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## FISCAL IMPACT REPORT

SPONSOR: Adair DATE TYPED: 02-24-01 HB \_\_\_\_\_  
 SHORT TITLE: Recovery of Costs & Attorney Fees SB 712  
 ANALYST: Gonzales

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
			\$ 60.0	Recurring	Public Liability Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

Administrative Office of the Courts (AOC)  
 Office of the Attorney General  
 Risk Management Division, General Services Department

### SUMMARY

#### Synopsis of Bill

Senate Bill 712 awards the prevailing party in a civil action costs and reasonable attorney fees unless provided otherwise by a specific statutory provision.

#### Significant Issues

Currently, many plaintiff cases are brought on contingent fee cases where the attorney is paid only if the plaintiff collects funds in the litigation. Therefore, plaintiff case filings could be dramatically affected due to the risk of a plaintiff being assessed attorney fees in a case.

Since current law only assesses attorney fees in the event they are specifically agreed upon by the parties or are allowed by statute, there are no laws that presently limit the award of attorney fees which may create exceptions to the intentions of this bill.

## **FISCAL IMPLICATIONS**

The fiscal impact for both the judiciary and Office of the Attorney General is directly impacted by the amount of litigation that is generated or alternatively avoided by the provisions of this bill.

According to the Risk Management Division of the General Services Division, the provisions of this bill would allow prevailing plaintiffs to collect costs and attorney fees in tort cases against the state with an estimated impact of \$60.0 a year.

## **OTHER SUBSTANTIVE ISSUES**

The Office of the Attorney General reports:

Under existing law in New Mexico, costs are routinely awarded to the prevailing party in a civil litigation but each party bears its own attorney fees. This so-called American rule differs from the English rule in which the prevailing party is entitled to recover attorney fees from the loser. The American rule is followed by almost all the states and in federal courts. The only exceptions are where there are statutes that allow for fee shifting. Examples of such statutes are in our consumer protection laws, in workers compensation cases and in shareholder suits.

The existing law is found in section 39-3-30 NMSA 1978 and in Rule of Civil Procedure 1-054. D. Costs are to be allowed to the prevailing party as a matter of course but the trial court has the power to limit or bar costs in an appropriate case. Costs can be awarded against the state as well as against a private party. Thus, the only effect of the bill with respect to costs is that it would divest the trial court of discretion to deny or limit costs in an appropriate case. This power is rarely used except when the prevailing party has done something that the court believes is inappropriate. A denial or limitation of costs is subject to appeal.

The award of legal fees to a prevailing party has long been a hotly debated issue. There is a lot of literature on the subject in law reviews, books and other materials. The plaintiffs' bar generally advocates the status quo claiming that the exposure to legal fees would be a chill to a lawsuit by the little man who has been wronged by a big corporation. The defense bar generally advocates this change claiming that it will reduce the number of bogus suits brought against their corporate clients. No side is clearly right or wrong but as a matter of politics and history, the American rule has prevailed in this country.

As a state agency we have no particular position with respect to this bill, as it would impact private litigation. However, we strongly oppose any bill that would subject the public to exposure for attorney's fees in civil litigation. In addition to the litigation engaged in by this agency, virtually every governmental agency at the state, county and local level is engaged in some civil litigation. Usually, the public body is represented by public employees who are compensated at rates far below prevailing rates for private attorneys. If passed into law, every public body that engages in litigation, whether as plaintiff or defendant, is exposed to having to pay for the attorney's fees of its adversary. The potential economic exposure of this to the public is incalculable but could be a disaster for the public and a potential goldmine for the private bar.

JMG/njw