Message from the Co-Chair .................................................................................. 2
By: Kara Petteway
Welcome message from the 2015-2016 YLD TIPS Co-Chair.

When do Future Service Contract Constitute Insurance? ......................... 2
By: Kathleen Dixon
Determining when future service contracts constitute insurance.

Three Things Every Lawyer Needs to Know About Insurance Coverage ..... 3
By: Dominic Spinelli
An overview of key topics in insurance coverage that every attorneys should know.

News and Announcements ............................................................................. 7
Fall 2015 News and Announcements from the ABA YLD TIPS Division

2015 YLD Fall Conference .................................................................................. 7
Join us this year in Little Rock, Arkansas for the 2015 YLD Fall Conference, from October 15-17, 2015.

2015 TIPS Fall Leadership Meeting ................................................................. 7
Join us this year for the TIPS Fall Leadership Meeting, October 14-18, 2015 in Scottsdale, Arizona.

Update from the Member Services Project .................................................... 7
Upcoming events from Member Services Project.

Update from the National Conference/Events Team .................................... 7
Call to action: ABA Everyday membership initiative and upcoming webinars.

Update from YLD Public Service Project ....................................................... 8
The Public Service Team will hold its inaugural “World Wise Web (“WWW”) outreach on Friday, October 16, 2015 in Little Rock, Arkansas.

Update from Disaster Legal Services Team .................................................. 8
New Team for 2015-2016 announced.
MESSAGE FROM THE CO-CHAIR
By: Kara Petteway

Kathleen Dixon and I are thrilled to be Co-Chairs of the YLD TIPS Committee for upcoming year. We are working to develop a collaborative network of young lawyers who practice in the torts, trial and insurance space, in a variety of contexts -- large law firms, small law firms and the government. Involvement in the ABA is a great way to connect with other young lawyers and sharpen your substantive knowledge of the law. This year, we will be publishing four newsletters that are geared to address issues facing young lawyers. This issue features two articles focused on developments in insurance law. We welcome submissions from young lawyers for upcoming newsletters. Publishing in the YLD TIPS newsletter is a great way to get published and become involved in the ABA at an early stage of your career.

There are two exciting ABA events taking place this Spring which I encourage you to attend. The ABA Mid-Year Meeting will be held February 4-7, 2016 in San Diego, California. The YLD Spring 2016 Conference will be held May 5-7, 2016 in St. Louis, Missouri. These events are full of professional development, CLE and networking opportunities for young lawyers.

If you have any suggestions about networking events, initiatives or programming, please feel free to contact me at kara.petteway@nortonrosefulbright.com.

Sincerely yours,

Kara Lynn Petteway
Senior Associate
Norton Rose Fulbright US LLP
799 9th Street NW
Washington, DC 20001

ARTICLES

When do Future Service Contract Constitute Insurance?
By: Kathleen Dixon

Selling insurance is a complicated business. There are extensive licensing, financial, and rating requirements a company must satisfy prior to ever thinking of selling any kind of insurance product. Sometimes, companies want to offer warranties on their products without having to qualify as an insurer. There is a fine line between when a contract for future services is simply a warranty, and when that contract is insurance.

To determine when a future services contract qualifies as insurance, and is thus subject to regulation, many states have adopted a test which weighs the predominant purpose of the contract. Essentially, this test asks whether the contract intends to serve as a guarantee of some service or as a promise of indemnity. Generally, a contract predominantly providing a service will not be considered insurance, whereas a contract for indemnity is considered
insurance. A further consideration in making this determination is the underlying business transaction giving rise to the disputed future services contract.

Applying this test to determine whether a contract is one for insurance is done on a case by case basis. In most cases, when a contract for future services is ancillary to some service provided in the underlying business relationship between the parties, that service is the essence of the contract in question, and will not be considered insurance. On the other hand, a contract will be one of insurance when indemnity is the central purpose and the contract conditions payment of an obligation on some unforeseeable act.

While this is a brief introduction into a complicated, fact-determinative area of law, knowledge of the basics in insurance determinations is helpful. Before offering, or allowing a client to offer, an unregulated future services contract, consider first what is the predominant nature of that contract?

Kathleen Dixon is an insurance prosecutor for the Tennessee Department of Commerce and Insurance. She is a member of the Tennessee Bar, the American Bar Association, and the Nashville Junior Chamber of Commerce.

Three Things Every Lawyer Needs to Know About Insurance Coverage
By: Dominic Spinelli

Insurance coverage issues affect almost every area of litigation. Whether a plaintiff’s personal injury attorney, a civil defense attorney, or an in-house corporate attorney, it is essential for every lawyer to have a basic understanding of insurance coverage. Plaintiff’s attorneys – do you want to maximize the potential recovery for your client (and your contingency fee)? Defense attorneys - do you want to ensure that your client's carriers are participating in the defense (and paying your attorney's fees)? In-house attorneys – do you want to protect your company from all risks that may arise? This article is intended to provide non-coverage attorneys with an overview of key topics in coverage that every attorney should know.

1. The Different Types of Insurance Coverage

There are numerous types of insurance coverage available in the market that may respond to a certain risk. Some of the common insurance policies in which attorneys should be generally familiar include:

   a) CGL Policies: Commercial General Liability Policies protect the insured against liability for claims of bodily injury and property damage (i.e., claims of negligence resulting in bodily injury or property damage), and personal and advertising injury (i.e., claims of defamation or libel).

   b) E&O Policies: Errors and Omissions Liability Policies protect the insured against liability for committing an error or omission in the performance of professional services. Such policies generally cover financial losses rather than liability for bodily injury and property damage (i.e., claims against
attorneys, architects, and doctors arising from their profession and resulting in financial loss).

c) D&O Policies: Director and Officer Liability Policies protect individual directors and officers against liability for claims made against them while serving on a board of directors and/or as an officer. Such policies cover monetary damages but not bodily injury and property damage (i.e., claims of negligence against directors or officers by a shareholder resulting in monetary damages).

d) EPL Policies: Employment Practice Liability Policies protect the insured against liability for claims of wrongful acts arising from the employment process (i.e., claims of wrongful termination, discrimination, sexual harassment, and retaliation).

It is important to note that in many cases, several different insurance policies may be triggered by a claim. For example, in claims involving bodily injury or property damage arising from professional services, both a CGL Policy and an E&O Policy may be triggered. In most situations, it will benefit all attorneys involved in a claim to have as many insurance carriers participating in the defense as possible.

2. How to Interpret an Insurance Policy

In addition to being familiar with the various types of insurance coverage, it is necessary for every lawyer to be able to read and interpret an insurance policy. For in-house attorneys, it is necessary to understand what is covered and the exclusions that take away coverage. For civil defense attorneys, it is important to understand how to tender your client’s defense to insurance carriers and the policy conditions that must be met in order to qualify for coverage. For plaintiff’s attorney, it is necessary to understand what is covered in order to convince the carriers to contribute to any settlement or judgement in your favor. Some of the key policy sections in which attorneys should be generally familiar include:

a) The Declarations Page is generally the front page of a policy that specifies the named insured, the policy period, the policy limits, the deductible, and other key information.

b) The Insuring Agreement summarizes what is covered under the policy.

c) The Exclusions take coverage away from the Insuring Agreement.

d) The Conditions place limitations on the insurer’s obligation to pay or perform and if the conditions are not met, the carrier may be able to deny the claim (i.e., late notice).

e) The Definitions section defines specific terms used in the policy and is important to read to understand what is covered.

f) Endorsements change the language or coverage of a policy.
3. The Implications of a Coverage Position Letter

In addition to being familiar with the various types of insurance coverage and being able to interpret a specific insurance policy, it is necessary for every lawyer to understand the implications of an insurance carrier’s coverage position letter. After a claim is reported to an insurance carrier, the carrier will issue a coverage position letter taking one of three positions:

a) Accepting coverage and providing an unqualified defense: Here, the insurance carrier decides that the claims are definitely covered under the policy and agrees to defend and indemnify its insured, without reserving its right to deny coverage. If the carrier takes this position, a key issue that may arise is who makes the decision to settle a claim. When faced with a settlement demand, the carrier, on the one hand, may think the claim is defensible and not want to settle, while the insured, on the other hand, might be fearful of a verdict in excess of policy limits and want to settle. While each state applies a different standard, carriers generally have a duty to accept reasonable settlement offers within policy limits. The failure to do so can expose the carrier to a bad faith failure to settle claim. Civil defense attorneys and in-house attorneys must carefully consider and respond to settlement offers and be aware of the potential for a bad faith claim. Conversely, plaintiff’s attorneys can use this concern to leverage a settlement with the defendant and their carrier.

b) Providing a defense but reserving the right to contest coverage later on: Here, the insurance carrier decides that the claims may potentially be covered under the policy and agrees to defend its insured, but reserves the right to contest coverage and withdraw the defense or deny indemnity coverage later on. If the insurance carrier takes this position, a key issue that may arise is whether the insured is entitled to independent counsel of its choosing, or whether the carrier can appoint an attorney of its choosing. The right to select defense counsel is ordinarily reserved for carriers. However, there are certain situations in which a conflict or potential conflict of interest between the carrier and the insured entitles the insured to choose its own independent defense counsel. States apply different standards for determining whether a conflict exists. For example, in Massachusetts, a carrier’s reservation of rights creates a per se conflict of interest that allows the insured to choose its own counsel to be paid for by the insurer. Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387 (2003). In Illinois, if a carrier agrees to defend an insured under a reservation of rights, and a conflict of interest arises, the carrier must appoint independent counsel for the insured. See Maryland Cas. Co. v. Peppers, 355 N.E.2d 24 (Ill. 1976). Common situations where a conflict arises include where there are claims of both intentional and negligent conduct, where there is damage outside the policy period, and where there is a likelihood of a judgement in excess of policy limits. It is important for all attorneys involved in litigation to understand when independent counsel is required.

c) Denying coverage and refusing to provide a defense: Here, the carrier decides the claims are definitely not covered and denies any duty to defend or indemnity its insured. If the insurance carrier takes this position, a key issue that may arise is
waiver or estoppel. In certain states, such as Illinois, when a carrier takes the position that a claim is not covered under a policy that includes a duty to defend, the carrier may not simply refuse to defend the insured. Instead, the carrier must seek a declaratory judgment that there is no coverage. If the insurer fails to do so and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage. The estoppel doctrine applies only where an insurer has breached its duty to defend. Thus, a court inquires whether the insurer had a duty to defend and whether it breached that duty. Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered. These circumstances include where the insurer was given no opportunity to defend; where there was no insurance policy in existence; and where, when the policy and the complaint are compared, there clearly was no coverage or potential for coverage. Once the insurer breaches its duty to defend, however, the estoppel doctrine has broad application and operates to bar the insurer from raising policy defenses to coverage, even those defenses that may have been successful had the insurer not breached its duty to defend. This issue was illustrated in a recent Seventh Circuit Court of Appeals case where the court issued “a warning for insurance companies who refuse to defend their insureds” that they will be estopped from later asserting policy defenses to coverage, unless the insurer files a declaratory judgment action. National American Insurance Company v. Artisan and Truckers Casualty Company, No. 14-2694, 2015 WL 4645245 (7th Cir. Aug. 6, 2015).

The issues discussed above are only a few of many coverage issues that affect litigation. Having an understanding of these basic coverage issues will “insure” that you get the best result for your client.

Dominic Spinelli is an associate with Bates Carey, LLP in Chicago, Illinois. Mr. Spinelli focuses his practice on insurance coverage litigation including advising clients on insurance coverage issues and representing insurance and reinsurance companies in coverage disputes.

NEWS AND ANNOUNCEMENTS

2015 YLD Fall Conference

We hope you can join us at the 2015 YLD Fall Conference on October 15-17, 2015. This year’s YLD Fall Conference is hosted by the Young Lawyers Division and will take place at the Little Rock Marriot in Little Rock, Arkansas.

You may now register for the meeting.

2015 TIPS Fall Leadership Meeting

Join us for the TIPS Fall Leadership Meeting, October 14-18, 2015 at the Westin Kierland Resort & Spa in beautiful Scottsdale, AZ. The meeting will feature a number of must-attend events including a complimentary CLE program featuring Corporate Counsel Executives,
networking receptions and dinners, committee business meetings and the Kirsten Christophe Memorial Award for Excellence in Trial and Insurance Law Presentation. Attendees will also have an opportunity to enjoy the relaxing desert surroundings, participate in our Friday afternoon golf tournament or attend our Saturday evening dinner featuring music, dancing and "glow-putt" mini-golf.

You may now register for the meeting and we encourage you to make your flight and hotel arrangements.

**Update from the Member Services Project**

On October 14, 2015 the ABA YLD will host a Twitter chat at 3PM PT/6 PM ET entitled Addressing Mental Health Stigmas in the Legal Profession. Rachael Barrett of The Dave Nee Foundation (@Neefoundation) will host the chat.

On October 15, 2015 Hilary Chancy will present an Ethics-CLE program entitled “The Bipolar Attorney: When the Mental Impairment is Your Own.”

On October 16, 2015 Judi Cohen of Warrior One will present a CLE program entitled “Chaos to Mindfulness.”

The Fit to Practice program will be launched at Fall Conference.

**Update from the National Conference/Events Team**

Please check out the ABA Everyday membership initiative found at: [http://www.abaeveryday.org](http://www.abaeveryday.org). Notable upcoming webinars include:

**October 20, 2015**
*Green Building: A Practical Guide to Transactional and Litigation Issues*
Sponsored by Business Law Section, Center for Professional Development, Forum on Construction Law, Section of Environment, Energy, and Resources, Section of Public Contract Law, Tort Trial and Insurance Practice Section, and Young Lawyers Division
1.50 CLE Credits

**October 28, 2015**
*Time Management for Lawyers: If You Don’t Manage Your Time, You Can’t Manage Your Practice (Webinar)*
Sponsored by Center for Professional Development, Law Practice Division, and Young Lawyers Division
1.50 CLE Credits

**November 24, 2015**
*Case Management for Lawyers: How to Organize the Chaos and Make More Time for YOU (Webinar)*
Update from YLD Public Service Project

Inaugural Outreach: The Public Service Team will hold its inaugural “World Wise Web ("WWW") outreach on Friday, October 16, 2015 at 9:00 a.m. at Henderson Middle School in Little Rock, Arkansas. This outreach is in conjunction with the ABA YLD Fall Conference. If anyone is interested in volunteering for this outreach, please contact ckannenb@fclaw.com.

Update from Disaster Legal Services Team

New Team for 2015-2016: The DLS team welcomed three new members to its team for this bar year: Karl Bach, Victor Flores, and Victoria Nedospasova. Returning to the team from last year is Wendy Ellard, Kim Goins, and Matthew Vlasman. Former DLS Director David Nguyen was appointed as Special Advisor and is helping the incoming DLS Director, Andrew VanSingel, transition into his new role.

A Disastrous Start to the Bar Year: The DLS team responded to an unusually high number of disasters in a short period of time (four, to be exact) in Texas, Wyoming, Saipan (I had to google where that was) and Kentucky. To put things in perspective, last year DLS was implemented only once, for the flooding in Michigan. The DLS team dodged the proverbial bullet as several hurricanes in the Atlantic and Pacific bypassed U.S. soil. Despite the volume of disasters, the DLS team responded swiftly and quickly to help disaster survivors get the legal help that they need.

September is Disaster Preparedness Month: September is National Preparedness Month, and the DLS Team is working with YLD District Representatives to create a disaster plan for each district. When finalized, we will have a single document containing the disaster plan for each district. When disaster strikes, the District Representative will be able to quickly implement the DLS plan. The DLS team hopes to have this document finalized by the end of the month.

Resources: Everyone should be thinking about disaster planning, whether it’s to help out the YLD DLS team, or in your own personal or professional life. Visit Ready.com for ways you can prepare yourself for disaster. Also, don’t forget to check out the ABA Disaster Legal Services website as well as the Disaster Legal Aid website for up to date disaster-related information.