



# Horizontal/Vertical Exhaustion Check List

## I. Risk Management/Pre-Litigation

- ❖ Check applicable state's law regarding horizontal/vertical exhaustion
- ❖ If you are an Additional Insured ("AI"), add a vertical exhaustion endorsement to your corporate policy
- ❖ Require vertical exhaustion of all AI policies in contracts
- ❖ Check AI policies' "other insurance" provisions and endorsements regarding horizontal exhaustion
- ❖ Ensure that indemnity agreement is broad and enforceable

## II. Claims & Litigation Management

- ❖ Put your corporate policy and all AI policies (primary + excess) on notice of "occurrence" and "suit"
- ❖ Demand that AI policies pay vertically
- ❖ Demand indemnification from named insured on the AI policy to trigger circuitry of litigation and ensure indemnity
- ❖ Work with your corporate insurer to ensure coverage in the event horizontal exhaustion applies
- ❖ Consider breach of contract claim against named insured if they fail to obtain AI coverage promised



## III. Wrap-Up Concerns

- ❖ Avoid wrap-up exclusions on your corporate insurance (excess to wrap-up provisions are acceptable)
- ❖ All enrolled contractors should pursue vertical exhaustion of wrap-up policies (primary + excess layers)
- ❖ Demand that wrap-up excess insurer endorse policy to apply *before* enrolled contractors' corporate primary policies
- ❖ If PD/BI occurs outside of wrap-up policy period, or is excluded, enrolled contractors' corporate policies must respond

## IV. Relevant Case Law Re: Horizontal/Vertical Exhaustion

- ❖ Kajima Construction Services, Inc., et al. v. St. Paul Fire and Marine Ins. Co., 227 Ill. 2d 102 (Ill. 2007)
- ❖ The North River Ins. Co., et al. v. Grinnell Mut. Reins. Co. et al., 369 Ill. App. 3d 563 (App. Ct. Ill. 2006)
- ❖ Bovis Lend Lease LMB, Inc., et al. v. Great American Ins. Co., et al., 53 A.D. 3d 140 (N.Y. App. Div. 2008)
- ❖ Wal-Mart Stores, Inc., et al. v. RLI Ins. Co., 292 F.3d 583 (8th Cir. June 5, 2002)
- ❖ JPI Westcoast Constr., L.P. v. RJS & Assocs., Inc., 68 Cal. Rptr. 3d 91 (Cal. Ct. App. 2007)
- ❖ Reliance Nat'l Indem. Co. v. Gen. Star Indem. Co., 85 Cal. Rptr. 2d 627 (Cal. Ct. App. 1999)