

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 (www.nmlegis.gov). 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

ORIGINAL DATE 02/28/13

SPONSOR Ryan LAST UPDATED _____ HB _____

SHORT TITLE Public Employee Sovereign Immunity SB 551

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	(TBD)*	(TBD)*	(TBD)*	Recurring	Public Liability Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

General Services Department (GSD)

SUMMARY

Synopsis of Bill

Senate Bill 551 amends the Fraud Against Taxpayers Act (FATA) to expressly state that the State has not waived sovereign immunity in any lawsuit brought under that Act and is not liable for attorney fees, costs or expenses of a public employee or any final judgment or settlement resolving that case when the state has brought the action or intervened in an action brought by a private party (qui tam plaintiff).

In addition, when the State has neither brought nor intervened in a private qui tam action, sovereign immunity is not waived and the State is not liable for any final judgment or settlement, but it shall provide a defense for a public employee who is sued in that action. The State shall be liable for attorney fees, costs or expenses unless the employee has violated the law, in which case the employee shall be liable for those costs and shall reimburse the State.

FISCAL IMPLICATIONS

As the Risk Management Division of the GSD (RMD) explains, because fraud is a tort, the RMD provides representation to public employees against whom a FATA claim has been made, even though sovereign immunity has not been waived for fraud under the Tort Claims Act. See Section 41-4-4, NMSA 1978. Because there is no waiver, RMD typically seeks dismissal of the claim against that employee. Since SB 551 provides that the governmental employer is not liable for the costs of defending its employee when the State brings or intervenes in a private FATA claim, the bill would save the State the cost of defending that employee. Additional savings may result from the provision requiring a public employee who has violated the law to reimburse the State for defense costs. Because RMD cannot predict with any accuracy the impact of these provisions, no estimate is presented in the Estimated Operating Budget Impact table above.

SIGNIFICANT ISSUES

The express retention of sovereign immunity in SB 551 could be problematic if it extends any further than to the governmental employer of a FATA defendant who is a public employee. Specifically, as both the AGO and the RMD advise, if sovereign immunity applies to the employee, it would make it impossible to bring a FATA claim against any public employee.

Further, the standard employed in SB 551 to determine when a FATA defendant who is a public employee must reimburse defense costs in an action brought by a qui tam plaintiff is a finding that that employee has violated the FATA, which requires acting in a fraudulent manner as specified in that Act. A similar standard is employed in the Tort Claims Act: a public employee is liable to the employee's governmental employer for providing a defense (and, under that Act, any settlement or final judgment) only when the employee has been found to have acted fraudulently or with actual intentional malice causing the tort that results in a settlement or final judgment. See Sections 41-4-4(E) and 41-4-17(A), NMSA 1978.

In addition, due to the interplay of the Tort Claims Act and FATA claims against public employees, the RMD suggests a number of technical amendments to the bill to clarify certain terms and provisions of the bill, as well as providing a mechanism for obtaining reimbursement from a public employee who is found to have violated the FATA.

TECHNICAL ISSUES

The RMD suggests these technical amendments:

- 1) To address the vagueness of the language in Section C regarding reimbursement of fees, costs or expenses when a public employee is required to reimburse those costs, amend line 12 on page 2 by striking “the law” and insert “ subsection A of Section 3 of the Fraud Against Taxpayers Act [44-9-3 NMSA 1978]”.
- 2) To address the inconsistent use of “state” and “governmental entity”, amend Section C, page 2 lines 6 and 8 by striking “state” and inserting “governmental entity”.
- 3) To address how and when a public employee is required to reimburse the governmental entity for defense fees, costs or expenses, amend Section C, page 2, line 12, by inserting “be ordered in the proceeding in which the violation of the Fraud Against Taxpayers Act

is found to” after “shall”.

- 4) To clarify who is a public employee for the purposes of a FATA claim and when a defense is to be provided, amend page 2, lines 2, 9, 11, 12 and 14 by inserting “as defined in the Tort Claims Act (§41-4-3(F) NMSA 1978)” after “public employee”. Alternatively, a definition of “public employee” like that found in the Tort Claims Act could be added to Section 44-9-2, the definitions section of the FATA.

Additionally, to clarify the term “governmental entity” for the purposes of a FATA claim, adding a definition of that term in Section 44-9-2 like the definition in Section 41-4-3(B) of the Tort Claims Act may be appropriate.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The State could potentially be responsible for paying the attorneys' fees of public employees who are sued under the FATA, including those claims brought directly by the Attorney General's Office.

AMENDMENTS

Limit the retention of sovereign immunity to the governmental entity or employer of any public employee who is a FATA defendant.

MD/blm