

May 8, 2019

Representative Maxine Grad, Chair
House Judiciary Committee
Montpelier, VT

Dear Rep Grad:

The American Property Casualty Insurance Association (APCIA)¹ is pleased to offer comments with respect to the most recent draft (5/1) of S.37, an act relating to medical monitoring. As you know, APCIA and others have expressed grave concerns with the legislation as it would negatively affect the business community and could have a chilling effect on Vermont's economy.

First, we are very pleased to see that the most recent draft eliminates the highly problematic provisions that would have created both strict *and* joint and severable liability for the release of toxic substances. This would have served as a tremendous disincentive to companies doing business in Vermont as it could have resulted in a significant impact on costs.

However, while we are appreciative of the changes that have been made thus far, we continue to have serious concerns with the remaining provisions to create a private right of action for medical monitoring damages. S.37 would adopt the broadly disfavored doctrine of medical monitoring in a more significant manner than any state in the country. The U.S. Supreme Court and most state and federal courts of last resort have rejected medical monitoring claims absent a present physical injury.

¹ Effective January 1, 2019, the American Insurance Association (AIA) and the Property Casualty Insurers Association of America (PCIAA) merged to form the American Property Casualty Insurance Association (APCIA). Representing nearly 60 percent of the U.S. property casualty insurance market, APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.

We continue to be concerned that the massive resource impact (e.g., financial, medical, and judicial) of a flood of speculative claims for medical monitoring that lack a scientific foundation would likely have significant ramifications for the insurance industry, as policyholders will undoubtedly seek liability coverage for those claims.

While APCIA will continue to oppose S.37 for the above reasons, we would be pleased to offer a number of suggested changes for the committee's consideration that we believe would help to address some of the adverse consequences associated with the bill. To that end, below we have identified the most significant concerns with the current version of the bill, and provided suggested alternative amendments.

7201 (1) – The definition of “Disease” continues to be overly broad in our view. We would suggest that the current definition be stricken and amended as follows:

“Disease” means a specific, identifiable, and treatable disease which scientific evidence generally relied upon by the medical community has proven to be caused by exposure to a toxic substance.

7201 (3) – We believe that the definition of “exposure” continues to be overly broad as well. We would suggest that the definition should be narrowed to require a sufficient exposure to be a substantial cause of the disease, to read as follows:

“Exposure” means ingestion, inhalation, or ~~absorption through any body surface contact with the skin or eyes, or any other physical contact in an amount sufficient to be the substantial cause of a disease.~~

7201 (11) – We believe that the definition of “toxic substance” needs tightening up. The revised draft is positive in that it now requires tortious conduct, but this benefit is diminished by the fact that the definition of toxic substance only requires that the substance “may cause personal injury or disease.” We would suggest the following alternative definition to provide that there must be a substantially increased risk of contracting a disease:

“Toxic substance” means any substance, mixture, or compound identified as toxic or hazardous under State or federal law that is the result of an environmental spill, contamination, or other unlawful release that exposes members of the public to a substantially increased risk of contracting disease

7202 (a) – We continue to have serious concerns with the extremely permissive preponderance of the evidence standard and would recommend that this language be strengthened to require a clear and convincing standard as follows:

(a) A person without a present injury or disease shall have a cause of action for medical monitoring against a person who is the owner or operator of a large facility from which a toxic

substance was released if all of the following are demonstrated by a preponderance of the clear and convincing evidence:

7202 (a)(2) – The revised version merely requires that, as a proximate result of the exposure, the person has a greater risk than the general public of contracting a later disease. We would recommend strengthening this language to require that exposure be sufficient to cause disease, and/or to require that exposure significantly increases the risk of developing the latent disease. As such, we offer the following suggested changes:

(2) The person's exposure was sufficient to cause disease and the person has a substantially increased risk of developing a disease As a proximate cause of the exposure., the person has a greater risk than the general public of contracting a latent disease.

Sec. 2 Retroactivity – We also have concerns with the retroactive nature of the legislation and, while our strong preference would be to have a prospective effective date that only applies to actions filed on or after the effective date, we would suggest the following as an alternative:

(a) Medical monitoring shall be awarded pursuant to Section 1, regardless of when the release or exposure of the toxic substance occurred, if discovery of such exposure occurs after the act's effective date.

(b) Medical monitoring shall not be awarded if discovery of exposure to the toxic substance occurred before the act's effective date.

Thank you for the opportunity to provide additional comments regarding S.37. We look forward to working with the committee to address the concerns outlined above to minimize any potential impact on the business community and insurance marketplace. Please do not hesitate to contact us if there are questions or if we can provide additional information.

Sincerely,



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