

INSURING FOREIGN OPERATIONS OF MOUNTAINEERING GUIDES & GUIDE SERVICES

by Don Pachner
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Disclaimer of Content

This course is intended to explain the basic concepts of insuring foreign operations of mountaineering guides and guide services. This is not an exhaustive or definitive guide, or template, 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 and requirements of guiding outside the U.S., 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 without first consulting one of those professionals.

What You Will Take Away From This Class

- **Recognize and understand insurance considerations when guiding outside the U.S.**
- **Understand what practices and procedures you need to draft and implement before insuring foreign operations**
- **What to send your insurance agent or broker when requesting foreign coverage**
- **Understand when and what insurance to ask of destination management companies, independent guides or guide services, transportation providers and others**

What You Will Not Learn in This Class

- **European Policies available to IFMGA guides**
 - Covers individual IFMGA licensed guides, not guide services
 - Covers requirements for guiding locally in European regions
 - Includes limits up to €5,000,000 to comply with new Swiss permit insurance requirements
 - Reasonable cost (usually under \$500 annually for an IFMGA guide)
 - Can be *pro rated* for the number of months needed
 - One source some AMGA IFMGA guides use in Europe is Sepp Oberweiser Insurance in Germany (sepp-oberwieser@gmx.de *)
 - See <http://www.montblancmountainguide.com/index.php/important-info/mountain-insurance> for web-based list of European Sources. *This is for informational purposes only **
- **To my knowledge, these policies do not cover claims or lawsuits brought in the U.S. against the guide or guide service**
 - I have been told that a policy available to fully certified French guides may cover claims or lawsuits brought in the U.S., but this has not been verified

*For informational purposes only. This does not make any assertions regarding suitability or whether coverage-limits will be appropriate for your particular circumstances

Guiding Outside the United States

- How is a guide service/guide's legal responsibility different outside the U.S.?
- What are your exposures to a claim of negligence when guiding outside the U.S.?
- How are guides themselves exposed to the cost of a serious injury when guiding outside the U.S.?



The U.S. System of Legal Responsibility

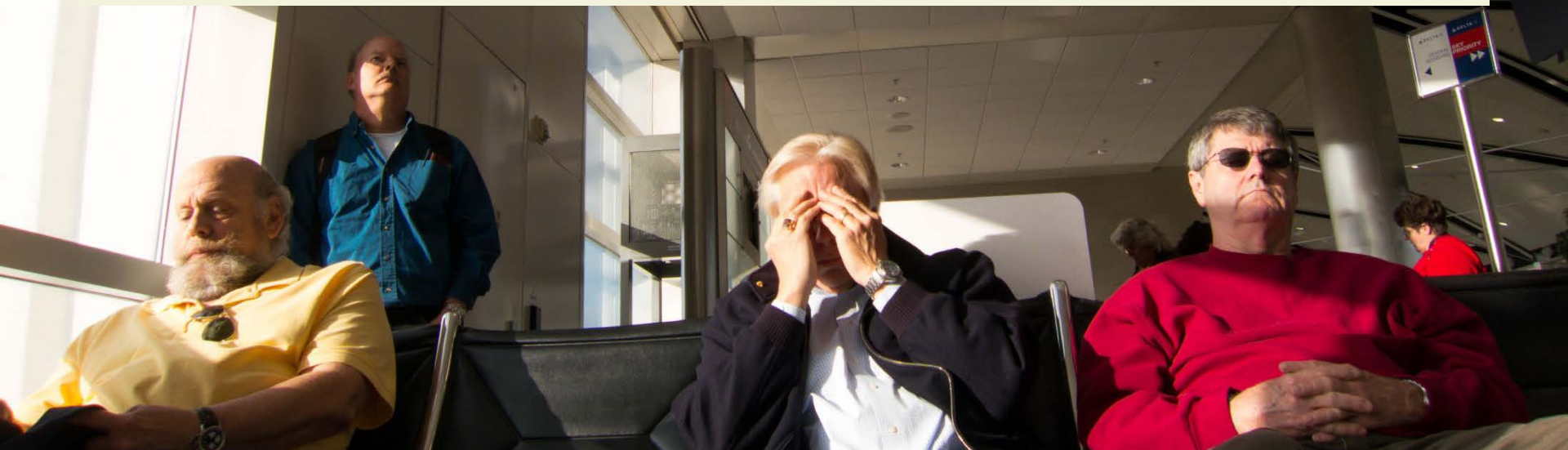
- In the U.S., the current system of legal responsibility is based upon permits and concessions between *guides* or *guide services* and *land managers*
- The *land manager* requires that the *land manager* be added to the *guide* or *guide service's* policy as additional insured for any liability arising out of guiding on their lands
- When a claim or lawsuit is brought, it is against the *guide* and/or the *guide service* providing guiding services.
 - If the *land manager* is named in a claim or lawsuit, they are covered under the *guide service's* liability insurance policy as additional insured
 - If the *guide* is named in a claim or lawsuit, they are usually covered by their own liability insurance policy, or under the *guide service's* liability insurance policy as an **employee** (depends on details)

The Foreign System of Legal Responsibility

- In Europe, the current system of legal responsibility is most often based upon licensing of individual guides
- Other regions often have no system of legal responsibility for claims of negligence against guides/guide services
- In Europe, the guide adds the guide service/tour operator as additional insured on their guide liability insurance policy
- When a claim or lawsuit is brought, it should be against the *guide* and/or the *guide service*.
 - If the *guide service* is named in a claim or lawsuit, the land manager is covered under the *guide service* or *guide's* liability insurance policy as *additional insured*
 - If the *guide* is named in a claim or lawsuit, they are covered by their own European liability insurance policy for claims brought in Europe

Targets of Negligence Claims

- Claims Brought in the U.S.
 - If the guide or guide service has assets in the U.S. they are exposed to a claim of negligence made in a U.S. court
- Claims Brought in Foreign Countries
 - Guide has significant assets in the foreign country where claim occurs
 - A claim is brought in a foreign country that has a treaty with the U.S., which allows them to seize assets in the U.S. as a result of a judgment against the guide in a foreign court



U.S.-based Guides Outside the U.S.

- Most U.S.-based guides & guide services have assets in the U.S. that would be target of a lawsuit, so the most likely venue for a lawsuit would be here in the U.S.
- If a lawsuit in a country outside the U.S. is a concern, then true foreign liability coverage (which will defend the policyholder in a foreign jurisdiction, or reimburse them for defense costs) may be desirable
 - Significant assets in the foreign country where guiding takes place
 - Treaty with the U.S. allowing the court to seize assets here based on legal verdicts in that foreign country
 - Legal action in foreign country would impair ability to guide, or ability to leave the country and return to the U.S.

Sources of Negligence Claims

- **Claims Brought in the U.S. by participants**
- **Claims brought by 3rd parties
(e.g. a guide, another climber or a contractor, others)**
- **Sponsors and Donors**
- **Equipment vendors and donors of equipment used in programs**
- **Other grantors (funding from foundations, etc.)**
- **Vendors of travel services**
- **Suppliers or servers of food and beverage (incl alcohol)**
- **Rental of equipment from others**
- **Lodging**
- **Ground Transportation Providers**

Subcontractors

- **Guides & outfitters (e.g. climbing, rafting, yoga, etc.)**
- **Logistics/Drop Camps/Sherpas**
- **Transportation providers (ground, air, water)**
- **Food and Beverage Providers/Servers**
- **Lodging**



Employed Guides

- **Guides paid of a W-2**
- **Guides paid on a 1099**



U.S.-based Guides Paid on a W-2

- Insuring exposure for injury to U.S.-based guides paid on an IRS Form W-2 (true employees)
 - The following applies to guides hired and paid in the U.S., and temporarily traveling outside the U.S. on business at the direction of the guide service
 - The guide service's U.S. workers' compensation policy should respond to a claim for lost time at work and medical benefits after an injured guide returns to the U.S.
 - The guide service's U.S. workers' compensation policy should pay a lump sum payment in the event of a fatality or other serious injury
 - Medical benefits, emergency evacuation (from the foreign country to the U.S.) endemic disease and repatriation expense should be covered on a group travel accident policy taken out by the guide service

U.S.-based Guides Paid on a W-2 (cont.)

- Insuring exposure for injury to U.S.-based guides paid on an IRS Form W-2 (true employees) [continued]
 - In certain situations, a Foreign Package Policy can be used to insure Foreign Voluntary Workers' Compensation Benefits (based on the schedule of benefits for the state of domicile) and employers' liability. For a mountaineering guide service, this is generally much more expensive than simply including coverage on the existing workers' compensation policy.
 - I recently was consulted by a guide service that was being charged over \$40,000 for this coverage on a modest set of trips. It basically duplicated the coverage available from their workers' compensation policy.
 - The Foreign Package Policies typically include some travel accident insurance and a small amount of kidnap and ransom insurance (usually \$10,000) for employees

U.S.-based Guides Paid on a Form 1099

- Insuring exposure for injury to U.S.-based guides paid on an IRS Form 1099 (*contract* employees)
 - The following applies to guides hired and paid in the U.S., and temporarily traveling outside the U.S. on business at the direction of the guide service
 - The guide service's U.S. workers' compensation policy should respond to a claim for lost time at work and medical benefits after an injured guide returns to the U.S., unless the guide has their own Workers' Compensation Policy
 - The guide service's U.S. workers' compensation policy should pay a lump sum payment in the event of a fatality or other serious injury, unless the guide has their own Workers' Compensation Policy
 - Medical benefits, emergency evacuation (from the foreign country to the U.S.) endemic disease and repatriation expense should be covered on a group travel accident policy taken out by the guide service
 - In certain situations, the guide service expects the contracted guide to procure and pay for their own travel accident/evacuation insurance

U.S.-based Guides Paid on a Form 1099

- Insuring exposure for injury to U.S.-based guides paid on an IRS Form 1099 (*contract* employees)
 - In certain situations, a Foreign Package Policy can be used to insure Foreign Voluntary Workers' Compensation Benefits (based on the schedule of benefits for the state of domicile) and employers' liability. For a mountaineering guide service, this is generally much more expensive than simply including coverage on the existing workers' compensation policy.
 - The Foreign Package Policies may provide the same coverage for contracted guides. Consult your insurance underwriters to confirm.
 - U.S.-based guides should have the provisions of their contract reviewed by their insurance broker or agent, or an attorney

Benefits for Foreign-based Guides

- For foreign-based guides, a Foreign Package Policy can be used to insure Foreign Workers' Compensation Benefits and Foreign Employers' Liability
 - The Foreign Package Policies will cover a guide service's statutory responsibility for foreign workers' compensation and employers' liability benefits, as well as some group travel accident insurance and a small amount of kidnap & ransom coverage in most countries
 - Covers both foreign employees in destination country, and third party nationals (e.g. a foreign-based guide who resides in Ecuador guiding in Nepal)
- Guide services should consult an attorney regarding the need for this coverage
- *Travel accident insurance* is also available to pay medical expense, endemic disease, repatriation expense and evacuation expense for foreign-based guides
- If purchasing this coverage, you may want to consider how this will dovetail with your domestic Workers' Compensation Policy

Insurance Consideration for Permits

- **Canada**
 - **Often require a \$2,000,000 per occurrence limit**
 - **This can be met in one of two ways**
 - Add an Excess Liability Policy/Umbrella Liability Policy with a \$1,000,000 limit per occurrence/aggregate through an insurer licensed in Canada (most U.S. insurers of mountaineering guides meet this requirement)
 - Write a separate policy through a Canadian broker for Canadian operations
- **Europe**
 - **As noted, you will wish to carry both an inexpensive European policy *plus* a U.S. policy covering lawsuits brought in the U.S.**
 - **Switzerland**
 - Currently requires a €5,000,000 limit
 - **European Community**
 - Currently requires a €1,000,000 limit, but could increase in the near future
- **Other**
 - **Piggybacking on Permits**
 - **Using local guides/guide services**

Commercial Automobile Coverage

- **Automobile Liability**
 - *Standard Commercial Automobile Policy Only Covers in U.S. and Canada*
 - *Foreign Rented or Borrowed Autos*
 - *Foreign Non-owned Autos (use of personal autos in business)*
- **Foreign Hired Auto Physical Damage Coverage**
 - *Damage to vehicle that you or your organization rents*
 - *Subject to a deductible*
 - *Comprehensive*
 - *Collision*

Types of Foreign Automobile Coverage



- ***Standard Commercial Automobile Policy Only Covers in U.S. and Canada***
- ***Can purchase Foreign Hired (& Rented) or Borrowed Automobile Liability***
- ***Can purchase Foreign Non-owned Automobile Liability (use of personal autos in business by local guides)***
- **Foreign Hired Auto Physical Damage Coverage**
 - ***Damage to vehicle that you or your organization rents***
 - ***Subject to a deductible***
 - ***Comprehensive***
 - ***Collision***



In-country Ground and Air Transportation



- **U.S. Commercial Automobile Policies will only cover liability arising out of travel in the U.S. and Canada**
- **Guides/Guide Services are exposed to an automobile liability claim in a foreign country involving either clients, employed/contracted guides or third parties**
 - **Vehicle Rentals or Charters**
 - **Destination Management Company Arrangements**
 - **Local Guides Use Personal Vehicles to Transport Clients**



In-country Ground and Air Transportation (cont.)

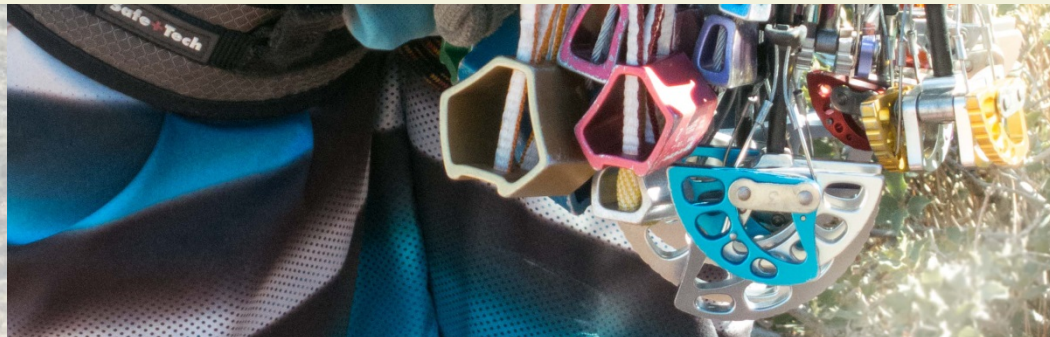


- If you are having a destination management company or local guide service arrange transportation, you can obtain *foreign non-owned/hired automobile liability coverage* on either a *foreign tour operator liability policy (will not cover technical mountaineering, nor will it coverage damage to the rented vehicle)* or a *foreign package policy (will exclude participant suits under the general liability coverage)*
- If you are arranging for your own ground transportation, you should purchase a foreign package policy to include hired car physical damage coverage (damage to the rented vehicle)



Inland Marine Coverage

- **Moveable equipment used in your operations**
- **Moveable equipment of others in your care, custody or control (your clients' equipment, cameras, and other personal items)**
 - **Note that your general liability policy excludes claims for damage to property of others in your care, custody, or control**
- **Normally policy covers worldwide**
- ***Usually valued at Actual Cash Value (fair market value or replacement cost less depreciation, whichever is less)***



Commercial General Liability

- Responds to claims based upon or arising out of bodily injury, tangible property damage, personal injury (libel, slander, defamation, invasion of rights of privacy, malicious prosecution) products liability, completed operations.
- For mountaineering or climbing, includes the *Limitation of Coverage Designated Premises or Project* endorsement CG2144 that states exactly which outdoor activities are covered by the policy
- Coverage for Foreign Operations on a standard Commercial General Liability Policy
 - Coverage territory is U.S., its territories, possessions, Puerto Rico and Canada
 - Coverage is extended to *employees of the guide service temporarily outside the policy territory on the business of guide service* – i.e. when a U.S.-based guide accompanies a foreign trip
 - While the incident may occur outside the policy territory, the covered claim or lawsuit must be brought within the policy territory (i.e. a U.S. court)

Commercial General Liability (cont.)

- **Specifically Described Foreign-based Guides (*new*)**
 - At our request, one underwriter has recently obtained authorization to add specified foreign-based guides to the policy as additional insured, and amended the policy territory to include those foreign trips guided for the insured guide service
 - Covers defense costs and indemnification for settlement or judgments on claims or lawsuits brought within the U.S.
 - Each guide to be added is underwritten separately and premium charged
 - Requires resume and home address of your guide
 - All professional and medical certifications of guide
 - List of all trips the guide leads for you, including location/country
 - Included separately for trips that are not accompanied by a U.S.-based guide
 - Amount paid to guide for each category of trip

Commercial General Liability (cont.)

- Amendment of Coverage Territory – Worldwide Coverage (Form CG2422)
 - **Not currently available** for most standard Commercial General Liability Policies covering mountaineering guides.
 - “...This endorsement broadens the territory to include anywhere in the world with the exception of any country or jurisdiction that is subject to trade or other economic sanction or embargo by the United States. So, if a lawsuit is brought against the insured [guide service] in a territory outside the U.S., Puerto Rico, or Canada, [CG 24 22](#) says that the insurer will **reimburse** the insured [guide service] for any **reasonable and necessary expenses** incurred for the defense; and, if the insured [guide service] loses the lawsuit and becomes legally obligated to pay damages, CG 24 22 says that the insurer will reimburse the insured for such sums. **All payments are made in U.S. currency at the prevailing exchange rate.**” **

** *FC&S Bulletins Coverage Analysis, National Underwriter Publications*

Commercial General Liability (cont.)

- Foreign Package Policy for Foreign General Liability
 - Small Foreign Package Policies that include *Foreign Voluntary Workers' Compensation & Employers' Liability Coverage*, and *Foreign Non-owned/Hired Automobile Liability Including Physical Damage Coverage* **typically exclude bodily injury and property damage claims brought by trip participants**
 - Can include limits higher than \$1,000,000 each occurrence
 - When coverage for *participant liability* (claims brought by participants on the trip) is included, the premium is typically very high compared to similar coverage available elsewhere, and usually not affordable for a mountaineering guide service

Commercial General Liability (cont.)

- Foreign Tour Operator Professional Liability Policies
 - These policies typically *exclude technical mountaineering*
 - They will *include a certain amount of top rope or single pitch climbing and rappelling*, subject to underwriting review
 - They can be used in conjunction with a U.S.-based policy that covers technical mountaineering to eliminate coverage gaps
 - These policies typically include Foreign Non-Owned/Hired Automobile Liability [they will *not* cover damage to a vehicle you rent or borrow]
 - These policies include professional liability arising out of travel arrangements (e.g. selection of carrier or lodging services)
 - These policies have an exclusion for provision of equipment to participants, which can be bought back after underwriting review of your procedures
 - Typically can write limits of \$3,000,000 per occurrence or greater
 - Can include abuse & molestation coverage for youth programs

Professional Liability

- **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
- Covers worldwide
- If you accept registration from EU countries, you may be subject to their privacy regulations. Check with a qualified attorney.

Excess/Umbrella Liability

- Provides increased limits per occurrence and/or per aggregate for specified underlying policies
- *Typically will **not** cover Foreign Automobile Liability*
- 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.*

When You Must Require Insurance of Others

- Examples of common situations that may require that you obtain evidence of insurance from other business partners that name your guide service, its directors, officers, (members) employees, contractors and volunteers as additional insured
 - Destination Management Companies
 - Local guides & outfitters
 - Recreation Facilities
 - Logistics support services
 - Ground Transportation and Aviation Services Suppliers
 - Film Production Companies

Transportation Coverage

- Establish written procedures for selection of ground transportation, marine transportation or aviation services providers
- Establish written procedures for obtaining certificates of insurance naming your guide service et al. as additional insured on the transportation provider's liability insurance



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

Three Tangible Action Items

- **Analyze your business model foreign guiding and determine your exposure for a claim**
- **Revise or create your risk management plan for foreign operations and implement it**
- **Speak to your insurance agent/broker about insuring your foreign exposure and about potential coverage gaps**

Some References/Links on Subject of Foreign Liability Coverage

- www.irmi.com International Risk Management Institute
- [FC&S Bulletins \(published by National Underwriter\)](#)
- www.montblancmountainguide.com/index.php/important-info/mountain-insurance
- www.ivbv.info/en/home.html
- www.amga.com