

Courier

DELIVERING
BUSINESS ESSENTIALS
TO MEMBERS OF
CROSSPHERE

Feb 2005

Money matters
Liability risk can
be reduced

**Casino
communities**
Attractions,
DMOs draw
winning hand

Trip planners
Atlantic Coast
and Southern
Europe

536 P2 *****3-DIGIT 405
ROBERT E. MACLIM, III
Attorney-At-Law
201 E Main St Ste 1000
Lexington, KY 40507-2003

travel essentials

Courier's business section examines current travel industry trends and issues.
To contribute ideas e-mail the editor at frances.figart@hostcommunications.com.

Preparation is vital to minimizing liability exposures

by Robert E. Maclin III, Esq.

In today's fast paced environment, the tour operator must juggle a variety of challenges. The ever-expanding and changing travel industry, combined with the consuming public's ever-rising expectations, create ever-increasing and evolving legal duties and responsibilities. Like it or not, regardless of who is ultimately responsible, a tour operator is often the customer's sole point of contact, and therefore likely to receive the brunt of any liability issue. The question, therefore, is when, not if, a tour operator will face a lawsuit from a customer.

Types of liability suits

Potential liabilities facing tour operators are typically based on what are called "causes of action," which include negligence, malpractice and breach of contract, fiduciary duty or statutory duty. The typical lawsuit that a tour operator might expect to face would very likely include a potpourri of these causes of action.

For example, a tour operator may be responsible for the negligence of a tour supplier that results in an injury to a customer. Or a tour operator may be held liable for misrepresentations or for breach of an implied warranty of habitability, arising from lodging provided by a tour supplier. Or a tour operator may be held liable if a customer becomes ill due to circumstances surrounding travel accommodations on a tour. Or a tour operator may be held liable for allowing a disabled customer to participate in an activity that may result in injury or disruption in travel

— and by the same token he may be held liable for refusing to allow the disabled customer to participate in a scheduled activity.

Getting prepared

Working with the company's legal advisor, a tour operator should develop and, on an ongoing basis, maintain, a general familiarity with the types of liability exposures that exist in the company's daily operations. This will enable the company to develop practices and procedures (commonly

requires all its North American tour operator members to maintain both \$1,000,000 in general liability insurance coverage and \$1,000,000 in professional errors and omissions coverage.)

The time for a tour operator to review and understand exactly what insurance coverage is available under the tour operator's insurance policy *is not* when the tour operator has received a summons and complaint. Too often, and not just in our industry, an insur-

"If you think this article is involved, imagine what a liability lawsuit would be like. Preparation is the key, good judgement the guide."

—Ed Dresel of Destinations Unlimited in Southington, Conn.

referred to as "loss control practices") to reduce liability exposure, to reduce or eliminate losses in the event of litigation and, most importantly, to reduce potential harm to the tour operator's customers.

Understand your policy

After becoming familiar with the types of liability exposures that may be confronted, it is critical that the tour operator work with both legal and insurance advisors to secure and maintain insurance coverage. (CrossSphere

ance policy is purchased and received and then "filed away" with no clear understanding of the precise risks of the business, the coverage amounts needed, the coverage which is actually provided under the policy, or the exclusions from coverage under the policy. This is why it is important to work with both legal and insurance advisors to develop and maintain an understanding of the liabilities that are covered as well as those that are not covered.



All tour operators should recognize that insurance simply does not protect against all risks and liabilities. Even with the availability of insurance coverage for a claim, there will be no compensation for the time lost addressing a lawsuit (time spent in depositions, answering written questions, and in court); for the increased premiums or the potential insurance coverage cancellation that may result from a lawsuit having been filed; for the damage to a tour operator's business and reputation; or for the mental stress inevitably resulting from litigation. (All insurance policies have a "duty to cooperate" clause, requiring the insured tour operator to fully participate in the defense afforded them under that policy in order for it to remain in effect.)

Contracts should reflect policy
Once the tour operator understands the liabilities and risks that are insured and the one's that aren't, it's important to work with the legal advisor to develop formalized agreements, policies, practices, procedures and internal behaviors that reflect the coverage policy. For example, a tour operator can act to minimize liability and risk exposure — and protect both his company and the customer — by being diligent and professional in the selection of tour suppliers. This not only protects the customer, but also should provide the tour operator with a legitimate defense in any lawsuit alleging negligent selection of a tour supplier.

Another way to minimize risk is by developing and implementing clear

and concise contracts with customers. For example, it is a good idea to include in a customer contract a "disclosure of principal and responsibility clause," stating that the tour operator does not own or operate the tour supplier, identifying all principals who are actually providing the tour components and disclaiming responsibility from conditions beyond the tour operator's control.

A final risk control strategy is developing and implementing clear and concise contracts with tour suppliers. For example, a contract should include clauses requiring the tour supplier to provide insurance for the tour operator and setting forth and establishing standards for the tour components that the tour supplier is providing. Other suggestions to consider are developing and implementing clear practices, policies and procedures with to respect areas such as customer warnings for travel venues, customer participation in activities, tour operator staff training and not over-representing or over-promising tours.

The readiness is all
The bottom line is, a tour operator must be prepared for the inevitable threat of litigation and should take the time to know and understand the potential risks and liabilities and the provisions of the chosen insurance program. It is also crucial to establish and implement proper disclosures, and clear and definitive policies and agreements. In summary a tour operator should be prepared.

"If you think this article is involved, imagine what a liability lawsuit would be like," said Ed Dresel of Destination Unlimited in Southington, Conn. "Preparation is the key, good judgment the guide." ■

Robert E. Maclin III is a member of the Lexington, Ky., Law firm of McBrayer, McGinnis, Leslie & Kirkland PLLC and has served as counsel for CrossSphere since 1984. This article and its contents are for illustrative and discussion purposes only and are not intended to establish any professional standards nor serve as legal advice regarding any particular situation. A competent legal professional should be consulted for any legal planning or advice.