

S.197. An Act Relating to Liability for Toxic Substance Exposures or Releases

Overview and Section by Section

Overview

- In 2016, the General Assembly enacted Act 154 which included a requirement that the Agency of Natural Resources form a Working Group on Toxic Chemical Use in the State.
- Act 154 tasked the Working Group with recommending to the General Assembly how to:
 - prevent exposure to toxic chemicals, hazardous materials and hazardous waste;
 - identify and regulate contaminants of emerging concern; and
 - inform Vermonters regarding potential exposure.
- One main recommendation of the Working Group was to strengthen remedies available to Vermonters to address violations of pollution laws and exposure to harmful chemicals.
- The Working Group recommended three ways that the remedies available to Vermonters could be strengthened. This bill would enact two of the three recommendations—
 - Adopt a strict joint and several liability standard for harm to citizens from toxic chemical releases; and
 - Authorize individuals to recover the expense of medical monitoring for latent diseases when exposed to toxic substances as a result of another’s tortious conduct.

Strict Liability

- Strict liability is the imposition of liability on a party without a finding of fault. A claimant need only prove the occurrence of specified criteria.
- Historically it has been imposed at common law and under statute for dangerous activities or substances.
 - E.g.: under State statute, persons who release hazardous materials are strictly liable.
- But the definition of hazardous material under State law is relatively narrow, and, as a result, tens of thousands of chemicals are not listed.
 - Many of these chemicals can greatly harm people who are exposed to the chemical.
- This bill provides that if a person is harmed—suffers personal injury or property damage—the person who released the chemical shall be strictly liable for the harm.

Medical Monitoring Damages

- Medical monitoring is the practice of testing someone who was exposed to a toxic substance to determine if exposure caused that person to suffer or develop a disease.
- Damages for medical monitoring have been awarded in some states without a showing of physical injury or property damage.
 - In those states, such as Pennsylvania, the courts have held that the need to undergo medical monitoring is a harm itself.
- Vermont courts have not expressly authorized medical monitoring as an independent cause of action.
- S.197 would establish the criteria under which person could bring an independent cause of action for medical monitoring damages.

Section by Section Summary

Sec. 1. 10 V.S.A. Chapter 159, Subchapter 5. Strict Liability for Toxic Substance Releases

- Sec. 1 enacts a new subchapter in the solid and hazardous waste chapter of Title 10 authorizing strict liability for releases of toxic substances.
- Definitions are provided in 10 V.S.A. § 6685, including:
 - Harm: any personal injury or property damage.
 - Release: any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, groundwater, or any other place where the toxic substance may be located in one or more of the following amounts:
 - * more than two gallons or pounds;
 - * two gallons or pounds or less if the amount released poses a threat to human health; or
 - * for CERCLA regulated substances, a quantity to be reported under CERCLA if released.
 - Toxic substance: a substance with capacity to produce personal injury or illness to humans through ingestion, inhalation, or absorption and that satisfies one or more of the following:
 - * the substance is listed on the U.S. EPA's List of Lists of toxic chemicals;
 - * the substance is defined as a "hazardous material" under State law;
 - * testing has produced evidence, recognized by the National Institute for Occupational Safety and Health or the U.S. EPA, that the substance poses acute or chronic health hazards;
 - * the Vermont Department of Health has issued a public health advisory for the substance; or
 - * ANR designated the substance as a hazardous waste.
 - Toxic substance shall not mean: pesticides regulated by the Agency of Agriculture, or ammunition, firearms, air rifles, discharge of firearms, or hunting or fishing equipment.
- The bill then enacts 10 V.S.A. § 6686, which provides that any person who releases a toxic substance shall be held strictly, jointly, and severally liable for any harm resulting from the release.
- Section 6866 also provides that any person held strictly liable shall have the right to seek contribution from any other person who caused or contributed to the release.
 - This includes the right to seek contribution from a chemical manufacturer that released a toxic substance when a court determines the manufacturer failed to warn a person of a toxic substance's propensity to cause the harm complained of.
 - Contribution is the right of one person who is found liable to seek recovery or compensation in whole or in part from another person who is also liable.
- Nothing in this new section would supersede or diminish in any way existing remedies available to a person or the State at common law or under statute.

Sec. 1a. DFR report on Insurance Policy Pricing

- Sec. 1a requires DFR to report to the Legislature on the effect of strict liability for toxic substance releases on the pricing and availability of general liability and homeowner's insurance policies.

Sec. 2. 12 V.S.A. chapter 219. Medical Monitoring Damages

- Sec. 2 enacts a new chapter in Title 12, the title for court procedure, authorizing a cause of action for medical monitoring damages.
- A definitions section is added in 12 V.S.A. § 7201, the definitions include:
 - Disease: any disease, ailment, or adverse physiological or chemical change linked with exposure to a toxic substance.
 - Exposure: means ingestion, inhalation, contact with the skin or eyes, or any other physical contact.
 - Medical monitoring damages: the cost of medical tests or procedures and related expenses incurred for the purpose of detecting latent disease resulting from exposure.
 - Release: is the same definition for strict liability for toxic substance releases.
 - Toxic substance: is the same definition as for strict liability for toxic substance releases, except that for medical monitoring there is an additional category for:
 - * Substances that when released, can be shown by expert testimony to pose a potential threat to human health or the environment.
- Sec. 2 also enacts 12 V.S.A. § 7202, which authorizes a cause of action by a person, with or without a present injury, for medical monitoring damages against a person who released a toxic substance if all of the following are demonstrated by a preponderance of the evidence:
 - The person was exposed to the toxic substance as a result of tortious conduct by the person who released the toxic substance.
 - There is a probable link between exposure to the toxic substance and a latent disease.
 - The person's exposure to the toxic substance increases the risk of developing the latent disease.
 - Diagnostic testing is reasonably necessary--testing is reasonably necessary if a physician would prescribe testing for the purpose of detecting or monitoring the latent disease.
 - Medical tests or procedures exist to detect the latent disease.
- If medical monitoring damages are awarded, a court shall place the award of medical monitoring damages into a court-supervised program administered by a medical professional.
- If there is an award of medical monitoring damages, the court shall also award to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.
- Nothing in the new chapter authorizing medical monitoring damages precludes the pursuit of any other civil or injunctive remedy available under statute or common law.

Sec. 3. Effective Date

- The act takes effect on July 1, 2018.