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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/09

SPONSOR Adair LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Vexatious Litigation Act SB 645

ANALYST Archuleta

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate	Indeterminate	Recurring	Public Liability

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)

General Services Department (GSD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 645 creates the Vexatious Litigation Act requiring the General Services Department, Risk Management Division to provide services for a victim of vexatious litigation. This bill creates a new cause of action for damages that would belong only to water and sanitation districts, mutual domestic water consumers associations and water users' associations, and only against certain individuals who are found to have brought habitual, unreasonable or frivolous litigation "sequentially or repeatedly" against the water and sanitation district, mutual domestic water consumers associations and water users' associations. Also, the bill would award double the costs and attorneys' fees to the water and sanitation districts, mutual domestic water consumers associations and water users' associations who have been sued by plaintiffs who are deemed to be vexatious litigators, by virtue of having filed a certain number of lawsuits, or to have had a certain number of lawsuits enforced, or by other criteria defined as having brought vexatious litigation.

### FISCAL IMPLICATIONS

Neither the General Services Department nor the Attorney General's Office identified a fiscal impact. However, requiring RMD to pursue "double costs and attorney fees" may result in increased costs paid by GSD from the Public Liability Fund.

## SIGNIFICANT ISSUES

The General Services Department has identified the following significant issues related to this bill:

1. This bill appears to seek “double costs and attorney fees” on behalf of water and sanitation districts, mutual domestic water consumers associations or water user’s associations. The bill simultaneously obligates RMD to pursue those “double costs and attorney fees.” Presumably, then, any recovery of “double costs and attorney fees” would be made into the Public Liability Fund, and not to the water and sanitation district, mutual domestic water consumer association or water user’s association, because the costs and attorneys’ fees would have been paid from the Public Liability Fund. The draft does not seem to consider this consequence, and appears to assume (perhaps wrongly) that the “double costs and attorney fees” would be paid to the water and sanitation district, mutual domestic water consumers association, or water user’s association.
2. Any restriction on a person’s right to pursue litigation is subject to constitutional challenge, under both the U.S. and New Mexico Constitutions. A challenge to this bill based on the First Amendment of the U.S. Constitution would likely succeed, especially because it does not allow for fact-finding, but instead peremptorily decrees that certain persons are vexatious litigators, and subject to penalty for any subsequent claim after a “vexatious litigation” threshold has been met. There are also substantive due process issues raised by this type of punitive restriction on litigation.
3. The threshold for “proving” vexatious litigation, in Section 3 of the bill, is rather low. For example, a plaintiff has caused more than one-half of the judges in a single judicial district to be recused, or has brought litigation that has been dismissed for lack of standing or failure to state a claim more than two times in a single year. These are rather low thresholds.
4. Presumably also, once a plaintiff has crossed the threshold into the realm of being characterized as a vexatious litigator, s/he would be deemed a vexatious litigator for the rest of her/his life, without a way to redeem her/himself. This would likely not pass constitutional scrutiny.
5. Water and sanitation districts, mutual domestic water consumers associations, and water users’ associations are among a number of types of organizations, each with their own enabling acts, that may or may not already be eligible for RMD coverage as political subdivisions and, hence, as local public bodies. If they are already eligible for RMD coverage, then the portions of this bill providing RMD coverage, are unnecessary. If they are not already eligible for RMD coverage, then the portions of this bill that would provide RMD coverage, may be in conflict with other statutes that do not allow RMD coverage to them.
6. Other types of similarly-situated organizations may or may not be eligible for RMD coverage (for example, acequia organizations, soil and water conservation districts, water utilities, and others). There does not seem to be a logical reason for specifying that only these three come within the scope of the bill. The scope of this bill would almost inevitably be enlarged at some point, creating more litigation for RMD.

7. RMD is not authorized to pursue claims on behalf of the State, or its political subdivisions. The Attorney General usually pursues claims. The bill should perhaps be amended to direct the Attorney General to pursue, rather than RMD.
8. Persons who file many truly meritless claims, often have scant resources. So even if double cost and attorney fees awards were obtained, the persons may not have ability to pay, so RMD would have expended funds on pursuing the claim, which will not be recovered.

According to the Attorney General’s Office, Vexation Litigation Act may likely be challenged for its constitutionality based on the fact it may chill a person’s First Amendment Rights and may potentially limit their access to the courts.

It is not readily apparent what the proposed amendment to NMSA §41-4-23 (page 3 of SB 645) seeks to do. The amendment appears contradictory and appears to permit a quasi-governmental entity to wait until after a claim for vexatious litigation arises to then obtain insurance coverage.

Although the definition of “quasi-governmental entity” is defined in the proposed Vexatious Litigation Act, the definition is not set forth in any amendments to NMSA §15-7-3, NMSA §41-4-3 or NMSA §41-4-23.

### **PERFORMANCE IMPLICATIONS**

RMD resources may be directed toward seeking these awards, and even if successful the “double costs and attorney fees” may never be recovered.

### **ADMINISTRATIVE IMPLICATIONS**

GSD notes that RMD is authorized to defend tort claims. If this bill were to pass, the AG would have to commission RMD attorneys to pursue the claims described in this bill. The Public Liability Fund would have to be tapped for costs of pursuing these claims. The bill should definitely specify whether RMD is to recover its costs of pursuing claims and/or whether RMD should receive any “double” recovery.

The Attorney General’s Office notes that the above mentioned language in NMSA §41-4-23 (page 3 of SB 645) would permit a quasi governmental entity to wait until after a claim for vexatious litigation has occurred to then obtain insurance coverage

### **TECHNICAL ISSUES**

According to GSD, this bill confuses RMD’s authority to defend claims, with a mandate for RMD to pursue claims. This bill is unclear whether RMD would be pursuing those claims on behalf of the Public Liability Fund, or on behalf of the water and sanitation district, mutual domestic water consumers association, or water users’ association.

## **OTHER SUBSTANTIVE ISSUES**

GSD notes, the proposed amendment adding Subsection 41-4-23(B)(10) is internally contradictory in that it requires RMD to “insure” for making of claims (i.e., for plaintiff’s coverage). All other RMD coverage is insurance for DEFENSE of tort claims. The provision is internally and inherently contradictory. Another contradiction is in the proposed addition of Subsection 15-7-3(F)(17), which says that quasi-governmental entities that have prevailed in a claim for vexatious litigation are “public employees.” Only persons can be public employees.

## **ALTERNATIVES**

GSD suggests that there may be some judicial solutions to vexatious litigation: If a litigant believes that a trial court is not managing litigation appropriately, the appellate courts can be asked to exercise supervisory control. Attorney’s fees awards are generally within the sound discretion of the trial court, and in some instances treble fees are available. This bill does not distinguish among the various types.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

GSD indicates that judges can dismiss meritless claims, and can sanction certain litigators for bringing truly meritless claims. Water and sanitation districts may seek RMD coverage as local public bodies.

DA/svb