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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/11
 LAST UPDATED 03/02/11 **HB** 348/aHBIC

SPONSOR Rehm

SHORT TITLE Declaratory Judgment for Alleged Debts **SB** _____

ANALYST Sanchez, C.

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of HBIC Amendment

The House Business and Industry Committee amendment to HB 348 makes technical changes to HB 348. The nine amendments deal with grammatical and editing changes.

Synopsis of Bill

House Bill 348 authorizes district, metropolitan and magistrate courts to enter declaratory judgments on the “status” of alleged debts as well as the ownership of any tangible assets in the jurisdiction of the court. The bill also allows for supplemental relief on a declaratory judgment related to a debt. Such relief would be limited to collection of the debt or an order requiring removal of negative information from a credit report.

The bill also creates an attorney fee reciprocation clause, which is to say that if a contract for debt allows for attorney fees in the event of a collection action, then fees would be allowed the debtor in the event of a declaratory judgment that the debt is invalid.

FISCAL IMPLICATIONS

Presently the number of debtor-creditor actions filed in all state courts is on the increase. According to the Administrative Office of the Courts (AOC) this bill would potentially limit the duration of these cases in court, and thus decrease the staff time necessary to process them. There may be a resulting fiscal savings from this bill, but since each case is different it would be speculative to guess the exact number of dollars saved with this matter.

SIGNIFICANT ISSUES

With many routine debtor-creditor actions, the matter is resolved entirely by resolution of certain threshold issues. For instance, in credit card collection actions debtors often do not contest the amount owed, and the creditor simply wishes to have a judgment of record that will last beyond the statute of limitations on the debt. The creditor can then establish a payment plan with a judgment in hand or execute on the debtor's property, but will have more time to get that done. This bill would accommodate that phenomenon so that creditors can get into court for a declaratory judgment and save some litigation costs. The bill simultaneously recognizes that debtors ought to be able to get out of these lawsuits just as quickly if the debt is invalid. Thus, the bill allows a debtor a declaratory judgment that the debt is invalid and an order removing the debt from credit reports.

According to the Attorney General's Office (AGO), HB 348 will confer jurisdiction on magistrate and metropolitan courts that they do not presently have, and that the non-substantive references in the heading to the bill to "clarifying" are inaccurate to that extent.

Also, Section 44-6-9 of the Declaratory Judgment Act provides for supplemental relief from the court once rights have been declared. It is a mechanism by which a prevailing party may obtain enforcement of those declared rights. Subsection B is a proposed new provision enabling a prevailing creditor to proceed to the collection of the debt, and a prevailing alleged debtor to obtain an order from the court for "the removal from a publication, credit report or other public file of alleged debts determined not to be valid." A losing alleged creditor who fails to comply with a court's order to remove a negative report on the prevailing alleged debtor will be potentially subject to a civil penalty of \$500.

According to the AGO, traditionally, the "American Rule" governs awards of attorney fees in litigation. Under the Rule, each party pays its own fees and costs, regardless of outcome of the case, unless there is a statute that provides for an award of attorney fees to a prevailing party or unless there is a provision in a contract providing for such fees. Subsection 3(B) will expand the latter exception. When a contract at issue provides for an award of attorney fees, the party seeking the fees must affirmatively plead them. The language of the bill also creates a reciprocal right in all other parties to fees, even if the contract does not do so.

TECHNICAL ISSUES

Section 2(B), p. 2 line 20, contains a drafting error. The word "of" is omitted following "collection." The phrase should read "collection of debts."

According to the Attorney General's Office (AGO), district courts are courts of general jurisdiction and, under the existing form of the Declaratory Judgment Act, already have jurisdiction to determine the status of alleged debts. In other words, in regard to district courts, the provision in Section 1(B) is redundant.

Section 1(B) of the bill includes jurisdiction “to determine the status of alleged debts or ownership of tangible personal property valued within their respective jurisdictions.” The meaning of the phrase “valued within their respective jurisdictions” is unclear and ambiguous.

OTHER SUBSTANTIVE ISSUES

Section 4 states that “[i]n a proceeding for declaratory judgment of alleged debts, a court may exercise personal jurisdiction over a nonresident person who mails or telephones into the state a demand for payment of an alleged debt.” According to the AGO, this provision probably violates the New Mexico Long-Arm Statute, NMSA 1978, § 38-1-16, and the U.S. Constitution (due process), which has been held by the U.S. Supreme Court to require “sufficient minimum contacts” with a state before that state’s courts may exercise personal jurisdiction over a nonresident. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945). The New Mexico Supreme Court has held that a nonresident must “purposefully avail” himself/herself of the benefits and protections of New Mexico law, and that merely calling or sending mail into the state is insufficient by themselves to meet the standard. In other words, these acts do not constitute a nonresident availing himself/herself of the benefits and protections of New Mexico law, and do not confer personal jurisdiction on New Mexico courts over the nonresident. *Katherin v. Parkview Meadows, Inc.*, 102 N.M. 75, 76-77, 691 P.2d 462 (1984); *Salas v. Homestake Enterprises, Inc.*, 106 N.M. 344, 345, 742 P.2d 1049 (1987).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

CS/bym