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SENATE BILL 532

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Rod Adair

AN ACT

RELATING TO LITIGATION; ENACTING THE VEXATIOUS LITIGATION ACT;
OBLIGING THE RISK MANAGEMENT DIVISION OF THE GENERAL SERVICES
DEPARTMENT TO PROVIDE SERVICES FOR A VICTIM OF VEXATIOUS
LITIGATION; DEFINING "VEXATIOUS LITIGATION"; RECONCILING
MULTIPLE AMENDMENTS TO THE SAME SECTION OF LAW IN LAWS 2009.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1
through 5 of this act may be cited as the "Vexatious Litigation
Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Vexatious Litigation Act:

A. "quasi-governmental entity" means a water and
sanitation district, a mutual domestic water consumers
association or a water users' association; and

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1 B. "vexatious litigation" means habitual,
2 unreasonable or frivolous litigation brought sequentially or
3 repeatedly against a quasi-governmental entity by the same
4 plaintiff or multiple plaintiffs asserting the same cause or
5 causes of action or causes of action substantially related to
6 each other; provided that "vexatious litigation" is not a cause
7 of action against a person authorized to practice law in New
8 Mexico who is representing a party or parties. "Vexatious
9 litigation" may include, but is not limited to, continuing a
10 lawsuit after discovery of the facts shows it has no merit. A
11 vexatious plaintiff shall not be shielded by the use of
12 multiple legal entities as the named plaintiff to disguise the
13 plaintiff's ongoing role in the litigation.

14 SECTION 3. [NEW MATERIAL] STANDARDS OF PROOF.--Vexatious
15 litigation may be proved by demonstrating that a plaintiff has:

16 A. filed twenty-five or more lawsuits in the course
17 of a single year;

18 B. brought litigation that has been dismissed for
19 lack of standing or failure to state a claim more than two
20 times in a single year;

21 C. caused more than one-half of the judges in a
22 single judicial district to be recused;

23 D. filed forty or more lawsuits in a five-year
24 period;

25 E. filed seventy-five or more lawsuits over the

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1 course of a decade;

2 F. filed one hundred twenty-five or more lawsuits
3 in a fifteen-year period;

4 G. been found by a court to have filed a lawsuit
5 with the knowledge that it has no legal basis, with a purpose
6 to bother, annoy, embarrass and cause legal expenses to the
7 defendant; or

8 H. in the reasonable judgment of the court, pursued
9 habitual or continuous abuse of the legal system.

10 SECTION 4. [NEW MATERIAL] DAMAGES.--A quasi-governmental
11 entity that prevails on a claim for vexatious litigation shall
12 be awarded damages in the amount of double the costs and
13 attorney fees incurred by the entity as a result of the
14 vexatious litigation.

15 SECTION 5. [NEW MATERIAL] LIABILITY COVERAGE FOR A QUASI-
16 GOVERNMENTAL ENTITY THAT IS THE VICTIM OF VEXATIOUS
17 LITIGATION.--The risk management division of the general
18 services department shall cover a quasi-governmental entity,
19 and its elected board of directors, that is a victim of
20 vexatious litigation, whether the directors are sued in their
21 official or personal capacities for acts arising out of their
22 official capacities.

23 SECTION 6. Section 15-7-3 NMSA 1978 (being Laws 1978,
24 Chapter 166, Section 8, as amended) is amended to read:

25 "15-7-3. ADDITIONAL POWERS AND DUTIES OF THE RISK

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1 MANAGEMENT DIVISION.--

2 A. The risk management division of the general
3 services department may:

4 (1) enter into contracts;

5 (2) procure insurance, reinsurance or employee
6 group benefits; provided that any proposal or contract for the
7 procurement of any group health care benefits shall be subject
8 to the provisions of the Health Care Purchasing Act; and
9 provided further that reinsurance or excess coverage insurance
10 may be placed by private negotiation, notwithstanding the
11 provisions of the Procurement Code, if the insurance or
12 reinsurance has a restricted number of interested carriers, the
13 board determines that the coverage is in the interest of the
14 state and cannot otherwise be procured for a reasonable cost
15 and the director seeks the advice and review of the board in
16 the placement and in designing private negotiation procedures;

17 (3) in the manner prescribed by Subsection E
18 of Section 9-17-5 NMSA 1978, after a notice and a public
19 hearing, prescribe by regulation reasonable and objective
20 underwriting and safety standards for governmental entities and
21 reasonable standards for municipal self-insurance pooling
22 agreements covering liability under the Tort Claims Act and
23 adopt such other regulations as may be deemed necessary;

24 (4) compromise, adjust, settle and pay claims;

25 (5) pay expenses and costs;

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1 (6) in the manner prescribed by Subsection E
2 of Section 9-17-5 NMSA 1978, prescribe by rule or regulation
3 the rating bases, assessments, penalties and risks to be
4 covered by the public liability fund, the workers' compensation
5 retention fund and the public property reserve fund and the
6 extent such risks are to be covered;

7 (7) issue certificates of coverage in
8 accordance with Paragraph (6) of this subsection:

9 (a) to any governmental entity for any
10 tort liability risk covered by the public liability fund;

11 (b) to any governmental entity for any
12 personal injury liability risk or for the defense of any errors
13 or act or omission or neglect or breach of duty, including the
14 risks set forth in Paragraph (2) of Subsection B and Paragraph
15 (2) of Subsection D of Section 41-4-4 NMSA 1978; and

16 (c) to any governmental entity for any
17 part of risk covered by the workers' compensation retention
18 fund, the surety bond fund or the public property reserve fund;

19 (8) study the risks of all governmental
20 entities;

21 (9) initiate the establishment of safety
22 programs and adopt regulations to carry out such programs in
23 the manner prescribed by Subsection E of Section 9-17-5 NMSA
24 1978;

25 (10) hire a safety program director who shall

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1 coordinate all safety programs of all state agencies;

2 (11) consult with and advise local public
3 bodies on their risk management problems; and

4 (12) employ full-time legal counsel who shall
5 be under the exclusive control and supervision of the director
6 and the secretary of general services.

7 B. The risk management division of the general
8 services department shall provide liability coverage for the
9 following risks:

10 (1) a claim made pursuant to the provisions of
11 42 USC Section 1983 against a nonprofit corporation, members of
12 its board of directors or its employees when the claim is based
13 upon action taken pursuant to the provisions of a contract
14 between the corporation and the department of health under
15 which the corporation provides developmental disability
16 services to clients of the department and the claim is made by
17 or on behalf of a client; ~~and~~

18 (2) a claim made pursuant to the provisions of
19 42 USC Section 1983 against a nonprofit corporation, members of
20 its board of directors or its employees when the corporation
21 operates a facility licensed by the department of health as an
22 intermediate care facility for the mentally retarded and the
23 claim is based upon action taken pursuant to the provisions of
24 the license and is made by or on behalf of a resident of the
25 licensed facility; and

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1 (3) a claim made pursuant to the Vexatious
2 Litigation Act by a quasi-governmental entity that has been the
3 victim of vexatious litigation, including prosecution of the
4 quasi-governmental entity's claim for vexatious litigation.

5 C. The director shall report [~~his~~] findings and
6 recommendations, if any, for the consideration of each
7 legislature. The report shall include the amount and name of
8 any person receiving payment from the public liability fund of
9 any claim paid during the previous fiscal year exceeding one
10 thousand dollars (\$1,000). The report shall be made available
11 to the legislature on or before December 15 preceding each
12 regular legislative session."

13 SECTION 7. Section 41-4-3 NMSA 1978 (being Laws 1976,
14 Chapter 58, Section 3, as amended by Laws 2009, Chapter 8,
15 Section 2 and by Laws 2009, Chapter 129, Section 2 and also by
16 Laws 2009, Chapter 249, Section 2) is amended to read:

17 "41-4-3. DEFINITIONS.--As used in the Tort Claims Act:

18 A. "board" means the risk management advisory
19 board;

20 B. "governmental entity" means the state or any
21 local public body as defined in Subsections C and H of this
22 section;

23 C. "local public body" means all political
24 subdivisions of the state and their agencies, instrumentalities
25 and institutions and all water and natural gas associations

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1 organized pursuant to Chapter 3, Article 28 NMSA 1978;

2 D. "law enforcement officer" means a full-time
3 salaried public employee of a governmental entity, or a
4 certified part-time salaried police officer employed by a
5 governmental entity, whose principal duties under law are to
6 hold in custody any person accused of a criminal offense, to
7 maintain public order or to make arrests for crimes, or members
8 of the national guard when called to active duty by the
9 governor;

10 E. "maintenance" does not include:

11 (1) conduct involved in the issuance of a
12 permit, driver's license or other official authorization to use
13 the roads or highways of the state in a particular manner; or

14 (2) an activity or event relating to a public
15 building or public housing project that was not foreseeable;

16 F. "public employee" means an officer, employee or
17 servant of a governmental entity, excluding independent
18 contractors except for individuals defined in Paragraphs (7),
19 (8), (10), (14) and (17) of this subsection, or of a
20 corporation organized pursuant to the Educational Assistance
21 Act, the Small Business Investment Act or the Mortgage Finance
22 Authority Act or a licensed health care provider, who has no
23 medical liability insurance, providing voluntary services as
24 defined in Paragraph (16) of this subsection and including:

25 (1) elected or appointed officials;

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- 1 (2) law enforcement officers;
- 2 (3) persons acting on behalf or in service of
3 a governmental entity in any official capacity, whether with or
4 without compensation;
- 5 (4) licensed foster parents providing care for
6 children in the custody of the human services department,
7 corrections department or department of health, but not
8 including foster parents certified by a licensed child
9 placement agency;
- 10 (5) members of state or local selection panels
11 established pursuant to the Adult Community Corrections Act;
- 12 (6) members of state or local selection panels
13 established pursuant to the Juvenile Community Corrections Act;
- 14 (7) licensed medical, psychological or dental
15 arts practitioners providing services to the corrections
16 department pursuant to contract;
- 17 (8) members of the board of directors of the
18 New Mexico medical insurance pool;
- 19 (9) individuals who are members of medical
20 review boards, committees or panels established by the
21 educational retirement board or the retirement board of the
22 public employees retirement association;
- 23 (10) licensed medical, psychological or dental
24 arts practitioners providing services to the children, youth
25 and families department pursuant to contract;

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1 (11) members of the board of directors of the
2 New Mexico educational assistance foundation;

3 (12) members of the board of directors of the
4 New Mexico student loan guarantee corporation;

5 (13) members of the New Mexico mortgage
6 finance authority;

7 (14) volunteers, employees and board members
8 of court-appointed special advocate programs;

9 (15) members of the board of directors of the
10 New Mexico small business investment corporation;

11 (16) health care providers licensed in New
12 Mexico who render voluntary health care services without
13 compensation in accordance with rules promulgated by the
14 secretary of health. The rules shall include requirements for
15 the types of locations at which the services are rendered, the
16 allowed scope of practice and measures to ensure quality of
17 care; ~~and~~

18 (17) an individual while participating in the
19 state's adaptive driving program and only while using a
20 special-use state vehicle for evaluation and training purposes
21 in that program; and

22 (18) quasi-government entities that have
23 prevailed in a claim for vexatious litigation;

24 G. "scope of duty" means performing any duties that
25 a public employee is requested, required or authorized to

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1 perform by the governmental entity, regardless of the time and
2 place of performance; and

3 H. "state" or "state agency" means the state of New
4 Mexico or any of its branches, agencies, departments, boards,
5 instrumentalities or institutions."

6 SECTION 8. Section 41-4-23 NMSA 1978 (being Laws 1977,
7 Chapter 386, Section 17, as amended) is amended to read:

8 "41-4-23. PUBLIC LIABILITY FUND CREATED--PURPOSES.--

9 A. There is created the "public liability fund".
10 The fund and any income from the fund shall be held in trust,
11 deposited in a segregated account and invested by the general
12 services department with the prior approval of the state board
13 of finance.

14 B. Money deposited in the public liability fund may
15 be expended by the risk management division of the general
16 services department:

17 (1) to purchase tort liability insurance for
18 state agencies and their employees and for any local public
19 body participating in the public liability fund and its
20 employees;

21 (2) to contract with one or more consulting or
22 claims adjusting firms pursuant to the provisions of Section
23 41-4-24 NMSA 1978;

24 (3) to defend, save harmless and indemnify any
25 state agency or employee of a state agency or a local public

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1 body or an employee of such local public body for any claim or
2 liability covered by a valid and current certificate of
3 coverage to the limits of such certificate of coverage;

4 (4) to pay claims and judgments covered by a
5 certificate of coverage;

6 (5) to contract with one or more attorneys or
7 law firms on a per-hour basis, or with the attorney general, to
8 defend tort liability claims against governmental entities and
9 public employees acting within the scope of their duties;

10 (6) to pay costs and expenses incurred in
11 carrying out the provisions of this section;

12 (7) to create a retention fund for any risk
13 covered by a certificate of coverage;

14 (8) to insure or provide certificates of
15 coverage to school bus contractors and their employees,
16 notwithstanding the provisions of Subsection F of Section
17 41-4-3 NMSA 1978, for any comparable risk for which immunity
18 has been waived for public employees pursuant to Section 41-4-5
19 NMSA 1978, if the coverage is commercially unavailable; except
20 that coverage for exposure created by Sections 41-4-9, 41-4-10
21 and 41-4-12 NMSA 1978 shall be provided to its member public
22 school districts and participating other educational entities
23 of the public school insurance authority, by the authority, and
24 except that coverage shall be provided to a contractor and
25 [~~his~~] the contractor's employees only through the public school

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1 insurance authority or its successor, unless the district to
2 which the contractor provides services has been granted a
3 waiver by the authority or the authority is not offering the
4 coverage for the fiscal year for which the division offers its
5 coverage. A local school district to which the division may
6 provide coverage may provide for marketing and servicing to be
7 done by licensed insurance agents who shall receive reasonable
8 compensation for their services; ~~and~~

9 (9) to insure or provide certificates of
10 coverage for any ancillary coverage typically found in
11 commercially available liability policies provided to
12 governmental entities, if the coverage is commercially
13 unavailable; and

14 (10) to insure or provide certificates of
15 coverage for a quasi-governmental entity that has a claim for
16 vexatious litigation.

17 C. No settlement of any claim covered by the public
18 liability fund in excess of twenty-five thousand dollars
19 (\$25,000) shall be made unless the settlement has first been
20 approved in writing by the director of the risk management
21 division of the general services department. This subsection
22 shall not be construed to limit the authority of an insurance
23 carrier, covering any liability under the Tort Claims Act, to
24 compromise, adjust and settle claims against governmental
25 entities or their public employees.

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1 D. Claims against the public liability fund shall
2 be made in accordance with rules or regulations of the director
3 of the risk management division of the general services
4 department. If the director of the risk management division
5 has reason to believe that the fund would be exhausted by
6 payment of all claims allowed during a particular state fiscal
7 year, pursuant to regulations of the risk management division,
8 the amounts paid to each claimant and other parties obtaining
9 judgments shall be prorated, with each party receiving an amount
10 equal to the percentage [~~his~~] the party's own payment bears to
11 the total of claims or judgments outstanding and payable from
12 the fund. Any amounts due and unpaid as a result of such
13 proration shall be paid in the following fiscal years."

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