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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/04/10

SPONSOR Lujan, B. LAST UPDATED \_\_\_\_\_ HB 190

SHORT TITLE Residential Construction Consumer Recovery SB \_\_\_\_\_

ANALYST Wilson

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
	FY11		
CID	\$150.0	Recurring	Residential Construction Consumer Fund
DFA	As needed to pay homeowners	Recurring	Residential Construction Consumer Fund
Local building programs	first \$ of every license collected by local authority	Recurring	Local funds

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
	FY11	FY12		
CID	\$150.0	\$150.0	Recurring	Residential Construction Consumer Fund
DFA	\$150.0-\$1,500.0	\$150.0-\$1,500.0	Recurring	Residential Construction Consumer Fund
Local building programs	first \$ of every license collected by local authority	first \$ of every license collected by local authority	Recurring	Local funds

(Parenthesis ( ) Indicate Revenue Decreases)

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

	<b>FY10</b>	<b>FY11</b>	<b>FY12</b>	<b>3 Year Total Cost</b>	<b>Recurring or Non-Rec</b>	<b>Fund Affected</b>
<b>Total</b>		\$150.0	\$150.0	\$300.0	Recurring	Residential Construction Consumer Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

**SOURCES OF INFORMATION**

LFC Files

Responses Received From

Attorney General’s Office (AGO)

Regulation & Licensing (RLD)

**SUMMARY**

Synopsis of Bill

House Bill 190 creates a Residential Construction Consumer Fund (RCCF) in the State Treasury and is to be administered by the Department of Finance and Administration (DFA). The RCCF is created to compensate homeowners who enter into a retail transaction agreement with a licensed contractor and who incur damages in the course of the performance or breach of contract as adjudicated in a judgment by a court of competent jurisdiction. The Construction Industry Division (CID) in RLD is charged with the administering and processing of all claims under the RCCF and will have authority to promulgate rules and regulations with approval of the Construction Industries Commission.

The RCCF will be supported primarily from fees assessed on residential building permits issued by CID and local building programs for building permits applied for on or after July 1, 2010.

HB 190 establishes statutory minimum and maximum balance amounts for the RCCF and places limits on the amounts that can be paid out on each claim from the RCCF. HB 190 also establishes minimum and maximum amounts that may be assessed against the permit fees. The director of CID will determine the amount of the permit fee based upon the projected amounts needed to maintain the statutory balance requirements of the RCCF; however the assessed permit fee cannot be less than \$5 or more than \$30.

If payment is ultimately ordered, the homeowner is required to assign his or her rights to CID in the amount that is paid out from the RCCF and in turn CID will enforce repayment to the RCCF from the licensee. Licensee’s failure to repay the RCCF will result in the cancellation of construction license and license cannot be reinstated until full payment or an approved arrangement with CID for full payment has been made by licensee.

**FISCAL IMPLICATIONS**

The Residential Construction Consumer Fund RCCF is created in the state treasury. The RCCF consists of appropriations, gifts, grants and donations to the RCCF and assessments charged by

CID and all local building programs on each residential building permit issued by CID or a local building program. Money in the RCCF at the end of a fiscal year shall not revert to any other fund.

An amount not to exceed \$150,000 per year is appropriated to CID to administer, operate and process the cost of implementing the fee on residential building permits and claims against the RCCF

DFA shall administer the RCCF, and money in the RCCF is appropriated to the DFA to carry out the provisions of the Residential Construction Consumer Recovery RCCF Act. The first one dollar of the fees assessed by a local building program is appropriated to and shall be retained by the local building program to defray the cost of administrating the collection and reporting the fee.

This bill creates a new fund and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

The RCCF will be funded by new money collected by state and local building programs through a modest initial assessment on residential building permits of \$10. That assessment will be adjusted annually, as needed, to keep the RCCF at a balance sufficient to respond to authorized claims.

The RCCF is expected to be self-supporting and will pay for the administrative costs of collecting the assessments and CID's management of the claims process.

Based on input from other states which operate construction consumer recovery funds, new full time FTEs will be required to administer claims against the RCCF. Examples have shown two FTEs managing these types of funds. The salaries and overhead costs of these FTEs is the basis for the proposed annual \$150,000 appropriation out of RCCF revenues to CID.

Repayment by licensees of amounts paid out of the fund is mandatory.

### **SIGNIFICANT ISSUES**

Currently, the only recourse for a homeowner to recover damages caused by a licensee of the division is through litigation; but, even when a judgment is awarded, the homeowner is often unable to collect on it because the licensee has no money, or the process of collecting is too difficult and costly to be worthwhile. This fund will provide homeowners an alternative means of compensation for damages awarded in a judgment.

The AGO provided the following:

Payment will be available for persons who have obtained a judgment against a construction licensee for breach of a construction, repair, alteration, remodeling or home improvement agreement involving the homeowner's primary residence which must be a single-family dwelling.

The recovery is limited in two ways:

1. The maximum recovery for an individual homeowner is limited to no more than \$25,000 on any single claim. Potential damage claims could exceed the maximum recovery amounts for individual claims, especially for claims involving custom home contracts.
2. The amount recoverable against any one licensee in a fiscal year is limited to no more than \$300,000. Potential damage claims could exceed the maximum recovery amounts against a licensee in one year, especially for multiple claims involving track housing development disputes. These amounts are further limited by the type of damages that can be collected from the RCCF

Litigation will be required in order to recover against the RCCF. Therefore, legal representation to all parties is a significant issue. If costs and attorney fees are included in the damages computation, the homeowner must share the limit of \$25,000 with cost of litigation and attorney fees.

Under HB 190, even if the homeowner prevails in his or her claim against the licensee, the homeowner is not guaranteed recovery of attorney fees and litigation cost. In construction cases, litigation costs frequently involve expert opinions, which are often costly. Also, without guarantee of attorney fees, homeowners may find it difficult to acquire the services of private counsel to assist in the claim. Unless, the agreement between the homeowner and the contractor otherwise provides for recovery of attorney fees, the homeowner will not be guaranteed a judgment that includes payment of attorney fees and costs. On the other hand, the licensee faces significant liability if licensee must defend the homeowner's civil action and the division's possible determination of repayment.

Thus, this underscores the importance to provide for the expense of legal representation. Since HB 190 provides a required legal adjudication by formal complaint and appeal it follows that HB 190 should make provisions for legal representation.

HB 190 is a consumer protection law. As such, it may be consistent to add a provision addressing attorney fees and cost similar to the general consumer protection in New Mexico, namely the Unfair Practices Act, N.M.S.A., Section 57-12-10(C). Please see proposed Amendment below.

HB 190 specifically addresses the type of damages that can be collected from the RCCF. The bill also provides for payment from the RCCF amounts remaining unpaid on the judgment up to its \$25,000 cap. This means that the RCCF will only pay a ceiling amount on a judgment award for claims that are within the definition of damages. This implies that the homeowner is not prevented from seeking and collecting additional amounts or for other damages. However, there is no specific language in HB 190 that states unequivocally that homeowners may collect from the RCCF and continue to attempt to collect the remaining judgment balance for other damages or for damages that exceed the cap from the licensee.

#### **ADMINISTRATIVE IMPLICATIONS**

This RCCF will create an entirely new process for CID, so rules and procedures will be required, and new staff will have to be hired and trained.

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Based on information received from similar programs in other states, CID estimates that there will be approximately 200 open claims at any given time, and that payouts will occur between 4 and 6 times a month. The administration of this amount of activity is estimated to require a minimum of two new FTEs. CID estimates that, using the assessments provided in the bill, the minimum balance will be reached in approximately three years.

CID must develop a protocol in the processing and handling of verified claims filed. Since these claims are done in court, CID's legal resources are implicated.

DFA will handle the administration of the RCCF with existing staff as part of ongoing responsibilities.

### **TECHNICAL ISSUES**

The AGO notes that HB 190 limits recovery from the RCCF to damages involving homeowner's primary residence and New Mexico licensees. The language used in HB 190 appears to make the RCCF available to any homeowner regardless of where the residence is located, including residences located outside of New Mexico. Since the RCCF is supported from fees assessed to permits issued in New Mexico, recovery from the RCCF should also be limited to residences located in the State. The AGO suggests that clarification could be easily accomplished by changing the definition of homeowner to a owner of a residence located in New Mexico that is or is intended to the primary place of residence of the owner.

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