OUTDOOR ORGANIZATION INSURANCE PLANNING FOR THE NIGHTMARE INCIDENT

A sophisticated practical guide to the legal and risk management considerations involved in assessing casualty insurance needs for outdoor recreation, or outdoor education and social service organizations through incidents and claims to illustrate insurance coverage

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What You Will Know After Taking This Class

1. Through use of actual claims and incidents, an explanation of what insurance is and how it provides financial and operational stability to your organization
2. Understand 10 important basic casualty insurance coverages for outdoor education and outdoor activity organizations through real world incidents and claims
3. An understanding of certificates of insurance and how they are used using real world examples
4. An understanding of the gray area between subcontractors and employees under the tax law and under the workers' compensation law, as well as how they are treated uniquely by each insurance company

Three Tangible Action Items

1. Review my insurance program with an agent or broker
    1. Determine whether I have any gaps in coverage
    2. Obtain an insurance quotation to determine the cost to plug any coverage gaps
    3. Make a decision whether the cost of protection makes sense for your organization.

Three Tangible Action Items (cont.)

1. Review your written contracts and agreements with business partners
    1. Make sure their insurance requirements make sense
    2. Review with your attorney and insurance agent or broker where these terms are unclear

Three Tangible Action Items (cont.)

- Review your administrative practices and procedures
  - Review all business relationships
    - Determine whether your organization is asking for proper insurance coverage from business partners
    - Determine whether your organization is properly negotiating insurance terms in your contracts.

WHAT IS INSURANCE?

1) Traditionally, an aleatory contract of adhesion based on the chance of a covered event occurring with a contract wording dictated by the insurance company that responds after the event, with terms, conditions & exclusions
2) Provides financial continuity and support where an event opens the organization up to legal action and/or financial uncertainty resulting from an adverse event.
3) Provides a framework for basic risk management that will lessen these impacts after an event and help plan for a sustainable financial and operational future
4) To help transfer risk from the outdoors organization to other responsible parties who should be directly responsible for their supervision and operations
5) New forms such as Parametric Contracts based upon a specific event (rather than a type of event) occurring and other experimental forms of risk transfer are gaining some traction

What is Commercial General Liability ?

- ***The most basic building block of attorney an insurance program that covers claims based upon or arising out of:***
- ***Bodily Injury and Tangible Property Damage***
- ***Personal Injury (libel, slander, defamation, invasion of the right of private occupancy, wrongful detention and malicious prosecution)***
- ***Advertising Injury***
- ***Products Liability/Completed Operations (liability arising out of products relinquished to others or structures installed for others)***

Who is Covered on the Commercial General Liability Policy?

- ***Your organization*** ***(the business entity)***
- ***Your organization's directors & officers, and members or managers if an LLC (usually for supervisory negligence)***
- ***Your organization's employees***
- ***Your organization's volunteers*** ***(within the scope of their duty to the organization)***
- ***Sometimes (to be explained later) its staff paid on a 1099 but treated as staff***
- ***Additional Insureds*** ***(to be discussed with certificates of insurance)***

Supervisory Negligence

- ***The organization, its staff, directors, officers, 1099 staff and volunteers not directly facilitating an activity can be sued for supervisory negligence*** *(often confused with D&O Insurance)*
  - An example would be a decision to not screen activity leaders prior to a covered negligence claim for bodily injury where the activity leader had a known poor track record
- Supervisory negligence claims are covered under a Commercial General Liability Policy (subject to all policy terms, conditions and exclusions) If the supervisory negligence results in a claim based upon or arising out of bodily injury, tangible property damage, personal injury (libel, slander, defamation, invasion of the right of private occupancy, wrongful detention, malicious prosecution) or products/completed operations liability

The 10 Basic Insurance Coverages Every Outdoor Activity Organization Needs (cont.)

- 1) Commercial General Liability (see prior discussion)
- 2) Abuse & Molestation Liability
  - Adds coverage for claims arising out of sexual or physical abuse and molestation t
  - One of the two coverages that encourages organizations to observe proper risk management and train employees in sensitivity toward these potential insensitive and harmful behaviors
- 3) Professional Liability
  - Coverage for acts, errors & omissions in providing services to third parties, such as consulting to other organizations in an area of expertise, teaching or other advice given to others.
- 4) CyberRisk, Internet Liability and Privacy Liability
  - Privacy violations involving personally identifiable information (such as health information)
  - Internet breaches, such as hacking and phishing that penetrates an organization's network
  - On many policies, added risk management consultation/guidance and forensic services

The 10 Basic Insurance Coverages Every Outdoor Activity Organization Needs (cont.)

- 5) Entity and Directors & Officers Liability
  - Most misunderstood coverage in the nonprofit world
  - Covers essentially same entity and people as coverage on the Commercial General Liability Policy
  - Claims based upon or arising out of intangible property damage (e.g. allegations of tortious interference or financial harm)
  - Impairment of an organization’s assets through an act, error or omission

The 10 Basic Insurance Coverages Every Outdoor Activity Organization Needs (cont.)

- 6) Employment Practices Liability – Including discrimination and sexual harassment of employees or volunteers
  - Same organization and people as insured on the Commercial General Liability Policy, but sometimes extended to cover contractors
  - Often combined with Entity & Directors & Officers Liability on Nonprofit D&O Policies
  - Treatment of employees and volunteers
  - Usually Includes third party claims of discrimination as well as within the organization
  - Includes wrongful termination, hostile work environment
  - Sometimes extended to wage and hour claims under the Fair Labor Standards Act

The 10 Basic Insurance Coverages Every Outdoor Activity Organization Needs (cont.)

- 7) Employers' Liability and Stop Gap Employers' Liability
  - Minimum required by law on a Workers' Compensation Policy in all states except Washington, Wyoming, North Dakota and Ohio for employee lawsuits involving third party over claims and lawsuits by employees not required to have coverage under the law of state having jurisdiction
  - Washington, Wyoming, North Dakota and Ohio have varying types of single payer workers' Compensation systems with premium paid through a payroll tax, and claims paid by the state.
    - These states do not customarily provide employers' liability coverage, so it is added to a Commercial General Liability Policy if the organization works in the subject states

Conveyances (Vehicles, Boats, Aircraft)

- 8) Commercial Automobile Liability/Marine Liability and Aviation Liability
  - Owned conveyances often required to have minimum statutory limits of liability by state law
  - Business partners or land managers often require automobile liability limit with set minimum according to the type of conveyance and its use
  - Where charters used (e.g. buses or vans, boats or bush flights/helicopters) are utilized, always have the transportation provider add the organization, its directors, officers, employees and volunteers as additional insured on the transportation provider's insurance for operation, loading and unloading of the conveyance (wording may vary according to the organizational structure and circumstances) with limits at least equal to the outdoor organization's. Have your insurance agent review their evidence of insurance!

The 10 Basic Insurance Coverages Every Outdoor Activity Organization Needs (cont.)

- Non-owned/Hired Automobile Liability
  - Hired automobile liability covers use of rental vehicles for third party liability
  - Can be extended to other coverage, including uninsured motorists, medical payments and physical damage to the rented vehicle
  - Non-owned automobile liability covers use of personal vehicles of employees or borrowed vehicles
    - Personal insurance policies cover any organization the vehicle's driver is driving on behalf of (e.g. your organization) but only up to the limit on the personal automobile liability policy (personal umbrellas often exclude business pursuits, so would not cover it)
    - The organization should have procedures in place to authorize drivers of personal vehicles and obtain evidence of adequate insurance before permitting drivers to drive on behalf of the organization with certain minimum limits and driving record required

COVERAGE ON FOREIGN TRIPS

9) Tour Operator Liability Insurance is another type of policy that can cover foreign operations for trips outside the U.S., even with subcontracted destination services companies/guides

- A Commercial General Liability Policy will often cover trips outside the standard policy territory of the U.S., its territories, possessions, Puerto Rico and Canada
  - As long as not specifically excluded and if it has been disclosed to insurance underwriters and approved, where an *employee* leaves the standard policy territory on the business of the policyholder, the trip is covered for claims brought in a court of law within the policy territory
- If foreign travel is not disclosed and approved by the insurance company, they may deny liability in the event of a claim

USE OF ACCIDENT INSURANCE

- 10) Accident Insurance is often utilized to discourage liability claims
  - The AD&D portion typically provides a death benefit and percentage of this *principle sum for certain serious injuries such as loss of a limb or paralysis*
  - *The medical payments section reimburses claimant medical expense*
    - *Can be written on a primary basis regardless of personal health insurance payments*
    - *Most commonly written on an excess basis for costs not reimbursed by all other available personal health insurance*

CLAIMS AND INCIDENTS HIGHLIGHTING INSURANCE COVERAGES

- Real world examples of insurance claims and operational incidents that highlight the importance of insurance specific coverages with nuts and bolts administrative and operational considerations

- Easy to remember incidents in familiar settings when thinking about insurance policies and how they cover your outdoor organization's operations

FATALITIES AND CRISIS RESPONSE COVERAGE

- Fatal ice climbing accidents
  - Avalanche swept participant into frozen river
    - Provided Counselling Services
    - Travel & lodging for family of deceased participant
    - Press releases
  - If contains strict insurance coverage reporting timeline, this should be included in your organization’s operations/risk management plan
  - Boy Scout With Father Scoutmaster Dies After Attempting to Return to Trailhead on His Own in Dangerous Terrain and Fell into Ravine
    - Guide instructed12 year old scout to wait while guide helped another member of the party
    - Provided counselling to those involved
    - Questions of how and whether to speak to family after death of son

FATALITIES AND GENERAL LIABILITY COVERAGE (cont.)

- Paddling Fatality Caused by Third Party
  - Speedboat full of drunken boaters strikes kayaker on full moon nature tour of slough
    - Kayaker pulled into kayak alive and put on shore, then med evac'd to trauma center, where she died
    - Criminal case against speedboat operator/owners took 1 ½ years to go to trial, speedboaters had declared bankruptcy
    - Surviving siblings of kayaker had been disinherited, so suing for their inheritance
    - Insurance company settled and also paid significant legal costs due to length of litigation process

REGISTRATION PAPERWORK
Concealment on Health Disclosure Form

- Registration and its paperwork can be a source of claims and can also save you from claims!
  - Fatality during waterfall rappel
    - Prominent clergy from an affluent community in Northeast failed to note on health form that he had open hearth surgery two weeks prior – would not have allowed on trip had this fact been known to guides – no claim
  - Serious head trauma on vision quest
    - Participant failed to note use of anti-psychotic meds on health form
    - Participant stopped taking her meds during solo on pinnacle
    - Participant suffered psychotic break during solo and jumped off pinnacle
    - No claim due to failure to report meds on health information form

REGISTRATION PAPERWORK
Failure to insist on *Physician's Letter*

- Participant suffered bone splinters in heart after crevasse rescue training at start of mountaineering trip in Alaska
  - Participant reported bicycling accident at home a week prior to trip
  - Guide accepted participants verbal confirmation that attending physician after bicycling accident told him ok to go on trip to AK
  - Failure to insist on copy of a physician's letter opened guide service up to legal liability for failing to use due diligence in screening

REGISTRATION PAPERWORK
Waiver Forms

- NEVER take your waiver form off the web or borrow from a friend or friendly organization without having it reviewed by a qualified attorney before use by your organization
  - Paddling Rentals During College reunion week – friends sign for other friends or partners on bordereau style waiver forms
    - Claim denied by insurer because organization agreed to individual waivers
    - Waiver not upheld in court because claimant did not sign the form, their friend did
  - Waiver form used in jurisdiction that prohibits waiver and indemnification – waiver form thrown out by judge as non-conforming and not permitted to be entered as evidence for acknowledgment of risk
  - Unbalanced Waiver form not admitted when used to move for summary judgment

COMMERCIAL GENERAL LIABILITY

- Guide service sued under Fairness in Advertising Laws for guide whose certification lapsed and not certified for alpine terrain – bodily injury/negligent supervision
- Guide service sued when guide failed to check protective pad under top rope and rope was severed – bodily injury
- Guide service sued when client clipped to wrong rope – fell head-first into ravine – bodily injury
- Guide sued when tree anchor pulled out of cliff on top rope climb – bodily injury
- Association sued when climber on owned climbing wall was hung up by helmet on hand hold, suffered brain damage – bodily injury/negligent supervision

Employment Practices Liability Claims

- Most common type of claim today under employment practices discrimination, sexual harassment, retaliation, hostile work environment and wrongful termination
    - Both for-profit and not-for-profit organizations at risk
    - Due to pandemic, uptick in these claims after downsizing/layoffs
    - Trailhead visitor information booth manned by volunteer-run organizations, alleged sexual harassment by volunteer in charge and retaliation by organization
    - Alleged sexual and racial discrimination and hostile work environment after downsizing by educational organization involved with program support in underserved urban schools
    - Wrongful termination of E.D. who refused fund raising duties

Directors & Officers Liability Claims

- Alleged failure to procure water rights when receiving conveyance of biological field research station/nature education campus
- Environmental advocacy organization concerned about potential tortious interference claims by real estate developer on development they opposed
- Nonprofit obtains grant for construction project, hands work to board member and project fails to complete
- Local business refuses to post activities or fund raiser of local trail nonprofit, activity leader mentions this on work trip
- Nonprofit has no insurance coverage after failure to renew

Professional Errors & Omissions and Cyber-Risk

- After avalanche fatality which results in negligence claim against heli-ski operator, former safety/operations director cited for stratigraphy/avalanche forecast
- Guide service network hacked by extortionists compromising personally identifiable health information and locked important files
- Nonprofit land trust sent phishing emails requesting bank account information after email server hacked during open space transaction

Improper Sexual and Physical Abuse

- Outdoor education organization sued by minor when she reaches age of majority alleging sexual abuse by contractor (settled for significant amount)
- Teenager from an underserved community alleges relationship on camping trip resulted in pregnancy (no liability on behalf of nonprofit after genetic testing ordered)
- Teen visitation during summer program results in angry parents alleging improper actions by staff

Employee vs. Contractor Under Commercial General Liability

- Claim involving moonlighting 1099 guide injured in test of mountaineering equipment (not while guiding)

Non-Owned Hired Automobile Liability

- Accident involving guide’s return to office from trailhead after completion of successful guided trip

Wording When Requesting Certificates of Insurance To Protect Your Staff & Board

- When adding your organization as additional insured, make sure you include the ***business entity or entities, its directors, officers, members if an LLC, volunteers, committee members if nonprofit, and employees***. Adding "agents" is a gray area, and depends on the relationship and circumstances. Consult your agent/broker/consultant and attorney regarding this.
- Make sure that the certificate of insurance specifically refers to the activities guided by the contractor, location and dates (if for a specific event or trip)
- Make sure the certificate of insurance refers to automobile insurance, umbrella liability insurance, accident insurance and workers' compensation insurance, where applicable

Beware: Insurance Follows Contract!

- Certificates of insurance generally follow the insurance requirements of a contract, so read any contract carefully before entering into an agreement, and have it reviewed by your insurance agent/broker/consultant from an insurance standpoint ***before*** you sign it!
- Many insurance underwriters will insist that you include a hold harmless (release) and indemnification clause in all contracts to protect your interest

Staff Paid on a 1099

- Employment relationships with staff paid on a 1099 are complicated! Consult your attorney, accountant and insurance agent/broker/consultant before you make a decision on how to structure your staff, and how to handle workers' compensation state law
- It is important to note that **1099 relationships are subject to tax law, workers' compensation law, and the insurance company's underwriting guidelines and policy form, as well as the requirements of your business partners and land managers**. This is a complex area of the law with many gray areas.
- Send any employment contracts for 1099 workers to your insurance broker/agent/consultant for review. It may have liability insurance implications.

Actual Incidents and Insurance Claims Summary by Type of Claims

- **FATALITIES AND CRISIS RESPONSE**
  - Ice Climbing Fatalities
    - Acts of God
    - Acts of Participants
- Rock Climbing
    - Registration Paperwork – Failure of Participant to Disclose Medical Condition
    - Registration Paperwork – Failure of guide service to obtain physician's letter of health
- **Paddling & Mountaineering**
    - Failure to have each participant sign waiver/failure to have qualified attorney review and approve use of waiver
- Contracts & Miscellaneous
  - Failure to obtain certificate of insurance adding your organization as additional insured on subcontractor’s/contractor’s insurance
  - Failure to obtain written contract (either formal contract or email thread with elements of a contract) with certificate of insurance naming your organization as additional insured “where required by written contract”
  - Failure to obtain waiver form or a Workers’ Compensation Policy for non-compensated duties of 1099 guides

Actual Incidents and Insurance Claims Summary by Type of Claims (cont.)

- Employment Practices Liability Claims
  - Layoffs or downsizing risks/discrimination claims/treatment of both employees and volunteers
  - Wage & Hour Claims based on Fair Labor Standards Act
- Directors & Officers Liability claims
  - Tortious interference claims
  - Failure to maintain or procure insurance
  - Improper dealings with board members who contract work for organization
- Professional Errors & Omissions and CyberRisk
  - Advice to or consulting with given to third parties
  - Teaching
  - Development and publication of curricula or standards
  - Professional certifications
  - Various Types of Phishing, Network remediation and privacy violations
- Improper Sexual or Physical Abuse
  - Minor brought claim after reaching age of majority
  - Alleged sexual encounter disproved by genetic testing
  - Beware of conflicting written practices and procedures when partnering with other organizations
- Non-owned/Hired Automobile Liability
  - Does not need to involve carrying passengers in personal vehicle for claim to be significant (guide hit by motorcyclists)

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