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FISCAL IMPACT REPORT

ORIGINAL DATE 2/1/2007

SPONSOR Komadina LAST UPDATED 2/9/2007 HB _____

SHORT TITLE Right to Eat Enchiladas Act SB 26/aSPAC

ANALYST Schuss

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 85 and HB 747

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Department of Health (DOH)
 Public Education Department (PED)
 Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee Amendment to Senate Bill 26 includes producers among the entities that may not be found civilly liable, with the exception of Section 5 of the act, for a claim arising out of weight gain, obesity or other generally know condition allegedly caused by or allegedly likely to result from the long-term consumption of food.

Additionally, the amendment also provides that the provisions of the act will apply to all covered causes of action filed on or after the effective date of the act, instead of pending on the effective date of the act.

According to AGO, this change to the applicability of the act is now in compliance with the New Mexico Constitution Article 4, Section 34 which states, "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

Synopsis of Original Bill

Senate Bill 26 creates the Right to Eat Enchiladas Act with the purpose of preventing frivolous lawsuits against manufacturers, packers, distributors, carriers, holders, sellers, marketers, or advertisers of food that comply with relevant statutory and regulatory requirements. These entities may not be found civilly liable for injury claims based on weight gain, obesity, a health condition associated with weight gain or obesity, or a condition allegedly caused by or likely to be caused by long-term food consumption.

It will be possible to pursue a civil lawsuit when food has been adulterated or misbranded in violation of state or federal law, and the injury was proximately caused by the violation. The violation must be knowing and willful. When filing a claim that alleges knowing and willful violation, the plaintiff must include these elements: state or federal law was violated, the facts are a violation of state or federal law, the violation was the proximate cause of the injury, and the facts support a reasonable inference that the violation was knowing and willful.

In all legal actions that are not prevented by the Right to Eat Enchiladas Act, all discovery or other proceedings are stayed while a motion to dismiss is pending unless the court finds that specific discovery is necessary to preserve evidence or to prevent undue prejudice.

This act covers all causes of action pending on the effective date of this act and all causes of action filed after the effective date.

SIGNIFICANT ISSUES

The Attorney General's Office lists the following issues:

The title of the bill does not appear to accurately reflect its intent. The bill is modeled after other recently enacted legislation in other states. Similar legislation in other states is entitled “[state name] Commonsense Consumption Act.”

In the bill the definition for the word “claim”, it clarifies who has standing to bring a cause of action. This definition includes a natural person, corporation, company, association, firm, partnership, society, joint-stock company or other entity including a governmental entity or private attorney general.

The definition for the phrase “knowing and willful” indicates what state of mind is necessary to prevail on a claim asserted under the exception of this act where liability is not precluded.

The remaining definition for “generally known condition allegedly caused by or allegedly likely to result from the long-term consumption” relates to the cumulative effect of consumption and not a single instance of consumption.

The bill does not include definitions for those immune from civil liability such as “manufacturers”, distributors” or “association(s) of one or more of these entities.”

The bill places immunity on causes of action that can currently be brought under the laws of this state while also defining exceptions to the immunity thus, maintaining certain rights and causes of action that can be enforced by law (substantive law). This is distinguished from a law that prescribes the procedures and methods of enforcing rights (procedural law). The applicability of the act applies to covered causes of action that are pending on the effective date of the act. Please note that pursuant to the New Mexico Constitution Article 4, Section 34, “[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.” It is the general rule that a case is not pending within the meaning of this constitutional provision before it is on the docket of some court or after a final judgment is filed. *State v. Druktenis*, 135 N.M. 223, 86 P.3d 1050 (2004).

The bill covers civil liability for any claim of injury but does not cover wrongful death claims.

BS/nt

This bill appears that it would stop discovery on all civil actions not bound by the Right to Eat Enchiladas Act while a motion to dismiss is pending, according to the Administrative Office of the Courts. This will lengthen the time to resolution of all civil cases. Parties, victims, witnesses, and attorneys will have to wait longer for resolution of their legal matters.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

RELATIONSHIP

Relates to SB 85 and HB 747

OTHER SUBSTANTIVE ISSUES

According to the Department of Health, New Mexico's percentage of obese Native American high school students (16.4%) and obese Hispanic high school students (12.4%) is much higher than obese Non-Hispanic White students (8%). Also, obesity disproportionately affects persons in lower socio-economic levels. Cost and lack of easy access to nutritious foods, such as fresh fruits, vegetables and low fat dairy products in low income neighborhoods may contribute to this disparity.

The Attorney General's Office notes that this bill reflects a national trend to address the mounting concern about the growing obesity epidemic we are facing in the United States. As of October 15, 2004, bills granting immunity to those in the food distribution and marketing industry had been introduced in twenty-five (25) states and were enacted in thirteen (13) of those states. The thirteen states that have enacted legislation include Arizona, Colorado, Georgia, Florida, Idaho, Illinois, Louisiana, Michigan, Missouri, South Dakota, Tennessee, Utah and Washington State. Many state-level proposals are modeled after federal legislation introduced in 2003, and are known as the Commonsense Consumption Act or the Personal Responsibility in Food Consumption Act.

There has been debatable discussion about who is responsible for the health risks associated with the choices in food consumption. This has led to the potential for food industry-focused tort litigation. However, other questions arise about the advisability of limiting the access to potential remedies through the courts. Industry leaders argue that these types of bills will protect against frivolous lawsuits for obesity claims. Trial lawyers argue that the award of sanctions and attorney's fees currently are in place to prevent and punish those who file frivolous lawsuits.

ALTERNATIVES

The Attorney General's Office offers that the bill could expand the immunity to include claims of wrongful death as some states have done including Florida, South Dakota, Louisiana and Michigan.