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## FISCAL IMPACT REPORT

SPONSOR: Godbey DATE TYPED: 02/22/01 HB 551  
 SHORT TITLE: Drug Trafficker Liability Act SB \_\_\_\_\_  
 ANALYST: Gonzales

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
			See Text		

(Parenthesis ( ) Indicate Expenditure Decreases)

### **SOURCES OF INFORMATION**

Corrections Department  
 Attorney General's Office  
 Bernalillo County Metropolitan Court  
 Administrative Office of the Courts

### **SUMMARY**

#### Synopsis of Bill

House Bill 551 creates a new civil cause of action. It allows both illegal users of controlled substances, under certain circumstances, and persons other than illegal users to recover damages from traffickers for injuries that are proximately caused by illegal users' use of controlled substances. In the former case, the drug user could only commence that action after disclosing the identity of the alleged trafficker. The trafficker is presumed to have acted willfully and wantonly if the plaintiff is:

- (1) the parent, legal guardian, child, spouse or sibling of an illegal user;
- (2) a person whose mother was an illegal user while the person was in utero;
- (3) an illegal user's employer;
- (4) a person who financially supports or provides un-reimbursed services to or on behalf of an illegal user;
- (5) or a neighbor who proves the trafficker's activities caused a decline in the value of the neighbor's property in the neighborhood of an illegal user.

The bill also creates a further rebuttable presumption. Any person convicted of trafficking drugs pursuant to Section 30-313-20 NMSA 1978 is presumed, to have trafficked pursuant to this Act. Any person convicted of the Controlled Substances Act or the federal comprehensive Drug Abuse Prevention and Control Act of 1970 is estopped from denying trafficking and is then conviction considered prima facie evidence of a person's trafficking in drugs during the two (2) years preceding the act giving rise to the action.

The bill provides that a non-drug user may recover for economic or non-economic and exemplary damages, pecuniary or nonpecuniary loss proximately caused by an illegal user's use of controlled substances and reasonable attorney fees and costs. An illegal user may recover economic damages, any pecuniary loss proximately caused by an illegal user's use of controlled substances, as well as reasonable attorney fees and costs. No damages shall be payable under any insurance policy nor shall duties to defend or indemnify be required prior to litigation.

Any action brought by an illegal user pursuant to the Act would be governed by the principles of comparative negligence; negligence would not be attributed to a plaintiff who is not an illegal user unless the plaintiff willingly or knowingly gave an illegal user a controlled substance or money for its purchase.

The bill provides that a plaintiff may seek a writ of attachment. Further, any person against whom a judgment has been rendered under the act is not eligible to exempt any property from the judgment, and a judgment is not subject to discharge under the federal bankruptcy law. No assets shall be used to satisfy a judgment under the Act if that asset is named or has been seized in a forfeiture action by the state or the United States before a plaintiff commences an action unless the asset is released after the forfeiture action is released by the agency that seized the asset.

Finally, the Act provides for a limitations period of six (6) years; this provision is tolled if a person is incapacitated by the use of illegal drugs to the extent that they cannot reasonably be expected to seek recovery under the Act.

#### Significant Issues

The Corrections Department states "the most significant issue of the bill is that the Department could be expected to provide information in the form of testimony or documents either by a plaintiff or defendant in an action commenced under this Act with respect to drug traffickers in its custody."

#### **FISCAL IMPLICATIONS**

It is expected any costs recovered for providing copied documents to third parties in the course of discovery in civil litigation would probably be offset by the administrative costs of gathering and collating these materials.

The Bernalillo County Metropolitan Court reports "For this agency (Metropolitan Court) the most significant issue is the potential for numerous actions for \$7,500, or less being filed in our Civil Division. If that were to occur: the Court's operating budget would need to be upwardly adjusted; additional judges may need to be authorized; and, more staff would have to be hired to cope with the increased workload. The potential for numerous case filings is reasonably apparent.

#### **ADMINISTRATIVE IMPLICATIONS**

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According to the Administrative Office of the Courts, “it will cost the judicial information system \$400 for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

The Corrections Department reports there may be a minor administrative impact on the department resulting from the provision of this bill if, in the course of discovery in any such potential civil action, the Corrections Department is required to disclose/produce relevant documents or testimony with respect to drug traffickers in its custody.

### TECHNICAL ISSUES

The Attorney General’s Office reports the following technical issues:

1. New Mexico statutes already provide a more comprehensive definition of “traffic.” See Section 30-31-20(a).
2. Other states’ versions have included language on the required standard of proof (i.e., clear and convincing evidence).
3. There is no definition for “neighborhood” in Section 3. Is that a city block, subdivision or an area of town?
4. Other states’ versions allow illegal drug users to recover “cost of treatment or rehabilitation.”

Additionally, the Bernalillo County Metropolitan Court reports the following technical issues:

There is an apparent grammatical error as to Subsection C, of Section 7 of the Bill (page 5, at lines 20-25 and page 6, at lines 1-3). There is some unclarity there as to what kind of circumstances must be present before the statutory exemptions from attachment/levy are not applicable. This could be clarified.

To make it easier for Courts to apply/interpret the Act as intended, more specificity is suggested as to exactly what would satisfy the requirement of an “immediate” hearing under Subsection B of Section 7 of the Bill. A better approach would be to specify a deadline such as, e.g., “within 7 days”.

### OTHER SUBSTANTIVE ISSUES

The Attorney General’s Office reports the bill may be vulnerable to challenge on the following grounds:

- double jeopardy under the 5<sup>th</sup> Amendment if the civil action is deemed as punitive; excessive fines under the 8<sup>th</sup> Amendment;
- lack of substantive due process under the 14<sup>th</sup> Amendment;
- lack of procedural due process under the 14<sup>th</sup> Amendment (because of the ex parte prejudgment attachment option);
- illegal drug user should be not allowed to sue because (a) in pari delicto (person’s own bad acts) and (b) volenti non fit injuria (person voluntarily exposed himself to unnecessary danger);
- ex post facto laws under Article 2, Section 19 of the New Mexico Constitution because there can be cause of action for an act committed prior to enactment of this bill.

JMG/prr