

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

**SPONSOR** Adair **ORIGINAL DATE** 03/02/11  
**LAST UPDATED** \_\_\_\_\_ **HB** \_\_\_\_\_

**SHORT TITLE** Class Action Lawsuit Reform Act **SB** 528

**ANALYST** Aubel

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

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate*			Recurring	All funds

(Parenthesis ( ) Indicate Expenditure Decreases)

\*Most likely minimal to state operating expenses.

Relates to Senate Bill 532

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the Attorney General (OAG)  
Public Employees Retirement Association (PERA)  
Administrative Office of the courts (OAC)  
Educational Retirement Board (ERB)

### SUMMARY

#### Synopsis of Bill

Senate Bill 528 enacts the Class Action Reform Act that limits attorney fees for awards to class counsel for lawsuits filed in state district court. SB 528 would limit attorney fees in class action lawsuits to 1,000 times the average class member's recovery but provides for reasonable fees to the class attorney in cases where equitable relief is awarded (such as an injunction) to compensate for expending time pursuing the equitable relief (nonmonetary action).

### FISCAL IMPLICATIONS

The intent of the bill appears to be reigning in aggressive lawyers chasing industry dollars and thereby limiting frivolous class action lawsuits, which would reduce costs for state district courts. However, OAC notes that the reduction in class action lawsuits by private attorneys because of the ceiling on payment might actually result in more class action lawsuits being brought by the Attorney General, which would increase operating expenditures for the state. The net fiscal impact is indeterminate but most likely minimal.

The bill would likely not have a fiscal impact for state agencies relating to investment-related lawsuits, as PERA explains:

PERA's involvement with class action litigation is almost entirely limited to federal court class actions filed pursuant to the Private Securities Litigation Reform Act of 1995. SB 528 does not affect federal litigation. On a rare occasion, PERA has served as a defendant in a state court class action, but PERA has never served as a plaintiff. Given the rarity of PERA's involvement and the unique circumstances surrounding each case, it is not possible to predict how SB 528 might ever affect PERA. But because SB 528 only addresses the award of attorney fees to plaintiffs' counsel relative to the average settlement paid to plaintiffs, PERA does not foresee any administrative implications from the proposed legislation.

However, the OAG poses scenarios where the fiscal impact of the bill could have unintended consequences, as follows:

The bill distinguishes between cases where fees are taken from the recovery and cases where fees are separate from the recovery. In the latter case, the bill provides for reasonable fees but with the same upper limit. This may lead to unintended results, as it means that there is an additional limit on attorney fees when such fees do not impact the recovery of class members that is not present when attorney fees do impact the recovery of class members.

A more troubling issue is that the bill pegs fees to an individual class member's recovery without taking into account the size of the class. Classes can range from around 40 members to over 100 million members. For example, assume an average recovery per class member of \$100. If the class is 100 members, the total recovery will be \$10,000, and under this bill, fees could be as high as \$100,000, ten times the total recovery. If, on the other hand, the class is all New Mexicans, then the limit on fees is still \$100,000, but the total recovery would be in excess of \$200 million. In such a lawsuit, the defendants would likely be willing to expend substantial resources, which would overwhelm the resources of the class attorneys. Consequently, large class actions in New Mexico would likely not be brought, regardless of merits.

The responding agencies concluded the bill might lead to a possible reduction in recovery of losses to New Mexico citizens due to the reduced incentive for attorneys to bring class action lawsuits. Businesses would benefit to the degree they do not need to defend themselves against frivolous lawsuits.

## **SIGNIFICANT ISSUES**

The primary policy issue related to the bill is weighing the benefit to New Mexico of limiting class action counsel fees against the potential loss of recoveries to the injured parties in the state due to reduced incentive for private attorneys to bring legal action.

According to a 2004 article published in *Liability and Insurance Week*, a study questioned the rationale for limiting class actions, as follows:

A study released last week by two law professors in the *Journal of Empirical Legal Studies* found "no robust evidence" to support limiting class actions on grounds class-

action awards are skyrocketing, hurting business and lining the pockets of greedy plaintiffs' attorneys.

The study, by Theodore Eisenberg of Cornell Law School and Geoffrey P. Miller of New York University Law School, found no dramatic increase since 1993 in class-action awards or legal fees.

They said their study was much "more comprehensive and analytically detailed" than previous studies because it was based on two new databases. One includes "data on all state and federal class actions with reported fee decisions between 1993 and 2002, inclusive, in which the fee and class recovery could be determined with reasonable confidence."

The second new database they used was the 2003 edition of Class Action Reports, which they said contains more than 600 cases where the award was based on the application of the common fund doctrine rather than a shifting-fee statute.

They said these data show "the amount of client recovery is overwhelmingly the most important determinant of the attorney fee award...Fees are also correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees."

Limiting the fee to 1,000 times the average class member monetary award would not align with this apparent legal business model of rewarding risk-taking.

## **RELATIONSHIP**

Senate Bill 528 relates to SB 532, which would amend Section §15-7-3 NMSA 1978 requiring State Risk Management to provide liability coverage to a quasi-governmental entity that has been the victim of vexatious litigation, including the prosecution of the entity's claim for vexatious litigation.

## **TECHNICAL ISSUES**

ERB notes the following technical issue:

The bill uses the terminology "other consideration" in the plaintiff class awards that come under the purview of this bill without defining "other consideration." It is uncertain whether this bill would limit all class action awards, even traditional strictly monetary awards. If it does so, it is unclear how courts would determine the limits to attorneys' fees to a thousand times the "average...consideration awarded to class members."

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

Attorneys will continue to be compensated in class action lawsuits as currently structured.

MA/mew:svb