



# **Co-Insurance Considerations and Allocation of Available Coverage**

**Jeffrey J. Vita, Esq.  
Saxe Doernberger & Vita, P.C.**

*“Advocates For Policyholders in Insurance Coverage Disputes”*



## Which Policy Responds First?

The AI Primary Policy  
**OR**  
the GC's Primary Policy?

What was the intent of the parties?

- General policy language
- AI endorsement
- Contract by which subcontractor promises insurance coverage and indemnity



# Policy Language

1) The Additional Insured endorsement

2) The “other insurance” clause

- The general “other insurance” clause
- The “other insurance” clause in the AI endorsement



## The Additional Insured Endorsement

WHO IS AN INSURED (SECTION II) is amended to include as an insured any person or organization (called hereafter "additional insured") whom you have agreed in a written contract, executed prior to loss, to name as additional insured, but only with respect to liability arising out of "your work" or your ongoing operations for that additional insured performed by you or for you.



## The Additional Insured Endorsement

### **Additional Insured's Liability “arises out of” Named Insured's “work”:**

Town of Manchester v. Vermont Mut. Ins. Co., 40 Conn. L. Rptr. 542, No. CV044004859, 2006 WL 164886 (Conn.Super. 2005) (Shortall, J.)

Westport Insurance Co. v. Town of Branford,  
# 3:02CV1824(AVC) (D.Conn. 5/18/05) (Covello, J.)

National Union Fire Ins. Co. v. Zurich American Ins. Co., 40 Conn. L. Rptr. 459, No. CV040491301, 2005 WL 3594732 (Conn.Super., 2005) (Lopez, J.)

Royal Indemnity Co. v. Terra Firma, 2006 WL 2411392 (Beach, J.)



## The General “Other Insurance” Clause

This policy shall be excess over any other insurance whether prior or subsequent hereto, and by whomsoever affected, directly or indirectly covering loss or damage insured hereunder, and this Company shall be liable only for the excess of such loss or damage beyond the amount due from such other insurance, whether collectible or not, however, not exceeding the limits as set forth in the Declarations.



## The “Other Insurance” Clause in the AI Endorsement

This insurance is *excess* over any other valid and collectible insurance *unless you [i.e., the subcontractor] have agreed in a written contract for this insurance to apply on a primary or contributory basis.*



# Subcontract: Insurance Procurement

## Agreement to Procure Insurance

[The subcontractor] is to furnish [the general contractor] with Certificates of Insurance for Liability and Workers Compensation and name [the general contractor] as an additional insured in an amount not less than \$2,000,000 per occurrence.



# Which Policy Responds First?

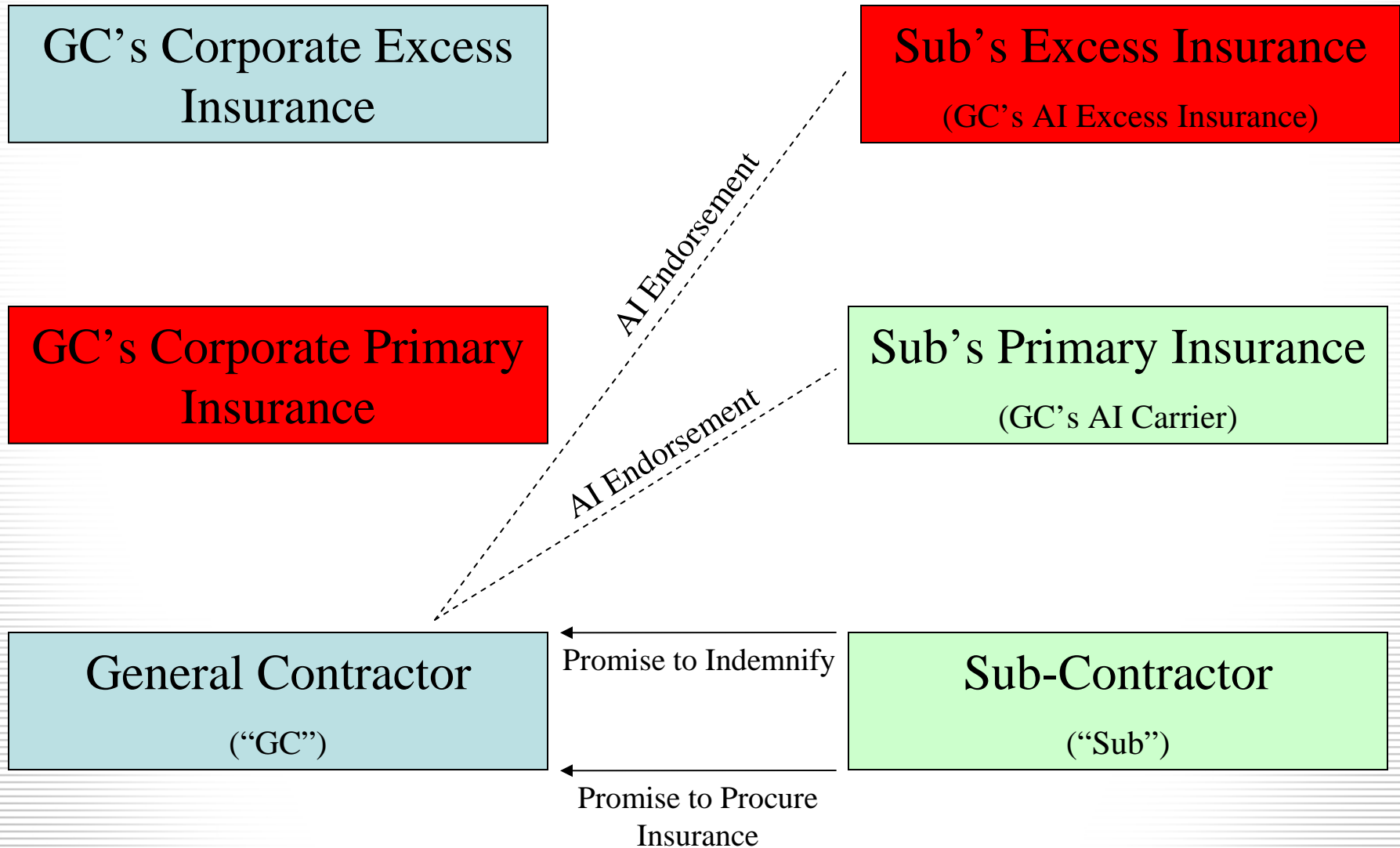
## Intent of the parties:

- Rossmoor Sanitation v. Pylon Inc., 13 Cal.3d 622 (1975)
  - Court focuses on indemnity
- Pecker Iron Works of New York v. Traveler's Ins. Co., 99 N.Y.2d 391 (2003)
  - Court focuses on AI status



# Which Policy Responds Second?

The AI Excess carrier OR the corporate primary policy?





## Which Policy Responds Second?

### Vertical v. Horizontal Exhaustion: Circuitry of Litigation Theory

- Wal-Mart Stores, Inc. v RLI Ins. Co., 292 F3d 583 (8th Cir 2002)
  - Vertical exhaustion
- American Indemnity Lloyds v Travelers Property Casualty Ins. Co., 2003 WL 21437012 (5th Cir 2003)
  - Vertical exhaustion



# Which Policy Responds Second?

## Vertical v. Horizontal Exhaustion

- Kajima Construction Services, Inc. and Tokio Marine and Fire Insurance Co. v. St. Paul Fire and Marine Ins. Co., 368 Ill.App.3d 665 (Ill.App. 1st Dist 2006)
  - Selective tender rule does not allow policyholder to trigger excess policies before all primary policies are exhausted
- North River Ins. Co. v. Grunnell Mutual Reinsurance Co. 2006 WL 3545139 (Ill. App. 1 Dist.) (Dec. 8, 2006)
  - Affirming Kajima and holding that rule in Kajima applies unless underlying contract provides otherwise re priority; also holding that additional insured excess coverage would apply before the additional insured's own corporate excess insurance
- Cheektowaga Cent. School Dist. v. Burlington Ins. Co., 822 N.Y.S.2d 213 (N.Y.A.D. 4 Dept. 2006)
  - All primary policies must be exhausted before any excess or umbrella policies are triggered