

The University of New Mexico

Office of University Counsel

April 7, 2006

TO WHOM IT MAY CONCERN:

This letter sets forth the reason why the University of New Mexico cannot indemnify entities with which it contracts.

The University of New Mexico is a state educational institution, created under Article XII, Section 11 of the New Mexico Constitution. As such, it is prohibited from contractually creating a general obligation against the University without submitting the question to the voters and creating a sinking fund, pursuant to Article IX, Section 8 of the New Mexico Constitution. Moreover, Section 23-1-5 NMSA 1978 prohibits the University from contracting any liability that might exceed authorized expenditures. Indemnification and save harmless clauses create potentially unlimited contractual liabilities and are therefore prohibited by the above provisions. Additionally, Article IX, Section 14 of the New Mexico Constitution prohibits the state from pledging or lending its credit, directly or indirectly. An indemnification clause could easily be construed as doing just that.

The New Mexico Attorney General has issued an opinion that such contractual indemnification provisions are not only unconstitutional for reasons explained above, but are also prohibited by the New Mexico Tort Claims Act, Sections 41-4-1 *et seq.* NMSA 1978, as amended ("NMTCA"). Op. N.M. Att'y Gen. 2000-04. According to the opinion, the NMTCA generally grants New Mexico governmental entities and their officers and employees immunity from liability from any tort, except as waived by the NMTCA, and is the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the NMTCA. *Id.* A governmental entity has no authority to waive its sovereign immunity, assume tort liability for third parties, or otherwise expand its potential liability beyond what the legislature has permitted. *Id.*

The NMTCA also prohibits governmental entities from purchasing liability insurance other than as authorized by the NMTCA. Section 41-4-20. Under the NMTCA, the University is required to obtain its liability coverage from the Risk Management Division of the New Mexico General Services Department. The certificate of coverage issued by

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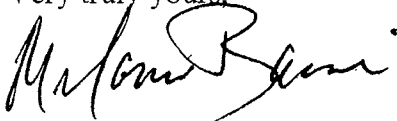
the Risk Management Division for the University specifically excludes any coverage for indemnification of third parties.

This is not to deny our tort obligations. Rather, the above constitutional and statutory provisions prevent us from converting potential tort obligations into potentially unlimited contractual obligations. The University Counsel's Office recommends the following alternative language:

Liability. As between the parties, each party acknowledges that it will be responsible for claims or damages arising from personal injury or damage to persons or property to the extent they result from the negligence of its employees. The liability of the University of New Mexico shall be subject in all cases to the immunities and limitations of the New Mexico Tort Claims Act, Sections 41-4-1 *et seq.* NMSA 1978, as amended.

I hope this provides the clarification you need. If you have questions, please call. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Melanie P. Baise". The signature is written in a cursive style with a large, prominent initial "M".

Melanie P. Baise
Associate University Counsel

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