

1 S.197

2 Introduced by Senators Campion and Sears

3 Referred to Committee on Judiciary

4 Date: January 3, 2018

5 Subject: Conservation and development; judiciary; toxic substances; strict
6 liability for releases; medical monitoring damages

7 Statement of purpose of bill as introduced: This bill proposes to hold any
8 person who releases a toxic substance strictly, jointly, and severally liable for
9 any harm resulting from the release. The bill also proposes to establish a
10 private right of action for medical monitoring damages incurred due to
11 exposure to a toxic substance.

12 An act relating to liability for toxic substance exposures or releases

13 It is hereby enacted by the General Assembly of the State of Vermont:

14 ~~*** Strict Liability; Toxic Substance Release ***~~

15 Sec. 1. 10 V.S.A. chapter 159, subchapter 5 is added to read:

16 Subchapter 5. Strict Liability for Toxic Substance Release

17 § 6685. DEFINITIONS

18 As used in this subchapter:

19 ~~(1) "Harm" means any personal injury or property damage.~~

1 ~~(2) "Release" means any intentional or unintentional, permitted or~~
2 ~~unpermitted, act or omission that allows a toxic substance to enter the air, land,~~
3 ~~surface water, groundwater, or any other place where the toxic substance may~~
4 ~~be located.~~

5 ~~(3) "Toxic substance" means any substance identified as toxic or~~
6 ~~hazardous under State or federal law, or mixture thereof, or any other~~
7 ~~substance that has been shown at any time to cause increased risk of disease.~~

8 ~~§ 6686. LIABILITY FOR RELEASE OF TOXIC SUBSTANCES~~

9 ~~(a) Any person who releases a toxic substance shall be held strictly, jointly,~~
10 ~~and severally liable for any harm resulting from the release.~~

11 ~~(b) Any person held liable under subsection (a) of this section shall have~~
12 ~~the right to seek contribution from any other person who caused or contributed~~
13 ~~to the release. The right to contribution under this subsection shall include the~~
14 ~~right to seek contribution from a chemical manufacturer that failed to warn a~~
15 ~~person of a toxic substance's propensity to cause the harm complained of.~~

16 ~~(c) Nothing in this section shall be construed to supersede or diminish in~~
17 ~~any way existing remedies available to a person at common law or under~~
18 ~~statute.~~

19 * * * Medical Monitoring Damages * * *

20 Sec. 2. 12 V.S.A. chapter 219 is added to read:

21 ~~CHAPTER 219. MEDICAL MONITORING DAMAGES~~

1 § 7201. DEFINITIONS

2 As used in this chapter:

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

5 (2) “Exposure” means ingestion, inhalation, contact with the skin or
6 eyes, or any other physical contact.

7 (3) “Medical monitoring damages” means the cost of medical tests or
8 procedures and related expenses incurred for the purpose of detecting latent
9 disease resulting from exposure.

10 (4) “Toxic substance” means any substance identified as toxic or
11 hazardous under State or federal law, or mixture thereof, or any other
12 substance that has been shown at any time to cause increased risk of disease.

13 § 7202. MEDICAL MONITORING DAMAGES FOR EXPOSURE TO
14 TOXIC SUBSTANCES

15 (a) Any person may recover medical monitoring damages from exposure to
16 a toxic substance resulting from another’s tortious conduct with or without a
17 present injury or disease.

18 (b) To recover medical monitoring damages, a person must prove by a
19 preponderance of the evidence each of the following:

20 (1) The person was exposed to a toxic substance.

21 (2) There is a probable link between exposure to the toxic substance and

1 a disease or diseases.

2 (3) The person's exposure is the result of another's tortious conduct,
3 including negligence, battery, strict liability, trespass, and nuisance.

4 (4) The person's exposure to the toxic substance increases the risk of
5 developing a disease. A person does not need to prove that the disease is
6 certain or likely to develop as a result of the exposure.

7 (5) Diagnostic testing is reasonably necessary. Testing is reasonably
8 necessary if a physician would prescribe such testing for the purpose of
9 detecting or monitoring the disease.

10 (6) Medical tests or procedures exist to detect the latent disease.

11 (c) A court shall either place the award of medical monitoring damages
12 into a court-supervised program administered by a medical professional or
13 award lump sum damages.

14 (d) If a court places an award of medical monitoring damages into a court-
15 supervised program pursuant to subsection (c) of this section, the court shall
16 also award attorney's fees and costs to the plaintiff.

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

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~~*** Effective Date ***~~

~~Sec. 3. EFFECTIVE DATE~~

~~This act shall take effect on July 1, 2018.~~

**** Strict Liability; Toxic Substance Release ****

Sec. 1. 10 V.S.A. chapter 159, subchapter 5 is added to read:

Subchapter 5. Strict Liability for Toxic Substance Release

§ 6685. DEFINITIONS

As used in this subchapter:

(1) "Harm" means any personal injury or property damage.

(2) "Release" means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, groundwater, or any other place where the toxic substance may be located in one or more of the following amounts:

(A) more than two gallons or pounds;

(B) two gallons or pounds or less if the amount released poses a potential or actual threat to human health; or

(C) for any toxic substance regulated under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, as amended, the reportable quantity specified under 40 C.F.R. § 302.4.

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

(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.

(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.

§ 6686. LIABILITY FOR RELEASE OF TOXIC SUBSTANCES

(a) Any person who releases a toxic substance shall be held strictly, jointly, and severally liable for any harm resulting from the release.

(b) Any person held liable under subsection (a) of this section shall have the right to seek contribution from any other person who caused or contributed to the release. The right to contribution under this subsection shall include the right to seek contribution from a chemical manufacturer that released a toxic substance when a court determines that the manufacturer failed to warn a person of a toxic substance's propensity to cause the harm complained of.

(c) Nothing in this section shall be construed to supersede or diminish in any way existing remedies available to a person or the State at common law or under statute.

Sec. 1a. DEPARTMENT OF FINANCIAL REGULATION; REPORT ON INSURANCE POLICY PRICING AND AVAILABILITY

(a) The Commissioner of Financial Regulation shall monitor how the imposition of strict liability for toxic substance releases pursuant to 10 V.S.A. chapter 159, subchapter 5 affects the pricing and availability of commercial general liability insurance policies, residential homeowner's insurance policies, and other insurance policies in the State. The Commissioner of Financial Regulation shall evaluate whether:

(1) insurance policies in the State are more expensive or less available due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5; and

(2) the insurance market in the State is negatively affected in comparison to the national market solely due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5.

(b) On or before January 15, 2019, and annually thereafter, the Commissioner of Financial Regulation shall report to the Senate Committee on Finance and the House Committee on Commerce and Economic Development the results of its evaluation under subsection (a) of this section.

** * * Medical Monitoring Damages * * **

Sec. 2. 12 V.S.A. chapter 219 is added to read:

CHAPTER 219. MEDICAL MONITORING DAMAGES

§ 7201. DEFINITIONS

As used in this chapter:

(1) "Disease" means any disease, ailment, or adverse physiological or chemical change linked with exposure to a toxic substance.

(2) "Exposure" means ingestion, inhalation, contact with the skin or eyes, or any other physical contact.

(3) "Medical monitoring damages" means the cost of medical tests or procedures and related expenses incurred for the purpose of detecting latent disease resulting from exposure.

(4) "Release" means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, groundwater, or any other place where the toxic substance may be located in one or more of the following amounts:

(A) more than two gallons or pounds;

(B) two gallons or pounds or less if the amount released poses a potential or actual threat to human health; or

(C) for any toxic substance regulated under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, as amended, the reportable quantity specified under 40 C.F.R. § 302.4.

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

(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

(vi) the substance, when released, can be shown by expert testimony to pose a potential threat to human health or the environment.

(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 DAMAGES FOR EXPOSURE TO TOXIC SUBSTANCES

(a) A person with or without a present injury or disease shall have a cause of action for medical monitoring damages against a person who released a toxic substance if all of the following are demonstrated 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, including conduct that constitutes negligence, battery, strict liability, trespass, or nuisance;

(2) There is a probable link between exposure to the toxic substance and a latent disease.

(3) The person’s exposure to the toxic substance increases the risk of developing the latent disease. 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 prescribe testing for the purpose of detecting or monitoring the latent disease.

(5) Medical tests or procedures exist to detect the latent disease.

(b) A court shall place the award of medical monitoring damages into a court-supervised program administered by a medical professional.

(c) If a court places an award of medical monitoring damages into a court-supervised program pursuant to subsection (c) of this section, the court shall also award to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.

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

(e) This section does not preclude a court from certifying a class action for medical monitoring damages.

** * * Effective Date * * **

Sec. 3. EFFECTIVE DATE

This act shall take effect on July 1, 2018.