State of Wisconsin
2005 – 2006 LEGISLATURE

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ASSEMBLY SUBSTITUTE AMENDMENT 2,

TO 2005 ASSEMBLY BILL 222

June 23, 2005 – Offered by Representative SCHNEIDER.

AN ACT ***to create*** 20.370 (2) (dj), 292.71 and 632.28 of the statutes; **relating to:** environmental claims under general liability insurance policies, fees related to removal of contaminated material from a navigable water, and making an appropriation.

Analysis by the Legislative Reference Bureau

This substitute amendment addresses various issues related to environmental claims under general liability insurance policies. An environmental claim is defined in the substitute amendment 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 this state as a result of a release of pollutants in this state.

The substitute amendment provides some general principles for interpreting a general liability insurance policy under which an environmental claim is made, including: 1) that Wisconsin law will be applied in all cases; 2) that any action taken by, or agreement made with, a governmental entity under which the insured is considered to be potentially liable for pollution in this state and that directs or requests the insured to take action with respect to the pollution is equivalent to a lawsuit under the terms of the policy; and 3) that 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 this state on the ground that those expenses are voluntary payments by the insured.

The substitute amendment provides that in any lawsuit relating to an environmental claim there are rebuttable presumptions that certain specified costs are defense costs, and certain other specified costs are indemnity costs, payable by an insurer; and that, if the court determines that apportioning recoverable defense and indemnity costs between insurers is appropriate, the court must allocate those costs on the basis of the time that the insured was covered for the environmental claim under each of the policies, the policy limits under each of the policies, and which of the policies provides the most appropriate type of coverage for the type of environmental claim. If the insured was not covered under a policy that provided coverage for the environmental claim at any time that is included in the environmental claim, the insured will be considered an insurer for that period of time for purposes of the allocation of costs. The substitute amendment also provides that any insurer that pays (or that has paid before the effective date of the substitute amendment) an environmental claim may seek contribution from any other insurer that is potentially liable for the claim and that has not entered into a good faith settlement of the claim with the insured.

The substitute amendment also 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, and provides that, if the insured is unable to produce evidence of the policy limits, the applicable limits will be the minimum limits that the insurer was offering at the time, but that, if the insured produces evidence of the limits, the insurer then has the burden to show that different limits apply.

Finally, the substitute amendment 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.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.370 (2) (dj) of the statutes is created to read:

20.370 **(2)** (dj) *Solid waste management — navigable waters.* All moneys received under s. 292.71 for activities under ch. 292 related to remedial action in and adjacent to navigable waters.

SECTION 2. 292.71 of the statutes is created to read:

292.71 Fees related to removal of contaminated materials from a navigable water. The department may assess and collect fees from a person responsible, under this chapter or the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC 9601 to 9675, for remedial action involving the removal of at least 10,000 tons of contaminated material from the bed or banks of a navigable water. The department may not assess a fee under this section that exceeds 25 cents per ton of contaminated material removed from the bed or banks of a navigable water. Fees collected under this section shall be credited to the appropriation account under s. 20.370 (2) (dj).

SECTION 3. 632.28 of the statutes is created to read:

632.28 Environmental claims under general liability insurance policies. (1) DEFINITIONS. In this section:

(a) "Environmental claim" means a claim for defense or indemnity that is submitted under a general liability insurance policy by an insured and that is 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 this state as a result of a release of pollutants in this state.

(b) "General liability insurance policy" does not include any of the following:

1. A homeowners insurance policy.

2. An insurance policy covering a farm owner's or farm operator's liability.

3. A claims–made insurance policy.

(c) "Governmental entity" means any federal, state, or local government, or any instrumentality of any of them, or any trustee for natural resources designated under 42 USC 9607 (f) (2) or 40 CFR part 300, subpart G.

(d) "Navigable waters" has the meaning given in s. 30.01 (4m).

(e) "Pollutant" means any solid, liquid, or gaseous irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalies, chemicals, asbestos, petroleum products, lead, products containing lead, and waste.

(f) "Pollution" means the presence of pollutants in or on land, air, or water.

(2) GENERAL INTERPRETATION PROVISIONS. Except as otherwise provided in the policy, all of the following provisions apply to the interpretation of general liability insurance policies under which environmental claims are made:

(a) Wisconsin law shall be applied in all cases involving environmental claims, regardless of the state in which the general liability insurance policy under which the claim is or was made was issued or delivered. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for claims for defense or indemnity that are submitted under general liability insurance policies and that involve bodily injury or property damage arising from pollution outside this state.

(b) Any action taken by a governmental entity against, or any agreement by a governmental entity with, an insured in which the governmental entity, in writing, notifies the insured that it considers the insured to be potentially liable for pollution in this state, or directs, requests, or agrees that the insured take action with respect to pollution in this state, is equivalent to a suit or lawsuit as those terms are used in the general liability insurance policy.

(c) The insurer may not deny coverage for any reasonable and necessary fees, costs, and expenses, including costs and expenses of assessments, studies, and investigations, that are incurred by the insured under a voluntary written agreement, consent decree, or consent order between the insured and a governmental entity and as a result of a written direction, request, or agreement by

the governmental entity to take action with respect to pollution in this state, on the ground that those expenses constitute voluntary payments by the insured.

(3) SUIT RELATING TO ENVIRONMENTAL CLAIM. In any lawsuit that relates to an environmental claim, all of the following apply:

(a) All of the following are rebuttable presumptions:

1. That the costs of preliminary assessments, remedial investigations, risk assessments, feasibility studies, site investigations, or other necessary investigation are defense costs payable by the insurer, subject to the provisions of the general liability insurance policy under which there is coverage for the costs.

2. That the costs of removal actions, remedial action, or natural resource damages are indemnity costs and that payment of those costs by the insurer reduces the insurer's applicable limit of liability on the insurer's indemnity obligations, subject to the provisions of the general liability insurance policy under which there is coverage for the costs.

(b) If the court determines that apportioning recoverable defense and indemnity costs between or among insurers is appropriate, the court shall allocate the amounts between or among the insurers before the court on the basis of the following factors:

1. The total time that each general liability insurance policy that was issued by each insurer and that provided coverage to the insured with respect to the environmental claim was in effect.

2. The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable.

3. The policy that provides the most appropriate type of coverage for the type of environmental claim.

(c) If the insured was not covered under a general liability insurance policy that provided coverage with respect to the environmental claim for any portion of the time included in the environmental claim, the insured shall be considered an insurer for that portion of the time for purposes of the allocation under par. (b).

(4) CONTRIBUTION AMONG INSURERS. An insurer that pays an environmental claim, or an insurer that paid an environmental claim before the effective date of this subsection .... [revisor inserts date], may seek contribution from any other insurer that is liable or potentially liable for the claim and that has not entered into a good faith settlement and release of the environmental claim with the insured.

(5) LOST POLICY. (a) In this subsection, "lost policy" means all or any part of a general liability insurance policy that is subject to an environmental claim and that is ruined, destroyed, misplaced, or otherwise no longer possessed by the insured.

(b) If, after a diligent investigation by an insured of the insured's own records, including computer records and the records of past and present agents of the insured, the insured is unable to reconstruct a lost policy, the insured may provide notice of the lost policy to the insurer that the insured believes issued the policy. The notice must be in writing and in sufficient detail to identify the person or entity claiming coverage, including the name of the alleged policyholder, if known, and any other material facts concerning the lost policy known to the person providing the notice.

(c) An insurer must thoroughly and promptly investigate a notice of a lost policy and must provide to the insured claiming coverage under the lost policy all facts known or discovered during the investigation concerning the issuance and terms of

the policy, including copies of documents establishing the issuance and terms of the policy.

(d) For facilitating reconstruction, and determining the terms, of a lost policy, the insurer and the insured must comply with the following minimum standards:

1. Within 30 business days after receipt by the insurer of notice of a lost policy, the insurer shall commence an investigation into the insurer's records, including computer records, to determine whether the insurer issued the lost policy. If the insurer determines that it issued the policy, the insurer shall commence an investigation into the terms and conditions relevant to any environmental claim made under the policy.

2. The insurer and the insured shall cooperate with each other in determining the terms of a lost policy. The insurer and the insured shall provide to each other the facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of the lost policy, and shall provide each other with copies of any documents establishing facts related to the lost policy.

3. An insurer that discovers information tending to show the existence of an insurance policy that applies to the claim shall provide an accurate copy of the terms of the policy or a reconstruction of the policy. If the insured discovers information tending to show the existence of an insurance policy that applies to the claim, the insurer shall provide an accurate copy of the terms of the policy or a reconstruction of the policy upon the request of the insured.

4. If the insurer is not able to locate portions of the policy or determine its terms, conditions, or exclusions, the insurer shall provide copies of all insurance policy forms issued by the insurer during the applicable policy period that potentially apply

to the environmental claim. The insurer shall identify which of the potentially applicable forms, if any, is most likely to have been issued by the insurer to the insured, or the insurer shall state why it is unable to identify the forms after a good faith search.

(e) If, based on information discovered in the investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer but cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, that the insurer offered during the period in question under such policies apply to the policy purchased by the insured. If, however, the insured produces evidence that tends to show the policy limits applicable to the policy, the insurer has the burden of proof to show by a preponderance of the evidence that different policy limits, including any exclusions to coverage, apply to the policy purchased by the insured.

(6) PUBLIC RIGHTS AND INTEREST. In applying the provisions under this section, 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.

(7) APPLICABILITY. (a) This section applies to all environmental claims that are not settled or finally adjudicated on or before the effective date of this subsection .... [revisor inserts date], regardless of when the claim arose.

(b) This section applies to all environmental claims specified in par. (a), regardless of the state in which the general liability insurance policy under which the claim is or was made was issued or delivered.

(8) CONSTRUCTION. Nothing in this section shall be construed to raise or support any inference that it is the intention of the legislature to change the common law of this state with respect to the interpretation of general liability insurance policies not subject to this section.

(END)