

SENATE BILL 197 – PROPOSED AMENDMENT

New Liability for Toxic Substance Exposure

STATEMENT OF OPPOSITION

To the Vermont House Judiciary Committee

April 23, 2018

On behalf of National Association of Mutual Insurance Companies (NAMIC)¹ members, thank you for the opportunity to express strong opposition to the proposed amendment to Senate Bill 197.² While recent amendments to the bill narrow the scope in some ways, as discussed below, they do not eliminate its possible widespread and sweeping negative impact.

“Strict Liability”

Looking at the **scope**, NAMIC is pleased to see that individual homeowners would no longer be included in the bill. Importantly, while the size threshold may limit the impact on some small businesses, as defined under the bill, a “large user” includes those with **10 or more employees** and manufacturing of 1000 pounds of material per year. Such criteria still include many small businesses.

Our legal system is typically premised on actual and verified harm which generally is to be compensated where a party is found to be at fault and legally liable (usually through a negligence standard). **Strict liability, especially as defined under the bill, diverges from the general common law negligence standard** which requires a legal duty on the part of the entity that is allegedly causing harm, a breach of that duty, proximate causation of the breach and damages to the harmed or injured party. Reasonableness and foreseeability play a part in the determination of fault under negligence. Strict liability standards typically are imposed by legislatures in situations known to be inherently dangerous (therefore no level of care could make these activities safe). Strict liability moves directly to the principal that if the matter occurred, the person responsible is liable regardless of duty or breach or fault. Consequently, strict liability skips several steps under negligence theories and goes directly to payment for the harm itself disallowing the ability to provide defenses and other relevant information as to why a matter occurred. This bill expands upon the broad scope of strict liability and creates the same for any release of an identified toxic substance as listed or identified in the bill. This may undermine even the cause and harm elements of a strict liability standard.

The **joint and several liability** aspect of the bill causes concern. Joint and several liability allows for recovery under the tort system from even a small entity that had a minute or tangential connection to the harm. A plaintiff may seek to pursue that entity – such entity may be the least ready to respond to the enormous financial burdens of paying the plaintiff and pursuing legal actions against others. Indeed, please consider whether it could raise Constitutional questions.

¹ NAMIC is the largest property/casualty trade association in the US, serving regional and local mutual insurance companies on main streets across America as well as many large national insurers. NAMIC consists of more than 1,400 property/casualty insurance companies serving more than 170 million auto, home, and business policyholders, with more than \$230 billion in premiums. In Vermont, NAMIC members write about 48% of the property-casualty insurance market.

² This statement supplements those NAMIC provided on April 12 on the bill as introduced. NAMIC asks for flexibility to further supplement going forward.

Department of Insurance Study on Rates

With respect to the section of the bill requiring the Department of Insurance to study the impact of this legislation on insurance rates, such impact should not be expected to be shown immediately given renewal cycles and the time for the market to respond. Consequently, it may be **years before data would allow the Legislature to see the full impact** of their actions taken today.

It is important to understand something about the nature of **how insurance costs are calculated**. Loss trends and loss adjusting expenses (LAE), including litigation, (which impact rates) need time to develop. Litigation costs are not known overnight – they develop as the litigation costs are incurred or anticipated and that takes time. Generally speaking, over time more lawsuits and increases in claim costs may ultimately impact insurance premiums in Vermont.

Medical Monitoring

The bill continues to state that a claimant **need not prove that a latent disease is likely to develop as a result of the exposure**. Medical monitoring as contained in the bill as amended would allow a cause of action for medical monitoring damages to a person “with or **without present injury**.” A large majority of states either disallow medical monitoring damages, have not addressed the issue or have allowed only with a showing of physical harm.

Under the bill as amended, the person only needs to be “exposed to the toxic substance at greater than normal background concentration levels.” Contrast this undefined **greater than normal background level** with an exposure standard that exceeds a threshold of level concern. This sets an uncertain and low threshold for recovery, possibly ripe for additional litigation.

The medical monitoring does not define a **reasonable cost for a testing procedure**. As medical research and development continues to find new answers to medical injury and disease, tests may be cutting-edge rather than mainstream and initial costs for such findings may be exorbitantly expensive. This raises questions. What is a reasonable amount for a testing procedure when in fact no harm has manifested itself to date? Does this answer differ between when there is one person seeking monitoring and when there are many?

A medical monitoring cause of action may in and of itself cause additional litigation concerning insurance coverage. While insurance coverage forms may differ with respect to their provisions, it may not be uncommon for there to be a **“bodily injury” before the policy is triggered**. Declaratory judgement actions and coverage disputes would have to be decided by the court system.

These claims would be considered **“long tail,”** meaning that it could be years – potentially 20 or 30 years into the future – before there may be a manifestation. To price these exposures, an insurer may consider the possible duration of monitoring costs.

Today’s approach toward **attorney fees** incentivizes attorneys to bring only those claims which they believe have merit and a possible recovery. On the other hand, fee shifting may incentivize and encourage litigation.



Medical monitoring damages that are based on more tenuous connections may **needlessly exhaust resources** that might not be there when needed to pay claimants for actual harm. For example, consider situations in which a medical monitoring award for masses of individuals with an accompanying attorney fees award may cause companies to file for federal bankruptcy protection. In those situations, while parties may receive initial medical surveillance, ultimately there may not be assets for injuries that manifest themselves.

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In closing, NAMIC thanks the Committee for considering the concerns of all interested parties. NAMIC believes there is a sufficient framework within the parameters of existing Vermont law to address any harm occurring to the citizens of Vermont in the toxic tort area. Again, NAMIC asks you to weigh the negative impacts this legislation, even as amended, may have on Vermont, its insurance policyholders, and its overall business community and to **vote no to Senate Bill 197**. Thank you.