

To: House Committee on Judiciary  
From: Jill Rickard, Director of Policy, Department of Financial Regulation  
Date: April 10, 2019  
Re: S.37, An act relating to medical monitoring

Thank you for the opportunity to testify on S.37. The bill has a laudable goal of strengthening civil remedies available to Vermonters harmed by exposure to toxic chemicals, which is particularly relevant in light of the Bennington PFOA issues. As the state's insurance regulators, DFR's mission is to protect consumers and ensure an affordable, competitive market for insurance. We believe the bill's imposition of strict, joint, and several liability for any harm resulting from any release (intentional or not) of any substance classified as toxic would have a significant unintended adverse impact on the market for commercial liability insurance in Vermont.

### Strict liability

S.37 may lessen access to commercial general liability, commercial auto, professional liability, and umbrella/excess liability policies.

Commercial general liability (CGL) policies provide coverage for (1) legal defense by the carrier for the policyholder against claims of bodily injury and property damage and (2) payment on the insured's behalf (indemnity) if the insured is "legally obligated" to pay damages. Insurers have the right and duty to defend any suit against a policyholder that seeks damages from a covered occurrence and will only pay damages if a court finds the policyholder liable.

Insurance companies will insure only known, controllable risks. Imposing a strict liability standard would mean that an insurance company would not have the opportunity to assert most tort law defenses on behalf of the policyholder, including an affirmative defense that another party is responsible for the release. Imposing joint and several liability would mean that a user who contributes a very small percentage to a release is liable for 100% of the damages. These two factors would make it much more likely that indemnity coverage would be triggered and reach policy limits. In response, insurers may increase rates to account for increased risk or pull out of the market completely, leaving few affordable options for Vermont businesses.

You heard from another witness that most commercial insurance policies include absolute pollution exclusions. This is not true in Vermont. The Department of Financial Regulation requires every liability policy issued in Vermont by an *admitted* insurer to provide coverage for pollution by endorsement, with limited exceptions (see DFR

Insurance Bulletin 111, dated October 18, 1996). The Department will consider a consent to rate application (which has been agreed to in writing by the insured) excluding pollution where there is identifiable pollution exposure and a high probability of a pollution claim (such as a business that stores or disposes of chemicals or has an oil storage tank of 1000 gallons or more). Examples are airports, auto body shops, battery manufacturers, and retail gasoline sales.

Absolute pollution exclusions may exist in surplus lines policies, but such policy forms are not reviewed by the Department, often contain restrictions on coverage, and are typically very expensive.

It has been noted that secondary pollution coverage options are available on the market. While these coverages may be available in the surplus lines market, the Department sees few standalone pollution liability policies in the admitted market. If S.37 is adopted, pollution-specific coverages will likely become even more expensive or not available at all.

You have also heard that “the economy survived CERCLA” and there is no compelling evidence that the economy could not survive this new strict liability standard. CERCLA’s retroactive, strict, joint, and several liability led to a significant shift in insurance companies’ willingness to insure pollution in a commercial context. As a result of nationwide CERCLA liability, a new pollution exclusion clause was adopted in the standard CGL policy. As a result, in many states throughout the country, pollution coverage may be unaffordable, unavailable, or available only on a claims-made basis.

In contrast to CERCLA’s nationwide standard regarding hazardous waste remediation, S.37’s strict, joint, and several liability would apply solely to businesses operating in Vermont, subjecting them to a standard not applicable in any other state and having a disproportionate impact on the insurance market in Vermont.

### Medical monitoring

Effects on the insurance industry of the bill’s medical monitoring provisions are more difficult to predict.

Commercial general liability coverage applies to “bodily injury, sickness, or disease” sustained during the policy period. In states that recognize a common law cause of action for medical monitoring, courts are split as to whether exposure to a toxic substance constitutes “bodily injury, sickness, or disease” under a CGL policy. It is therefore unclear whether medical monitoring claims would implicate the defense and indemnity

provisions of CGL policies. For clarity, commercial insurers may request to add specific policy exclusions for medical monitoring, which would put the onus on Vermont businesses to pay these claims directly.

CGL policies do provide limited coverage on a no-fault basis for medical payments for non-employees that can be triggered without legal action, but this coverage is generally limited to \$5,000. If Vermont were to adopt a cause of action for medical monitoring, insurers may also exclude this limited coverage through an endorsement.

Courts in approximately 13 states recognize medical monitoring as a cause of action. DFR continues to research and have discussions with our colleagues in these states but is not aware of any significant insurance market disruption based on common law medical monitoring. However, S.37 goes further than most states' common law, for example, by tying exposure to any tortious conduct rather than the typical negligence standard, and not requiring a minimum level of exposure that exceeds background levels. It is difficult to predict how Vermont's insurance market may react to a cause of action that is significantly different from those established in other states. For this reason, DFR recommends more closely aligning S.37's statutory cause of action for medical monitoring with established common law.