

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 6 RISK MANAGEMENT
PART 5 CERTIFICATES OF COVERAGE

1.6.5.1 ISSUING AGENCY: General Services Department, Risk Management Division.
[1.6.5.1 NMAC - N, 7/1/2004]

1.6.5.2 SCOPE: This rule applies to state agencies and local public bodies for which the general services department, risk management division provides public liability fund coverage for risk or liability pursuant to NMSA 1978, Section 41-4-20 (A) (2) of the state of New Mexico Tort Claims Act [NMSA 1978, Section 41-4-1 et seq. (1976)] (hereinafter referred to as the “Tort Claims Act” or “the act”).
[1.6.5.2 NMAC - N, 7/1/2004]

1.6.5.3 STATUTORY AUTHORITY: This rule is statutorily authorized and promulgated pursuant to NMSA 1978, Section 15-7-3 (A) (7) (which authorizes the risk management division to issue certificates of coverage in accordance with the rulemaking procedures contained in NMSA 1978, Section 9-17-5 (E), granting the secretary of the general services department the general power to make and adopt such reasonable administrative and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions, including the risk management division). In addition, Section 41-4-23 (D) of the Tort Claims Act authorizes the general services department, risk management division to regulate claims made against the public liability fund. Pursuant to NMSA 1978, Section 15-7-2 (A), the director is responsible for the acquisition and administration of all insurance purchased by the state. Except as provided by NMSA 1978, Section 15-7-2, no state agency may procure any kind of insurance other than through the risk management division. Pursuant to NMSA 1978, Section 41-4-20 (C), no liability insurance may be purchased by any governmental entity other than as authorized by the Tort Claims Act.
[1.6.5.3 NMAC - N, 7/1/2004]

1.6.5.4 DURATION: Permanent.
[1.6.5.4 NMAC - N, 7/1/2004]

1.6.5.5 EFFECTIVE DATE: July 1, 2004, unless a later date is cited at the end of a section.
[1.6.5.5 NMAC - N, 7/1/2004]

1.6.5.6 OBJECTIVE: It is the public policy of the state of New Mexico that governmental entities and public employees shall be protected by the principle of sovereign immunity and may only be liable for torts as provided by the express provisions of the Tort Claims Act. The general services department, risk management division is authorized to issue certificates of coverage to governmental entities to defend the state of New Mexico in cases involving tort liability. This rule sets the parameters and procedures by which certificates of coverage are issued and amended by the director.
[1.6.5.6 NMAC - N, 7/1/2004]

1.6.5.7 DEFINITIONS: As used herein:

- A. “coverage” or “coverage provision” means the type of protection provided against specific risks or losses;
 - B. “covered entity” means a governmental entity, as defined below, which is covered under the terms of a coverage document issued to it by the public liability fund through the general services department, risk management division;
 - C. “director” means the general services department, risk management division director;
 - D. “fund” or “the fund” means the public liability fund as defined in NMSA 1978, Section 41-4-23 of the Tort Claims Act;
 - E. “governmental entity” means the state and a local public body as defined in NMSA 1978, Section 41-4-3 (B), (C) and (H) in the act;
 - F. “public employee” means individuals as defined in NMSA 1978, Section 41-4-3 (F) of the act;
- and

G. “scope of duty” means the performance of duties as defined in NMSA 1978, Section 41-4-3 (G) of the act.
[1.6.5.7 NMAC - N, 7/1/2004]

1.6.5.8 ISSUANCE OF CERTIFICATES OF COVERAGE: Certificates of coverage shall be issued on an annual basis, unless otherwise determined by the director, on or before July 1 of the state fiscal year, and in the sole discretion of the director shall be in force on July 1 of that fiscal year, or as soon as practicable thereafter, and shall remain in effect for a period of one year from the date of issuance or until superceded by another certificate of coverage, unless otherwise earlier terminated in writing by the director. The director shall issue certificates of coverage by a letter of administration issued to a governmental entity attaching the certificates of coverage. The letter of administration will describe the type, extent, nature and description of coverage(s), and may also include other matters and administrative procedures reasonably necessary and which must be followed to carry on or administer the requirements of the Tort Claims Act.
[1.6.5.8 NMAC - N, 7/1/2004]

1.6.5.9 CERTIFICATE OF COVERAGE GUIDELINES: The following guidelines govern all certificates of coverage that may be issued under cover of a letter of administration.

A. By statute, NMSA 1978, Section 59A-1-16 (C), the general services department, risk management division is expressly exempt for the provisions of the insurance code of the state of New Mexico, NMSA 1978, Section 59A-1-1 et seq. Certificates of coverage do not provide insurance, but instead provide an understanding among the governmental entities of the state of New Mexico about the intent of the use of funds from the public liability fund. The public liability fund is a self-insurance mechanism established to handle losses to or claims against covered governmental entities. Although coverage through the fund may be in formats like or similar to insurance policies, the relationship between the fund and covered entities is not that of insurer and insured. No special duties, rules of construction, or other legal doctrines recognized by the courts or created by statute with respect to the relationship of an insurer to its insured shall apply to the fund or entities covered by it.

B. Pursuant to NMSA 1978, Section 41-4-23 (D), all decisions to expend money from the fund to provide coverage to defend, save harmless, and indemnify any state agency or employee of a state agency or a local public body or an employee of such local public body are within the discretion of the director.

C. Duty to Defend.

(1) Pursuant to NMSA 1978, Section 41-4-23 (B) (3), the general services department, risk management division may expend money from the public liability fund to defend, save harmless, and indemnify a governmental entity or employee of a governmental entity. This defense extends only as far as a governmental entity’s duty to provide a defense pursuant to NMSA 1978, Section 41-4-20 (A) for causes of action that may be properly brought under the Tort Claims Act, and any defense provided by the general services department, risk management division for any legal claim or liability exposure is controlled by the terms of the valid and current certificate of coverage in force at the time the claim arose, to the limits of such certificate of coverage. The director may contract with one or more attorneys or law firms, or with the attorney general, to defend tort liability claims against governmental entities and their employees acting within the scope of their duties.

(2) Pursuant to NMSA 1978, Section 41-4-4 (G) of the Tort Claims Act, the general services department, risk management division’s duty to defend continues after public employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

(3) Pursuant to NMSA 1978, Section 41-4-17 (B), any settlement or judgment in any action brought under the act constitutes a complete bar to any further legal action on the same occurrence against a governmental entity or public employee whose negligence gave rise to the action. As a result of any settlement or judgment in any action brought under the act, the duty to defend is deemed to have been satisfied by the general services department, risk management division, and no further duty to defend continues to exist.

D. Other than the following specified causes of action that have been waived under the Tort Claims Act, no other causes of action can be defended by the general services department, risk management division. Pursuant to the Tort Claims Act, a defense shall be provided for claims brought on the following grounds:

(1) pursuant to NMSA 1978, Section 41-4-5 of the Tort Claims Act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft;

(2) pursuant to NMSA 1978, Section 41-4-6 of the act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment, or furnishings; provided, however, that nothing in this subparagraph shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water;

(3) pursuant to NMSA 1978, Section 41-4-7 of the act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of airports; provided, however, that nothing in this subparagraph shall include liability for damages due to the existence of any condition arising out of compliance with any federal or state law or regulation governing the use and operation of airports;

(4) pursuant to NMSA 1978, Section 41-4-8 of the act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: gas, electricity, water, solid or liquid waste collection or disposal, heating, and ground transportation; provided, however, that nothing in this subparagraph shall include liability for damages resulting from bodily injury, wrongful death, or property damage caused by a failure to provide an adequate supply of gas, water, electricity, or services or arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water;

(5) pursuant to NMSA 1978, Section 41-4-9 of the act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home, or like facilities;

(6) pursuant to NMSA 1978, Section 41-4-10 of the act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees licensed by the state or permitted by law to provide health care services while acting within the scope of their duties of providing health care services;

(7) pursuant to NMSA 1978, Section 41-4-11 of the act, liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance of any bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area; provided, however, that nothing in this subparagraph shall include liability for damages caused by a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area; the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area; or a deviation from standard geometric design practices for any bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area allowed on a case-by-case basis for appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical, or technical reasons, provided the deviation is required by extraordinary circumstances, has been approved by the governing authority; and is reasonable and necessary as determined by the application of sound engineering principles taking into consideration the appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical, or technical circumstances;

(8) pursuant to NMSA 1978, Section 41-4-12 of the act, liability for personal injury, bodily injury, wrongful death, or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges, or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties;

(9) pursuant to NMSA 1978, Section 41-4-4 (B) (2) of the act, when alleged to have been committed by a public employee while acting within the scope of their duties, liability for any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico.

E. Pursuant to NMSA 1978, Section 41-4-4 (D) of the act, and whether it is a governmental entity or the general services department, risk management division that provides a defense, the governmental entity shall pay any settlement or any final judgment entered against a public employee for any tort that was committed by the public employee while acting within the scope of their duty, or a violation of property rights or any rights, privileges, or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of their duty.

F. Pursuant to NMSA 1978, Section 41-4-4 (H) of the act, the duty of the governmental entity to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

G. All actions for damages brought against a governmental entity shall be subject to the maximum liability limits contained in NMSA 1978, Section 41-4-19.

H. Pursuant to NMSA 1978, Section 41-4-28, coverage which may be provided for liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories, and possessions and the United States, is not limited by the maximum liability limits contained in NMSA 1978, Section 41-4-19, and such coverage may be provided pursuant to the provisions of NMSA 1978, Section 41-4-28 (B).

[1.6.5.9 NMAC - N, 7/1/2004]

1.6.5.10 COVERAGE, APPORTIONMENT, AND UNDERWRITING STANDARDS: Specific risks covered, properties covered, coverage limits, exclusions, apportionment of contributions, underwriting standards, and other provisions for coverage through the public liability fund shall apply in accordance with certificates of coverage, letters of administration, or other coverage documents issued by the director to each covered entity. Pursuant to NMSA 1978, Section 15-7-2 (B), the director shall apportion contributions toward the purchase of insurance or for the providing of coverage for any risk not insured and the amount of contributions to be made by each governmental entity in a letter of administration issued to the governmental entity. Pursuant to NMSA 1978, Section 15-7-3 (A) (3), the director may prescribe underwriting standards for governmental entities in a letter of administration issued to the governmental entity.

[1.6.5.10 NMAC - N, 7/1/2004]

1.6.5.11 COVERAGE DISPUTES:

A. The director shall make a determination if the certificate applies to a presented claim. The decision of the director may only be appealed through arbitration, and such arbitration shall be requested by the covered party in writing to the director within 30 days of receipt of the written decision of the director.

B. If arbitration is requested, the covered entity and the director, on behalf of the fund shall, select one arbitrator within 15 days and submit the arbitrator's name in writing to the other side. Within 10 days after the selection of the two arbitrators, those two arbitrators shall select a third independent arbitrator. If the two sides cannot agree on the selection of the third arbitrator within those 10 days, either side may petition the First Judicial District Court in the county of Santa Fe for the appointment of the third arbitrator. The third arbitrator shall be an attorney and preside as the Chairperson of the arbitration panel. No arbitrator shall be employed or affiliated with the covered entity or the general services department, risk management division.

C. A decision of the panel shall be reported in writing to the director and to the covered entity. The written decision of the panel shall be given to both sides within thirty days of the close of the hearing.

D. All decisions of the arbitration panel shall be final and binding upon the parties and shall not be subject to any further appeal or court action.

[1.6.5.11 NMAC - N, 7/1/2004]

1.6.5.12 PREMIUM ESTABLISHMENT: The director shall determine the appropriate premiums for coverage provided to each covered entity, on an annual basis and in the sole discretion of the director, and shall be reported to each covered entity in a letter of administration from the director. In making the premium determination, the director may use, among other actuarially sound factors, information regarding a covered entity's use of risk control standards and a covered entity's compliance with underwriting standards, such standards being established by the director.

[1.6.5.12 NMAC - N, 7/1/2004]

HISTORY of 1.6.5 NMAC: [RESERVED]