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**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date Feb. 4, 2016
Bill No: HB 308

Sponsor: Rick Little **Agency Code:** 264
Short Settlements on Civil **Person Writing** Gary Cade
Title: Penalties **Phone:** 505-507-7752 **Email** cadeabq@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: The proposed bill states that if a “person injured by an act constituting criminal conduct has a remedy to the through a civil action, the criminal offense may be compromised.” The compromise would be accomplished if the injured person “...appears in person or by affidavit before the court in which the action for the criminal offenses is pending at any time before trial and acknowledges that (they) received satisfaction for the injury, the court may order all proceedings to be stayed upon the prosecution and dismiss the case.” The reasons for dismissal must be set forth in a written order and it would be a bar to another prosecution for the same offense.

There are seven specified crime categories that would be excluded from resolution by civil compromise. They include criminal acts involving: peace officers in performance of their duties, intent to commit a designated violent felony, violation of a court order issued for domestic abuse under the Family Violence Protection Act (“FVPA”), crimes committed by or against a household member specified in the FVPA, upon someone 60 years of age or older, upon someone less than 18 years old, and by a defendant who has a prior conviction for a violent felony specified in listed in the “three strikes and you’re out” statute that provides for life imprisonment upon a third conviction. Those specific felonies are: murder in the first or second degree, shooting at or from a motor vehicle resulting in great bodily harm, kidnaping resulting in great bodily harm, some criminal sexual penetration offenses, and armed robbery resulting in great bodily harm.

FISCAL IMPLICATIONS

Unknown.

SIGNIFICANT ISSUES

The proposed civil compromise of criminal proceedings could take discretion for resolution of some crimes away from elected district attorneys and their assistants who might otherwise decide how the crimes they were prosecuting should be resolved. Resolution of cases involves multiple considerations including, but not limited to: strength of evidence, defendant’s criminal history, victim(s)’ cooperation,

influencing defendant's cooperation in testifying or otherwise assisting in their own and their co-defendant(s) cases, technical and logistical issues in evidence presentation. Sworn prosecutors are bound by professional standards and rules of conduct in evaluating, presenting and resolving their cases, but victims--as lay persons--are not. Several years ago the New Mexico Supreme Court withdrew the rules that had previously permitted private citizens to file criminal complaints in the metropolitan and magistrate courts and the change was, presumably, at least in part because of the problems involved with lay persons, most of whom were victims, handling criminal cases. It seems almost inevitable that some crime victims will receive "satisfaction" and want the case dismissed but prosecutors may feel it important to continue. The reverse could also happen. A defendant might make a fair settlement offer in a case that could be appropriate for a pre-trial resolution but the victim wants the charges pursued.

A defendant with prior felony convictions, if their charges are not included in one of the specified excluded crimes, could pay their victim money for "satisfaction" of their injury and potentially avoid prosecution, enhancement of their sentence and mandatory incarceration. The Public Defender's Office has already raised concerns that the proposed civil compromise statute would favor persons who are affluent or have access to other resources over indigent persons. Simply put, well-to-do defendants could buy their way out of criminal charges while poor defendants could not. An equal protection challenge under both the federal and state constitutions seems likely if the bill is adopted and implemented. An equal protection challenge is also possible by a defendant charged with one of the seven excluded crime category who would like to try to compromise the charge with their victim(s) but was not able to do so like persons charged with other crimes.

The New Mexico Constitution (Art. II, Sect. 24) already provides for the right of restitution for victims of many crimes, as does the Victims' Rights Act (Sect. 31-26-4, NMSA 1978). Generally speaking only crimes resulting in personal injury or death are included in those laws. However, "It is the policy of this state that restitution be made by each violator of the Criminal Code to the victims of his criminal activities to the extent that the defendant is reasonably able to do so." (See, Sect. 31-17-1, NMSA 1978). That same statute defines: "victim" as "any person who has suffered actual damages as a result of the defendant's criminal activities;" "actual damages" as "...all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain and suffering, mental anguish and loss of consortium;" "criminal activities" as "...any crime for which there is a plea of guilty or verdict of guilty, upon which a judgment may be rendered and any other crime...which is admitted or not contested by the defendant;" and, "restitution" means "full or partial payment of actual damages to the victim." *Id.* The rights of restitution do not apply until after a defendant has been convicted. "An order requiring a defendant to pay restitution, entered pursuant to (Sect. 31-17-1) constitutes a judgment and lien against all property of a defendant for the amount the defendant is obligated to pay under the order" and can be enforced by filing liens against real and personal property or garnishment. (See, Sect. 31-17-1(D), NMSA 1978). It is also worth noting that pre-prosecution diversion and probation programs already provide for dismissal of some criminal cases upon completion of agreed upon conditions which, if appropriate, include restitution to the victim(s).

HB 308 would limit its application to just criminal cases in which the victim has "a remedy through a civil action." A criminal defendant's attorney may not be aware of whether the victim could and should pursue their civil remedy. Failure to do so might give rise to a defendant claiming ineffective assistance of their attorney. In contrast, the criminal defendant's attorney could pursue that avenue and, especially if they

work with imaginative and resourceful plaintiff's attorneys, could find a potential civil action for many crimes. Besides the ordinary civil claims for fraud, conversion, etc., New Mexico has recognized prima facie tort for cases where traditional civil liability is not present. Defendants facing serious charges and incarceration might seek postponement of the criminal cases in order to pursue funds from insurance or friends or relatives to offer "satisfaction" to their victims. There is no guidance regarding whether the bill would be limited to just crimes that had been formally charged, or whether uncharged crimes could be resolved by satisfaction.

In multiple defendant cases HB 308 provides no guidance how joint and several liability, which is common in civil cases, might be applied. It is not clear what would be done if one defendant has paid some but not all of the damages resulting from an injury to a victim, or if one (or more) of the defendants has paid for all the damages whether charges against any or all of the remaining defendants would be eligible for dismissal of their charges, even if they have not paid to satisfy the victim for their injury. This could also give rise to an equal protection challenge by any defendant(s) whose case was not dismissed. The bill would bar prosecution for the same offense if the charge was dismissed. It is conceivable that a defendant could submit money in "satisfaction" for the victim's injury and after the charge against them was dismissed they might claim any remaining co-defendant(s) were not culpable. That would, at a minimum, complicate prosecution of any remaining defendants. It's possible that multiple persons can be "...injured by an act constituting criminal conduct" that would leave them with "...a remedy to the injury through a civil action," and the offender would not have the resources to provide satisfaction to all. There is no guidance on whether the charge would be ripe for dismissal if one, or more, persons "received satisfaction" but one, or more did not, or who should be favored if there are not enough resources available to satisfy everyone injured.

Some defendants may try to have their private insurance provide "satisfaction" to a person injured by their criminal acts. Virtually all insurance policies exclude coverage for intentional and/or criminal acts but if the defendant claims his act was merely negligent or mistaken then coverage might be implicated. If there is a potential dispute over whether the act was criminal, it might then give rise to a separate civil declaratory judgment proceeding to see if the act would be covered. This is especially so for those crimes that involve negligence. (See, e.g., Involuntary Manslaughter, Sect. 30-2-3, NMSA 1978; Negligent Arson, Sect. 30-17-5(G), NMSA 1978; Cruelty to Animals, Sect. 30-18-1(B)(1), NMSA 1978; and Neglect of A Resident, Sect. 30-47-5, NMSA 1978). Collateral litigation could be complicated by the fact that the Fifth Amendment protects a person from being forced to answer questions "...in any proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him in any future criminal proceedings." (See, *Rainbo Baking Co. of Albuquerque vs. Apodaca*, 88 N.M. 501 (Ct. 1975))

Since there is usually a three-year, or four-year, statute of limitations for most civil actions while criminal cases usually are commenced well before that time and involve speedy trial issues and other deadlines set by court rule and judges' orders, there is a potential conflict between getting insurance issues resolved in time to pursue "satisfaction for the injury" and resolve the criminal case without trial. A separate issue could involve the injured person receiving "satisfaction" through their own insurance, like an uninsured motorist policy for a motor vehicle crash by a careless or reckless driver or from their homeowner's policy for a break-in and theft. Defendants might try to compel testimony from crime victims that they have already received "satisfaction" from an insurance claim the victim submitted so the criminal charge(s) should be dismissed.

No clarification is provided in HB 308 on what exactly would constitute “satisfaction” for the injury. Typically civil proceedings, at least in personal injury cases, include more than just the specified costs for medical care, vehicle repair or replacement and loss of use, etc. They also involve payments for pain and suffering and other non-quantifiable damages, like being forced to use assistive devices like crutches or a wheelchair (even if their use is just temporary), or changes in lifestyle that may result like being unable to participate in the same recreational activities as before or feeling the need for increased security measures or fear of driving, etc. The bill does not contain any limitations to “actual damages” like the restitution statute quoted above. That might lead to defendants refusing to try and offer “satisfaction” to the victims of their crimes since they might have to pay less if they are found guilty. There can also be collateral victims in civil cases that may bring civil actions for claims like loss of consortium or being a witness to a loved one’s injury or death. A major component of civil litigation is determination of comparative fault so that would also likely complicate what is sufficient to provide “satisfaction.”

There is also no guidance on what kind of injury would suffice to be covered by HB 308 other than the language relating to a potential civil action. Some crime victims might legitimately claim financial injury but even that can be confusing. For instance, if a person commits cruelty to animals would the financial costs for treating the animal make the animal’s owner the injured person? A person who commits computer abuse (See, Sect. 30-45-4(B), NMSA 1978) may have multiple victims, and each of them may have different injuries because their computer systems were corrupted or damaged. A person who violates the Indian Arts and Crafts Sales Act (See, Sect. 30-33-1, et seq., NMSA 1978) could be taking sales away from multiple artisans. Medicaid fraud (See, Sect. 30-44-7, NMSA 1978) is another crime in which multiple providers could be affected, in addition to the patient and the government who paid for services. Would someone who bought drugs (See, Sect. 30-31-20, NMSA 1978) be able to sue their dealer if they overdosed? Identifying the persons injured so they might attest to having “received satisfaction for the injury” could be hugely complicated.

In civil cases it is common that providers of services to persons who have been injured assert a lien for payment. Hospitals and other medical providers and even persons who have repaired an automobile can assert a lien for reimbursement for any recovery made by an injured person. If any providers assert a lien or otherwise require payment for their services then there could be a dispute whether the person who was injured has received “satisfaction” for a defendant’s criminal conduct. Insurance companies that have paid for injuries can have a right of subrogation against the responsible party. (See, *State v. Brooks*, 116 N.M. 309 (Ct. App. 1983)) If they pursue their right of subrogation that could also give rise to a dispute about the victim receiving “satisfaction.” It is also common in civil cases that providers’ liens and subrogation claims are settled for less than their full value so that could also contribute to issues about “satisfaction.”

HB 308, as drafted, applies only if there is “a person injured by an act constituting criminal conduct...” (Emphasis added). “Person” is defined in the Criminal Code as “any human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof.” (See, Sect. 30-1-12(E), NMSA 1978). That has been interpreted to include the Mortgage Finance Authority of the state and an insurance company that had a right of subrogation because of payments required for a crime victim. (See, *State v. Griffin*, 100 N.M. 75 (Ct. App. 1983) and *State v. Brooks*, supra). The bill does not provide guidance on whether business enterprises, government agencies and other non-persons would be included in the act, or if so, how they might participate even though they

might claim a remedy for any economic injury that they suffered from a criminal offense. For example, a school district might have to hire a substitute for a teacher injured by a criminal act or a police department have to pay overtime because a peace officer was injured and unable to work but it is unknown if they would have more or less rights than are provided in the victim restitution statute.

The list of crimes excluded from possible civil compromise could also give rise to litigation. The bill would not apply to criminal acts committed "...by or upon a peace officer, while in the execution of the peace officer's duties," so an issue could be raised regarding the last clause. An equal protection challenge might also be pursued since crimes against other protected classes of persons, like educators, sports officials, and health care personnel are not excluded by the bill. The provisions of HB 308 would also not be available to persons charged with violations involving the Family Violence Protection Act, but there is no explanation why other special classes are not also excluded (See, e.g., Battery and Aggravated Battery Upon School Personnel, Sect. 30-3-9(E)-(F), NMSA 1978; Battery and Aggravated Battery Upon Sports Officials, Sect. 30-3-9.1(f)-(J), NMSA 1978; and, Battery and Aggravated Battery Upon Health Care Personnel, Sect. 30-3-9.2(E)-(G), NMSA 1978. An equal protection challenge might also be pursued since crimes against other protected classes of persons, like educators, sports officials, and health care personnel are not excluded by the bill. The distinction drawn on the ages of the victims, which could not be compromised if they are under 18 years old or over 60 years old might stand up.

Litigation could arise on whether the criminal acts were intended to violate one of the crimes specified in the "three strikes, you're out" statute. (See, Sect. 31-18-23, NMSA 1978). Self-defense and manslaughter are frequently raised as defenses in murder prosecutions. A high profile case in Albuquerque has resulted in second degree murder charges pending against two city police officers who have asserted that they were acting in defense of another officer, and themselves, when they shot a man armed with a knife. [Upon information and belief, the family of the man who was killed has settled their civil suit against the officers and the City of Albuquerque.] Other sections of the crimes listed in that statute noted above, like great bodily harm, great mental anguish, and use of a deadly weapon, are fact questions that nearly always should be decided by a jury.

HB 308 would permit the "person injured" to appear in court, in person or by affidavit at "any time before trial" to acknowledge they have received "satisfaction" for injury caused by the criminal conduct of the defendant. Since the injured party(ies) could appear "...at any time before trial," it could wreak havoc with the schedules of the court, the prosecutors, witnesses and other involved persons. It could also result in gamesmanship by some defendants who wait to see if there is sufficient admissible evidence for a conviction before offering satisfaction to their victim(s). Permitting a person to appear by affidavit could prohibit the prosecutor from ascertaining whether the "satisfaction" was voluntary and complete, would prohibit clarification of issues of joint and several liability, and might even be deemed a denial of one or more non-participating defendants offering "satisfaction" to a victim of their constitutional rights to confront the witnesses against them. It could also be interesting to know if the "satisfaction" paid to a victim came from an organized criminal enterprise.

HB 308 would require the court to enter a written order of dismissal in which the "reasons for the order (are) set forth." There is no guidance on what would be sufficient reasons to accept a civil compromise and satisfaction of the charges and dismissal of criminal charges." If the bill is implemented appellate litigation on this point is almost inevitable by unhappy defendants and might even be pursued by prosecutors.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS