



American Tort Reform Association

1101 Connecticut Ave, NW ■ Suite 400 ■ Washington, DC 20036
(202) 682-1163 ■ Fax: (202) 682-1022 ■ www.atra.org

January 18, 2022

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

RE: Opposition to Unsound Medical Monitoring Legislation (S. 113)

Dear Chairman Sears:

I am writing on behalf of the American Tort Reform Association (ATRA) to respectfully urge you to reject S. 113. 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 subject countless Vermont businesses and other entities to potentially massive new liability exposure. It would add to the already enormous economic toll the COVID-19 pandemic has had on businesses and other entities in the state.

Over the last twenty-five 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. 113 suffers numerous specific defects that make it particularly unsound public policy. Under the legislation, “any disease, illness, ailment, or adverse physiological or chemical change *linked* to exposure” to a toxic substance could give rise to a lawsuit. A person could, for instance, argue that feeling uneasy or apprehensive about any exposure to a potentially harmful substance constitutes an “ailment” deserving of lifetime medical monitoring compensation.

In addition, the bill’s inclusion of any “adverse physiological or chemical change” in the definition of “disease” could similarly give rise to medical monitoring lawsuits alleging a potentially harmful exposure simply resulted in stress. The full scope of what may constitute an “adverse physiological or chemical change” allowing for medical monitoring compensation is also ambiguous.

The bill’s definition of a “toxic substance” adds to the legislation’s extraordinarily broad scope. S. 113 defines a toxic substance to include “any substance, mixture, or compound that *may cause* personal injury or disease” and can be shown by expert testimony to increase any risk of disease. This definition would include exposures to countless substances, many of which are not ordinarily thought of as “toxic” or recognized as toxic under state or federal law.

In addition, the bill’s substantive provisions ignore 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, would allow a person to recover medical

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monitoring damages for *mere exposure* to a toxic substance where the person shows that the exposure results only in “an increased risk” of disease—regardless of whether that increase in risk is marginal.

The result is a broad new statutory cause of action with relatively few safeguards to protect against abusive litigation. This concern for abuse is also heightened by several other bill provisions, including a requirement that a claimant recover his or her attorney fees in any successful medical monitoring action and an express provision stating that employees exposed to a substance outside the workplace may bring medical monitoring claims.

The adverse impacts of this legislation on businesses and other entities throughout the state could be enormous and add to the devastating economic impacts of the COVID-19 pandemic. 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 shutter or relocate. The full adverse consequences of S. 113 also may be difficult to predict because no state has adopted such a broad statutory cause of action for medical monitoring.

For all of these reasons, ATRA strongly urges the Committee to reject S. 113.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Joyce', with a long horizontal stroke extending to the right.

Sherman Joyce
President

cc: Members of the Senate Judiciary Committee