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FISCAL IMPACT REPORT

ORIGINAL DATE 03/08/11

SPONSOR HJC LAST UPDATED _____ HB CS/386/HJCS

SHORT TITLE Transparency in Private Attorney Contracts SB _____

ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI	NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

No longer duplicates/conflicts with SB 461/SJCS
 Conflicts with SB 404
 Relates to SB 86, SB 269, and HB 38

SOURCES OF INFORMATION

LFC Files

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for the Business and Industry Committee substitute for House Bill 386 authorizes the Attorney General to enter into contingency-fee-based legal services to recover money due to any state or any of its departments, agencies, officers, instrumentalities, institutions or political subdivisions. Contingency fees, exclusive of reimbursement for reasonable costs and expenses, are capped as follows:

- \$20 million or less: fees are capped at 25% of the amount recovered;
- \$20 million-\$30 million: fees are capped at \$5 million plus up to 20% of the amount recovered; and
- Greater than \$30 million: fees are capped at \$7 million plus 15% of the amount recovered.

The contingency fee contracts shall be subject to the Procurement Code.

The contract may be terminated if any partner, associate, or employee of the contractor is found guilty of violating Section 1-19-34.8 NMSA 1978.

The bill creates the “attorney general suspense fund” to receive any settlement, from which

compensation is to be disbursed to private attorneys and the balance distributed to the permanent fund or other appropriate fund from which the loss occurred.

The bill includes a provision for promoting transparency by requiring the Attorney General (AG) submit a report by February 1st of each year to the President Pro Tempore of the Senate and the Speaker of the House that, at a minimum, includes the following:

- All new contingency fee contracts entered into the preceding calendar year;
- All contingency contracts that remain current during any part of the year;
- The name of the private attorney and name of the law firm;
- The nature of and status of the legal matter;
- The name of the parties to the action;
- The amount of any recovery; and
- The amount of the contingency fee paid.

The final provision restricts attorneys who have entered into a contingency fee contract with the AG from making campaign contributions or soliciting contributions on behalf of that Attorney General or his or her or campaign committee. The bill also prohibits contributions for a political committee controlled by the AG or an agent of the AG to aid or promote nomination or election of any candidate to a state office.

FISCAL IMPLICATIONS

The operating budget impact table above shows no fiscal impact since payments under these contracts come from funds received in satisfaction of a state claim.

There is an additional significant and desired fiscal impact that is not estimated in the table above resulting from the recovery of certain losses to the state's permanent or other funds by settlement or judgment that might otherwise not be achievable due to high upfront litigation costs or lack of internal expertise that would dissuade an agency from filing the lawsuit.

SIGNIFICANT ISSUES

ERB has stated the basic rationale for use of contingency fee contracts in prior testimony:

In contingency fee contracting the lawyer only collects if the plaintiff wins the case or it is settled out of court for a positive amount. Because contingency fee contracts shift risk from the plaintiff to the plaintiff's lawyer, only cases that that have merit are taken by a prospective firm. Contingency fee contracts allow agencies to utilize sophisticated firms, with greater experience and resources, to prosecute claims without governmental appropriations or direct payment of litigation costs.

It is possible permitting any state agency or local public body to enter into contingency fees contracts for litigation services presents the risk of abuse through law firm selection or case selection (or non-selection) involving "pay to play" schemes involving favorable settlement terms. The bill strives to mitigate against this possibility by requiring the AG to submit annual reports to the Legislature as well as prohibiting political contributions to the AG from attorneys who have a contingency-fee contract with the AG.

There is a clear need for both transparency and strong oversight to avoid these situations and other risks from having this method of litigation available. Including language in the bill to specify that procurement of services in this way also be subject to the represented agency's review and approval and requiring additional concurrent approval by an outside entity such as the Department of Finance and Administration's Contracts Review Bureau or the State Purchasing Agent might help insure that this type of procurement method is only being used for appropriate cases and to maximize possible returns to the state.

CONFLICT, RELATIONSHIP

HB 386/BICS now conflicts with the Senate Judiciary Committee Substitute for SB 461, which retains the lower fee caps, requires web posting of contracts, and precludes three procurement provisions: emergency, sole source and amended contract.

HB 386/BICS, while adopting similar sections in SB 404, still conflicts with that bill, which retains the lower fee caps and has slightly different campaign restrictions.

HB 386/BICS relates to SB 269/SJCS (Educational Retirement Board Bank & Attorneys).

HB 386/BICS relates to SB 86 (Investment Council Legal Service Contracts).

HB 386/HBICS relates to HB 38 (PERA Custodian Bank and Attorney Fees).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AG or will not be granted express statutory authority to enter into contingency fee contracts to recover monies owed or damages due the sate and/or its political subdivisions.

MA/svb:bym