NORTHEAST REGION
95 Columbia Street
Albany, NY 12210
518- 462-1695
Fax 518- 465-6023

S.197 – AN ACT RELATING TO LIABILITY FOR TOXIC SUBSTANCE EXPOSURES OR RELEASES

Statement of the American Insurance Association in Opposition

January 26, 2018

The American Insurance Association (AIA) is a leading national trade association representing approximately 320 major property and casualty insurance companies that collectively underwrite nearly $125 billion in direct property and casualty premiums nationwide, including nearly 20% of all such business in the State of Vermont.

AIA must respectfully oppose Senate Bill 197, which would create both strict *and* joint and severable liability for *any* harm caused by *any* release of *any* substance the bill defines as "toxic," regardless of whether or not the release was unintentional or legally permitted. The bill further creates a private right of action for *all* exposed individuals, regardless of the level of exposure, to sue to recover the costs of medical monitoring. AIA members have serious concerns with this legislation, as we believe it would negatively impact the business community and could have a chilling effect on Vermont's economy.

I. Strict Liability Creates Fundamental Due Process Problems

S.197 is breathtakingly broad, as it would create strict – that is, absolute – liability for any "harm" (broadly defined as <u>any</u> personal injury or property damage) resulting from the release of any toxic substance, which in turn is broadly defined as "any substance identified as toxic or hazardous under State or federal law, or mixture thereof, or any other substance that has been shown at any time to cause increased risk of disease."

Simply put, the bill would blatantly circumvent legal concepts that have been carefully developed and applied over decades, and even centuries. While we certainly understand and sympathize with those impacted as a result of the possible PFOA contamination in North Bennington, we do not believe that the extreme approach embodied in S.197 is warranted.

Strict liability is generally very rare in American jurisprudence, as nearly all cases have some form of intent component. If strict liability applies, it is irrelevant how carelessly, or how carefully, the defendant acted. It simply does not matter if the defendant took every precaution to

avoid harm—if someone is harmed in a situation where strict liability applies, then the defendant is liable.

Since strict liability can have harsh consequences, it applies in a only few limited circumstances, such as when the defendant is engaged in an "ultra-hazardous" activity – one that is so inherently dangerous that if anything wrong happens, the defendant is held absolutely liable for those activities. A good example would be the transporting of dangerous chemicals or nuclear waste, as these activities are inherently dangerous.

With that said, we believe that the bill's approach is far too broad, since it would apply strict liability to the release of *any* chemical that causes *any* harm. This is an extreme and dangerous declaration that activities involving *all* chemicals are ultra-hazardous, which may have alarming consequences – both intended and unintended.

The report submitted to the committee in support of the bill, entitled "Modernizing Legal Remedies for a Toxic World," makes a number of interesting assertions, including the following:

1. Its purpose is to remove any reasonable impediment to immediate and unfettered financial recovery by plaintiffs (as well as unlimited medical monitoring in the absence of any physical symptoms) in <u>all</u> alleged cases of harm caused by the release of a toxic substance.

2. "Victims of toxic chemical exposure face a potentially long and expensive battle to hold polluters liable; a situation aggravated by legal rules that encourage protracted litigation and tolerate less-than-full compensation for innocent victims."

3. "After more than a year and a half, the [North Bennington PFOA] case is at best only halfway to a final resolution as the defendant is opposing the lawsuit vigorously."

4. "Polluters may not be liable for all the harm they cause," because plaintiffs must actually prove that the polluter acted unreasonably – in the face of reasonable defenses like (a) the chemical was generally believed to be safe; (b) the science was inconclusive; (c) they complied with all necessary permits and regulations; and (d) no one could have foreseen the impacts at issue.

5. While the report acknowledges that "these arguments may not completely shield a polluter from liability," it complains that (a) "litigation is expensive" and "reduce(s) victims' overall recovery accordingly"; and (b) "litigating unreasonableness and foreseeability inevitably prolongs the case and makes the outcome less predictable."

The direct implication of all of these observations is troubling, as they seem to suggest that defendants should not have the ability to exercise lawful means to reasonably contest lawsuits. This undermines one of the fundamental constitutional rights we have in the United States, the right to due process.

S.197 summarily deprives companies providing important products and services of the right to defend themselves – all to ensure that plaintiffs can be guaranteed a swift, certain and massive recovery that is not subject to even the most basic due process hurdles.

Even if a company is merely negligent, or not negligent at all, it would nevertheless be held legally responsible without being able to marshal any defense, regardless of how reasonably it may have acted.

Finally, the notion that strict liability is necessary to foster increased safety in the handling of chemicals is flatly incorrect, as many lawsuits alleging harmful chemical releases are ultimately successful, thereby providing companies with sufficient incentive to act responsibly. In fact, plaintiffs prevailed in an Ohio PFOA contamination case against DuPont, yet the report actually cites that case as evidence in support of eliminating a company's right to defend itself: "While the judge ultimately denied DuPont's motion, preserving the jury's verdict in favor of the plaintiff, it took significant resources to litigate these issues." In other words, the plaintiffs won, but they were forced to clear hurdles justified in the name of due process.

II. Strict Liability Imposes Broad Societal Costs

The liability concerns created by strict liability as envisioned under S.197 would serve as a tremendous disincentive to companies that currently undertake important economic activity, particularly in areas of new or developing technology. If companies bear the risk of all foreseeable and unforeseeable harms, regardless of how reasonably and otherwise within the law they may have acted, they may be deterred from pursuing important innovations – particularly those whose risks are relatively unknown.

Furthermore, strict liability will likely result in higher costs for manufacturers of chemical products and others in the supply chain. If companies are not even permitted to mount a defense in response to the torrent of litigation that is virtually assured to accompany the imposition of strict liability, the insurance marketplace is likely to suffer grave consequences, as insurers will be forced to make individual business decisions based on both anticipated and actual losses.

Furthermore, since the increase in the price of *any* product due to strict liability would be borne equally by all those who use the product regardless of their income, there is also the potential that the additional costs would disproportionately affect people with low incomes.

Finally, while the report touts purported administrative cost savings under a strict liability rule, any potential savings would likely be offset by a significant increase in the number of suits being brought, since guaranteed victory is a major litigation incentive.

III. Fundamental Litigation Costs Do Not Justify Strict Liability

The issue of litigation costs is raised frequently in the report, "…particularly in cases involving large-scale environmental contamination." Furthermore, "The sheer expense…serves as a

practical barrier for many toxic exposure victims," with expert witnesses costing between $50,000 and $100,000.

The report drastically overemphasizes the cost issue, since the plaintiffs in this case (as in many toxic exposure cases) have filed a class action and therefore are not individual litigants lacking the resources to navigate the not insubstantial but reasonable burdens of proving complex and costly claims.

The appropriate solution to the overstated concern over litigation costs is most certainly *not* to eliminate the concept of fault and prevent companies potentially faced with financial ruin from proving they acted reasonably, e.g., by pointing out that they followed the applicable law and science through, among other things, the use of expert witnesses.

IV. Joint and Several Liability Concerns

The inclusion in this bill of joint and several liability, on top of the proposed imposition of strict liability, is incongruous and typifies S.197's casual disregard for fundamental principles of tort law. As explained earlier, strict liability is completely unwarranted in the present context; but even if it were warranted, attempting to graft the fault-based doctrine of joint and several liability onto the absolute fault doctrine of strict liability is nonsensical and frankly gratuitous. It is difficult to envision a scenario in which multiple defendants in a chemical release situation could be fairly subjected to strict liability, particularly when individual companies have no control over the activities of other market participants.

Generally speaking, joint and several liability potentially makes a defendant with very little liability (e.g., 1%) responsible for an entire judgment, leading to even more litigation with other defendants to accurately apportion responsibility. Even outside of the context of S.197, this approach disregards the public policy behind the common-sense doctrine of comparative negligence, whereby each defendant is liable to the plaintiff only for the percentage of harm he or she has caused.

While the primary intent (for better or worse) of joint and several liability is to relieve plaintiffs of the burden of proving the respective liability of multiple defendants who may have contributed to an alleged harm, imposing that doctrine in concert with strict liability in the event of a toxic substance release (particularly since it will likely be clear as to which defendant is ultimately responsible) is a non sequitur. Therefore, it seems particularly inappropriate in the present context to permit plaintiffs to collect the entire verdict (particularly one obtained through minimal effort due to strict liability) from a single, likely deep-pocketed defendant who may be minimally at fault – though, again, the concept of fault is abolished under strict liability.

V. Private Right of Action for Medical Monitoring is Generally Disfavored

AIA also has significant concerns with the provisions of S.197 that create a new private right of action for medical monitoring damages incurred due to exposure to a toxic substance. It is important to note that the U.S. Supreme Court and most state and federal courts of last resort have rejected medical monitoring claims absent a present physical injury.

The U.S. Supreme Court, in its 1997 decision in *Metro-North Commuter Rail v. Buckley*, found that medical monitoring is unwarranted because:

1. There could be an avalanche of claims, creating potentially unlimited liability exposure for defendants.

2. A flood of less severe cases would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injuries and adversely affect the allocation of scarce medical resources. [*This has occurred in the asbestos context, where bankruptcy trusts are paying pennies on the dollar to claimants with mesothelioma because of medical monitoring and other resources expended on claimants who are not currently sick and may never be.*]

3. There are several public policy concerns that weigh against requiring medical monitoring, such as (a) difficulty in identifying which costs are over and above the preventative medicine ordinarily recommended for everyone; (b) conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments; and (c) each plaintiff's unique medical needs.

4. Requiring medical monitoring in one context would permit literally tens of millions of individuals to justify some form of substance-exposure-related medical monitoring.

5. Medical monitoring could lead to double recoveries because alternative, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.

Thank you for the opportunity to provide comments and share our concerns on this issue. For the foregoing reasons, AIA opposes S.197 and respectfully requests that the Committee NOT approve the legislation.