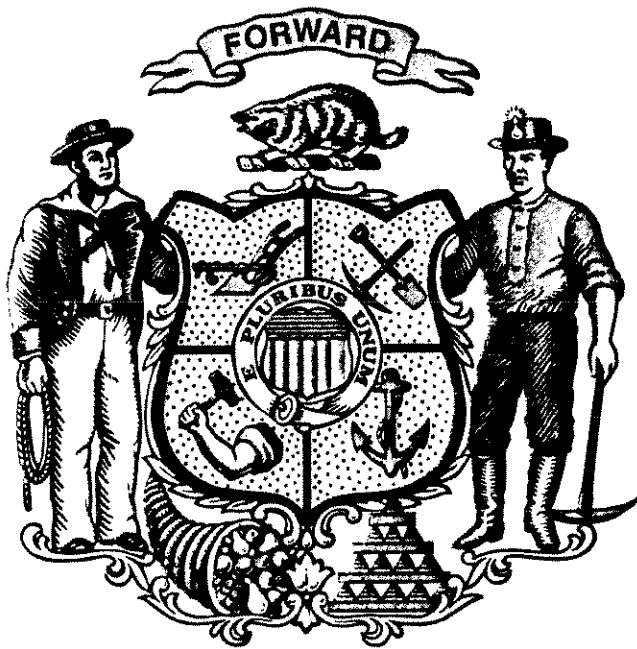
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Please oppose SB 137 and AB 222. All Sums jeopardizes the strength of the insurance industry in Wisconsin and will ultimately hurt all insurance consumers in Wisconsin.

Thank you for your time and consideration.

Sincerely,

Bryan Phillips
3605 Rivers Crossing Dr
Waukesha, WI 53189



Rosenak, Mary Jan

From: Greg Bergner [bergner.gregory@partnersmutual.com]
Sent: Wednesday, June 22, 2005 4:15 PM
To: Rep.Nischke
Subject: Opposition to AB 222 & SB 137 Legislation

Dear Representative Nischke:

The State of Wisconsin business climate has allowed many Wisconsin based insurers to become large and growing regional companies. These companies don't pollute, do recycle and the profits they generate, their payrolls and their tax payments stay here in Wisconsin. These companies have nothing to gain by the defeat of this legislation because they are not part of the cleanup but, the State of Wisconsin has everything to gain by defeating this legislation. Don't drive companies to go elsewhere because of an uncertain legal climate and let's keep Wisconsin out of the national spotlight by not making bad law.

Please OPPOSE Senate Bill 137 (SB 137) and Assembly Bill 222 (AB 222), otherwise known as All Sums legislation.

This is unconstitutional special interest legislation that would benefit a few powerful out-of-state paper companies at the expense of Wisconsin consumers and businesses.

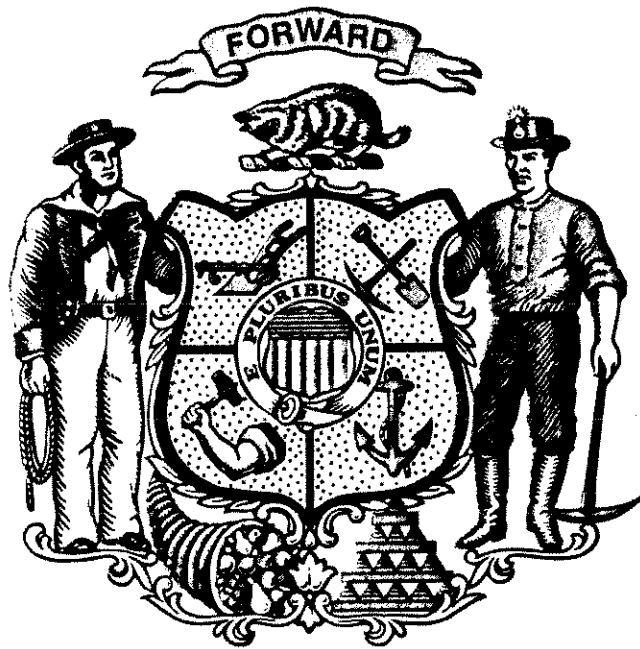
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Please oppose SB 137 and AB 222. All Sums jeopardizes the strength of the insurance industry in Wisconsin and will ultimately hurt all insurance consumers in Wisconsin.

Thank you for your time and consideration.

Sincerely,

Greg Bergner
1809 E Main St Apt 207
Waukesha , WI 53186



Rosenak, Mary Jan

From: Patrick Clavette [mushroom0305-fairness@yahoo.com]
Sent: Wednesday, June 22, 2005 7:16 PM
To: Rep.Nischke
Subject: Opposition to AB 222 & SB 137 Legislation

Dear Representative Nischke:

Please OPPOSE Senate Bill 137 (SB 137) and Assembly Bill 222 (AB 222), otherwise known as All Sums legislation.

This is unconstitutional special interest legislation that would benefit a few powerful out-of-state paper companies at the expense of Wisconsin consumers and businesses.

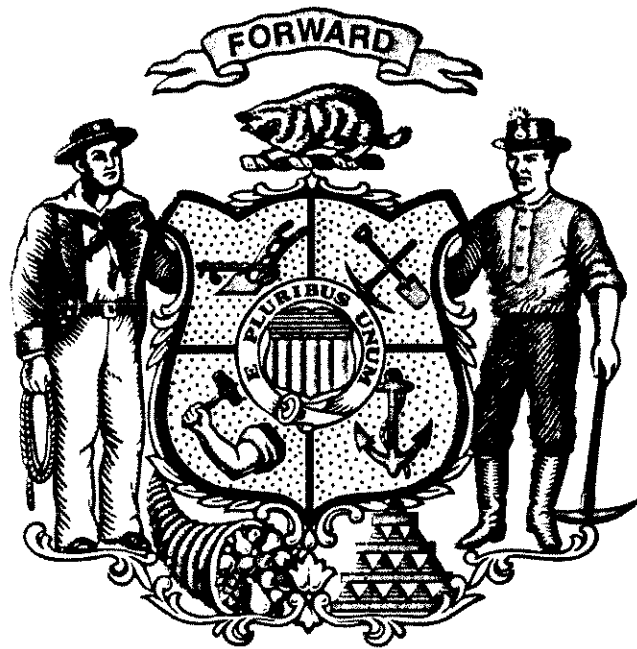
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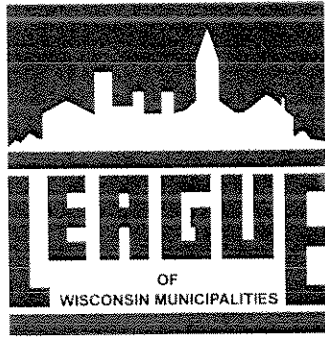
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Thank you for your time and consideration.

Sincerely,

Patrick Clavette
416 Scott Ct
Hartford, WI 53027

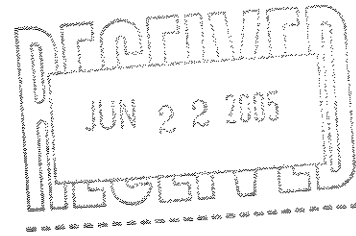




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800/991-5502
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E-mail: league@lwm-info.org
www.lwm-info.org



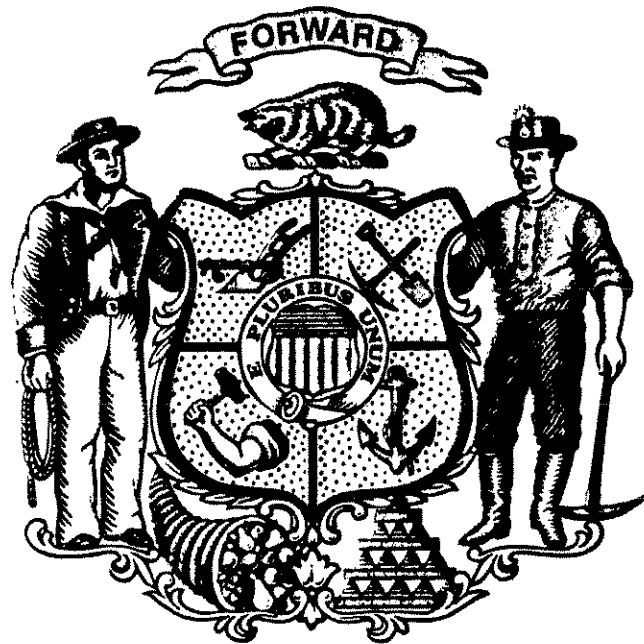
To: Wisconsin State Assembly
From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities
Date: June 22, 2005
Re: Support for AB 222, Fair Claims Act

The League of Wisconsin Municipalities supports AB 222, the fair claims act, which is scheduled for floor action on Thursday, June 23.

The bill would require insurance companies to pay up-front the costs of cleaning up PCBs in the Fox River, and then work out financial settlements among each other later. Under current law, the insurance companies don't have to pay on an environmental damages claim until a Wisconsin court determines how much each party and insurance company must contribute towards the cost of cleaning up the pollution. Such a determination will take years of litigation.

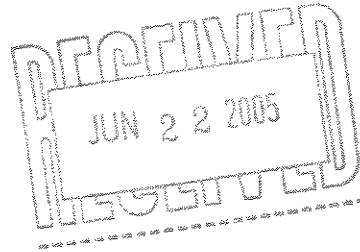
Under the "fair claims" method specified in the bill, insureds such as paper companies and municipalities along the Fox River could demand that their primary and re-insurance companies pay up front, to the maximum allowed under their policies, the legal costs and damages associated with cleaning up pollution in the Fox River.

Municipalities facing potential environmental liability for pollutants in the river would benefit by this bill. Hence, we urge you to vote "yes" on adoption of AB 222. Thank you for considering our comments.





WISCONSIN ALLIANCE OF CITIES



TO: Honorable members of the Wisconsin Assembly

FROM: Edward J. Huck

RE: AB 222, Support

The Alliance of Cities supports the Fair Claims Act by action of our Board of Directors. We are supportive of AB 222 because it:

Clarifies the responsibility of insurance companies to pay their fair share of environmental cleanups. The insurance policies held by papermakers and municipalities involved in the Fox River cleanup plainly state that insurance companies "will pay on behalf of the insured ALL SUMS" that the papermakers are obligated to pay as damages—up to policy limits.

Simplifies the collection process of insurance money from multiple insurers who provided coverage from the same environmental problem. Insurance companies themselves can then figure out an equitable allocation among their counterparts.

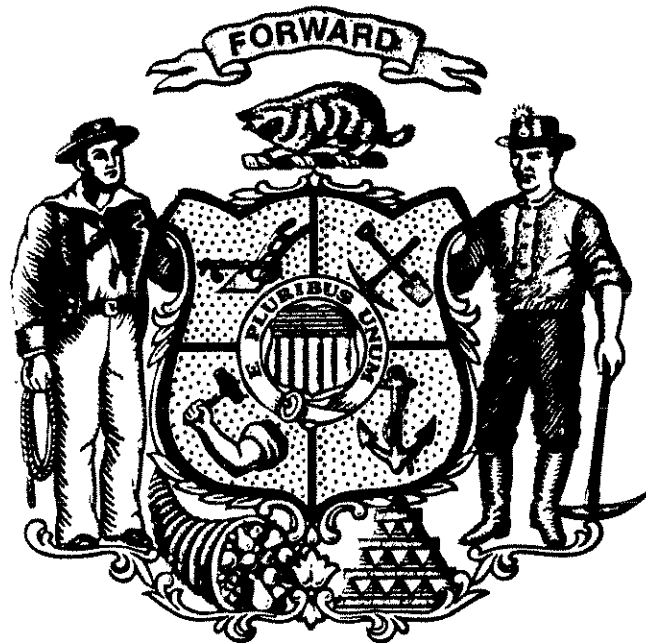
Expedites the cleanup process. Litigation will delay the cleanup for years as insurance companies fight their responsibility. The cleanup will not only take longer but cost more.

Protects public resources (the Fox River) under Wisconsin's Public Trust Doctrine.

It is important to note that the government has estimated that the cost of the cleanup is likely to be at least \$600 million. The paper companies have already invested \$130 million to date in out-of-pocket expenditures. The insurance companies have contributed ZERO DOLLARS under their policies, except for one small settlement with Georgia Pacific. Other settlements with paper companies are contingent on reaching agreement with the various government agencies or are in litigation.

The passage of the Fair Claims Act would allow this high competitive global industry to focus their resources on equipment, facilities, and expanding production...AND it reduces the exposure of local governments to lawsuits. Local government sewage treatment plants may have discharged some PCBs as paper company effluent passed through them.

It is imperative to get action on the cleanup NOW. That is why we support AB 222.



Rosenak, Mary Jan

From: Diane Walters [walters.diane@partnersmutual.com]
Sent: Thursday, June 23, 2005 7:18 AM
To: Rep.Nischke
Subject: Opposition to AB 222 & SB 137 Legislation

Dear Representative Nischke:

Please OPPOSE Senate Bill 137 (SB 137) and Assembly Bill 222 (AB 222), otherwise known as All Sums legislation.

This is unconstitutional special interest legislation that would benefit a few powerful out-of-state paper companies at the expense of Wisconsin consumers and businesses.

Both the Federal and State Constitutions specifically provide protections against legislative interference with existing contracts. All Sums legislation rewrites contracts that were written years ago to the benefit of the paper companies. Clear and simple, the paper companies that polluted the Fox River want the Wisconsin Legislature to bail them out with unconstitutional, special interest legislation. Having the legislature take this action is bad not just for insurers, but Wisconsin businesses and consumers.

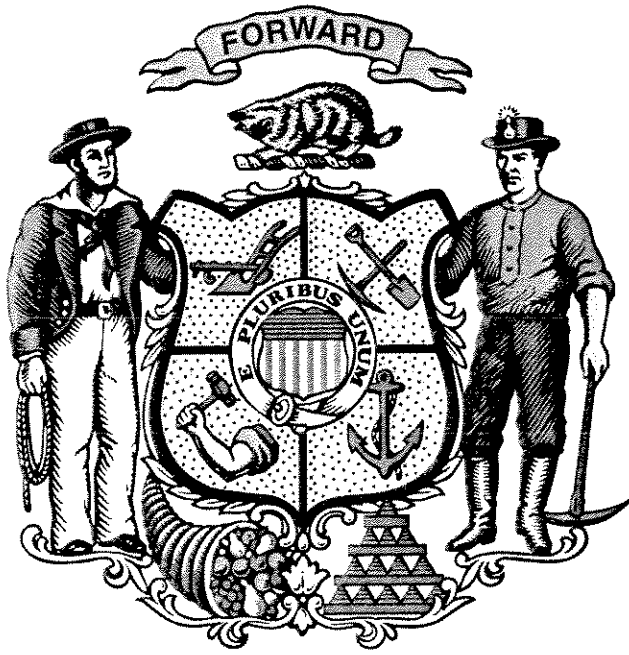
Please oppose SB 137 and AB 222. All Sums jeopardizes the strength of the insurance industry in Wisconsin and will ultimately hurt all insurance consumers in Wisconsin.

Thank you for your time and consideration.

I feel very strongly that this bill is a deterrent to all free trade. If you cannot trust the contract, how can anyone do business. The contract is the foundation of free trade.

Sincerely,

Diane Walters
202 S Moreland Blvd
Waukesha , WI 53188



No Date ??

**Fair Claims Act:
James Kelley Testimony
Before the Assembly Committee on Insurance**

My name is Jim Kelley, and I am Executive Vice President and General Counsel of Georgia-Pacific Corporation. I appreciate the opportunity to testify today on this important legislation.

Let me begin by saying it is great to be back in Wisconsin. I grew up in Whitefish Bay, and I have a brother and sister and other relatives living here, so it is always nice to be back home and see so many friendly faces.

I appear before you in support of AB222 – the Fair Claims Act.

As you may know, Georgia-Pacific is deeply ingrained in Wisconsin's economy. We operate seven facilities in the state AND employ more than 4,200 hard-working Wisconsin men and women.

We generate \$238 million in taxable wages, and we purchase tens of millions of dollars of local goods and services through relationships with dozens of Wisconsin companies.

As a global business that operates in an increasingly competitive environment, we are a leading manufacturer of tissue, packaging, paper, building products and related chemicals. Our Wisconsin mills play a very big role in our success as a company, and our commitment to the communities we call home is reflected in the millions of dollars that we invest each year to protect the environment, ensure public and employee safety, and support local organizations so that they can continue to improve the quality of life of Wisconsin residents.

The Fox River Cleanup

I am here to talk about the Fox River clean-up. Let me begin with a quick review of history, which I think will help explain how we got here today.

Paper mills have been operating on the banks of the Fox River for more than 150 years, and the paper industry continues to be an important contributor to the state's economy.

In the mid-1950s, a Fox Valley mill began manufacturing carbonless copy paper that used a PCB coating. As you can imagine, this paper was largely used in offices, and so was reclaimed after use, and then recycled by other mills in the Valley to make paper for other uses.

It is important to understand that the manufacture of this carbonless paper, and the subsequent recycling of used carbonless paper, was conducted in accord with *all*

pertinent laws in effect at the time. In fact, during this period state and federal governments strongly encouraged papermakers and other manufacturers to develop a variety of resource recovery methods under the mantra of "reduce, reuse and recycle."

Beginning in 1971, the paper companies began voluntarily curtailing the recycling of carbonless paper because of growing concerns about PCBs. Nevertheless, the use of this paper has left the paper companies with an obligation to aid in the clean-up of the Fox.

A few years ago, seven paper companies, including Georgia-Pacific, began working in concert with the federal government and the State of Wisconsin to develop a cleanup plan for the Fox River. Based on our work with the government, we believe that remedial costs, damage claims and government oversight costs could exceed \$600 million, perhaps substantially so.

Status of Settlement with Insurers

Naturally, these paper companies looked at the general liability insurance policies they had purchased over the years to determine whether they would cover at least a part of the costs of the Fox River clean-up.

Since mid-2003, six of these companies have been involved in extensive efforts to work out settlements with their insurers. They have participated in dozens of information meetings and negotiations with these insurers. After about a year of such meetings, the parties were nowhere close to settlement and agreed to bring a formal mediator into the process. In the last nine months, the paper companies and the insurers have met at least five times in all-day or multi-day mediation sessions, as well as in numerous small-group sessions, conferences and other related negotiations. To date, we've made very little real progress toward settlement in spite of all this time, cost and effort.

In the weeks leading up to this hearing, there have been a number of false statements and distortions about this mediation process and the outcomes of those negotiations. In particular, the suggestion that a significant number of insurers are reaching satisfactory settlements with the paper companies is simply false. Let me give you a short outline of the status of those negotiations so that everyone on the committee has the same knowledge of what is going on.

To date, ~~Georgia-Pacific~~ has settled with one insurance carrier ... and that agreement occurred more than two years ago. More recently, although talks have continued, we have not been able to reach agreement with any other insurance companies.

As for other Fox Valley paper companies ... **Appleton Paper** entered into one settlement with a small insurer last December... a settlement that is contingent on settlements with all of that insurer's clients. That has not yet happened.

Wisconsin Tissue and some of its carriers have made progress on a conditional settlement through the mediation process. The settlement would be conditioned on Wisconsin Tissue's ability to reach agreement with the various government entities

regarding the Fox River site. All other terms of the insurance settlement would be confidential.

Menasha has no settlements pending.

U.S. Paper has no settlements pending.

NCR has no settlements pending.

To the best of our knowledge, none of the municipalities along the Fox River that could potentially be held liable for cleanup costs have settled with their insurance companies.

So, except for the one small Georgia-Pacific settlement I noted, the insurers for these six paper companies have contributed ZERO DOLLARS under their policies toward the clean-up of the Fox. In that same period, papermakers have paid more than ONE HUNDRED MILLION DOLLARS toward the river clean-up.

I would like to point out that one other Fox River paper company, Glatfelter, chose to litigate rather than participate in the insurance mediation. Although I understand Glatfelter has made compromise settlements with some insurers, that litigation continues after two years.

It has certainly absorbed a lot of time, money and energy that would have been better used to clean up the river.

Another lawsuit filed recently in Brown County Circuit Court by three insurance carriers against one of these companies and 22 other insurance companies provides a revealing picture of how the insurance industry views this process -- in papers filed with the court, the carriers literally claim that they have absolutely no duty to defend or indemnify the papermakers under the insurance contracts they issued for PCB discharges into the Fox River.

That lawsuit -- *Columbia Casualty Company, PLC, et al vs. Arjo Wiggins, PLC, et al* -- is reason alone for you to support the Fair Claims Act. In essence, this lawsuit shows that insurance carriers are looking for every reason imaginable **NOT** to honor existing policies with papermakers for cleanup efforts -- and intend to fight that obligation -- raising every argument their lawyers can think of -- case-by-case, year after year, in Wisconsin's courts.

Effect of the Fair Claims Act

The obligation of insurance companies to pay for environmental cleanup costs for past events was decided by the Wisconsin Supreme Court in ***Johnson Controls v. Employers Insurance of Wausau***, which you will hear more about from Paul Kent. The Court expressly held that environmental cleanup costs are covered "damages" under a general liability policy, but it did not address how to allocate those costs among multiple insurers.

It is interesting to note that the Court decided *Johnson Controls* over two years ago, and the insurance companies in that case still have not paid the policyholders. I believe that the primary remaining obstacle to payment in that case, as in our case, is the allocation issue. As one of the papermakers directly involved in the Fox River cleanup effort, Georgia-Pacific supports the Fair Claims Act because we believe it is the fairest and most responsible resolution of the allocation issue, and the most expeditious way to get the river cleaned up.

This legislation will require the insurance industry to pay its fair share by doing the following three things.

FIRST, it clarifies the meaning of the term “all sums” in general liability policies, and simplifies the collection process of insurance money from multiple insurers who provided coverage for the same environmental problem – in this case, the Fox River.

The language in these “all sums” policies was, of course, drafted by the insurance industry to begin with. In their policies, each insurer literally promised to pay “all sums” that its policyholder becomes liable to pay because of property damage during the policy period. The Fair Claims Act clarifies that language by requiring each carrier on the risk during continuing property damage to be responsible, jointly and severally, for “all sums” the insured company is liable for as a result of that property damage.

The reason each paper company has several insurers involved in this issue is because the Fox River pollution damage occurred over a period of years. It is common for a business or property owner to pay premium dollars to a variety of different carriers over time for the same kind of insurance. Insurers then argue about how to allocate responsibility among themselves for which portion of the claim each has to pay. The unfortunate truth is that most of the carriers in the Fox River matter have used this argument as a basis for not paying **at all**.

Contrary to the suggestions of some insurers, the Fair Claims Act does not make one insurer liable for the obligations of another. It simply makes each carrier liable to pay the full extent of its obligations under its policy language – to pay, as its own policy agrees to pay, “all sums” that the paper company insured is obligated to pay to clean up the Fox.

I should point out that the Act does not change any policy – as I say, policies already include the obligation to pay “all sums” – but insurers are using the allocation issue as a shield against stepping up to their liabilities.

The rights of the insurers to seek contribution from other responsible carriers, which is how they normally resolve this allocation question, are carefully preserved. The Act simply says that it is up to the insurers to resolve the allocation issue. It would shift the burden of the allocation dispute from the papermakers to the carriers, where it should be in the first place. In the process, litigation can be prevented; claims can be made and resolved in a timely manner; and cleanup will continue to move forward.

THE SECOND THING the Fair Claims Act does is protect a public resource – the Fox River -- under Wisconsin's Public Trust Doctrine. The Wisconsin Constitution, through the Public Trust Doctrine, imposes an affirmative obligation on the State and its Legislature to both preserve and promote the public trust.

We firmly believe that this legislation promotes the public trust. When environmental contamination affects public trust waters like the Fox River, the State, through its Legislature, has an obvious interest in ensuring that the waters are promptly cleaned up.

And **THREE**, the Act protects local governments that have the same type of insurance policies as paper companies by reducing their exposure to lawsuits. If insurers refuse to pay their fair share of the Fox River clean-up, municipalities may be held responsible for some cleanup costs. Moreover, without this legislation, they will face the same coverage disputes with their insurers that the paper companies have been wrestling with for years.

AB 222 is constitutionally sound. Contrary to claims by the insurance industry, the Fair Claims Act does not retroactively change any of the provisions of an existing contract, nor does it release policyholders from any of their existing obligations under these policies.

Instead, it confirms the rights provided by the plain language of the insurance policies and provides a procedure for enforcing those rights. The constitutionality argument is particularly compelling given the constitution's mandate that the State protect and promote the Public Trust.

To date, the "all sums" approach has been confirmed in appellate court decisions in a majority of states that have considered the issue. None of these decisions rewrote existing policies. To the contrary, the courts emphasized that the "all sums" resolution merely applied the plain meaning of the policies, in effect holding that it was the alternative theory advanced by insurers that would constitute a change in the policies as written. Additionally, Oregon has codified elements of an "all sums" method by legislation. You will be hearing more on this later from an environmental expert who was intimately involved with that bill.

Finally, it is worth noting that only two insurance carriers in Wisconsin are actually affected by this law. The majority of the insurance coverage applicable to the Fox River was written by insurers with no significant presence in Wisconsin, many of them non-U.S. companies.

Summary

As we discuss the fine points of this legislation, let's not lose sight of the big picture. Today, more than ever, paper companies are under intense competitive pressures. There is a constant drive for more efficiency in the face of high energy costs and foreign competition. In spite of the excellent facilities Georgia-Pacific has in Wisconsin, we continue to have to reduce costs, and recently, that has meant the loss of jobs.

Maintaining the status quo on the fair claims issue could make the situation worse. The simple fact is that every dollar the papermakers have to pay because their insurers won't is one less dollar they have to invest in their mills and the future of the papermaking industry in Wisconsin.

Some have argued that this issue should be left to the courts. I am convinced that if the allocation question is left to the courts, it will take years, if not decades, as well as tens of millions of dollars in legal fees from policyholders, before insurers will pay the share of the Fox River clean-up covered by their policies.

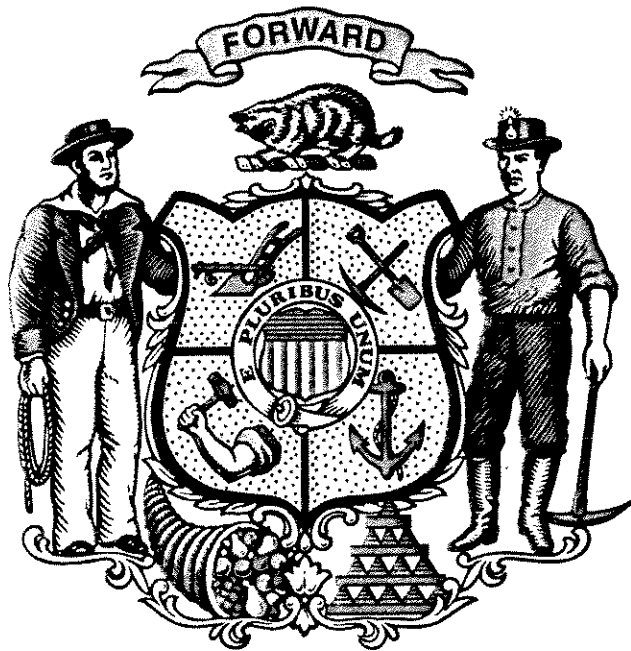
What this means is that the Wisconsin DNR, the EPA and the paper companies will not be able to reach an expeditious agreement on the Fox River clean-up, and will likely result in paper companies paying costs their insurers long ago agreed to bear.

Given these circumstances, I urge the Legislature to use this opportunity to confirm the responsibilities of insurance companies to pay their share of environmental cleanup costs for properties in Wisconsin, including the Fox River. When that happens, all the people of Wisconsin will benefit.

With this bill, critical environmental cleanup projects like the Fox River won't be delayed because of a lack of clarity over the insurance industry's obligation to cover damages of general liability policyholders. The result is that communities and their residents will be able to enjoy the Fox River like never before.

In closing, let me say that the time for action on this matter is now. The prompt clean-up of the Fox River is important to all Wisconsin citizens. We at Georgia-Pacific believe that passage of this legislation is essential if that goal is to be achieved.

Thank you. I will be happy to answer any questions.





Arjo Wiggins Appleton

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AB 222
File

No Date??

Dear Legislature:

Much has been written in the press about the “all sums” legislation sponsored by Sen. Robert Cowles and Rep. Dean Kaufert, much of it at the instigation of the insurance industry. Unfortunately, a lot of what has been written has contained factual inaccuracies, misrepresentations and unfounded conclusions. I would like to correct at least some of these.

Firstly, the bill is not simply about the Fox River. It addresses all “navigable waters” in Wisconsin. It is just that the Fox River clean up is likely to be the first environmental site in Wisconsin which will benefit from this legislation.

Secondly, the companies being called upon to pay for the clean-up of the Fox River have, in most cases, inherited this liability – they did not “release toxic chemicals into the Fox River” as is so often stated. Due, however, to the vagaries of federal law they have been declared by the federal government to be liable to pay for the clean up of the river on a joint and several basis. *Tough luck for the companies.*

Thirdly, in years previous, but ending in 1986, those companies purchased Comprehensive General Liability insurance policies which state that the insurer will pay “all sums which **the insured becomes legally obligated to pay**”.

Having been declared by the federal government to be liable for the clean up of the Fox River, **the companies are now legally obligated to pay** for the clean up. This decision by the federal government cannot be challenged until the clean up is complete.

Fourthly, for many years these policies were not required to respond to such claims. However, a decision of the Wisconsin Supreme Court in 2003 reversed that court’s earlier ruling and the policies purchased by the companies are now legally obligated to respond. *Tough luck for the insurers.*

Fifthly, when a claim such as this is made, that is, when it relates to a period of time longer than one year, the first issue in the insurers’ minds is which year should pay. Fortunately, in Wisconsin, all the insurance purchased over the relevant period (which, in the case of the Fox River, runs from 1954 to 1986) is required to respond; it is just a question of when and to what extent.

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Does one insurer pay and then recover from the other insurers or does the insured have to chase each insurer for some prorated portion of its loss? Insurers have seized on this question as an excuse to pay nothing. The Cowles/Kaufert bill removes this question as an impediment to prompt payment under the policies.

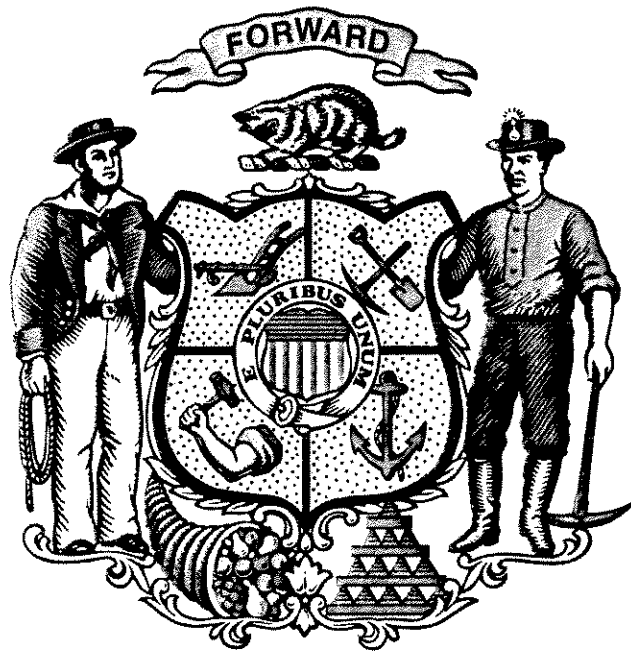
This “allocation” of the liability among insurers has not been decided by Wisconsin appellate courts. Insurance law is a matter for the states. In some states the law is “all sums” i.e. the insurer pays and recovers from the other insurers. In some states the law is “pro-rata” (which may take one of several forms) i.e. the insured has to pursue each insurer for its share of the liability.

Sixthly, as the law regarding “allocation” is undecided it is not inappropriate for the Legislature to step in and decide this crucial aspect of insurance law. We could wait for the courts to rule on this issue, but why? Some states have allowed this issue to be resolved by the courts, with the inherent risk that the rulings change when appealed, and others, like Oregon, have resolved the issue definitively through legislation.

The insurance industry has been its own worst enemy. Individual insurers have denied their duties to defend. Individual insurers have denied any obligation to pay towards the cost of cleaning up the Fox River and, rather than pay, have enlisted the insurance industry and its surrogates to deflect any criticism of their actions. They have introduced irrelevancies to the debate (that the companies are “multi-nationals” – as if the insurers are not, AIG, ACE, Allianz, the London market, Royal and many others). They have sought to scare you by stating that premiums will go up in Wisconsin (why? – given that these policies were issued 19 or more years ago and that the insurers should be carrying adequate reserves against their liability). And they dare to argue that it is the companies, not they, who are dragging their feet despite the fact that the companies have paid around \$130 million in relation to the Fox River with not one cent of this being paid pursuant to the terms of the policies bought by those companies.

The Cowles/Kaufert bill may not prevent this matter being litigated in court (the insurers are likely to litigate every aspect of this issue given the sums involved). However, it will provide guidance to the judges as to the will of the people of the State of Wisconsin, as reflected by their elected representatives, on an important question of public policy.

Chris Gower
Director of Legal Affairs



**Fair Claims Act
Testimony of Paul G. Kent
Before the Assembly Committee on Insurance**

Found In The
AB 2222
File
No Date ??

Thank you for the opportunity to testify before you on this important bill. The purpose of my testimony will be to highlight several of the key legal issues associated with the bill.

Basic Summary.

The Fair Claims Bill provides that where an insurance company has issued a comprehensive general liability (CGL) policy in which it agrees to pay all sums as a result of a covered risk, that the insurance company will pay up to the policy limits regardless of whether the insured has other insurance that covers the damage. It is a way of requiring payment to the insured up front, and allowing the insurance companies to sort out issues of allocation and contribution later. It asks insurance companies to pay what they have already agreed to pay.

This bill is limited to environmental claims arising from the presence of pollutants on the bed or banks of navigable water. It would include but not be limited to the Fox River cleanup.

The following are several key legal concepts that have shaped the bill.

Liability of Insurance Companies for Environmental Claims Has Been Established

The liability of insurance companies to pay for environmental clean up costs for past events was decided by the Wisconsin Supreme Court in *Johnson Controls v. Employers Ins. Of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257. This bill does not create liability for these events; that was already decided by the Supreme Court .

In issuing its ruling in *Johnson Controls*, the Court recognized that it was appropriate for the insurance industry to bear the costs of unexpected environmental liability such as that imposed by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) because, "... CGL policies were designed precisely to cover known and unknown hazards." The Court went on to explain that, "When CERCLA was adopted, it created strict liability not based on fault, made responsible parties joint and severally liable and imposed liability retroactively."

It is also important to understand that *Johnson Controls* and this bill is only applies to CGL policies written before 1986. Because of cases around the country finding liability for environmental claims, in 1986 the insurance industry adopted what became known as the "absolute" pollution exclusion. As a result, this legislation will not affect current policies or premiums.

The Proposed Bill Does Not Change Policy Language

The standard CGL policy language provides 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." The legislation does not change this language.

What the bill does is establish a procedure for the insured where there is an occurrence that spans more than one policy period or policy and where the losses are not readily divisible. The bill simply provides that the insurer cannot argue that its liability should be pro-rated because the occurrence extends to other policy periods. Insurers have argued for pro-rata allocation, but it is not based on policy language. The insurers' obligation is to pay up to their policy limits and then equitably settle accounts among them.

It is important to know what this bill does not do.

- This bill does not change contract language. It merely enforces the language already in the policy.
- This bill does not change any liability limits or any other policy terms or defenses available to insurance companies.
- This bill does not change the rules for allocating claims between insurance companies. The bill expressly acknowledges and protects claims for contribution among insurers.

The Role of the Legislature Instead of the Courts

The policy reason for legislative resolution of this issue rather than judicial resolution is that it can be accomplished more quickly and definitively. There are also legal reasons why such an approach is appropriate for the Legislature.

The Fox River cleanup is not simply a dispute involving private property interests; it also involves a public interest, the navigable waters of the State. The Public Trust Doctrine in the Wisconsin Constitution provides that the navigable waters of the state are held in trust for the public. The Trust Doctrine is not only a source of legislative authority to act, but also a requirement to act. As the Wisconsin Supreme Court noted in *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W.2d 820 (1927), "[T]he trust being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it."

This bill is limited to environmental claims where the pollution is on the bed or banks of navigable waters and within the scope of the public trust doctrine. As for other environmental claims, the bill provides that there is no inference that the common law is different than the approach taken by this bill.

Conclusion.

This bill is designed to provide a mechanism to have insurance proceeds paid quickly to ensure prompt clean up of the Fox River and other waters subject to the Public Trust Doctrine. In doing so, the bill does not create liability; the Supreme Court has already established liability. It simply requires insurance companies to pay what they have agreed to pay.

I would be glad to answer any questions.