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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 01/22/13  
**LAST UPDATED** 02/12/13    **HB** 88/aHJC

**SPONSOR** Egolf

**SHORT TITLE** Foreclosure Fairness Act    **SB** \_\_\_\_\_

**ANALYST** Jorgensen

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

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	NFI	NFI	NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Attorney General’s Office (AGO)

### SUMMARY

#### Synopsis of Amendment:

The House Judiciary Committee amendment clarifies that the court shall award reasonable attorney fees and costs to the prevailing party of a foreclosure provided the prevailing party is an individual and the non-prevailing party is not an individual or sole proprietorship.

The amendment also clarifies that the act shall not modify any other party’s right to recovery of fees or costs that may be granted by statute or agreement.

#### Synopsis of Bill

House Bill 88 creates a new act entitled the “Foreclosure Fairness Act.” The proposed act mandates that if a defendant prevails in a foreclosure action, the court shall award attorney’s fees and costs, unless:

- 1) the plaintiff (mortgage holder) is an individual bringing the foreclosure claim on their own behalf;
- 2) the plaintiff is an individual bringing the foreclosure claim on behalf of the plaintiff’s sole proprietorship.

The act also clarifies that if a defendant is successful in either reinstating the loan before the foreclosure or redeeming the property after foreclosure, the defendant is not considered a prevailing party.

**SIGNIFICANT ISSUES**

Unless altered by statute, parties to litigation in New Mexico pay their own legal fees and costs, regardless of income. 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. House Bill 88 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 sole proprietorship owned by the plaintiff. If the defendant keeps or acquires 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 and 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).

**ADMINISTRATIVE IMPLICATIONS**

According to the AOC, if enacted, House Bill 88 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, unless the plaintiff is an individual or a sole proprietorship. 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.

NCJ/blm