How to Read an Insurance Policy (And Actually Understand It)

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Why Should You Care?

- Plaintiff Attorneys: Don’t leave $$$ on the table

- Defense Attorneys: Get another party to fund defense → Impress self-insured client/insurer

- Competency / Avoid a malpractice claim
After Today, You Will Understand:

- The big picture of insurance coverage
- The difference between first- and third-party insurance
- How to read any insurance policy and understand the grant of coverage, exclusions, and conditions
- Have a systematic approach for conducting insurance coverage analysis that you can use to analyze any claim
- N.Y. Ins. Law § 3420(d)
What Do You Need to Understand Insurance Coverage?
- Reading comprehension
- Basic legal research skills
- Mild amount of perseverance
  (or a strong cup of coffee)
READ THE POLICY!

READING GIVES ME A HEADACHE!

Photo Credit: GIPHY
1st Party vs. 3rd Party Insurance

Two Types of Insurance:

- First-Party Insurance - applies to the insured’s own property
- Third-Party Insurance - “litigation insurance” - provides defense and indemnity against claims / suits brought by third parties
First-Party Insurance
Examples of First-Party Insurance

Covers loss/damage to the insured’s property or themselves

- Homeowners Insurance (property coverage part)
- Commercial Property
- Comprehensive Auto
- Personal Injury Protection (PIP)
- Uninsured Motorists (UM) / Underinsured Motorists (SUM)
Third-Party Insurance
Examples of Third-Party Insurance

Covers liability claims brought against the insured

- Automobile Liability policy
- Homeowners Insurance (liability coverage part)
- Commercial General Liability (CGL)
- Professional Liability
- Product Liability
Insurance Coverage?

Follow the Flowchart!
Is claim within insuring grant?

Yes → Do any exclusions apply?

No → Did insured comply with conditions? (Notice, Cooperation)

Yes → COVERAGE

No → NO COVERAGE

Yes → NO COVERAGE

No → NO COVERAGE
Insuring Grant

What did the insurance company agree to do?

- **Defend** claims of **bodily injury or property damage** resulting from an “occurrence”
  - Even if fraudulent, false, or baseless

- **Indemnify** covered claims (pay judgment / settlement)
Duty to Defend vs. Duty to Indemnify

Duty to Defend depends on the **allegations**

- What matters → **what's alleged**
- Does **not** matter whether allegations are true or false

Duty to Indemnify depends on **facts**

- The insured’s liability has been established
- **Facts matter**
Examples of Claims Outside Insuring Grant

- Damages sought for something other than “property damage” or “bodily injury”
  - Lost revenue, lost goodwill
  - Breach of contract (unless “insured contract”)
  - Failure to pay labor, services, etc.
  - Government fines / penalties
- Intentional harm (assault; battery; sex abuse; fraud)
- Affirmative litigation by the insured
- Coverage litigation
“Occurrence” Requirement

- For liability coverage to be triggered, there must first be an “occurrence” → an accident

- “Occurrence” is judged from the insured’s perspective
  - Was this unexpected? Unusual? Unforeseen?
Insuring Grant: Burden of Proof

- Insured has initial burden of proving that claim falls within the policy coverage
Exclusions

- Exclusion: a provision referring to hazards, perils, circumstances, or property not covered by the policy.

- Exclusions must be clear and specific, and are strictly construed.

Exclusions

Burden of Proof: **Insurer** has the burden of showing that a claim or lawsuit falls within a policy exclusion

- If there are two **reasonable** interpretations, one which favors coverage and one that does not, the exclusion is ambiguous

- Ambiguity is construed against the insurer

Common Exclusions in Liability Insurance
Exclusions

- Intentional Acts Exclusion
  - Woman drives over her cheating husband with her Mercedes several times

- Contractual Liability Exclusion
  - Excludes coverage for damages sought for breach of contract
    - Ex. Breach of warranty, failure to comply with contract terms
  - But restores coverage for certain contracts called “insured contracts”, such as leases and trade contracts for indemnification
Exclusions

- **Workers Comp Exclusion**
  - Excludes coverage any obligation under WC law

- **Employer’s Liability Exclusion**
  - Excludes coverage for injury to employees

- **Aircraft, Auto or Watercraft**
  - Excludes coverage for auto losses (such claims should go to auto ins.)
Exclusions

- Damage to Property Exclusion
  - j(1) excludes coverage for insured’s property
    - CGL coverage is not 1st party ins. It’s liability coverage
  - j(5) excludes coverage for damage to the part of the property where insured or its contractors were working
  - J(6) excludes coverage for property that must be restored or replaced because insured’s work or its contractor’s work was incorrect, defective, etc.
Exclusions

- Damage to Your “Work”, Your “Product”
  - Excludes property damage coverage for the work insured (or its contractor) performed or the product insured made.
  - Consequential damages, however, would be covered

- Product Recall Exclusion
Exclusions

- Independent Contractor Exclusion
  - Excludes coverage for injuries to construction workers and property damage caused by hired contractors

- Lead Liability exclusion

- Asbestos exclusion

- Total Pollution Exclusion
Exclusions

Homeowners Policy:

- Business exclusion
- ATV exclusion
- Watercraft Liability Exclusion
Conditions
Notice

- Insured is required to give prompt notice of:
  - Accident
  - Lawsuit
  - Immediately Forward Suit Papers
Late Notice

- Insurer cannot simply disclaim because loss was not timely reported

- NY imposes a prejudice requirement
Late Notice: Burden of Proof

- Notice within 2 years: **insurer** has the burden of establishing prejudice
- Notice outside 2 years: **insured** has the burden of showing insurer was not prejudiced
- In NY, claimant has right to give notice
Duty to Cooperate

- Cooperate with insurer by providing information, documents, appear at EBT and trial

- Cooperate with the insurer’s enforcement of risk transfer / subrogation

- No voluntary payments
Cooperation: Burden of Proof

- Insurer has burden to prove:
  1. it acted diligently in seeking to bring about the insured’s cooperation;
  2. the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation; and
  3. that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction

Is claim within insuring grant?

Yes

Do any exclusions apply?

Yes

No COVERAGE

No

Did insured comply with conditions?

(Notice, Cooperation)

Yes

No

No COVERAGE
Coverage B – “Personal and Advertising Injury”

- “Personal and advertising injury” is standard coverage in a liability policy

- Only covers enumerated offenses
  - Intentional torts (“personal injury” offenses)
  - Advertising injury
  - Need to look at the definition of “personal and advertising injury”
“Personal and advertising injury”:

- False arrest or false imprisonment
- Malicious prosecution
- Wrongful eviction or invasion of privacy by landlord
- Slander/libel of another person
- Oral or written publication that violates another’s right to privacy
- Disparaging another company’s products or services
- Using another’s advertising idea
- Copyright infringement and trade dress infringement
Suit Limitation

Insurance policies routinely contain suit limitation clauses:

- In NY, insurers can reduce the six-year statute of limitations to as little as one year.
Timing

Insurers who wish to disclaim coverage for bodily injury or death that occurred in NY must do so within a “reasonable” amount of time.

- Courts have usually construed this to mean within 30 days of notice.
- Can be extended where there is documented claims investigation:
  - Insured or claimant not responding
  - Waiting for police report, cause & origin report, etc.
  - Requested Examination Under Oath (EUO)
For bodily injury or death that occurred in NY insurers must copy:

- The injured person
- “Any other claimant”

Failure to comply the injured person or other claimant makes the disclaimer invalid as to that party.
Non-New York Accident

More time allowed where bodily injury or death occurred outside NY

- Ins. Law 3420 does not apply to an accident outside NY
Timing

Insurers who wish to disclaim coverage for property damage claim have more time

- Three to four months, and beyond is often timely
Timing

Stricter timeframe applies to death and bodily injury that occurred in New York.
Legal Research

- Legal research is necessary to determine:
  - Is the exclusion against public policy?
  - Has this exclusion been found ambiguous? → unenforceable
Putting It All Together...
Systematic Approach

Read the claim notice / suit
- What is alleged?

Read the insuring grant
- BI? PD? Personal and advertising injury?
- Occurrence?
- Within policy period?

Exclusions
- Do any exclusions apply?
- Do they bar all the claims? Or only some claims?
Read the **conditions**
- Was there timely notice? cooperation?

**Was the letter timely?**
- BI or death in NY: w/in reasonable amount of time?

**All claimants copied?**

**Legal research**
- Exclusion enforceable?
Questions?
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