

# **INSURANCE PROVISIONS IN CONTRACTS AND PERMITS FOR MOUNTAINEERING GUIDES & GUIDES SERVICES**

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*or*

**How to Navigate the Wilderness  
With a Lawyer and an Insurance Policy!  
(Be sure to bring a GPS or compass, a  
topographic map and an insurance agent!)**

by Don Pachner  
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# Disclaimer of Content

- *This course is intended to explain the basic concepts of the use of insurance provisions in contracts, permits and other written agreements or legal documents entered into by mountaineering guides and guide services. This is not an exhaustive or definitive guide or template for the use of such terms or documents, and only a qualified attorney, along with a competent insurance agent or broker can advise you as to the wording of contract terms relating to insurance, with full knowledge of the details of your particular operations, business relationships, business partners and business arrangements or goals. Do not use the contents of this presentation in a legal document or agreement without first consulting one of those professionals.*

# What You Will Take Away From This Class

- **Recognize and understand the basic insurance requirements found in many contracts, agreements, licenses and permits**
- **Understand how to negotiate insurance requirements of your contracts, agreements, licenses or permits with business partners and vendors with the help of your insurance broker or agent, along with your attorney**
- **Understand when and what insurance to require of independent contractors, licensees and others**

# Topography of Insurance

- **Topographic Map as An Analogue to an Insurance Policy**
  - **When used with a compass or GPS device, a topo map is helpful in navigating from one point to another, and serves as a database of information for this purpose**
  - **A topo map is useful and will show you the terrain, the ups and downs, possibly the best views, water courses and water bodies**
  - **A topo map is a snapshot in time and does not inform you of changing conditions, local weather patterns, hazards created by dynamics of the land or vegetation, wild animals, flood, fire, etc.**
  - ***An insurance policy can help your organization navigate from one point in time to the next while minimizing the risk of financial uncertainty in a constantly changing operational landscape***

# Topography of Insurance (cont.)

- **Topographic Map as An Analogue to an Insurance Policy**
  - **An insurance policy can help your organization navigate from one point in time to the next by transferring to the insurance company the risk of negative impacts from unforeseen events**
  - **Like a topographic map, an insurance policy is one important tool in your quiver of risk management arrows; it is not required by law (unless you are guiding in an area requiring a permit) but an important tool to have with you**
  - **Like a topographic map, you should always have an insurance policy on your organization's trip from one point to the next, but you will need additional risk management/risk transfer tools to ensure that your organization successfully navigates to its goal**

# Topography of Contracts

- **What is a legal contract? Short and simple definition from a layman...**
  - **Agreement: offer and acceptance**
  - **Parties have capacity to enter into contract**
  - **Contract Has a Legal purpose**
  - **Consideration is Exchanged**
- **Leadership Roles as an Analogue to Contracts**
  - **We assign responsibilities to guides or volunteers and expect them to carry out those responsibilities**
  - **When those guides or volunteers do not carry out assigned responsibilities, potential exists for problems from a degraded command structure**
  - **What can go wrong? The Frozen Boot...**

# Intro to Variety of Contracts/Permits/Licenses and Written Agreements for Outdoor Organizations

- Limited by my professional experience, discussions with colleagues and reading
- Please let us know if you have an example of a contract or agreement not mentioned





# Contracts with Vendors

- **Lessors of equipment**
- **Sponsors and Donors**
- **Equipment vendors and donors of equipment used in programs**
- **Other grantors (funding from foundations, etc.)**
- **Vendors of curriculum or training (e.g. AMGA, AIARE)**
- **Vendors of travel services**
  - *e.g. resorts, cruise lines, tour operators, parks & rec depts, etc.*
- **Suppliers or servers of food and beverage (incl alcohol)**
- **Rental of equipment from others**
- **Vendors at Festivals or Competitions**
- **Lodging**
- **Mortgagees**

# Contracts with Subcontractors

- **Guides & outfitters (e.g. rafting, yoga, etc.)**
- **Facilitators**
- **Logistics/Drop Camps/Pack Trains**
- **Transportation providers (ground, air, water)**
- **Caterers/Food and Beverage Providers/Servers**
- **Alcohol Servers**
- **Lodging**
- **Challenge courses and zip line tours, or climbing gyms**
- **Film production**

# Contracts with Subcontractors (cont.)

- **Professionals**
  - **Guides (true subcontractors, not 1099 employees)**
  - **Trainers/Teachers**
    - **Certification vs. Course Completion**
  - **Medical consultants**
  - **Contract operations managers**
  - **Miscellaneous Consultants (attorneys, engineers, etc.)**
- **Construction or renovation projects**



# Contracts with Clients

- **Nonprofit clients**
- **School systems**
- **Government entities**
- **Film production companies**



# Employment Contracts

- **Contracts with W-2 Employees**
- **Employment contracts that masquerade as contracts with subcontractors!**



# Permits or Contracts with Landowners, Land Managers and Venues, Government Regulators

- **Lease of Premises**
  - Variations (net leases, responsibility for charges, ability to find another, etc.) applicable to insurance
  - Comparable lease available if the premises are destroyed by a fire?
- **Private landowners**
  - Trail crossings
  - Venues for activities
- **Easements (license for use)**
  - Land use easements
  - Conservation Easements
  - Enforcement of easements by conservation organizations

# Permits with Land Managers and Venues, Government Regulators (cont.)



- **Government land use permits**
  - Commercial Use Authorization Permits
  - Concession Contracts
- **Government Regulatory Compliance**
  - Permits and licenses
  - DOT and PUC Filings for Use of 12-15 Passenger Vans, etc.
- **Challenge Courses and Zip Line Tours**
- **Climbing Gyms**



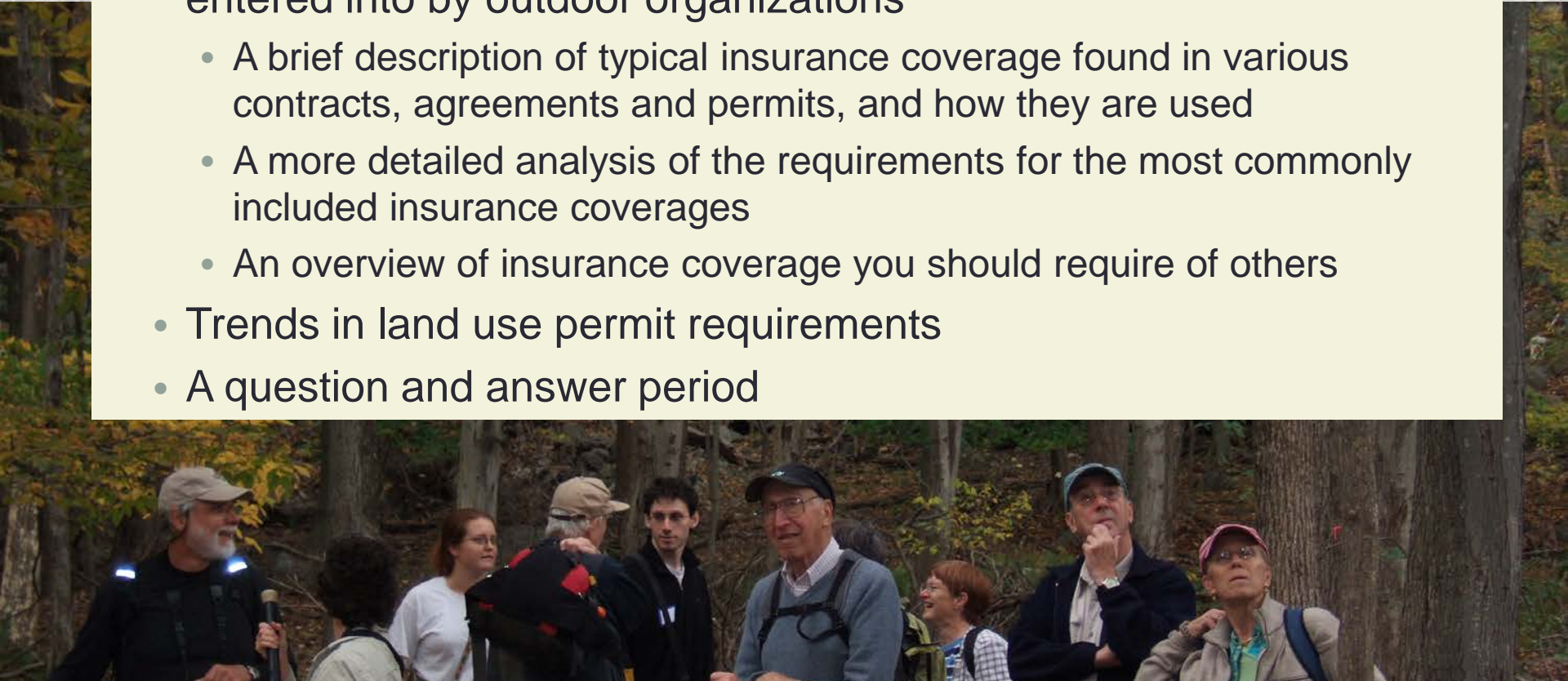
# Types of Insurance Typically Treated in Contracts, Agreements and Permits

- **Commercial General Liability**
- **Commercial Automobile Coverage**
- **Workers' Compensation & Employers' Liability**
- **Excess Liability/Umbrella Liability**
- **Professional Liability Coverages**
- Property Coverage
- **Inland Marine Coverage**
- Crime Coverage
- Surety Bonds
- Energy Equipment Coverage (aka Boiler & Machinery)



# A Survey of Typical Coverages Found in Contracts, Permits & Agreements

- In the remainder of the lecture, we will examine the use of each of these insurance coverages in contracts, agreements and permits entered into by outdoor organizations
  - A brief description of typical insurance coverage found in various contracts, agreements and permits, and how they are used
  - A more detailed analysis of the requirements for the most commonly included insurance coverages
  - An overview of insurance coverage you should require of others
- Trends in land use permit requirements
- A question and answer period



# Commercial General Liability

- Responds to claims based upon or arising out of
  - Bodily injury
  - Tangible property damage
    - Claims based upon or arising out of “intangible property damage”, better known as financial harm, covered on a Directors & Officers Liability Policy
  - Personal injury
    - Libel
    - Slander
    - Defamation
    - Invasion of rights of privacy
    - Malicious prosecution
    - Wrongful detention
  - Advertising injury
  - Products liability
  - Completed operations.

# Insurance Buzz Words in Contracts

- Some of the insurance language you will see in contracts and permits...we will review some of these in detail
  - Additional Insured
  - 33 various standard additional insured clauses
  - Subtle language differences important
  - Operations
  - Completed Operations and Products Liability
  - Subrogation
  - Waiver of Subrogation
  - Primary vs. Excess
  - Primary wording
  - Non-contributing wording
  - ISO (Insurance Services Office) Form Numbers
  - Pollution Liability
  - Mortgagees and Lien Holders

# Commercial Automobile Coverage

- **Automobile Liability**
  - *Additional Insured*
  - *Leased Autos*
  - *Rented or Borrowed Autos*
  - *Non-owned Autos (use of personal autos in business)*
  - *Federal and State Regulatory Filings for DOT/PUC*
- **Physical Damage Coverage**
  - *Lien Holders*
  - *Lessors of Vehicles*
  - *Time in Shop Charge on Rental Vehicles (gap in coverage)*
  - *Gap Insurance (difference between loan payments due and loss of vehicle)*

# Property Coverage

- **Real Property**
  - *Mortgagee clause*
- **Personal Property**
  - *Lien holders*
- **Usually valued at replacement cost with no coinsurance**
- **Variations of scope of coverage (basic, broad, special forms)**
  - *Term “All Risks” no longer used*
- **Mortgagees and Lien Holders**
  - *Mortgagee Endorsement*
  - *Lender’s Loss Payable Endorsement*
- **Contractors**
  - *Film Production Companies*
  - *Logistics Companies (drop camps, rental equipment, ropes, etc.)*

# Inland Marine Coverage

- **Moveable equipment used in your operations**
- **Moveable equipment of others in your care, custody or control**
- **Instrumentalities of communications or transportation**
- **Similar considerations to Personal Property**
  - *Usually valued at Actual Cash Value (fair market value or replacement cost less depreciation, whichever is less)*



# Energy Equipment Coverage aka Boiler & Machinery Coverage

- **“Engineered” coverage – subject to safety inspection**
- **Covers damage and lost income resulting from mechanical malfunction of machinery and equipment**
- **Often added to commercial property coverage as “*Mechanical Breakdown Coverage*”**
- **Sometimes written as a separate policy**



Cedar Stump House, National Park Service – North Cascades National Park Visitor Center, WA

# Marine Insurance

- Protection & Indemnity (P&I)
  - Analogous to terrestrial-based commercial general liability insurance
- Hull Insurance on vessels
- Ocean Marine Cargo Insurance
- Workers' Compensation
  - To be covered under discussion of Workers' Compensation
  - Jones Act Coverage for master & members of a vessel's crew
  - Long Shoremen and Harbor Workers Coverage for certain ship yard workers (including maintenance and supply of vessels) and occupations over water that do not involve operation of a vessel





# Professional Liability Coverage

- **Based upon advice given to others**
  - *Training or Teaching*
  - *Certification*
  - *Development and Implementation of Standards or Teaching Curriculum*
  - *Licensing of trainers or franchises*
  - *Contract Administration*
  - *Consulting Work*
- **Often contains a bodily injury/property damage exclusion**
- ***If you have this professional liability contingent bodily injury/property damage exposure, ask your agent to include coverage in any proposal, if available***

# Professional Liability (cont.)

- **Publisher's Liability**
  - **Copyright infringement**
  - **Personal injury (i.e. libel)**
  - **Difficult to include contingent bodily injury & property damage for publications involving outdoors activities (for smaller policies)**
- **Trademark/Patent Insurance**
  - **Prosecution and Defense Coverage Available**



# Professional Liability (cont.)

- **Consulting Work**
  - *Often classified “Miscellaneous Professional Liability”*
  - *Bodily Injury/Property Damage Exclusion*
    - **Contingent bodily injury/property damage available**
    - **May depend on size of policy or nature of work**
    - **Usually available at additional cost**
    - **Sometimes included in policy form at no additional charge**
  - *Often cannot add additional insured – can only offer evidence of insurance*
    - *Due to nature of coverage for professional errors & omissions, and the client is not qualified as a professional*

# Professional Liability (cont.)

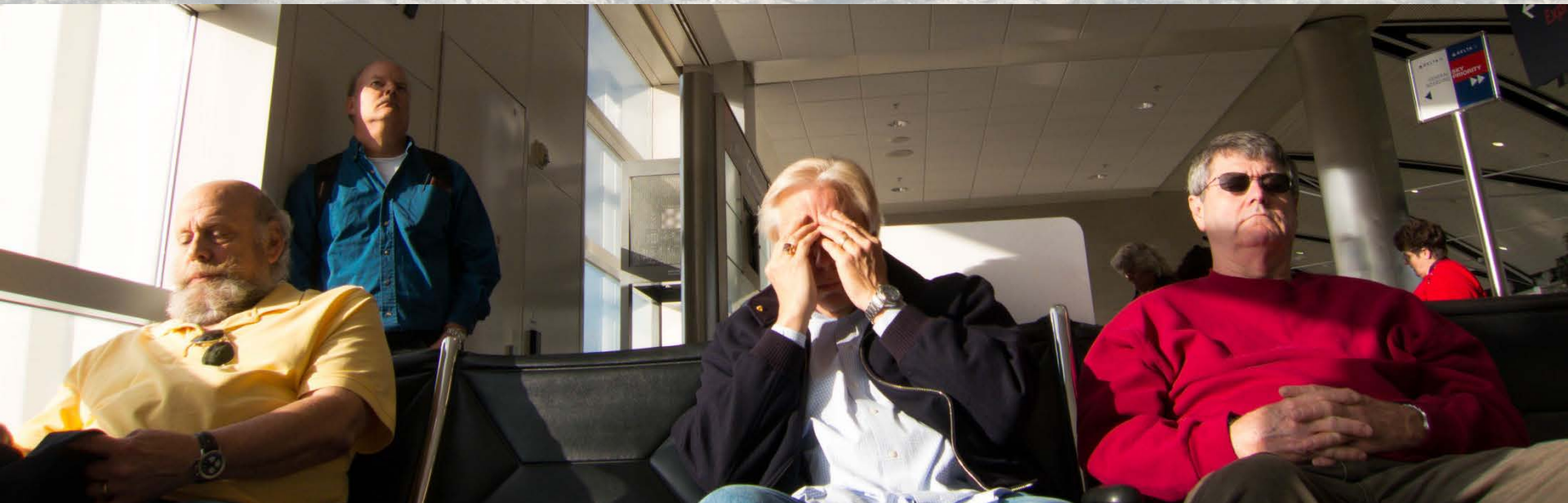
- **CyberRisk**
  - *Protection of private information or data*
  - *Contracts and agreements with third party payment processors and third party registration services*
    - Look for hold harmless/indemnification clause in their favor
    - Even if a breach occurs at the large processor or registration serviced, in the contract, they may hold you responsible for their security breaches
  - You may want to carry CyberRisk coverage where the processing/registration service holds you responsible
  - Where your organization provides services to others, the contract may include hold harmless/indemnification

# Professional Liability (cont.)

- **Employment Practices Liability**
  - *Excluded on a Commercial General Liability Policy*
  - *Covers treatment of employees and sometimes of third parties*
  - *Third party discrimination*
  - **Wrongful termination**
  - **Hostile Work Environment**
  - **Discrimination (employees and third parties)**
  - **FLSA sublimit available on many policies**
  - *Occasionally required in a contract or agreement*
    - *Can become an issue in merger or acquisition agreements*
- **Directors & Officers Liability Policy**
  - *Indemnification agreements with board members*

# Crime Coverage

- **Employee Dishonesty and Crime Coverage**
  - *Can be required in certain contracts or permits, including concession agreements*
  - *Easily obtained from your existing agent or broker*



# Surety Bonds

- What is a surety bond
  - ***Surety (insurance company) stands in for principal (your organization) in the event that a financial obligation is owed to the obligee (government agency or company who is permitting you, or is contracting with you to perform work, to perform services, or provide goods)***
- License Bonds
  - ***Sometimes required for permits and licenses***
  - ***Penalty (dollar amount of the bond) is defined by statute and often shown in the permit or license***
  - ***Easy to obtain from your insurance agent or broker, and relatively inexpensive***

# Surety Bonds (cont.)

## Bid/Payment/Performance Bonds

- ***Written as a package – for performance of a service***
  - Amounts and types of bonds specified in the contract for services or goods.
  - Bid/Payment/Performance Bonds underwritten *in toto*, as if the bid will be accepted
  - Bid bond filed with your bid and premium paid
  - Payment bond and Performance Bond only written and invoiced to you after a bid has been accepted
  - *Due to underwriting of the package in toto, the issuance of the Payment and Performance Bond is issued pro forma after the surety is informed the bid has been accepted*
- ***Requires full financials***
- ***Often requires personal guarantee***
- ***For many contracts, a letter of credit can substitute for a Bid/Payment/Performance bond***
  - If finances allow, this can be less intensive process and less expensive option overall



# Workers' Compensation and Employers' Liability

- Workers' Compensation and Employers' Liability
  - **Never added as additional insured (except for a PEO)**
  - **Workers' Compensation Coverage is a *statutory coverage* defined by law**
  - **Employers' Liability is sometimes not limited, by statute (e.g. NY)**
  - **In states where workers' compensation coverage is optional (e.g. TX, NJ) the employer waives their three defenses if they opt out of covering employees (assumption of risk, contributory negligence of employee or co-employee)**
  - **Standard employers' liability policy limit is \$100,000/\$500,000/\$100,000 each employee disease/policy limit disease/each accident**
- Employers' Liability Stop Gap
  - **Only in monopolistic states WA, WY, OH, ND**
  - **Added by endorsement to a Commercial General Liability Policy**
- Subrogation
  - **A workers' compensation insurance carrier can bring a lien against a negligent party for the benefits paid out to an employee of their policyholder**

# Excess/Umbrella Liability

- Provides increased limits per occurrence and/or per aggregate for specified underlying policies
- *Automobile liability limits are almost always per accident and **no** aggregate limit applies (on either the automobile policy, or on the excess/umbrella liability policy)*
- In theory, an umbrella liability policy may cover a claim not otherwise covered on an underlying policy, subject to the *retention*; however, this is extremely rare.
  - The *self-insured retention* **only** applies to such claims not covered by an underlying policy (*not* as a policy deductible)
- *The per occurrence limits and the aggregate limits on an excess/umbrella liability policy are typically equal amounts.*

# Important Insurance Provisions



# Where Do I Find Insurance Requirements in a Contract, Agreement, License or Permit?

- **Insurance clause**
- **Indemnification provisions**
- **Responsibilities, Operations or Required Services**
- **Waiver of subrogation**
- **Environmental (concession permit)**
- **Use, access and parking (Concession Permit)**
- **Maintenance, repairs and alterations (Concession Permit)**
- **Damage or destruction (Concession permit)**
- **Utilities (lease of premises)**
- **Assignment and subletting (lease of premises)**

# Commercial General Liability

- **We'll start with an analysis of the provisions that are easy and relatively inexpensive to comply with, or at no additional charge on most insurance policies**
- ***Additional insured on a Commercial General Liability Policy***
  - **33 different standard additional insured endorsements published by the Insurance Services Office (which adopts wording and files endorsement wording with state regulators on behalf of member insurance companies)**
    - ***This does not include additional non-standard wording for non-admitted insurers***

# Confusion With “Named Insured”

- **Named Insured vs. Insured vs. Additional Insured**
  - **Named insured** has right to pay premium & receive return premium, to cancel coverage, to request changes to policy and receive notices
  - **Insureds** are defined in the “who is insured” section of the policy and often include automatically persons such as directors, officers, employees and volunteers
  - A **property manager** is automatically included as an insured, but not the fee owner, mortgagee or super lessor
  - **Additional insured** is coverage status granted a third party such as a land owner, land manager, vendor of travel services, landlord, or other business partner by a separate endorsement to the Commercial General Liability Policy

# Coverage for Written Contract or Agreement

- ***Beware contracts/permits that specify “additional named insured”, this will not be feasible and is usually due to an error of the attorney or risk manager who drew up the contract language***
- ***Beware of clauses that leave a gap between the liability assumed in a contract and your insurance coverage (e.g. “**must insure against any and all liability...**”)***
  - The final wording is often determined by the amount of leverage you can exert in the transaction
- ***Beware of proprietary forms that only cover written contracts, not agreements***

# Always Add Exposed Entities & Individuals

- Insurance policy additional insured endorsements grant coverage only for the entity named, so it should read ***“name of your organization, its directors, officers, employees and volunteers”***
  - ***Sometimes you will want to add contractors or agents to the list, depending on your needs. Consult your insurance agent/broker and attorney.***
  - ***It is reasonable for a contract or permit to require this of your insurance policy. Common for government entities to require it.***
    - **Business entity (or entities)**
    - **Directors & Officers**
    - ***Members, if a Limited Liability Company or variation thereof***
    - ***Partners, if a partnership***
    - **Employees**
    - **Volunteers**
    - **Agents or contractors (check with your attorney)**



# Written Contracts vs. Written Agreements

- ***Standard insurance policies on an Insurance Services Office published policy form include status conferred in both a written contract and in a written agreement***
- ***According to insurance industry expert Donald S. Malicki:***
  - An agreement is considered broader than a contract
  - An agreement does not require consideration
  - An agreement can be a letter of intent, an MOU/MOA, or an email
  - A certificate of insurance showing a party as an additional insured can be evidence of an agreement

# Contractual Liability Limitations and Extensions

- **Certain proprietary insurance policy forms outside of the standard *Insurance Services Office forms* will limit insurance coverage only to written contracts, which must include all legal requirements of a contract (agreement, capacity, legal purpose, consideration)**
  - Also, watch for proprietary “contractual limitation” endorsements
  - *Ask your insurance agent/broker if you are not sure*
- **Standard policy forms do not cover oral contracts**
  - Coverage for oral contracts is sometimes granted through proprietary broadening/extension endorsements that enhance coverage, but *usually* not for policies covering mountaineering

# NY Work At Height Laws

- In New York *only*, many contracts will require that you delete the *employee exclusion* on the Commercial General Liability Policy due to their labor laws allowing employees to sue their employer or a building owner if working at height in lieu of collecting workers' compensation benefits
- Please note that this will generally not apply to an outdoor organization, unless they are working at height in or on a structure.
- I have been advised by attorneys handling these cases that the initial route setting on a climbing wall may be subject to the labor laws, but not subsequent route setting activity.
- Most Rock climbing and other activity at height would not be subject to the law according to these sources
- *Rope access work and training may be subject to the NY labor laws*
- Finding an insurance carrier willing to delete the *employee exclusion* is an expensive proposition for most organizations, and you should try to negotiate this provision out of the contract or permit.
- Where an exposure exists in NY, failure to delete the *employee exclusion* leaves a significant gap in liability insurance coverage

## “Primary” Wording

- In the liability insurance world, the order in which insurance policies pay claims is described as “*primary*” or “*excess*”
- One insurance policy is described as *excess over* another
- Modern versions of the standard Commercial General Liability Policy Form CG0001 since 2004 have automatically included coverage on a primary basis when required by written contract that states another policy will be excess over yours
- In the absence of this contract term denoting primary coverage, both policies would share in the indemnification until the limit is exhausted, or “by limits” (ratio of your limit to all available limits) depending on policy terms of others
- Requirement of “*primary coverage*” is easy to comply with

## Non-contributory Wording

- *Non-contributory* wording in a contract means that your insurance policy will be the only recourse in the event of a claim made against the additional insured. The **additional insured's insurance will not contribute at all toward any claim made against them** *resulting from your negligence*.
- Common in contracts with some school systems and many government agencies, large corporations/professional firms
- Sometimes included when a party has leverage
- Also seen in construction contracts
- Not all insurance companies will grant this wording
- Normally, insurance companies charge an additional premium for adding this wording, when coverage available

# Waiver of Subrogation (Liability)

- As noted earlier, an insurance company is **subrogated** to your right to recover from a negligent party, after paying a claim
- When you waive this right against a third party, the insurance company cannot sue to recover from the **additional insured** for their negligence, after the insurance company pays a covered claim on your behalf or indemnifies you for a covered loss
- Not all insurance companies will grant this provision
- If the insurer cannot recover, negatively impacts loss ratio
- Normally, insurance companies charge an additional premium for this
  - Some Commercial General Liability broadening endorsements automatically grant coverage for this, particularly for nonprofits, but rarely policies covering mountaineering guides/guide services.

# Miscellaneous Liability Provisions

- Pollution Liability
  - Sometimes found in government agency land manager or resort concession contracts
  - Many liability insurers will *not* grant this exception and a separate policy is required, which is more expensive than adding to an existing policy
- Aggregate Limits Apply Per Location
  - Sometimes found in government agency land manager or resort concession contracts to ensure aggregate policy limits (per policy year) are not exhausted by claims at another location (e.g. National Park Service)
  - Can be simply met if an “aggregate limits per location endorsement” is added, or by issuing a separate policy for the location. Sometimes automatically granted through a general liability broadening endorsement from some insurers
- Aggregate Limits Apply Per Project
  - Commonly found in contracts for construction projects
  - Can be simply met if an “aggregate limits per specified project endorsement” is added, and sometimes automatically granted through a general liability broadening endorsement (but *not* found in policies covering mountaineering)

## Miscellaneous Liability Provisions (cont.)

- Premises Medical Payments Coverage
  - Covers a small amount of emergency medical expense of a visitor who is injured on your premises, excess of their own personal health insurance or workers' compensation coverage. No-fault basis (regardless of negligence).
- Participant Medical Payments
  - Covers a small amount of emergency medical expense of a participant in your activities on a no-fault basis (regardless of negligence). Can be found on either an excess basis or on a primary basis.
- Excluded medical payments
  - Does **not** mean that medical expense is not indemnified in a settlement or judgment involving a covered claim involving negligence!
  - Normally excludes premises medical payments coverage only
  - Some government land managers misunderstand this



# Workers' Compensation

- Evidence of insurance only
  - Additional interests cannot be added as “additional insured” or “named insured” to a Workers' Compensation Policy
  - Only exception is a PEO for leased employees, a rare situation in the outdoor recreation/outdoor education field



# Employers' Liability

- *Standard policy limits on a Workers' Compensation Policy are \$100,000/\$500,000/\$100,000 each employee disease/policy limit for disease/each accident*
- Monopolistic states (WA, WY, OH, ND) provide workers' compensation coverage through the state, but may not include employers' liability
- Many contracts or permits require Employers' Liability with minimum limits
- *Workers' Compensation carriers charge a percentage of the standard premium to increase the limit to \$500,000/\$500,000/\$500,000 or \$1,000,000/\$1,000,000/\$1,000,000, the most common employers' liability limit requirements*
- *Contracts or permits for work in Monopolistic States (WA, WY, OH, ND) may require a Stop Gap Employers' Liability endorsement on your Commercial General Liability Policy*
- Not all Commercial General Liability insurers will add Employers' Liability Stop Gap coverage
- Cost varies widely, from \$50 to \$500 or more

# Waiver of Subrogation (Workers' Compensation)

- *A workers' compensation carrier who pays out benefits on a workers' compensation claim (for injury to a worker) is subrogated to the rights of the employer to collect from a negligent party.*
  - *e.g. A participant who is an independent contractor or who works for your client or business partner is injured during the activity, then puts in a workers' compensation claim for lost wages and medical expense. The workers' compensation insurer then puts a lien on your organization for the benefits they paid out to the worker, alleging you negligently caused or contributed to the worker's injury.*
- *Some contracts and permits will require a waiver of subrogation on the Workers' Compensation Policy in favor of the permitor/contracting party*
- *Workers' compensation carriers charge a percentage of payroll to add a waiver of subrogation, usually ranging from 2% to 10%*
- *Workers' Compensation carriers can often apply the waiver of subrogation to payrolls at a single location, for operations with multiple locations, reducing the cost of adding this feature.*
- *Waiving subrogation may increase your experience modification and premium in the event of a paid workers' compensation claim*

# Waiver of Subrogation Workers' Compensation (cont.)

- ***Similar to Commercial General Liability, when requesting a waiver of subrogation for your own interest (e.g. from a contractor) always request that the waiver of subrogation be worded to include “waiver of subrogation in favor of”***
  - **Business entity (or entities)**
  - **Directors & Officers**
  - **Members, if a Limited Liability Company or variation thereof**
  - **Partners, if a partnership**
  - **Employees**
  - **Volunteers**
  - **Agents or contractors (check with your attorney)**

# Property or Inland Marine Coverage

- Often requires a detailed reading of concession agreement or lease to determine insurance exposures
- Look for sections spelling out responsibility for business personal property, building (huts, yurts) improvements & betterments, trade fixtures, common areas, building HVAC or electrical systems, sprinkler systems, alarm systems, window glass, signs
  - Policy Protective Safeguards Warranties may require landlord to maintain, even where you are not responsible for the systems
    - If warranties are violated, insurer may consider coverage null & void
  - Pay attention to responsibility for sprinkler tests and sprinkler maintenance
- When renting to others, make sure that all additional interests required on your policy are also reflected on the policy of your tenant or sub-tenant
- Watch for requirement to insure loss of income in a lease
- If you are responsible for HVAC electrical or automated systems in a lease, make sure that *mechanical breakdown coverage* is included or that you have a separate Energy Equipment Policy

# When You Must Require Insurance of Others

- Examples of common situations that may require that you obtain evidence of insurance from other
  - Festivals/Competitions with outside vendors/equipment demonstrations
  - Fundraisers
  - Film Production Work
  - Catered Events
  - Avalanche education or backcountry ski programs using downhill ski areas for venue or access
  - Rental of your premises (for parties, fundraisers, races, etc.)
  - Construction or renovation projects



# Requiring Commercial General Liability

- Have your insurance agent/broker or risk manager and attorney help you assess your exposure to a claim
- You should ask for a reciprocal certificate of insurance when asked to add a business partner to your insurance, if they may have a separate exposure due to their operations
  - An example of this is a guide service that must access the back country through a ski area. The ski area asks to be named on the guide service's policy.
  - Conversely, the guide service must ask the ski area for a certificate of insurance naming the guide service for liability arising out of ski area operations (this will be required by your insurance underwriter) i.e. liability arising out of operation of lifts and snow cats, etc.

# Requiring Commercial General Liability (cont.)

- **Bodily Injury & Property Damage Liability**
  - Commonly written with combined single limit each occurrence
  - Use multiples of \$1,000,000 for the required limit
    - If \$1,000,000 unavailable, use your discretion and find out from your insurance agent/broker whether you will have a gap in coverage if a contractor carries a lower limit than your organization carries, or a lower limit than your land manager/sponsor/mortgagee/lien holder/landlord requires
    - Check for policy warranties that all contractors will carry the same or equal limits and coverage as your policy's.



# Requiring Commercial General Liability (cont.)

- **Bodily Injury & Property Damage Liability**
  - Require that your organization and its directors, officers, volunteers and employees are included as additional insured
    - This may vary according to the details
    - In some cases, you may wish to require inclusion of
      - “Members” of an LLC, or “partners”, if a partnership
      - Agents
      - Contractors (e.g. logistics for competitions, guides, vendors, etc.)
  - **Also require inclusion of any additional insured wording required by**
    - **Your land manager**
    - **Venue**
    - **Land owner**
    - **Permit**
    - **Sponsors**

# Requiring Commercial General Liability (cont.)

- Remember to take into account any cross liability exclusion when adding categories as additional insured
  - If you add a contractor as additional insured, you may have no coverage for a claim brought by that contractor against you or your organization
- Remember that claims based upon or arising out of intangible property damage (financial harm) are normally not covered on a Commercial General Liability Policy.
  - If the insurance clause or indemnification agreement states “any and all claims for damage to property...” you may have a gap in coverage
  - These types of claims might properly be covered on a professional liability policy, or a directors & officers liability policy or other professional liability/executive risk coverage, depending on exposure
- Always insist on an “*occurrence form*” with “*defense costs outside the limit*” and no “*sublimit per person*”
- Insert clause with minimum acceptable rating and that insurers must be acceptable to your organization

# Requiring Commercial General Liability (cont.)

- **Personal & Advertising Injury Limit \$1,000,000**
  - Should be included as a requirement in most but not all instances. Contractor or vendor could have implied authority to libel or slander, wrongfully detain an intruder, etc.
- **Products & Completed Operations \$1,000,000**
  - Important where products are provided, sold or rented, demo days, donations of product by vendors, caterers, food or product vendors at festivals, work done by a contractor
  - For sale or distribution of products of others by your organization, you should ask for *Additional Insured on a Vendor's Endorsement* for products liability.
    - Sometimes distributors/manufacturers will not do this for a small vendor.
  - Products liability claims may occur in the future, so you will want to require products liability coverage for a period equal to the statute of limitations

# Property Damage Legal Liability

- Commercial General Liability Policies generally exclude coverage for damage to *property in your care, custody and control*, but provide a separate limit of liability for fire damage, or, sometimes, for property damage to rented premises caused by the alleged negligence of the policyholder
- When renting out facilities/venues, make sure this limit is adequate to protect your real property
- To protect against claims for damage to the property of others, you should require inland marine coverage for property of others (see Inland Marine Coverage)
- Some endorsements limit this coverage to rentals over a certain time period (e.g. more than 7 days) so ask to include wording “*covers rental of ...*” on the certificate of insurance
  - If possible, ask for a copy of the certificate of insurance and have your insurance agent review it

# Medical Payments Coverage

- Premises medical payments is a small amount (usually \$5000 to \$10,000) granted on a no-fault basis (regardless of negligence) for accidents to third parties coming onto your premises
- This coverage is generally not important when negotiating a contract or permit, *unless participant liability is excluded*
- Outdoor activity organizations or competitive sports organizations often have policies that exclude this coverage. This is acceptable from the standpoint of negotiating a contract or agreement.

# Professional Liability Coverage

- For professionals, consultants, or for organizations that train or certify your employees and others, you should insist on evidence of Professional Liability coverage as well as Commercial General Liability coverage
- Depending on your organization's operations and nature of the training, you should ask for evidence that this professional liability coverage includes contingent bodily injury or property damage
  - If the trainer is a licensed instructor (but not employed by the certification, training and standards organization providing the curriculum) you should ask for evidence that the parent organization's professional liability policy covers *contractors*, or that *the trainer has their own policy to cover professional liability*

# Automobile Coverage

- Require a Commercial Automobile Policy for any contract involving an organization that needs to load or unload people, materials or equipment, or needs to drive a vehicle to your venue for commercial purposes
- Require a Commercial Automobile Policy for any ground transportation provider that moves participants, clients, or customers.
- Request a limit commensurate to the risk.
  - The most common limit is \$1,000,000 each accident
  - Carriers transporting persons and subject to USDOT or state PUC filings may have to carry higher limits of liability by law.
- Request that your organization, its directors, officers, volunteers and employees be added as additional insured

# Chartered Aviation or Boat

- When chartering an aircraft (including helicopters or bush flights) **always** require a certificate of insurance from the aviation company showing aviation liability insurance naming your organization, its directors, officers, employees and volunteers as additional insured
- If you are chartering the aircraft for work with a client who has asked you to name them as additional insured on your own insurance, required that they also be included as an additional insured on the aviation company's insurance.
- When chartering a boat, ask to be named on the firm's Protection & Indemnity Insurance (P&I Insurance) same as with the aviation risks



# Property & Inland Marine Coverage

- Where a contractor (e.g. film crew) has significant equipment on your trip or on your site, ask for evidence of insurance showing they are covered for exposures such as theft, damage or loss of equipment with appropriate coverage and limits.
- Include a waiver of subrogation in your contract in favor of your organization, its directors, officers, employees and volunteers (etc.)
  - These policies will honor a written waiver of subrogation if signed prior to a loss
- Includes wording in your participant agreement (waiver form) holding you harmless and indemnifying you for damage to or loss of the participant's property, and include the inherent risks

# Trends in Contracts and Permits

- The following provisions may be either difficult to obtain, add expense to your insurance program, or require additional work on the part of your insurance agent:
  - Watch for primary/non-contributory wording and waiver of subrogation in contracts with government entities, school systems, or universities and colleges
    - If available, can cost between \$25 and \$600, or require an extension endorsement
  - Watch for odd limits of liability that are not insurance industry standard limits (e.g. \$1,500,000 liability limit) which must be rounded up to the next \$1,000,000 (e.g. \$2,000,000)
  - Watch for “aggregate limit of liability shall apply only to guiding activities under this permit”.
    - This may require a separate policy or Aggregate Limit Applies to Specified Location or Project endorsement

# Trends in Contracts and Permits (cont.)

- Pay careful attention to a prohibition on using waiver forms in certain government jurisdictions (***assumption of risk form aka AOR***) and have your attorney draft your own form, if feasible. Send a copy of the form you will be using just for these trips to your insurance agent for approval by insurance underwriters.
  - You must continue to use your waiver form for all other trips
  - Consult your attorney for trips that run through overlapping jurisdictions (i.e. more than one permit area) which have differing requirements on the use of waivers.
  - You may have to ask the land manager and your insurance underwriter to approve a hybrid version, or ask your insurance company whether they will accept use of the AOR for the entire trip.
- High limits
  - We are now seeing occasional limits requirements of \$2,000,000 for CUAs
  - We have seen limits requirements of \$3,000,000 or higher in certain National Park Service concession contracts over the past 8 years. This is not a new trend, but recently has become a contentious issue

# Class Exercise

- **For a film production contract:**
  - **What insurance types are covered in the contract**
  - **What insurance types should be covered in the contract, but have been omitted**
  - **What are the insurance implications of adding the insurance types covered and of adding the types omitted**
  - **What insurance and limits will you require of the film production company?**

# Three Tangible Action Items

- **Inventory your contracts, agreements, licenses and permits to analyze and assess insurance requirements**
- **Have your attorney draw up contracts for vendors or contractors, for festivals, competitions, film production, rental agreements, clients, licensees, and construction or renovation work on headquarters or offices, with appropriate insurance requirements**
- **Speak to your insurance agent/broker about the draft insurance provisions of your next contract or permit *before* you enter into it!**

# References/Links on Subject of Contractual Liability

- [www.MaleckiOnInsurance.com](http://www.MaleckiOnInsurance.com) for in depth articles on contractual liability issues and insurance through 2013 policy form revisions
- [www.irmi.com](http://www.irmi.com) International Risk Management Institute
- [FC&S Bulletins \(published by National Underwriter\)](#)