ATRA American Tort Reform Association

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February 4, 2019

The Honorable Dick Sears Jr.
Vermont Senate
115 State Street
Montpelier, VT 05633

Dear Chairman Sears:

I am writing on behalf of the American Tort Reform Association (ATRA) to express our opposition to S. 37, legislation that would establish medical monitoring in Vermont. ATRA, founded in 1986, is a broad-based bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. This legislation proposes to create a new legal right for people who are not sick and may never become ill to recover damages based on mere exposure to a substance that is only *potentially* harmful. If adopted, this legislation would be the most expansive "medical monitoring" law in the country, and would subject countless Vermont businesses, individuals, and other entities to potentially massive new liability exposure.

Over the last twenty years, most states and the Supreme Court of the United States have rejected invitations to award damages to mere "exposure only" claimants who do not have any present physical injury. These courts have appreciated that awards for so-called medical monitoring raise a host of serious policy problems, including the depletion of resources for future claimants who become sick. The U.S. Supreme Court, for example, said that such claims, if permitted, could produce a "flood" of cases and result in "unlimited and unpredictable liability."

In addition to inviting these overarching policy concerns, S. 37 suffers numerous specific defects that make it particularly unsound public policy. Under the legislation, "any disease, ailment, or adverse physiological or chemical change *linked* with exposure to a toxic substance" could give rise to lawsuit. For instance, a claimant could argue that feeling uneasy or apprehensive about a potentially harmful exposure constitutes an "ailment" deserving of lifetime medical monitoring compensation.

The bill's definition of a "toxic substance" is also extraordinarily broad. The legislation defines a toxic substance to include "any substance, mixture, or compound that has the capacity to produce personal injury or illness." S. 37 would allow medical monitoring damages related to exposure to any substance that can be shown to merely "pose a potential threat to human health or the environment." The legislation could, therefore, apply to exposure to countless substances, regardless of whether a substance is recognized under state or federal law as hazardous.

Equally troubling is the fact that the legislation ignores the basic principle of toxicology that the "dose makes the poison," meaning there needs to be an assessment of whether the amount of an exposure is sufficient to actually cause an injury. The legislation, instead, invents a totally arbitrary, low-level amount of exposure of "more than two gallons or pounds" of a toxic substance, or any amount less than two gallons or pounds if that amount "poses a potential or actual threat to human health." This so-called "threshold" provides no real standard at all, though, because virtually any exposure to any toxic substance could be said to pose a potential threat to a person's health (that is why a substance is called "toxic" in the first place).

S. 37 expressly states that any person may recover medical monitoring damages based on exposure to a toxic substance, with or without a present injury or disease. Under the essentially non-existent standard discussed above, a claimant need only prove *mere exposure* to a toxic substance where there is a "probable link" between exposure to the substance and a disease. The legislation additionally provides that a person need only show that exposure to the substance increase the risk of developing a disease – regardless of by how much – and expressly states that a "person does not need to prove that the latent disease is certain or likely to develop as a result of the exposure."

The result is a bill that creates a broad new legal cause of action that can lead to absurd results. Consider a homeowner who accidently spills a small amount of gasoline while filling up his lawnmower (again, whether the spill is above or below two gallons makes no difference because additives in gasoline pose at least a potential threat to human health). A neighbor passing by who inhales the gasoline fumes could sue for medical monitoring for the rest of his or her life related to any disease which exposure to any of the chemicals in gasoline have been shown to be capable of producing injury.

The adverse impacts of this legislation on businesses and other entities throughout the state could be enormous. The legislation would expose businesses to potentially massive new liability exposure overnight and could produce a flood of litigation that strains judicial resources, drives up costs, leads to fewer jobs, and causes businesses to relocate or avoid setting up shop in Vermont. In 2018, Governor Phil Scott vetoed legislation similar to S. 37 due to concerns it would have a "catastrophic" impact on the state's economy. The full consequences of the legislation may be difficult to predict because, again, no state has ever adopted such a broad cause of action for medical monitoring.

For all these reasons, ATRA strongly opposes S. 37.

Sincerely,

Matt Fullenbaum
Director of Legislation

cc: The Honorable Tim Ashe