

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)  
\*\*

➤ Miscellaneous ... Misc

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**(un-dated documents)**

## INSURING THE PAPER INDUSTRY: The History—The Impact

PRIOR TO 1986, courts recognized that Comprehensive General Liability (CGL) policies cover environmental liability for most sites. This situation raised concerns and the industry reacted by adopting an *absolute exclusion* for any environmental liability.

AFTER 1986, there has been no environmental coverage for CGL policies, and the insurance companies have been attempting to narrow their liability under pre-1986 policies. For instance, insurance companies argued that cleanup costs were not damages, a position rejected last summer by the Wisconsin Supreme Court in the *Johnson Controls v. Employers Insurance of Wausau* case.

The proposed Fair Claims Act will have a *limited* impact on insurance companies because it won't affect any policy written after 1986. For policies in effect before 1986, when the insurance industry covered environmental liability, insurance companies would be obligated to pay the claim.

### HISTORY IN DETAIL

#### Before 1986

- CGL policies, like any insurance policies, have items that are excluded from coverage. Prior to 1986, most CGL policies contained a "pollution exclusion" that contained an exception allowing coverage for pollution events that were "sudden and accidental."
- After Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980 and suits were brought seeking coverage for CERCLA liability, several courts began interpreting the terms "sudden and accidental" to include CERCLA liability.
- The insurance industry adopted what became known as the "absolute" pollution exclusion. In other words, there was no longer any "sudden and accidental" exception or any other exception to the pollution exclusion.

#### After 1986

As a result of these events, there is no coverage. The insurance industry has tried to focus the debate in the courts (and legislatures) over the scope of the pre-1986 language.

- The insurance industry, having lost the "sudden and accidental" argument, turned to other terms in the policy to exclude or limit coverage. For instance, since policies only required the payment of "damages" the insurance industry argued that environmental cleanup costs were not damages.
- In *City of Edgerton v. General Case, Co.* 184 Wis.2d 750, 517 N.W. 2d 473 (1994), the Wisconsin Supreme Court sided with the insurance industry. It was that issue that was reversed by the Wisconsin Supreme Court on July 11, 2003 in *Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.



## CHRONOLOGY OF EVENTS

- 1853** Paper mills begin to locate along the Lower Fox River.
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# FAIR CLAIMS ACT

## Legislative Fact Sheet

### WHAT THE BILL DOES

**CLARIFIES** the responsibility of insurance companies to pay their fair share of environmental cleanups.

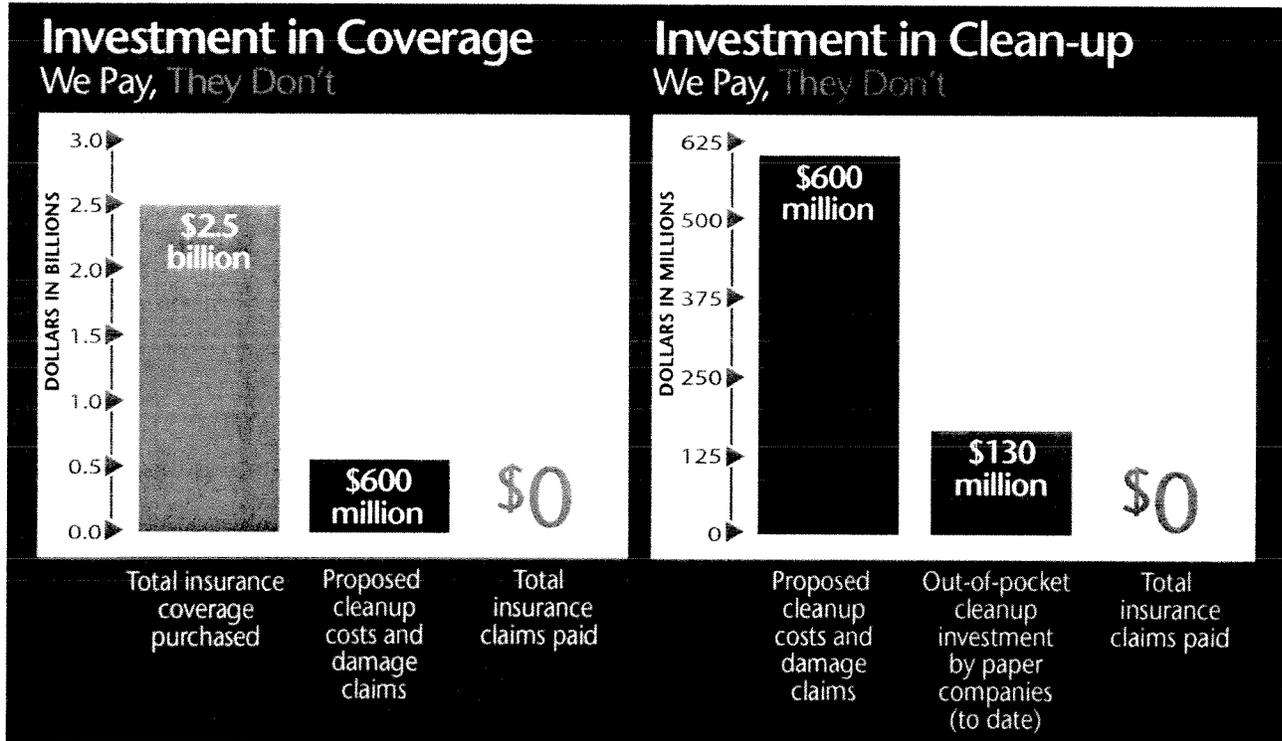
**SIMPLIFIES** the collection process of insurance money from multiple insurers who provided coverage for the same environmental problem.

**EXPEDITES** the cleanup process.

**PROTECTS** the public resources under Wisconsin's Public Trust Doctrine.

### THE SITUATION

The paper industry, which has made significant investments in cleanup efforts, and insurance carriers have been in on-going negotiations the past year. **No agreement has been reached. Negotiations have stalled.**



Note: The \$600 million is based on government estimates of remedial costs and NRD claims and does not include past or future transaction costs. It is possible that the government has underestimated the remedial costs.

These statistics do not include a limited number of insurance carriers that have settled with paper companies and do not include the paper companies' defense costs to date.

### LITIGATION VS. LEGISLATION

**LITIGATION** will delay cleanup for years as insurance companies fight their responsibility to cover the paper companies (the insured) one case at a time. As a result, **cleanup will take longer and cost more.**

**LEGISLATION** will force resolution and expedite cleanup by clarifying the responsibility of multiple insurance companies and simplify the payment process. As a result, **cleanup will start sooner and cost less.**



## PROTECTING PUBLIC RESOURCES UNDER THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine in the Wisconsin Constitution provides that all navigable waterways are held in trust by the State of Wisconsin.

- The Legislature, as the State's representative, must not only take action to prevent endangerment of the trust, but it must also take affirmative steps to protect the trust.
- When environmental contamination affects public trust waters, the State has an interest in ensuring that the waters are promptly cleaned up.

## PROTECTING LOCAL GOVERNMENT

Local governments have the same type of insurance policies as paper companies. The Fair Claims Act reduces the exposure to lawsuits for local government.

If insurers refuse to pay their fair share of the Lower Fox River cleanup effort, they will be exposed to potential lawsuits and may be forced to contribute to the cleanup.

### Why?

- Some paper companies had no wastewater treatment plants and relied on municipal plants to remove pollutants from their effluent.
- Communities may be held responsible for some PCB (polychlorinated biphenyl) cleanup costs because of discharge from sewage treatment plants and dredging activities.

## THE LOWER FOX RIVER The Cleanup Effort

Paper companies have already committed \$130 million to cleaning up the Lower Fox River.

Insurers are trying to avoid paying coverage in the cleanup effort, claiming current law is ambiguous regarding payment methods, in spite of insurance companies accepting billions of dollars in aggregate coverage from paper manufacturers for decades.

Historically, state and federal officials urged the paper industry to produce more paper with recycled-fiber. This carbonless paper was manufactured using a PCB coating in accordance with laws in effect at the time. It was later learned the process exposed the Lower Fox River to PCBs.

## PAPERMAKING IN WISCONSIN

- Directly employs more than 50,000 workers
- Indirectly employs thousands more in related industries
- Number-one producer in the nation
- \$12.4 billion in annual paper shipments
- \$16.8 billion in combined shipments of paper, lumber and other wood products annually
- Leader in environmental protection and an outstanding corporate citizen

## PASSAGE OF THE FAIR CLAIMS ACT

would allow this highly competitive global industry to meet tomorrow's challenges and opportunities by encouraging paper companies to focus their resources now on equipment, facilities and expanding production.



## Frequently Asked Questions

### 1. What is the Fair Claims Act?

The Fair Claims Act is a bill intended to make clear the responsibility of insurance companies to pay their fair share of environmental cleanups, and to simplify for policyholders the process of collecting from multiple insurers responsible for the same environmental problem, thereby expediting the cleanup process.

### 2. Who benefits by passing the Fair Claims Act?

We all benefit. Critical environmental cleanup projects like the Lower Fox River cleanup have been delayed because of a lack of clarity over the insurance industry's obligation to cover damages of general liability policy holders. Passage of this bill means cleanup projects can move forward and communities benefit. Failure to pass the bill may force local governments to contribute to cleanup costs if insurers refuse to pay their fair share of the cleanup effort.

### 3. Why legislate versus litigate? Is this issue better decided in courts?

Litigating this issue in the courts could take years and the public should not be forced to wait. Communities have waited long enough and the public interest is served by the Fair Claims approach because it makes additional funding available more quickly for cleanups in Wisconsin. Also, the Wisconsin Legislature has a duty to act under the Public Trust Doctrine to protect public trust resources like the Fox River. If it is left to the courts to decide, cleanups will likely be further delayed or even halted.

### 4. What is the economic impact of passing this legislation?

Passage of the Fair Claims Act means insurers cover the insured and pay their fair share. Economically, the Act would allow this highly competitive papermaking industry, with its 50,000 workers and thousands of other employees in related industries, to meet tomorrow's challenges and opportunities by allowing paper companies to focus their resources now on equipment, facilities and expanding production. Communities get their contaminated sites cleaned up more quickly, creating economic and recreational opportunities.

### 5. What is the environmental impact of passing this legislation?

Critical cleanup projects can move forward on a faster pace. These cleanups of contaminated sites would be expedited because the bill will clearly set forth the obligations of insurers to pay environmental claims. The clarity in law prevents time consuming, costly litigation between policyholders and insurance carriers.

### 6. What happens if this bill is NOT passed?

If the bill is not passed, there likely will be further delays to cleanup efforts as the parties go to court, wasting substantial resources to resolve insurance-related issues as opposed to focusing on cleanup issues and allowing companies to be more efficient and competitive.

### 7. Would the law affect existing insurance contracts, outside the Fox River Valley problem?

The law would apply to environmental claims related to contaminated sites in Wisconsin that, like the Fox River, fall under the Public Trust Doctrine.



**8. Will the change in law actually result in resolution of cleanup issues or just lead to more litigation between policyholders and carriers about the meaning, intent or constitutionality of the new law?**

The new law will help in the resolution of cleanups by clarifying the meaning of the term "all sums" in Comprehensive General Liability policies. Currently, policyholders and insurance carriers interpret the meaning differently, leading to litigation when environmental claims are made under such policies. In particular, environmental claims typically occur over multiple insurance policy years, leading to disputes regarding which policies pay all, none or some portion of the claims.

By passing this law, the ambiguity in the interpretation of "all sums" will be removed. Thus, litigation is prevented, claims are paid in a timely manner and cleanups can continue to move forward.

**9. If the new law were passed, how would the cost of cleanups, such as the Fox River, be paid?**

Identified insurance companies would pay defense and indemnity costs for environmental property damage first, and then seek reimbursement from other insurers who may have also provided coverage for the same claim. The amount paid would be based on levels of liability and policy limits.

**10. Would this proposal have a long-term detrimental effect on Wisconsin insurance companies or threaten their solvency?**

Under the Fair Claims approach, any insurer's right to obtain contributions from other insurers whose policies are applicable is preserved. But these disputes don't delay payment of the claim or funding of the cleanup.

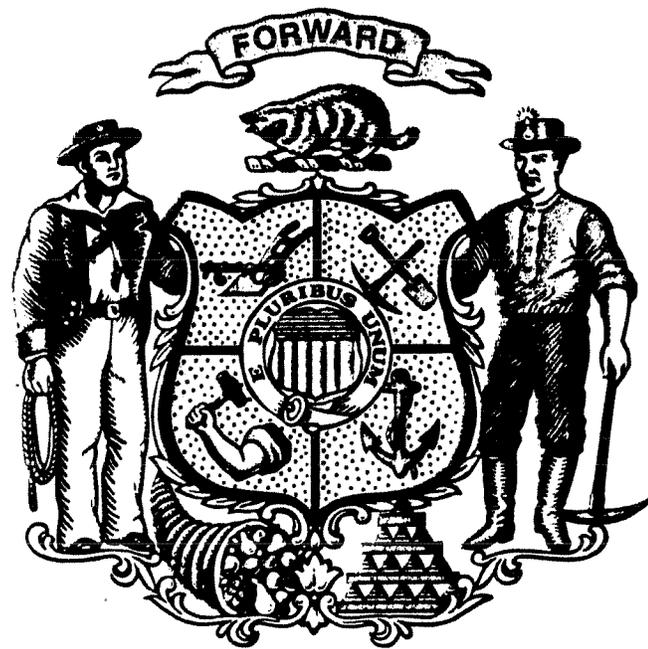
**11. Does this legislation violate the U.S. and state constitutions, which protect against interference by the Legislature in an existing contract?**

This claim is unjustified. This bill would not change any of the provisions of an existing contract, nor does it release policyholders from an existing obligation. On the contrary, the legislation enforces existing contracts by clarifying the language and the obligations of insurers. Also, the legislation is consistent with constitutional provisions of the Public Trust Doctrine.

**12. How have other states addressed this issue?**

Eight states (WA, CA, IL, IN, OH, PA, DE and MA) have required the "all sums" allocation of environmental claims through state Supreme Court action. One state, Oregon, has required the "all sums" allocation method by statute. In Wisconsin, insurers are refusing to pay environmental claims because the issue has not been addressed by Wisconsin's Supreme Court or by Wisconsin statutes.





# Papermaking in Wisconsin: A Proud Tradition

Wisconsin is the **NUMBER ONE** papermaking state in the nation and has been the leader for 50 years.

## HIGH-PAYING JOBS

- Approximately 40,000 men and women are employed by pulp, paper and allied firms.
- This represents 1 in every 13 manufacturing jobs
- Papermakers are the highest paid manufacturing workers in the state, earning over \$50,000 annually
- 50 percent of jobs are in pulp and manufacturing-related activity
- 50 percent are in operations that transform jumbo paper rolls into a wide variety of paper products

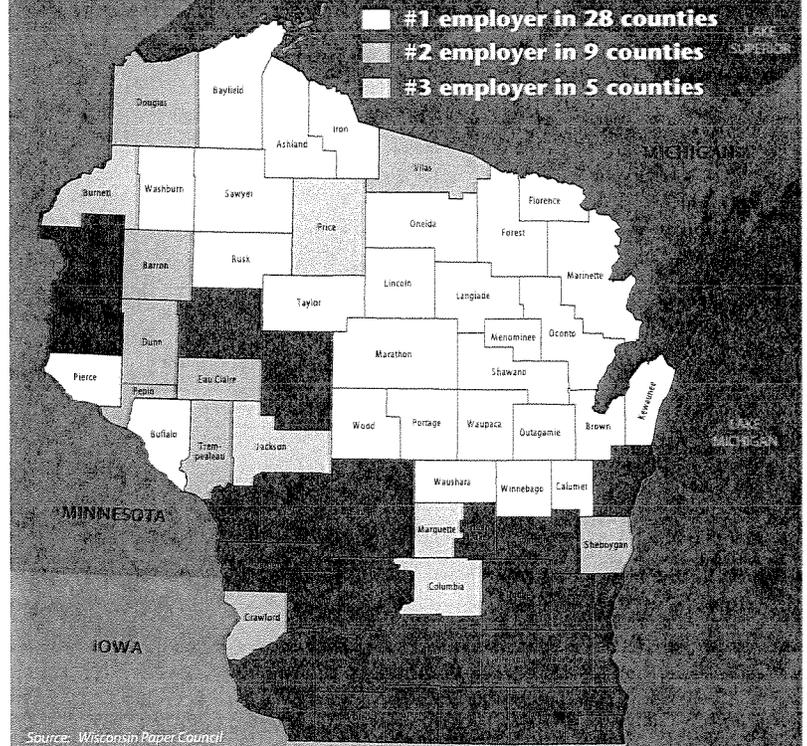
## ECONOMIC IMPACT

- Value of shipments from Wisconsin paper companies tops \$13.0 billion annually
- Combined shipments of paper, lumber and wood products valued at nearly \$17.7 billion
- Over \$2 billion in wages earned annually by the industry's workforce

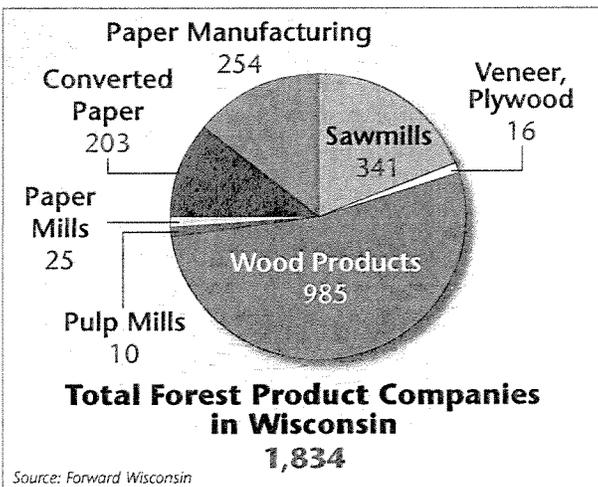
## PRODUCTS

- Approximately 28 companies operate about 45 mills in Wisconsin
- Half of all production is related to printing and writing grades
- Tissue, paperboard and paper products account for the rest
- More than 5.3 million tons of paper and over 1.1 million tons of paperboard are produced in Wisconsin
- More than 2.7 million tons of pulp is produced here to supply papermaking operations

## Paper and Forest Products Companies Are Leading Employers in 42 Counties



**42 out of 72 Counties in Wisconsin**



## DID YOU KNOW...

- Wisconsin's forest products industry employs more than 100,000 people with papermaking representing the largest component.
- More than 52,700 printing firms, one half of which are located in Milwaukee and southeastern Wisconsin, provide an additional \$1.8 billion in wages annually.
- Wisconsin pulp, paper and allied firms provide more than 40,000 high quality jobs in which the pay is 60-percent higher than the state average.





# Good for Wisconsin... Good for the Fox Valley!

Georgia-Pacific is one of the world's leading manufacturers and marketers of tissue, packaging, paper, building products and related chemicals.

## IN WISCONSIN, GEORGIA-PACIFIC:

- Operates 7 facilities
- Employs more than 4,000 people
- Generates \$238 million in taxable wages

## A LOOK AT OUR FACILITIES

	Products	Brands	Employees
(Day Street)	Consumer Products Airlaid Paper	Quilted Northern®, Sparkle®, Vanity Fair®	741
(Broadway)	Consumer Products Airlaid Paper	Angel Soft®, Green Forest®, Mardi Gras®, So-Dri®, Soft 'n Gentle®	2,530
Phillips	Business Office	Support for North American consumer products	543
Green Bay	Technical Center	Development & testing of Georgia-Pacific's North American consumer products	160
Neenah	Corrugated Board	Corrugated board	80
Oshkosh	Corrugated Products	Corrugated products	129
Sheboygan	Hardboard	Tileboard, paneling	87

**4,270 employees in Wisconsin**

## GEORGIA-PACIFIC INVESTS IN WISCONSIN

GP invests millions of dollars each year in protecting the environment, ensuring public and employee safety and supporting local organizations that are committed to improving the quality of life.

**CAPITAL INVESTED** — \$1.2 billion for land, buildings, manufacturing equipment, furniture and fixtures

**CAPITAL ADDITIONS** — \$131 million, or an average of \$43.7 million annually, since 2002

**PURCHASES OF GOODS AND SERVICES** — \$80 million goes into the Wisconsin economy through purchases of local goods and services with local businesses

## GEORGIA-PACIFIC BELIEVES IN WISCONSIN COMMUNITIES

GP commits time, financial resources and products to local organizations through corporate programs and the Georgia-Pacific Foundation.

Since 2002, Georgia-Pacific has awarded:

- \$354,420 in grants to educational and charitable organizations in Wisconsin
- \$120,000 in scholarships, with 15 at \$8,000 each
- \$202,073 in matching gift contributions

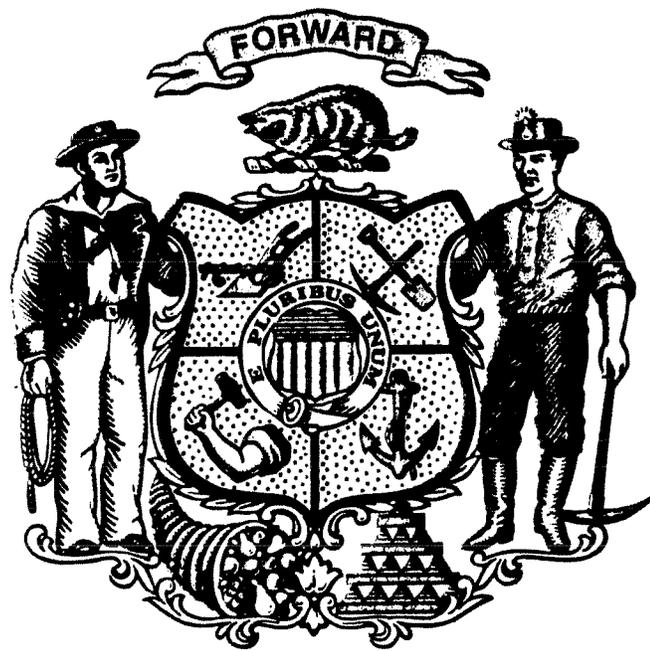
**GIVING BACK  
TO THE  
FOX VALLEY**

### Foundation Grants:

- United Way
- Boys and Girls Clubs
- Mid-State Technical College Foundation

### Green Bay Facilities Support:

- Weidner Performing Arts Center
- The Green Bay Symphony Orchestra
- The Boys and Girls Clubs of Green Bay
- United Way



When the insurance  
industry comes calling about  
the Fair Claims Act...



## THE FAIR CLAIMS ACT:

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## **ASK THE BIG INSURANCE COMPANIES...**

**How many requests for coverage from policyholders, that are paper manufacturers, does your Company have?**

(Only two Wisconsin companies are involved.)

**How much money has the insurance industry collectively contributed to the cleanup since the public became aware of the proposed Fair Claims Act legislation?**

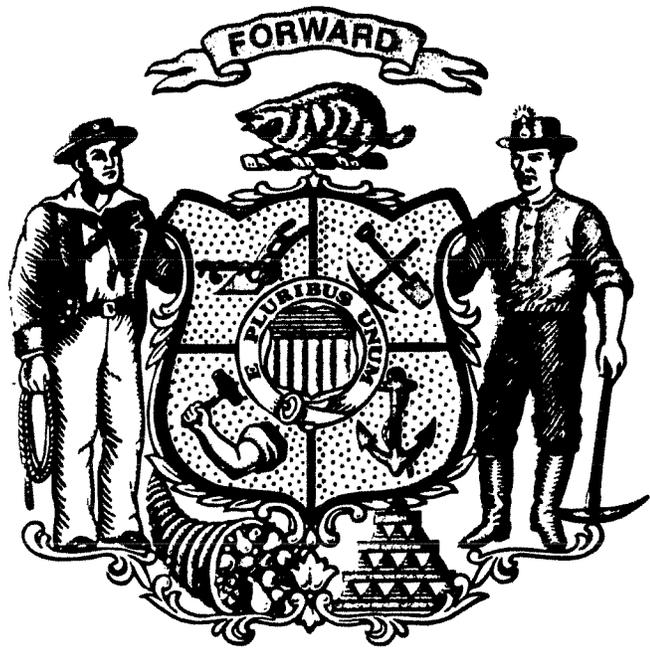
(Prior to the public debate, the insurance industry had contributed ZERO dollars; papermakers have contributed \$130 MILLION.)

**If a Company has paid insurance premiums year after year, isn't it reasonable for them, as a policyholder, to assume that its carriers have an obligation to promptly respond to their requests for coverage?**

(The Wisconsin Supreme Court and Wisconsin case law obligates an insurance company to respond in good faith to the policyholder. While in some instances an insurance company may dispute coverage, they must also continue to defend the policyholder until the dispute is resolved. This is similar to auto insurance — if you get in an accident, you expect the insurance company to respond to the claim.)

**What's your reaction to language in a pending lawsuit in Brown County that states the insurance industry has "no liability" in the Fox River cleanup effort?**

(If Fair Claims Act legislation is not enacted and insurance companies fail to provide any meaningful settlement offers . . . Papermakers might be forced to sue or be sued by their insurance carriers. The suit already filed will be joined by many more like it; involving a multitude of parties, millions of dollars spent on litigating rather than settling and worse yet, years of additional delay.)



# FAIR CLAIMS ACT

## Myth vs. Fact

The insurance industry and its lobbying groups have circulated materials with many misleading statements about the Fair Claims Act and what it does to keep from having to fulfill the insurance industry's responsibility to pay.

### MYTH

**The Fair Claims Act is an unconstitutional effort by polluters to try and rewrite pre-existing contracts for their benefit.**

**The Fair Claims Act will stall cleanup operations because of the many constitutional challenges, lawsuits and countersuits by lawyers for paper companies and insurance companies.**

**The Fair Claims approach is unfair to Wisconsin consumers because insurance companies would end up passing along the cost of higher insurance premiums.**

**The Fair Claims Act is without legal or legislative precedent in the United States.**

**The total price tag for the cleanup is estimated to be hundreds of millions of dollars and the paper companies are trying to avoid their responsibility to pay.**

### FACT

To the contrary, the Fair Claims Act merely codifies what many courts have stated to be the plain meaning of the insurance industry's standard-form policies. The contract clause of the federal constitution has not been an issue in states that have adopted the "Fair Claims" approach, either by legislation or through the courts. The proposed environmental insurance allocation legislation does not render the provisions of an insurance policy invalid, nor does it release policyholders from their obligations.

State and federal officials urged paper companies to produce more paper with recycled fiber. As a result, carbonless paper was manufactured using PCB coating in accord with laws in effect at the time.

The legislation's intent is to minimize incentives for delay and costly, unnecessary litigation clogging Wisconsin's courts. The insurance industry however, has vowed to fight the Fair Claims Act if it ever passes the Legislature. Local governments have been threatened with lawsuits and may be forced to contribute to cleanup costs if insurers refuse to pay their fair share in the Lower Fox River cleanup effort.

A very small number of insurance companies and insurance policies will be affected. The Fair Claims Act only applies to (1) Comprehensive General Liability policies; (2) those CGL policies issued before 1986; (3) pre-1986 CGL policy claims involving environmental matters. Fair Claims will assure fair treatment of policyholders and allow paper companies to focus their resources on running their businesses rather than litigating with insurers.

Eight states (WA, CA, IL, IN, OH, PA, DE and MA) have required the "all sums" allocation of environmental claims through state Supreme Court action. One state, Oregon, has required the "all sums" allocation method by statute. In Wisconsin, insurers are refusing to pay environmental claims because the issue has not been addressed by Wisconsin's Supreme Court or by Wisconsin statutes.

The paper companies have already invested \$130 million in the cleanup effort. The paper companies are requesting that the insurers honor their obligations under the insurance policies purchased by the paper companies to cover some of the costs.

The issue really is about insurance companies not wanting to pay what they owe for claims against policies they issue. The insurance companies are contractually obligated to indemnify the paper companies under the terms of the Comprehensive General Liability policies in effect with the pollution damage occurred.



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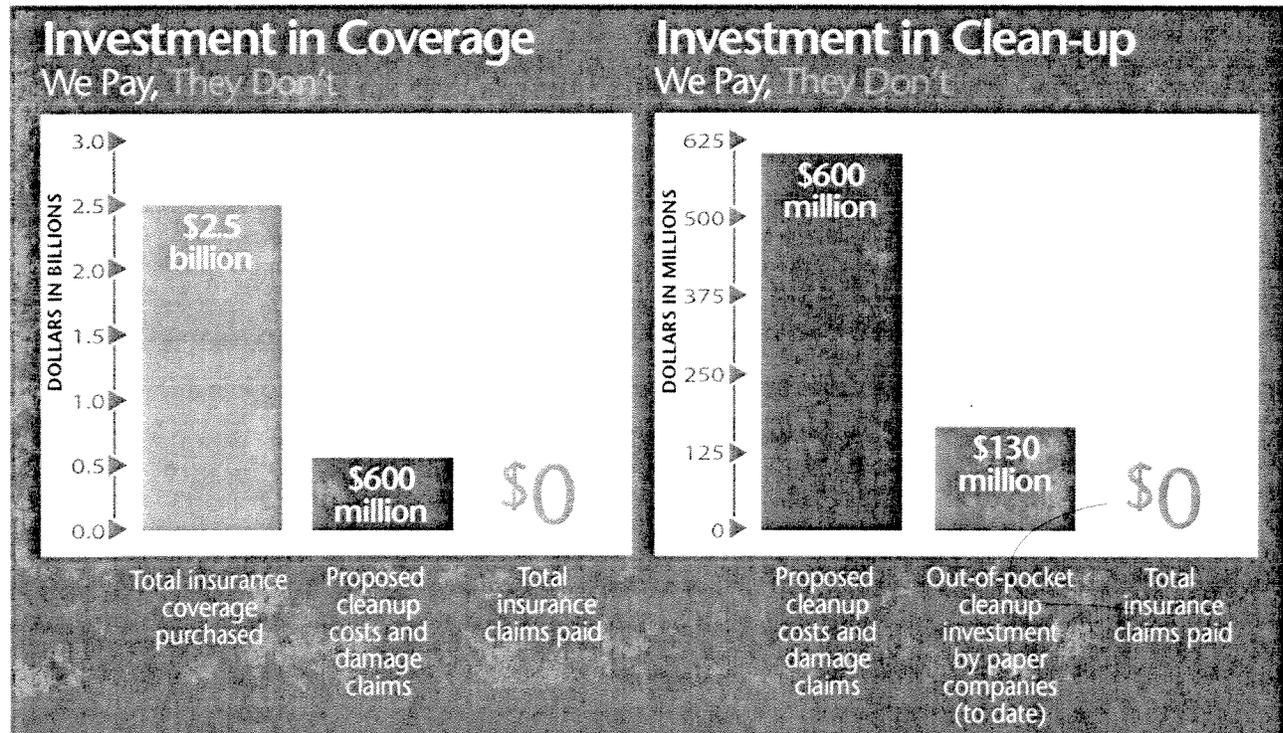
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## PASSAGE OF THE FAIR CLAIMS ACT

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## Frequently Asked Questions

### 1. What is the Fair Claims Act?

The Fair Claims Act is a bill intended to make clear the responsibility of insurance companies to pay their fair share of environmental cleanups, and to simplify for policyholders the process of collecting from multiple insurers responsible for the same environmental problem, thereby expediting the cleanup process.

### 2. Who benefits by passing the Fair Claims Act?

We all benefit. Critical environmental cleanup projects like the Lower Fox River cleanup have been delayed because of a lack of clarity over the insurance industry's obligation to cover damages of general liability policy holders. Passage of this bill means cleanup projects can move forward and communities benefit. Failure to pass the bill may force local governments to contribute to cleanup costs if insurers refuse to pay their fair share of the cleanup effort.

### 3. Why legislate versus litigate? Is this issue better decided in courts?

Litigating this issue in the courts could take years and the public should not be forced to wait. Communities have waited long enough and the public interest is served by the Fair Claims approach because it makes additional funding available more quickly for cleanups in Wisconsin. Also, the Wisconsin Legislature has a duty to act under the Public Trust Doctrine to protect public trust resources like the Fox River. If it is left to the courts to decide, cleanups will likely be further delayed or even halted.

### 4. What is the economic impact of passing this legislation?

Passage of the Fair Claims Act means insurers cover the insured and pay their fair share. Economically, the Act would allow this highly competitive papermaking industry, with its 50,000 workers and thousands of other employees in related industries, to meet tomorrow's challenges and opportunities by allowing paper companies to focus their resources now on equipment, facilities and expanding production. Communities get their contaminated sites cleaned up more quickly, creating economic and recreational opportunities.

### 5. What is the environmental impact of passing this legislation?

Critical cleanup projects can move forward on a faster pace. These cleanups of contaminated sites would be expedited because the bill will clearly set forth the obligations of insurers to pay environmental claims. The clarity in law prevents time consuming, costly litigation between policyholders and insurance carriers.

### 6. What happens if this bill is NOT passed?

If the bill is not passed, there likely will be further delays to cleanup efforts as the parties go to court, wasting substantial resources to resolve insurance-related issues as opposed to focusing on cleanup issues and allowing companies to be more efficient and competitive.

### 7. Would the law affect existing insurance contracts, outside the Fox River Valley problem?

The law would apply to environmental claims related to contaminated sites in Wisconsin that, like the Fox River, fall under the Public Trust Doctrine.



**8. Will the change in law actually result in resolution of cleanup issues or just lead to more litigation between policyholders and carriers about the meaning, intent or constitutionality of the new law?**

The new law will help in the resolution of cleanups by clarifying the meaning of the term "all sums" in Comprehensive General Liability policies. Currently, policyholders and insurance carriers interpret the meaning differently, leading to litigation when environmental claims are made under such policies. In particular, environmental claims typically occur over multiple insurance policy years, leading to disputes regarding which policies pay all, none or some portion of the claims.

By passing this law, the ambiguity in the interpretation of "all sums" will be removed. Thus, litigation is prevented, claims are paid in a timely manner and cleanups can continue to move forward.

**9. If the new law were passed, how would the cost of cleanups, such as the Fox River, be paid?**

Identified insurance companies would pay defense and indemnity costs for environmental property damage first, and then seek reimbursement from other insurers who may have also provided coverage for the same claim. The amount paid would be based on levels of liability and policy limits.

**10. Would this proposal have a long-term detrimental effect on Wisconsin insurance companies or threaten their solvency?**

Under the Fair Claims approach, any insurer's right to obtain contributions from other insurers whose policies are applicable is preserved. But these disputes don't delay payment of the claim or funding of the cleanup.

**11. Does this legislation violate the U.S. and state constitutions, which protect against interference by the Legislature in an existing contract?**

This claim is unjustified. This bill would not change any of the provisions of an existing contract, nor does it release policyholders from an existing obligation. On the contrary, the legislation enforces existing contracts by clarifying the language and the obligations of insurers. Also, the legislation is consistent with constitutional provisions of the Public Trust Doctrine.

**12. How have other states addressed this issue?**

Eight states (WA, CA, IL, IN, OH, PA, DE and MA) have required the "all sums" allocation of environmental claims through state Supreme Court action. One state, Oregon, has required the "all sums" allocation method by statute. In Wisconsin, insurers are refusing to pay environmental claims because the issue has not been addressed by Wisconsin's Supreme Court or by Wisconsin statutes.



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## PROTECTING PUBLIC RESOURCES UNDER THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine in the Wisconsin Constitution provides that all navigable waterways are held in trust by the State of Wisconsin.

- The Legislature, as the State's representative, must not only take action to prevent endangerment of the trust, but it must also take affirmative steps to protect the trust.
- When environmental contamination affects public trust waters, the State has an interest in ensuring that the waters are promptly cleaned up.

## PROTECTING LOCAL GOVERNMENT

Local governments have the same type of insurance policies as paper companies. The Fair Claims Act reduces the exposure to lawsuits for local government.

If insurers refuse to pay their fair share of the Lower Fox River cleanup effort, they will be exposed to potential lawsuits and may be forced to contribute to the cleanup.

### Why?

- Some paper companies had no wastewater treatment plants and relied on municipal plants to remove pollutants from their effluent.
- Communities may be held responsible for some PCB (polychlorinated biphenyl) cleanup costs because of discharge from sewage treatment plants and dredging activities.

## THE LOWER FOX RIVER The Cleanup Effort

Paper companies have already committed \$130 million to cleaning up the Lower Fox River.

Insurers are trying to avoid paying coverage in the cleanup effort, claiming current law is ambiguous regarding payment methods, in spite of insurance companies accepting billions of dollars in aggregate coverage from paper manufacturers for decades.

Historically, state and federal officials urged the paper industry to produce more paper with recycled-fiber. This carbonless paper was manufactured using a PCB coating in accordance with laws in effect at the time. It was later learned the process exposed the Lower Fox River to PCBs.

## PAPERMAKING IN WISCONSIN

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# FAIR CLAIMS ACT

## Legislative Fact Sheet

### WHAT THE BILL DOES

**CLARIFIES** the responsibility of insurance companies to pay their fair share of environmental cleanups.

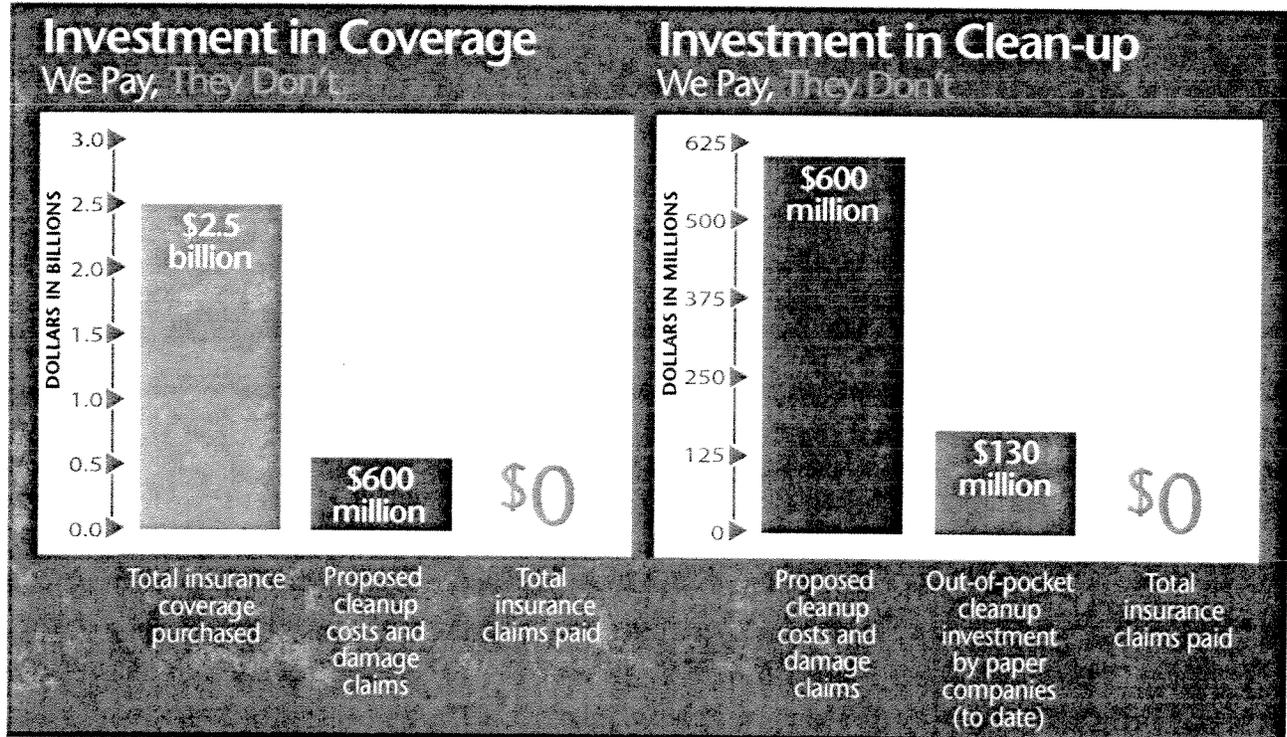
**SIMPLIFIES** the collection process of insurance money from multiple insurers who provided coverage for the same environmental problem.

**EXPEDITES** the cleanup process.

**PROTECTS** the public resources under Wisconsin's Public Trust Doctrine.

### THE SITUATION

The paper industry, which has made significant investments in cleanup efforts, and insurance carriers have been in on-going negotiations the past year. **No agreement has been reached. Negotiations have stalled.**



Note: The \$600 million is based on government estimates of remedial costs and NRD claims and does not include past or future transaction costs. It is possible that the government has underestimated the remedial costs.

These statistics do not include a limited number of insurance carriers that have settled with paper companies and do not include the paper companies' defense costs to date.

### LITIGATION VS. LEGISLATION

**LITIGATION** will delay cleanup for years as insurance companies fight their responsibility to cover the paper companies (the insured) one case at a time. As a result, **cleanup will take longer and cost more.**

**LEGISLATION** will force resolution and expedite cleanup by clarifying the responsibility of multiple insurance companies and simplify the payment process. As a result, **cleanup will start sooner and cost less.**



## INSURING THE PAPER INDUSTRY: The History—The Impact

PRIOR TO 1986, courts recognized that Comprehensive General Liability (CGL) policies cover environmental liability for most sites. This situation raised concerns and the industry reacted by adopting an *absolute exclusion* for any environmental liability.

AFTER 1986, there has been no environmental coverage for CGL policies, and the insurance companies have been attempting to narrow their liability under pre-1986 policies. For instance, insurance companies argued that cleanup costs were not damages, a position rejected last summer by the Wisconsin Supreme Court in the *Johnson Controls v. Employers Insurance of Wausau* case.

The proposed Fair Claims Act will have a *limited* impact on insurance companies because it won't affect any policy written after 1986. For policies in effect before 1986, when the insurance industry covered environmental liability, insurance companies would be obligated to pay the claim.

### HISTORY IN DETAIL

#### Before 1986

- CGL policies, like any insurance policies, have items that are excluded from coverage. Prior to 1986, most CGL policies contained a "pollution exclusion" that contained an exception allowing coverage for pollution events that were "sudden and accidental."
- After Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980 and suits were brought seeking coverage for CERCLA liability, several courts began interpreting the terms "sudden and accidental" to include CERCLA liability.
- The insurance industry adopted what became known as the "absolute" pollution exclusion. In other words, there was no longer any "sudden and accidental" exception or any other exception to the pollution exclusion.

#### After 1986

As a result of these events, there is no coverage. The insurance industry has tried to focus the debate in the courts (and legislatures) over the scope of the pre-1986 language.

- The insurance industry, having lost the "sudden and accidental" argument, turned to other terms in the policy to exclude or limit coverage. For instance, since policies only required the payment of "damages" the insurance industry argued that environmental cleanup costs were not damages.
- In *City of Edgerton v. General Case, Co.* 184 Wis.2d 750, 517 N.W. 2d 473 (1994), the Wisconsin Supreme Court sided with the insurance industry. It was that issue that was reversed by the Wisconsin Supreme Court on July 11, 2003 in *Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.



## CHRONOLOGY OF EVENTS

- 1853** Paper mills begin to locate along the Lower Fox River.
- 1954** Carbonless copy paper is manufactured using a PCB coating. This paper is reclaimed after use and then recycled by other mills to make paper for a wide variety of uses. Manufacturing and the subsequent recycling are in accord with the laws in effect at the time.
- 1971** PCB use in carbonless copy paper manufacturing is voluntarily curtailed. The use of PCBs remains an acceptable practice by every legal standard.
- 1972** Congress enacts the Clean Water Act, and the Wisconsin Department of Natural Resources (DNR) begins investigating possible PCB contamination in the Lower Fox River.
- 1976** Congress bans PCB manufacturing in the United States.
- 1980s** Congress passes the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), more commonly called "Superfund," giving the federal government the authority and money to clean up spilled or dumped chemicals threatening public health or the environment. The "Superfund" is applied to chemicals released or discharged before the law's passage, which paper mills are now held responsible for their previous lawful actions.
- 1986** The DNR initiates the Green Bay Remedial Action Plan process, a joint effort of government, industry and academia.
- 1995** After a decade of seeking solutions for PCB problems, the DNR, EPA and a public-private group called the Fox River Coalition that included paper industry representatives investigate distribution of PCBs along the Lower Fox River.
- 1997** Paper companies and the DNR sign agreement dedicating \$10 million to fund test cleanup projects along the Lower Fox River.
- 1998** The EPA seeks official "Superfund" status for the Lower Fox River and the DNR begins dredging of PCB deposits near Kimberly (completed in 1999). Though EPA never designates the Lower Fox River as a national priority site, paper companies have continued an aggressive cooperative effort with state and federal agencies.
- 1999** DNR releases comprehensive study of health risks and cleanup feasibility.
- 2001** DNR and EPA release a Lower Fox River cleanup plan for public comment through January 21, 2002.
- 2003** DNR and EPA issue a "Record of Decision" cleanup report calling for the dredging and disposal of 7.25 million cubic yards of sediment beginning in the summer of 2004. Completion is expected to take many years and cost hundreds of millions of dollars.
- 2004** Governor Jim Doyle announces that the Wisconsin DNR and the U.S. EPA have reached agreement with Georgia-Pacific Corporation and NCR Corporation on design work for the cleanup of sediment contaminated with PCBs in the Lower Fox River. The agreement covers four sections of the Lower Fox River from the mouth of the Little Lake Butte des Morts to the mouth of the river and the Bay of Green Bay. Glatfelter and Wisconsin Tissue enter into a Consent Decree to undertake the design work and implement a remedy in Little Lake Butte des Morts. Pilot dredging activities are initiated in the summer.
- Insurers and paper companies begin mediation. Discussions occur throughout the year, with no agreement.

