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FISCAL IMPACT REPORT

SPONSOR Komadina DATE TYPED 2/3/05 HB _____
 SHORT TITLE Limit Common Law Causes of Action SB 105
 ANALYST McSherry

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
NFI	NFI	NFI	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

- LFC Files
- Attorney General’s Office (AGO)
- Public Defender Office (PDO)
- Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

Senate Bill 105 proposes to amend NMSA Section 38-1-3 1978 relating to the adoption of the “common law” as the rule of law within the State of New Mexico. The bill proposes to prohibit changes in common law by disallowing the courts in New Mexico from creating new causes of action or modifying or evolving a common law cause of action. The proposed amendment would exempt writs of the Supreme Court “necessary or proper for the complete exercise of its jurisdiction.”

Significant Issues

According to the Administrative Office of the Courts (AOC), the proposed changes included in Senate Bill 105 would significantly restrict the power of the courts to change the common law. The AOC cites that courts have had this power in the Anglo-American tradition for almost 1000 years. Whether the legislature has the power to enact this measure will be subject to judicial review.

The Attorney General’s Office (AGO) asserts that should the proposed Senate Bill 105 be enacted, it would likely be struck down as an unconstitutional violation of the doctrine of separation of powers contained in Article III Section 1 of the New Mexico Constitution, and as a violation of Article VI Section 1 of the New Mexico Constitution which vests the judicial power of

the state in the courts.

By enacting Section 38-1-3 and its predecessors, AGO cites, “New Mexico adopted the common law or *lex non scripta* and such British statutes of a general nature not local to that kingdom nor in conflict with our Constitution or specific contrary statutes, which are applicable to our conditions and circumstances and which were in force at the time of American separation from England, and made it binding as the rule of practice and decision in the courts of this State.” *Boddy v. Boddy*, 77 N.M. 149, 420 P.2d 301 (1966). However, continues AGO, the New Mexico Supreme Court has the power to do away with common-law principles since the common law is not the rule of practice and decision if inapplicable to conditions in New Mexico, and if it is not applicable to the condition and circumstances it is not to be given effect. *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). AGO states that Senate Bill 105 does not recognize that common-law doctrine is judicially created, and that it is within the court's province to change a common-law doctrine if it is unwise. *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982).

With regard to the bill's attempted prohibition against courts creating new causes of action, AGO asserts that this has been dealt with by the Judicial Branch. For example cites AGO, the Supreme Court in *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1990) recognized a cause of action known as “prima facie tort”. The Court recognized that tort law was not static, and that “it must expand to recognize changing circumstances that our evolving society brings to our attention.” The Supreme Court referred to its recognition of a tort inducing a breach of contract, and infliction of emotional distress.

Article VI Section 1 of the New Mexico Constitution vests the judicial power of the state in the courts (and the senate when it sits as a court of impeachment). AGO cites that the right to determine controversies between individual litigants stems from the state constitution and this power rests alone with the courts. *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069. AGO continues that any statutory proposal under which the executive and legislative branches of a municipal government can control or exercise the inherent powers of the judiciary would violate the state constitution. *Mowrer v. Rusk*, 95 N.M. 48, 618 P.2d 886 (1980).

The Public Defender (PD) states that “Common law” means “judge made law” and that only the judiciary has the power to change common law rules. PD continues, asserting that, prohibiting judges from creating new common law would in effect freeze common law, which would violate the spirit of separation of powers and would limit access to courts by preventing citizens of New Mexico from redressing grievances for causes of action not yet perceived by society.

PERFORMANCE IMPLICATIONS

According to PD, the legal defenses and bases upon which tort claims may be defended by and on behalf of the Risk Management Division (RMD) of the General Services Department (GSD) would be limited with the amendments proposed in Senate Bill 105.

FISCAL IMPLICATIONS

AOC reports that the enactment of Senate Bill 105 would result in a minimal administrative cost for statewide update, distribution, and documentation of statutory changes, and that additional fiscal impact on the judiciary would be proportional to the administrative burden on court dockets, if any.

TECHNICAL ISSUES

The Public Defender's Office believes the exception to the prohibition for certain Supreme Court writs included in Senate Bill 105 would be unclear and subject to interpretation.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The current common law practices and defenses available to the State of New Mexico under the protections of the Tort Claims Act would remain available, as would the application of future common law created torts and defenses.

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