

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

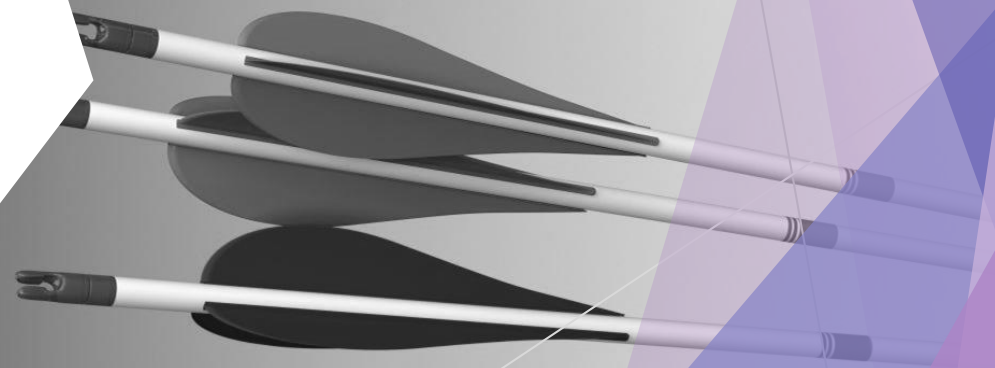




After Today, You Will Understand:

- ▶ 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)

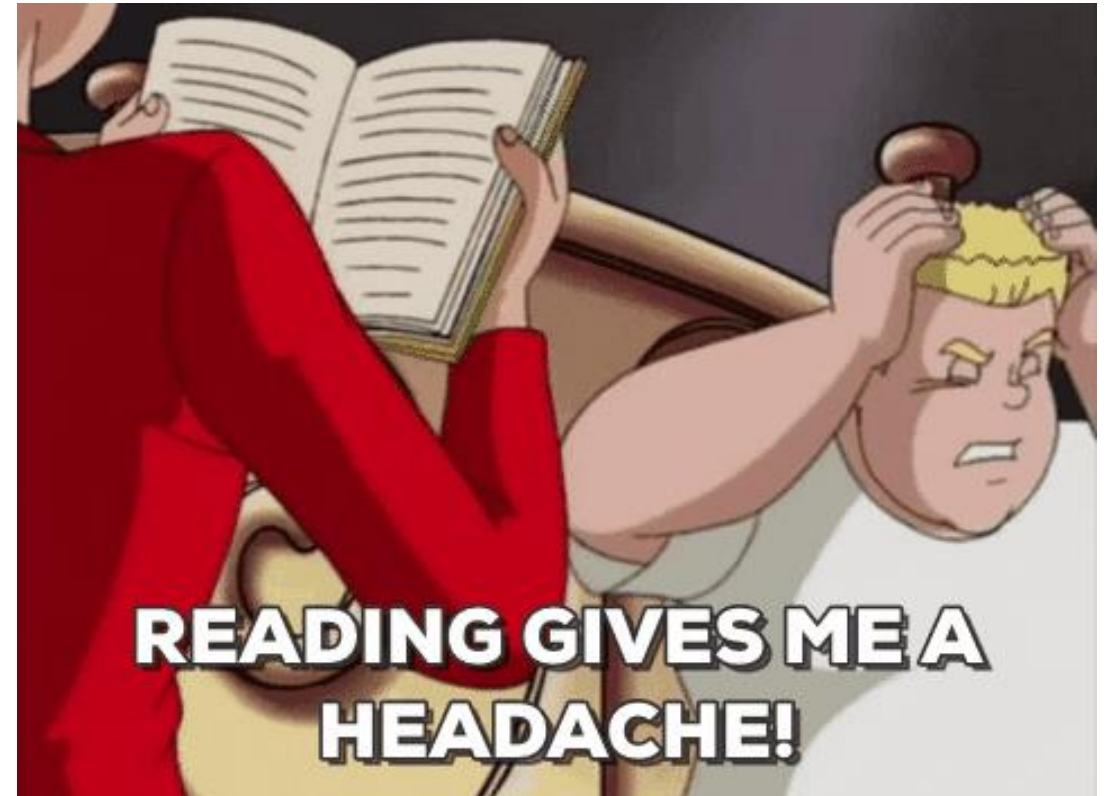
What Do You Need to Understand Insurance Coverage?





- ▶ Reading comprehension
- ▶ Basic legal research skills
- ▶ Mild amount of perseverance
(or a strong cup of coffee)

READ THE POLICY!



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



Photo Credit: Pixabay

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

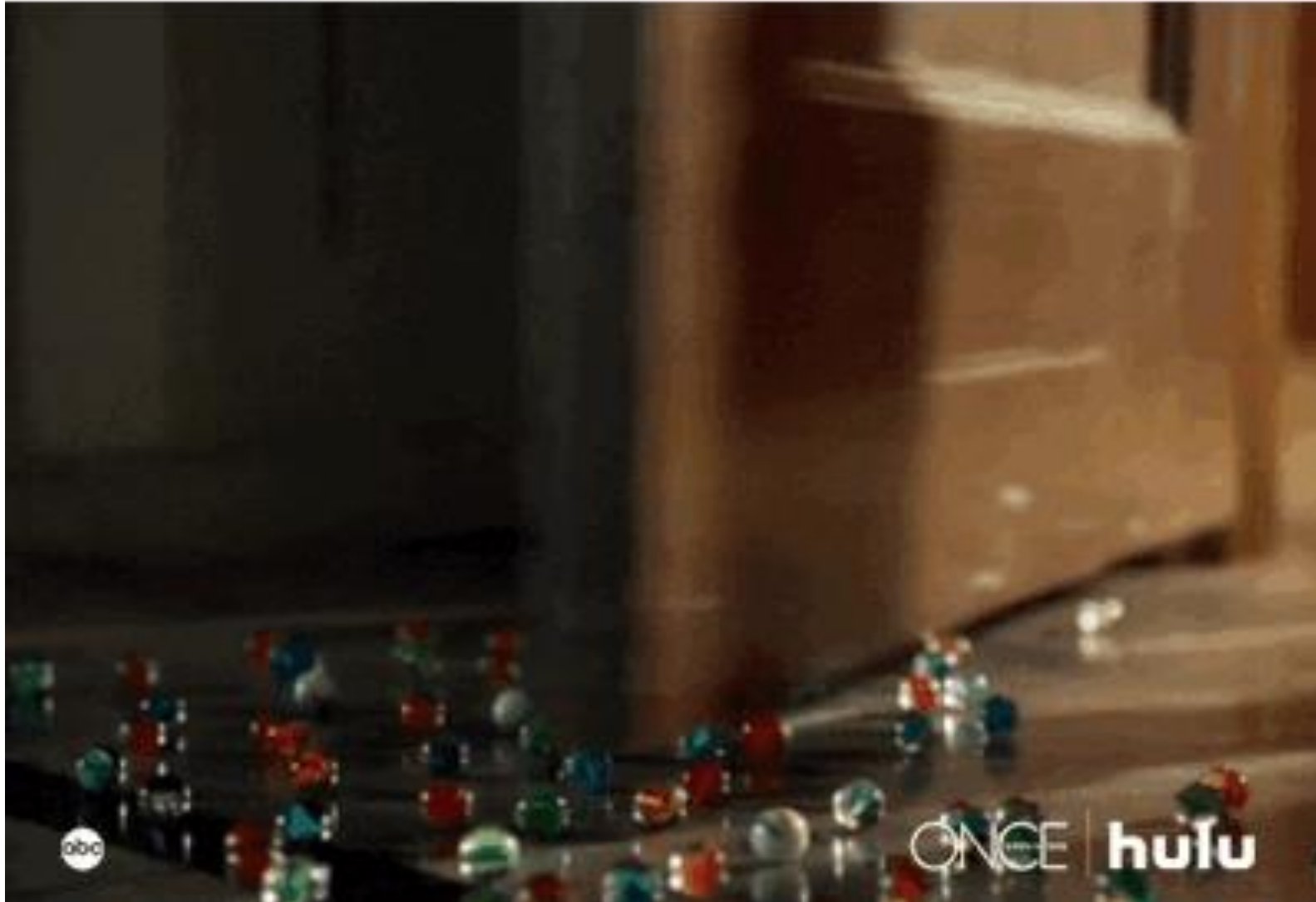


Photo Credit: GIPHY

Examples of Third-Party Insurance

Covers liability claims brought against the insured



Automobile
Liability policy



Homeowners
Insurance (liability
coverage part)



Commercial
General Liability
(CGL)



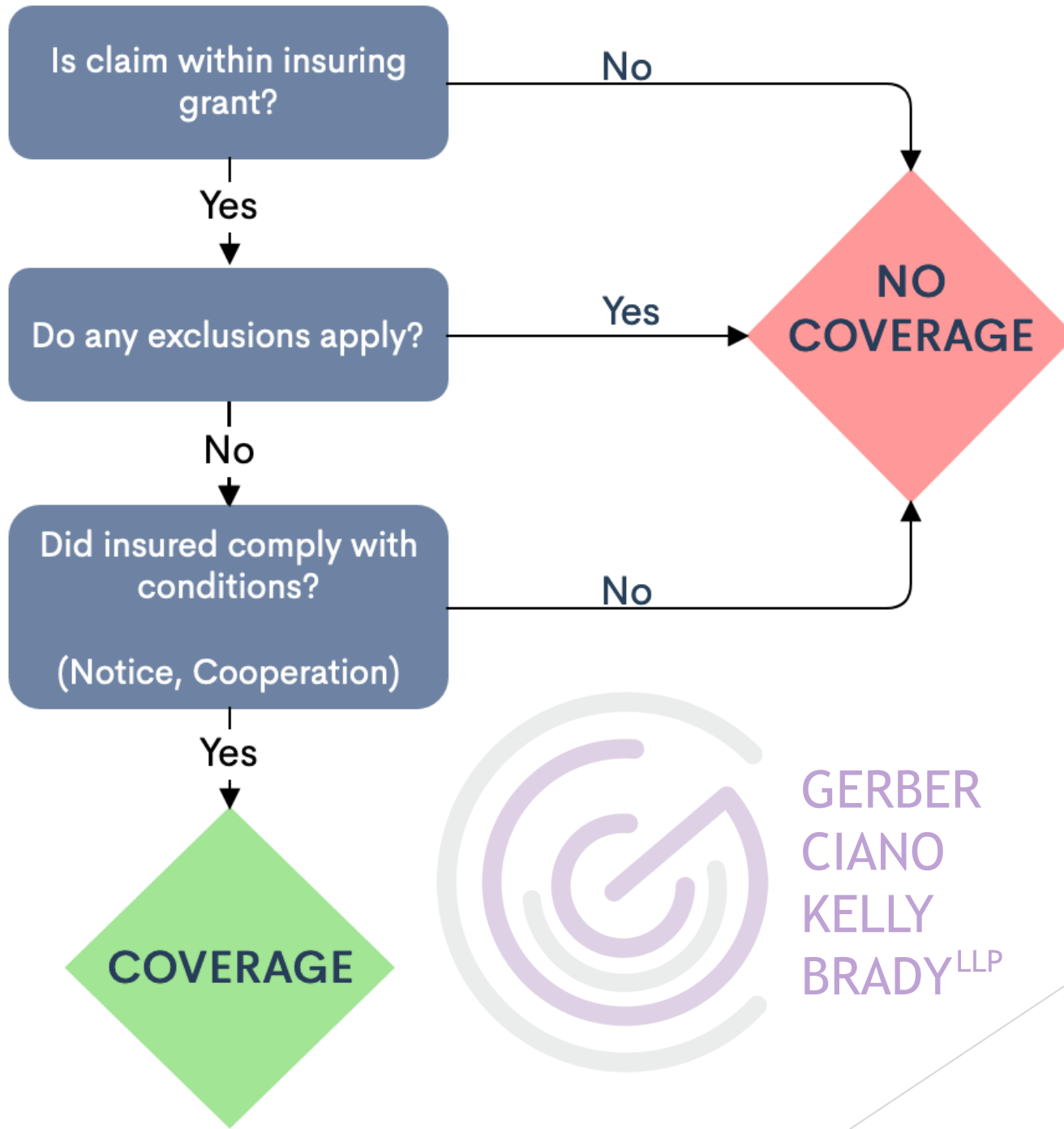
Professional
Liability



Product Liability

Insurance Coverage?
Follow the Flowchart!





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CONTRACT



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?**

A chalkboard with a wooden frame is shown at an angle. The words "BURDEN OF PROOF" are written in white chalk on the black surface. The board is resting on a wooden surface, and a piece of white chalk is visible in the bottom left corner.

BURDEN OF
PROOF

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

Irmi.com; Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co., 12 N.Y.3d 307 (2009)

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

Lend Lease (US) Constr. LMB Inc., 28 N.Y.3d 675, 682 (2017)

The background features a close-up of interlocking puzzle pieces in shades of purple and blue. A large, semi-transparent white trapezoidal shape is centered over the puzzle pieces. The text is positioned within this white shape.

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

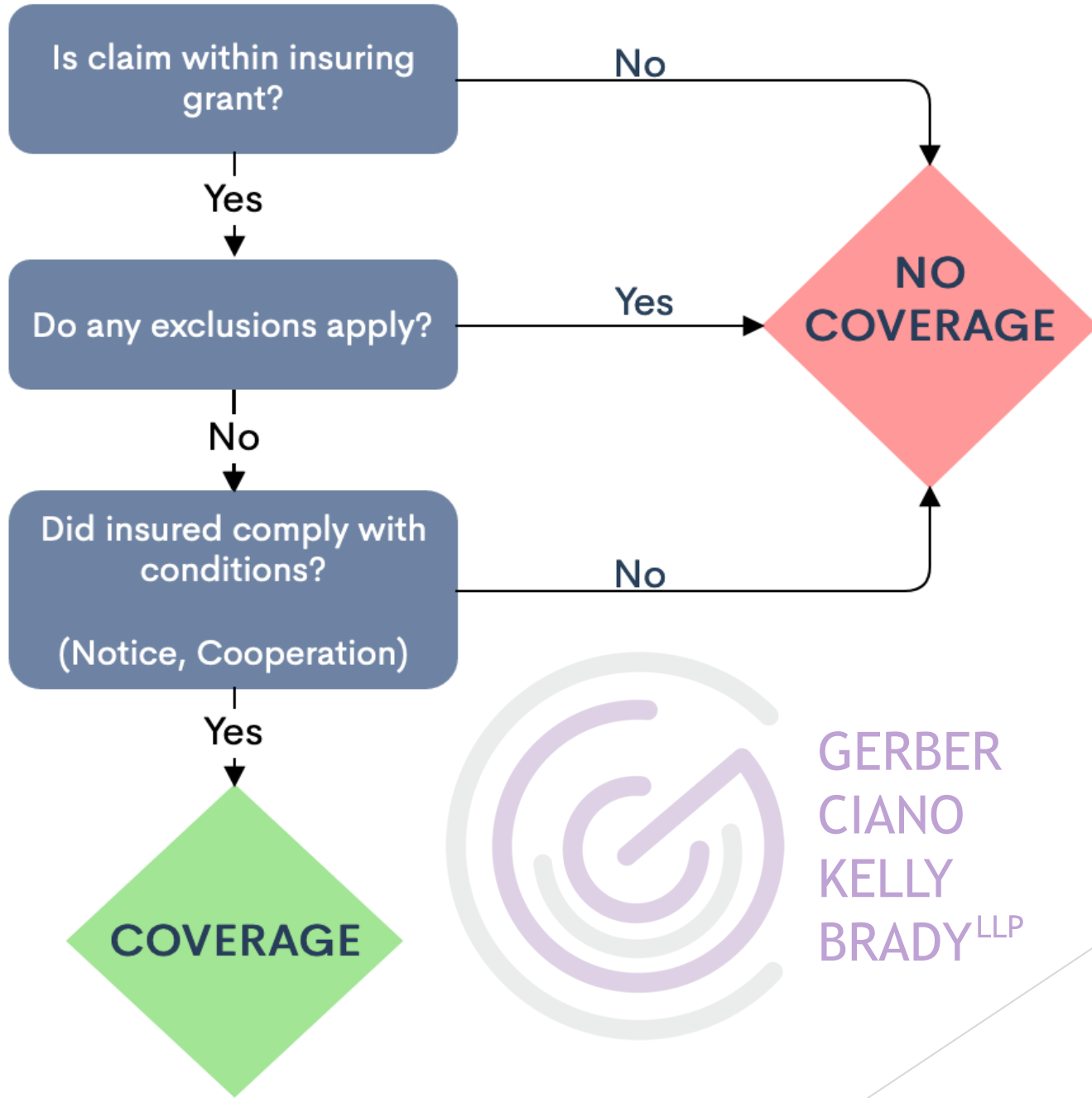
COOPERATE



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**

Thrasher v. United States Liab. Ins. Co., 19 NY2d 159 (1967)



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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”

Coverage B - “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)

Ins. Law § 3420

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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