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FISCAL IMPACT REPORT

ORIGINAL DATE 01/27/12

SPONSOR Fischmann LAST UPDATED _____ HB _____

SHORT TITLE Foreclosure Mediation Act SB 75

ANALYST Chabot

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY12	FY13		
	\$2,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 1, SB 38, SB 70 and 84

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General Office (AGO)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of Bill

Senate Bill 75 appropriates \$2.0 million from the general fund to Administrative Office of the Courts for the purpose of establishing the foreclosure mediation program pursuant to the Foreclosure Mediation Act. The bill provides for foreclosure mediation programs to assist homeowners and creditors and requires a good faith loss mitigation review of the financial situation is required and, whenever feasible, a loan modification or other option offered before foreclosure. The bill sets strict timelines in which the mediation must be held and extends the foreclosure process by 60 days to allow for the mediation. If a creditor fails to appear at a mediation meeting, the time period for the mediation is extended. If a borrower fails to attend, the mediation process is terminated and the foreclosure process will resume.

FISCAL IMPLICATIONS

The appropriation of \$2.0 million contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2013 shall revert to the general fund. The LFC staff assesses the appropriation as recurring because it establishes

a new program with the expectation it will be continued beyond FY13; however, the recurring amount may be adjusted based on the use of the program by individuals and should be reevaluated once a baseline of costs is established. In addition the AOC director is to establish a fee for mediation services based upon “reasonable costs” to be paid by the creditor which should reduce reliance on general fund for the program. AOC is reviewing potential costs but the potential is there will be an increase in workloads for the courts. New staff may be required that will continue beyond FY13 and funding will be needed.

SIGNIFICANT ISSUES

AOC assesses cases referred to existing foreclosure mediations are a very small percentage of total foreclosure cases and even with mediation, the majority of foreclosure cases end in default judgments. There are two foreclosure medication programs in New Mexico: the 1st Judicial District and the 13th Judicial District. Records are not kept on the effects of mediation in the 1st Judicial District although less than 10 percent of the cases went to mediation. In the 13th Judicial District for a 12 month period, there were 825 foreclosure cases filed, only 75 took advantage of mediation and only 31 settled. Costs to the district for the mediations were \$37,500.

The RLD states “the bill does not require that uniform mediation programs be created in each judicial district. As a result, lenders and mortgage holders must be familiar with the different programs created in each judicial district.

PERFORMANCE IMPLICATIONS

AOC should develop a database to determine if the mediation program is cost-effective.

ADMINISTRATIVE IMPLICATIONS

The AOC and district courts will have to design a framework for this process, identify qualified mediators to conduct the mediations, and procedures for implementation.

TECHNICAL ISSUES

AOC identifies the following technical issues:

SB 75 does not refer to the Mediation Procedures Act (MPA), the provisions of which may conflict with SB75. For example, SB 75 defines “mediation” differently than does Section 44-7B-2(A) of the MPA.

SB 75 does not address how the appropriation to AOC and development of local programs by the judicial districts would operate with the unified budget system in place for all the courts statewide.

SB 75 contains “good faith/bad faith” requirements. Such requirements spawn satellite litigation about what is good (or bad) faith, further burdening court dockets, as opposed to objective standards that can be measured. See ABA Resolution on Good Faith at http://www.pamediation.org/archives/ABA_Resolution.pdf.

The time frames in the bill are problematic. By the time this law became effective, there would be only 5-6 months until the December 1, 2012 deadline for programs to be in place in all courts statewide. Also, the 3-day notice of referrals to mediation and a first session within 10 would be very difficult to accomplish in the crowded court dockets of today, not to mention the personal schedules of the parties.

The NM Supreme Court created the Alternative Dispute Resolution (ADR) Commission in 2011 to address the overall system of ADR, court-based or not. Among many other issues, that Commission is addressing is standardized mediator training, qualifications, program elements, etc., many of which this bill attempts to establish for the limited purpose of foreclosure mediation. The work of the Commission encompasses not only the goals of this bill, but also the bigger picture of ADR generally, inside and outside of the court system.

United South Broadway, a nonprofit legal service organization that currently assists some New Mexico courts in their foreclosure mediation programs (among other services to low income people), notes as follows:

Section 3.G.3 - talks about [recognized loan modification programs]. Most lenders have in-house or traditional modification programs that are not, subject to any regulatory or governmental review. This qualification may unnecessarily limit programs available to borrowers.

Section 5 - strengthen the goal of a loan modification by making the offer of other options secondary and not equally valid as alternatives

Section 7.B - scheduling the first mediation session within ten days might be a bit onerous. Generally the homeowner has to gather a substantial number of documents for the financial review, including pay stubs, utility bills, tax returns, bank statements, and 30 days might be a better time frame.

7. C. - The requirement that the creditor's representative appear in person with authority to settle is key to the success of the mediation process.

GAC/amm