

S. 37

[Sections 1, 2, 3 deleted from Senate Passed Version]

* * * Medical Monitoring * * *

Sec. ~~4~~1. 12 V.S.A. chapter 219 is added to read:

CHAPTER 219. MEDICAL MONITORING

§ 7201. DEFINITIONS

As used in this chapter:

(1) “Disease” means any disease, illness, ailment, or adverse physiological ~~or chemical~~ change ~~linked with~~ caused by exposure to a toxic substance.¹

~~(2) “Establishment” means any premises used for the purpose of carrying on or exercising any trade, business, profession, vocation, commercial or charitable activity, or governmental function.~~²

~~(3)~~ (2) “Exposure” means ingestion, inhalation, ~~contact with the skin or eyes, or any other physical contact~~ or absorption through any body surface.³

~~(4)~~ (3) “Facility” means all contiguous land, structures, other appurtenances, and improvements on the land where toxic substances are manufactured, processed, used, or stored. A facility may consist of several treatment, storage, or disposal operational units. A facility shall not include land, structures, other appurtenances, and improvements on the land owned by a municipality, or

¹ The changes in this definition were intended, first to eliminate the redundancy between physiological change and chemical change, as the first term encompasses the second; and next to make clear the requirement that exposure has a causal relationship with disease, illness, etc.

² This term was eliminated because it is not used elsewhere in the draft.

³ This change was made for consistency with the definition of toxic substance below.

owned or operated by a health care facility or health care provider as defined in section 9402 Title 18.⁴

~~(5)~~(4) “Large facility” means a facility:

(A) where 10 or more full-time employees have been employed at any one time; or

(B)(i) where an activity within the Standard Industrial Classification code of 20 through 39 is conducted or was conducted; and

(ii) that is owned or operated by a person who, when all facilities or establishments that the person owns or controls are aggregated, has employed 500 employees at any one time.

~~(6)~~ (5) “Medical monitoring” means a program of ~~medical surveillance, including~~ periodic medical tests or procedures examinations for the purpose of early diagnosis and treatment ~~detection of signs or symptoms of a serious~~ latent disease resulting from exposure to a toxic substance.⁵

~~(7)~~ (6) “Person” means any individual; partnership; company; corporation; association; unincorporated association; joint venture; trust; municipality; the State of Vermont or any agency, department, or subdivision of the State; federal agency; or any other legal or commercial entity.

⁴ This change is requested on behalf of the Vermont Association of Hospitals and Health Systems in consideration of the risk this bill would impose on healthcare providers who use, handle and dispose of hazardous materials under the requirements of the Vermont Hazardous Waste Management Regulations as part of routine operations.

⁵ This change is intended to harmonize the definition of medical monitoring with the elements for a medical monitoring claim, as those elements are cited by courts including the Ninth Circuit Court of Appeals, the Federal District Court for Colorado, as well as state courts in Pennsylvania, Florida, Massachusetts, Missouri, Utah and West Virginia.

~~(8) “Release” means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, or groundwater, or any other place where the toxic substance may be located.⁶~~

~~(9)~~ (7)(A) “Toxic substance” means any substance, mixture, or compound that has the capacity to ~~produce~~ cause personal injury or illness to humans through ingestion, inhalation, or absorption through any body surface and that satisfies one or more of the following:⁷

(i) the substance, mixture, or compound is listed on the U.S. Environmental Protection Agency Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act, Comprehensive Environmental Response, Compensation and Liability Act, and Section 112(r) of the Clean Air Act;

(ii) the substance, mixture, or compound is defined as a “hazardous material” under 10 V.S.A. § 6602 or under rules adopted under 10 V.S.A. chapter 159;

(iii) testing has produced evidence, recognized by the National Institute for Occupational Safety and Health or the U.S. Environmental Protection Agency, that the substance, mixture, or compound poses acute or chronic health hazards;

(iv) the Department of Health has issued a public health advisory for the substance, mixture, or compound; or

(v) the Secretary of Natural Resources has designated the substance, mixture, or compound as a hazardous waste under 10 V.S.A. chapter 159;~~or~~

⁶ This definition was removed because the term is not used later in this draft.

⁷ We made this change because the term “cause” has established, clear legal meaning, i.e. damages are *caused* by a defendant when the harm to the plaintiff would not have occurred but for the action of the defendant.

~~(vi) exposure to the substance can be shown by expert testimony to increase the risk of developing a latent disease.~~⁸

(B) “Toxic substance” shall not mean:

(i) a pesticide regulated by the Secretary of Agriculture, Food and Markets; or

(ii) ammunition or components thereof, firearms, air rifles, discharge of firearms or air rifles, or hunting or fishing equipment or components thereof.

§ 7202. MEDICAL MONITORING FOR EXPOSURE TO TOXIC SUBSTANCES

(a) A person ~~with or~~⁹ without a present injury or disease shall have a cause of action for the ~~remedy of~~ reasonable cost of medical monitoring when exposed to a toxic substance ~~against a person who released a toxic substance~~¹⁰ from a large facility if that person proves all of the following ~~are demonstrated~~¹¹ by a preponderance of the evidence:

(1) The person was exposed to the toxic substance as a result of ~~tortious conduct by the person who released the toxic substance~~ the defendant’s negligence,¹²

⁸ We did not find this element in any of the cases we reviewed, it lacks any grounding in health science and provides no notice to businesses attempting to comply with legal requirements. If the concern this is trying to address is how to regulate contaminants of emerging of concern, it would be possible to link to EPA and state lists of CECs.

⁹ This change is intended to clarify that recovery of medical monitoring damages is distinct from recovery in the presence of actual, demonstrated harm. There are numerous cases reported in other jurisdictions where courts have rejected this claim in the absence of a present injury, but we are not relying on those cases.

¹⁰ This change aligns with the test outlined below, i.e. a plaintiff must demonstrate exposure to a toxic chemical, not just that the chemical was released.

¹¹ “Prove” is substituted for “demonstrated,” for clarity of legal usage, consistent with the holdings of courts cited in these footnotes (See, e.g. *Barnes v. American Tobacco Co.*, 161 F.3d 127, 138 (1998) (“[P]laintiffs must *prove* the following elements...”) (emphasis added).

¹² This change is made consistent with cases decided by the Federal Ninth Circuit, the Federal Third Circuit, as well as state courts in California, Pennsylvania, Florida, Colorado and Utah, which require a “defendant’s negligence” as a necessary element of the claim. A minority of courts adopting this test substitute the term “tortious conduct” for “negligence,” including the Federal District Court for Colorado and state courts in Maryland and West Virginia. In these instances, medical monitoring is a compensable item of damage when liability after liability is first established in a proceeding under traditional tort theories of recovery, such as negligence, strict liability, trespass, intentional conduct, etc.

~~(2) There is a probable link between exposure to the toxic substance and a latent disease~~
The exposure exceeded background levels¹³ and, where applicable, state and federal health standards or guidelines,¹⁴

~~(3) As a proximate result of the person's exposure to the toxic substance, there is a significant increases in the risk of developing a serious latent disease,¹⁵ A person does not need to prove that the latent disease is certain or likely to develop as a result of the exposure.~~

~~(4) Diagnostic testing is reasonably necessary. Testing is reasonably necessary if a physician would recommend testing for the purpose of detecting or monitoring a serious latent disease based on the person's exposure,¹⁶~~

~~(5) (4) Medical tests or procedures exist to detect the serious latent disease,¹⁷~~

(5) A physician prescribes such monitoring and it is different than what would be recommended in the absence of such an exposure,¹⁸ and

¹³ The requirement that exposure exceeded background levels is set forth in decisions from the Federal Third Circuit and state courts in Pennsylvania and Florida. The Federal Ninth Circuit, the Federal District Court for Colorado and Supreme Court of Appeals in West Virginia all require a plaintiff to prove that exposure was "significant." The Supreme Court of California requires that a plaintiff be exposed "to a toxic substance that threatens cancer." Finally, the Court of Appeals of Maryland requires a plaintiff to prove a "significant increase in risk of disease, thus ensuring that the nature and extent of medical monitoring is actually greater than that which should be undertaken by the general population."

¹⁴ This change is suggested consistent with the effort this draft makes to rationalize the bill with existing legal authority, in this case aligning the test element with promulgated standards under Federal or State laws and regulations.

¹⁵ This language tracks almost directly decisions from the Federal Ninth Circuit, the Federal Third Circuit, the Federal District Court for Colorado, as well as state courts in West Virginia, Pennsylvania and Florida. The Supreme Court of Utah, similarly, required that exposure resulted in an increased risk of a serious disease, illness or injury. The Court of Appeals of Maryland required that exposure caused a "significant increase in risk of disease."

¹⁶ This was removed as an unnecessary summary of several elements of the required elements for a medical monitoring claim. It's content is reflected more clearly now in subsections (3), (5), and (6), consistent with the cited cases.

¹⁷ This language is consistent with decisions from the Federal Ninth Circuit, the Federal Third Circuit, the District Court for Colorado and state courts in West Virginia, Pennsylvania, Florida and Utah.

¹⁸ This language is consistent with decisions from the Federal Third Circuit, the Federal District Court for Colorado, as well as state courts in Pennsylvania, Florida, Utah, West Virginia.

(6) The prescribed monitoring is reasonably necessary according to contemporary scientific principles.¹⁹

~~(b) A person's present or past health status shall not be an issue in a claim for medical monitoring.~~²⁰

~~(e) (b) If the cost of medical monitoring is awarded, a court shall order the defendant found liable ~~person~~ to pay that award to fund a court-supervised medical monitoring program fund administered by ~~one or more health professionals~~ a trustee.~~²¹

~~(d) Upon an award of medical monitoring under subsection (e), the court shall award to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.~~²²

~~(e) (c) Nothing in this chapter shall be deemed to preclude the pursuit of any other civil or injunctive remedy or defense available under statute or common law, including the right of any person to seek to recover for damages related to the manifestation of a latent disease. The remedies and defenses in this chapter are in addition to those provided by existing statutory or common law.~~²³

(d) This section does not preclude a court from certifying a class action for the remedy of medical monitoring.

¹⁹ This language is consistent with decisions from the Federal Third Circuit and state courts in Florida, Pennsylvania and Utah.

²⁰ This requirement is not found in the cases we reviewed, and we do not believe it is a necessary element because the person's underlying health is immaterial to a claim predicated on exposure to a toxic chemical rather than present injury.

²¹ This requirement is consistent with state court decisions in Maryland, Florida and Pennsylvania and used to ensure medical monitoring awards are used for their intended purpose and because lump sum payments are inappropriate.

²² With only one exception, the cases we cited did not include a requirement for payment of attorneys' fees; in one Pennsylvania decision attorney's fees were awarded because the medical monitoring claim was brought pursuant to the citizen's suit provision of Pennsylvania's Hazardous Sites Cleanup Act as a "response cost" and the HSCA allowed for the award of attorney's fees.

²³ These changes are clarifying only.

(e) For the purpose of establishing whether a defendant is liable under Section 7202, compliance with a permit issued by any Federal, State or local permitting authority shall be admissible and prima facie evidence that a defendant met its duty of care with regard to the use, handling, storage, disposal or transport of a toxic substance consistent with standards established in the permit.²⁴

Sec. 2. RETROACTIVITY

A claim for medical monitoring shall not be available if discovery of exposure to the toxic substance occurred before the Act's effective date.²⁵

* * * Effective Date * * *

Sec. 5 3. EFFECTIVE DATE

This act shall take effect on July 1, 2019.

After passage the bill shall be amended to read: "An act relating to medical monitoring"

²⁴ This language does not create an absolute bar on claims, but establishes a rebuttable presumption that a defendant is not negligent if they managed toxic substances consistent with quantitative permit standards. This is consistent with the Federal Clean Water Act, CERCLA and RCRA, as well as 10 V.S.A. § 6616.

²⁵ This change is intended to clarify that the act will not affect pending litigation, but apply only to prospective claims.