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## FISCAL IMPACT REPORT

SPONSOR Komadina DATE TYPED 02/08/05 HB \_\_\_\_\_

SHORT TITLE Substantive Law Applied to Government SB 104

ANALYST McSherry

### APPROPRIATION

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

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files  
 General Services Department (GSD)  
 Administrative Office of the Courts (AOC)  
 Office of the Attorney General (OAG)  
 Corrections Department (CD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 104 proposes to add a new section to NMSA 1979, Chapter 38, "Trials." The bill would name the new section "Fairness in Litigation" and proposes language providing that if the state, or political subdivision of the state, sues a defendant, and by suing that defendant seeks to recover the value of a benefit or service provided to the state to or on behalf of a person injured by the defendant, then the state or political subdivision would be subject to the same substantive law that would apply as when the injured person himself or herself sues the defendant.

#### Significant Issues

According to the General Services Department (GSD) this bill appears to impact the right of the state or local government to seek reimbursement for worker's compensation benefits. GSD continues, that if this would be the result of the proposed statute, then in turn, the change could impact the entire rate and premium structure and balance sheet of worker's compensation self-insurance funds and the premiums for purchased insurance coverage

The Office of the Attorney General (AGO) assumes that the bill is meant to address situations

where the state or a local government is subrogated to the rights of a plaintiff after it provides medical or other services to that plaintiff. AGO continues stating this subrogation would entitle the state or local government to prosecute a claim against the defendant causing injury to the person receiving benefits from the state or local government. AGO asserts that there are only a few situations in which the state or a local government obtains subrogation rights. For example, NMSA Section 61-29-27 1978 Comp. allows the Real Estate Commission to be subrogated to the rights of a judgment creditor when it pays a claim from the Real Estate Recovery Fund. County indigent hospital and county health care boards are subrogated to the rights of a hospital receiving payment from the county indigent hospital claims fund pursuant to NMSA Section 27-5-10 1978 comp. AGO state that this bill would presumably apply in those situations.

The bill does not define the term “substantive law,” or “injury,” and is unclear what the terms would encompass.

AGO proposes that there is a danger that the bill, if enacted, could be construed as a blanket waiver of sovereign immunity when the state or a local government pursues a subrogation claim. AGO provides that “substantive law” is distinguished from “procedural law,” and different substantive law has historically been applied to governmental entities as distinguished from private parties; different statutes of limitations, standing requirements, etc. could apply depending upon whether the plaintiff is a government or private party.

The Corrections Department reports that the purpose and meaning of this bill are unclear to the Department.

#### **PERFORMANCE IMPLICATIONS.**

AGO asserts that the bill is unclear as to its application and impact on subrogation suits brought by the state or local governments. At worst, states AGO, it could waive sovereign immunity in such suits and subject those governments to all claims and defenses applicable against private parties.

#### **FISCAL IMPLICATIONS**

GSD relates that the bill could impact the entire rate and premium structure and balance sheet of worker’s compensation self-insurance funds and the premiums for purchased insurance coverage.

The AOC cites a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the administrative burden on court dockets, if any. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

#### **TECHNICAL ISSUES**

Definitions for substantive law and injury may be useful to clarify the intended meaning of the proposed bill.

## **OTHER SUBSTANTIVE ISSUES**

The Administrative Office of the Courts states that this bill is directed to the substantive law and is therefore without impact on procedural law under which the State is treated differently from other litigants.

## **ALTERNATIVES**

AGO suggests that the bill should specify the actions it is intended to target, along with specific sections of substantive law the sponsor believes the state and local governments should be subjected to when bringing subrogation suits. The AGO further suggests that the intent of the bill could be more clearly defined, to avoid the possibility of subjecting the state and local governments to laws and claims intended to apply only to private parties.

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

According to GSD, state and local government entities would continue to be governed by the New Mexico Tort Claims Act, the New Mexico Worker's Compensation Act, and other existing substantive law and common law which govern governmental entities.

## **POSSIBLE QUESTIONS**

1. What is the intended outcome of the proposed bill; and can this purpose be ?
2. Are definitions needed, and available, for the terms "substantive law" and "injury" used in Senate Bill 104.

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