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FISCAL IMPACT REPORT

ORIGINAL DATE 2/10/15

SPONSOR Moore **LAST UPDATED** _____ **HB** _____

SHORT TITLE Criminal Obligation to Pay Restitution **SB** 322

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	Crime Victims Reparation Fund/General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Crime Victim’s Reparations Commission (CVRC)
- New Mexico Corrections Department (NMCD)
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

Senate Bill 322 amends Section 31-17-1 NMSA 1978 to permit a District Attorney’s Office (“DAO”), the Attorney General’s Office (“AGO”) or a victim of a crime to enforce an order of restitution and recover remaining amounts due to a victim pursuant to the order by filing liens against the defendant’s property or a garnishment of the defendant’s wages or by pursuing other remedies available at law or equity, when court-ordered restitution has not been paid in full after a defendant has completed all applicable probation or parole periods.

SB 322 also amends Section 31-17-1 as follows:

- expands coverage from the Criminal Code to any crime;
- spells out that “actual damages” means all damages of which a defendant’s criminal activities are a proximate cause and includes: damages for wrongful death; the value of stolen property; a victim’s funeral expenses; a victim’s actual lost income; and any other damages that a victim suffered as a result of a defendant’s criminal activities;

- includes a plea of no contest within the meaning of “criminal activities”;
- defines “lost income” to include: wages, salaries, other compensation and commission income that is established by evidence of commission-based earnings during the 12 months preceding the loss that is lost as a result of a defendant’s criminal activities;
- requires the court to make a written finding of the amount of full restitution of actual damages to the victim, in every case in which a victim has suffered actual damages as a result of a defendant’s criminal activities, and requires that full restitution be ordered from the defendant unless the court finds compelling or extraordinary reasons for not ordering the restitution and states those reasons on the record;
- requires a defendant to sign, under oath, a financial disclosure statement, identifying all income, liabilities and assets in which the defendant holds or controls a present or future interest as of the date of the defendant’s arrest;
- requires a prepared and signed financial disclosure statement to be provided to the defendant’s probation or parole officer to the applicable DAO no more than 5 days before the defendant’s sentencing hearing, to be used in determining an appropriate restitution plan;
- affords the defendant a hearing on the amount and plan of restitution;
- permits a DAO to request a modification of an order of restitution before the end of all applicable probation or parole periods;
- provides that, after the defendant has completed all applicable probation or parole periods, an order of restitution shall no longer be subject to modification and any remaining balance due to a victim may be enforced in the same manner as provided in Subsection (E) of the amended statute;
- requires an order of restitution to be in a form approved by the NM Supreme Court and to satisfy the application requirements for a writ of garnishment and a writ of attachment of a defendant’s property pursuant to the Rules of Civil Procedure for the District Courts;
- requires, if it appears that court-ordered restitution will not be paid in full before the defendant’s scheduled release from probation or parole, the defendant to sign, under oath, an updated financial disclosure statement, identifying all income, liabilities and assets in which the defendant holds or controls or has held or controlled a present or future interest during the defendant’s period of probation or parole, no more than 60 days before the defendant’s release from probation or parole and to provide it to the defendant’s probation or parole officer and to the applicable DAO;
- clarifies that the proceedings pursuant to the amended statute shall not limit or impair the rights of victims to recover damages from the defendant in a civil action or otherwise pursue full civil legal remedies

The effective date of the Act is July 1, 2015.

FISCAL IMPLICATIONS

The AOC stated that there would be damages trials in virtually every criminal case that is not pled. This may have a substantial effect on staffing and other related resources.

The AODA provided the following:

It is very likely that there will not be agreement by defendants on the amount or cause of the damages claimed by many victims of crime. If so, litigation will be needed to

determine what damages were proximately caused by a defendant's criminal activities and the value of those damages. That means there will be more court hearings, perhaps involving expert witnesses, in addition to testimony from lay persons and submission of other pertinent evidence, and arguments by the involved parties. That will be costly for the courts, district attorneys and their assistant prosecutors and, presumably, defendants' criminal attorneys who are usually public defenders. Additional staff will be needed in all DA agencies.

District attorneys are also charged with additional responsibilities to review defendants' financial statements before sentencing and, if complete restitution is unlikely before any defendant is discharged from probation or parole supervision, review another financial statement before the defendants are discharged from supervision. They would also be charged with authority to pursue modifications of restitution plans, and enforce orders of restitution for any unpaid amounts by filing liens against defendants' property and writs of garnishment of their wages and other legal remedies. That will also be costly because of the additional personnel needed to handle those duties and the additional expertise necessary to pursue civil remedies, as well as the additional hearings district attorneys and their assistants would be required to participate in.

SIGNIFICANT ISSUES

The AOC provided the following:

In magistrate courts, it is common for a sentence to be imposed immediately following a plea. Under the proposed legislation a hearing on the plan of restitution would be added to any criminal case in which there is a victim who suffers actual damages as a result of a defendant's criminal activities. The additional hearings will impose a large burden on the courts, as well as on the DAs and the Public Defender Department.

Additional hearings on restitution plans will impose a large burden on the courts, particularly limited-jurisdiction courts, but there is no appropriation to increase court staff, which will be impacted by significantly higher workloads. If SB 322 were amended to apply only to felony cases the potential fiscal impact on limited jurisdiction courts would be significantly reduced or eliminated.

The AODA provided the following:

There is no indication in the bill whether anyone besides the defendant and their assigned probation or parole officer can submit evidence to the court it can utilize to decide what restitution is due. The applicable district attorney's office would only be charged, before sentencing, with reviewing a sworn financial statement from the defendant that could be used in determining an appropriate restitution plan. There is no indication on whether the defendant would have legal representation regarding any restitution that may be due and which, if not paid or otherwise was not in compliance with the plan, could be a violation of their probation or parole and result in their incarceration.

Compelling defendants to submit a financial statement, under oath, and list all of their income, liabilities and assets could be a violation of their rights against self-incrimination under the Fifth Amendment to the United States Constitution and Article II, Sec. 15 of

the New Mexico Constitution. Defendants might also claim that it violates their right to privacy secured by the Fourth Amendment to the United States Constitution and Article II, Sec. 10 of the New Mexico Constitution. Barring any modification of the order of restitution after a defendant had completed their probation or parole periods might be claimed as a violation of their due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Sec. 18 of the New Mexico Constitution.

SB 322 states “If the restitution ordered by the court has not been paid in full after a defendant has completed all applicable probation or parole periods, the district attorney’s office, the attorney general’s office or the victim may enforce the order of restitution and recover any remaining amounts due to a victim pursuant to the order....” There is no indication how long a defendant should be given after conclusion of their probation or parole to complete payment of restitution before someone may seek enforcement of the order of restitution.

SB 322 does not consider whether defendants may be convicted of multiple crimes and have overlapping sentences. It is not unusual to have defendants on probation or parole for criminal conduct in one case and serving a jail or prison sentences in other cases. It also fails to acknowledge that many defendants are indigent, many have significant substance abuse and/or alcoholism issues, many have mental health issues, and their abilities to make restitution are severely impaired, and often, impossible.

NMCD provided the following:

NMCD probation and parole division already receives restitution payments and has a system in place. For efficiency purposes, NMCD would need to ask the court to have the offender send his payments directly to his probation and parole officer, or this section of the bill should be amended to require the restitution payments be made to NMCD PPD during any period of probation or parole, unless otherwise directed by the court.

Judges are going to be more likely to revoke the probation of those offenders who do not comply with their order of restitution, as compliance with such is a condition of the offender’s probation or parole. If judges wait until near the end of the probation period to consider or impose revocation, the offenders will complete their probation, and be released from custody (if they are in custody).