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## FISCAL IMPACT REPORT

**SPONSOR** Egolf **ORIGINAL DATE** 02/08/12  
**LAST UPDATED** \_\_\_\_\_ **HB** 143  
**SHORT TITLE** Foreclosure Fairness Act **SB** \_\_\_\_\_  
**ANALYST** Hoffmann

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	NFI*		

(Parenthesis ( ) Indicate Expenditure Decreases)

\*See Fiscal Implications

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

The AGO analysis includes the following disclaimer: "This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request."

Regulation & Licensing (RLD)

### SUMMARY

#### Synopsis of Bill

House Bill 143 would enact the Foreclosure Fairness Act. The proposed act mandates that a court shall award reasonable attorney fees and costs to a defendant who prevails in a claim of foreclosure on a mortgage note secured by the defendant's primary residence.

The court shall not award reasonable attorney fees and costs if the plaintiff in such an action is an individual bringing the claim on the individual's own behalf or on behalf of a sole proprietorship owned by the plaintiff.

For the purposes of this bill, a defendant who exercises the defendant's right of reinstatement or redemption shall not be considered a prevailing party.

The effective date of the provisions of this act is July 1, 2012.

## **FISCAL IMPLICATIONS**

The AOC suggests that enactment of this bill may result in a decrease in foreclosure filings in the district courts. The AOC is currently working on possible parameters to measure resulting change in case load. In addition, there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

## **SIGNIFICANT ISSUES**

The AOC comments that the number of foreclosures filed in New Mexico district courts has grown significantly in recent years. As a practical matter, most defendants in foreclosure proceedings are not represented by attorneys. The substitute bill may provide an incentive for more attorneys to represent defendants in foreclosure actions because the bill mandates that prevailing defendants be awarded attorney's fees and costs. Representation ensures that defendant's rights are protected and that proper foreclosure procedures have been followed. In addition, fewer foreclosure cases may reach the district court if banks have additional incentives to restructure loans.

The following discussion was provided by the AGO.

HB 143 provides limited post-litigation recovery of attorney fees and costs to defendants who prevail in foreclosure actions. The bill does not provide any pre-foreclosure protections that may prevent or limit foreclosure actions. Pre-foreclosure protections such as notice of creditor's intent to foreclose and requiring creditors evaluate whether debtor qualifies for any loss mitigation programs prior the entering of a foreclosure judgment could assist both the plaintiffs and defendants in avoiding unnecessary costs associated with foreclosure proceedings, including proceedings involving right of reinstatement or redemption of the property.

Unless altered by statute, parties to litigation in New Mexico pay their own legal fees and costs in litigation, regardless of outcome. This is called the "American Rule." In some instances, however, the Legislature has provided for "fee shifting," usually entitling a prevailing plaintiff to recover those fees and costs from a losing defendant who has caused injury to the plaintiff. The New Mexico Unfair Practices Act is such example. Section 57-12-10(C). HB 143 will implement this fee shifting rule in actions to foreclose a security interest in real property if: (a) the property to be foreclosed is a primary residence; (b) the defendant wins the case; (c) the losing plaintiff is an entity other than an individual or a sole proprietorship owned by the plaintiff. If the defendant keeps or reacquires the residence because he/she exercises a right of reinstatement or redemption, the defendant is not a "prevailing party" and is not entitled to an award of fees and costs.

As (a) above indicates, a prevailing defendant will not be entitled to an award of fees and costs if the security interest is in commercial property. As (c) above indicates, the bill does not allow an award of fees and costs against an individual or a sole proprietorship owned by the plaintiff, but will require the court to award fees and costs against all other losing plaintiff entities (partnerships, LLC's and corporations).

## **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 percentage of cases filed; and percentage change in case filings by type.

## **ADMINISTRATIVE IMPLICATIONS**

According to the AOC there may be an administrative impact on the courts as a result of an increase in caseload and or in the amount of time necessary to dispose of these cases.

## **RELATIONSHIP**

Senate Bill 1, the Mortgage Fair Foreclosure Act, requires that homeowners be given 1) reasonable notice prior to the commencement of foreclosure actions and 2) an opportunity to participate in loss mitigation.

## **ALTERNATIVES**

RLD suggests an amendment to Section 58-21A-6 NMSA 1978 (the *Home Loan Protection Act*) including this language.

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

The AGO states that prevailing defendants will pay their own fees and costs. As a practical matter, a financially distressed defendant who is facing foreclosure (legitimate or otherwise) is not likely to have the resources to hire a lawyer if the defendant has to pay the lawyer his/her fee. This bill, if passed, may have the effect of making more lawyers willing to take on cases with meritorious defenses, since it does provide a means by which the lawyer can get paid.

CH/svb