

## Opinion No. 54-6057

December 14, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Honorable Boaz Long, Director Museum of New Mexico Santa Fe, New Mexico

{\*530} Recently, you requested the opinion of this office with regard to the necessity of the Museum's protecting itself by insurance against claims resulting from its normal operations and the existence of premises.

Your understanding that a claim cannot be made against the Museum of New Mexico without legislative action permitting such a claim is correct, for the reason that the Museum, as an agency of the state, is protected from suit by the doctrine of sovereign immunity. In this connection, even those state agencies which have the power "to sue and to be sued" (a power that the Board of Regents of the Museum of New Mexico does not possess) may not be sued in tort actions, in the absence of additional legislative authority for such actions, for the reason that the sovereign is deemed incapable of the commission of a tort -- a wrong against an individual. **Vigil v. Penitentiary of New Mexico**, 52 N.M. 224, 244 P. 2d 1110.

Our Legislature has provided for the carrying of public liability insurance upon state vehicles, in Section 68-1108, N.M.S.A., 1941, which provides:

"The state board of finance is authorized to require all officials or the administrative heads of all departments to purchase and secure public liability and property damage insurance in such sums as they may deem advisable, protecting the state against property loss and the public against injury to property or persons because of the negligent operation of automobiles, trucks, trailers, tractors, graders or other motor vehicles by employees, agents or officials of the state, or any of its institutions, agencies or political subdivisions."

Section 68-1109, N.M.S.A., provides:

"No action shall be brought or entertained in any court of this state against the state or any of its institutions, agencies or political subdivisions for injury or damage caused by the operation of such vehicles, but the action for any such injury or damage shall be brought against the person operating such vehicle at the time of the injury or damage. Every policy of insurance upon such vehicles shall contain a provision that the defense of immunity from tort liability because the insured is a governmental agency or an employee of a governmental agency, or because the accident arose out of the performance of a governmental function, shall not be raised against any claim covered by such policy, provided the claimant, or plaintiff in the event suit is instituted, shall file with the insured and the company issuing such policy of insurance a release in writing of any amount of such claim in excess of the limit stated in the policy, and a further

statement that any such release shall not be construed as an admission of liability, nor may it be offered in evidence for any purpose, and that no attempt may be made in the trial of any case to suggest the existence of any insurance which covers in whole or in part any judgment or award in favor of the claimant."

We have found no other instances in which the carrying of public liability insurance by state agencies {\*531} has been required by statute. As a practical matter, it would appear to be futile, from the standpoint of affording protection to the public, for a state agency to carry public liability insurance in the absence of a statute of the type of Section 68-1109, requiring policies of insurance to contain provisions prohibiting the use of the defense of sovereign immunity from tort liability. In the absence of such a statute, that defense could be utilized in each case in which a suit was instituted, unless the contract of insurance involved specifically waived such defense. Only an insurance contract containing such a waiver would accomplish the purpose of affording genuine protection to the public.

Turning from the subject of public liability insurance, we call to your attention the fact that all officers and boards charged with the custody and control of buildings belonging to the State of New Mexico are required to keep such buildings insured, for the benefit of the State, against loss or damage by fire, by Section 6-201, N.M.S.A., 1941, which provides:

"All officers and boards charged with the custody and control of public buildings belonging to the state shall keep the same insured for the benefit of the state against loss or damage by fire, at least to the amount of three-fourths (3/4) of the estimated value of the buildings at the time the insurance is applied for, and in the event that insurance cannot be obtained upon the same to such an amount, the insurance shall be taken for an amount such as can possibly be obtained to reach three-fourths (3/4) of such estimated value; and each board of county commissioners of the various counties of the state, shall keep the public buildings belonging to said counties insured in like manner for the benefit of said counties; said insurance on public buildings belonging to the state and located in Santa Fe county, can be taken out with any companies or agencies in the state; however on public buildings belonging to the state or the various counties other than Santa Fe county, said insurance in each case, must be taken out with companies or agencies in the county where such buildings may be located, and said insurance on both state and county buildings shall be given to the company or agency offering the lowest premium and rate of insurance; Provided, however, that such insurance shall be taken out with, and given only to such company or companies, as have fully complied with the laws of the state with reference to carrying on business therein. Provided further, that the state game commission with the consent and approval of the state board of finance is authorized and empowered to determine whether or not fire insurance shall be carried on public buildings and property with the custody and control of which it is charged."

Trusting that the foregoing will answer your question satisfactorily, I am

By: Henry A. Kiker, Jr.

Assist. Attorney General