



Trigger of Coverage

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Field Claim Specialist

Amerisure Insurance Company

Principal Coverage Theories

- Exposure- The policy in force at the time the property was exposed to the damage-producing element triggers coverage; property damage occurs upon installation of the defective product.
- Manifestation- The insurance policy on the risk on the date that property damage is discovered is triggered.

Principal Coverage Theories

- Injury in Fact- Each insurance policy on the risk on the date damage is established through actual proof that the damage was sustained is triggered on a case-by-case basis. It may be determined as incurring at any time from exposure to manifestation, inclusively.
- Continuous- All insurance policies on the risk beginning at the time of first exposure through date of manifestation are triggered.

Case Study: Florida

- *Trizec Properties, Inc. v. Biltmore Constr., Inc.* (11th Cir.1985)
- *Auto Owners Insurance Co. v. Travelers Cas. & Surety Co.*, 227 (M.D. Fla. 2002)
- *Boran Craig Barber Homes Inc. v. Mid-Continent Cas. Co* (M.D. Fla. 2009)

What are the Carriers Doing??

- Depends on their interpretation of case law and endorsements on policy (Montrose or First Manifestation Endorsements)
- Results of informal, un-scientific poll among adjusters
- Can we work out our differences?

T. Tucker Hobgood

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Additional Insured Issues

ISO Forms

- CG 20 10
 - Additional Insured

- CG 20 37
 - Completed Operations

ISO Form CG 20 10

- 11 85
 - Arising out of “your work”
- 10 01
 - Out of ongoing operations
 - Exclusion for completed operations
- 07 04
 - Essentially same as 10 01
 - Caused in whole or in part by [you or others for you]

ISO Form CG 20 37

- 10 01
 - Completed operations coverage
 - At the location designated and described

- 07 04
 - Substantially same as 10 01
 - Only for liability for act of named insured of for it
 - Caused in whole or in part by “your work” at designated location

Indemnification Provisions

- As “insured contract”

Arising Out of

- Illustrative Cases

- *Pulte v American So. Ins.*, N.C. App. 2007
- *BBL v Baldwin*, Ga. App. 2007
- *Pacific v Liberty*, Del. 2008
- *Freddie Mac v Scottsdale*, 3rd Cir. 2003 (NJ)
- *Container v Maryland Cas.*, Fla. 1998
- *Taurus v U.S. Fidelity*, Fla. 2005

No Contribution – “Targeted Tender”

Steven D. Pearson



Chicago • Dallas • Phoenix

I. What Is A “Targeted Tender”?

- Insured’s affirmative selection of one insurer to provide a defense precludes the selected insurer(s) from seeking contribution from other insurers otherwise owing a concurrent duty to defend.

II. Reasons Why Contribution Should Or Should Not Be Precluded

- Contractual undertakings establish the risk transfer methodology intended by the parties (i.e., Additional Insured protection), which should not be contravened by equitable contribution principles.
- Contribution should not be precluded where target tender is contrary to Parties' Contractual Risk Transfer Agreements.

III. Does Each Insurer Have An Independent Obligation To Defend?

- Farm Bureau Mutual Ins. Co. v. North Star Mutual Ins. Co., 2005 WL 3112014 at *4-5 (Minn. Ct. App. Nov. 22, 2005)
- American Casualty Co. of Reading Pa. v. Health Care Indem., Inc., 520 F.3d 1131, 1137-1139 (10th Cir. 2008)

IV. Tender and De-Tender

- Who may properly make the targeted tender?
- May a selected insurer later be “de-selected”?
- Workarounds – Loan Receipt Agreements

V. Target Tender v. Horizontal Exhaustion

- A target tender does not trump horizontal exhaustion requirements in states applying both principles.
- Kajima Construction Services, Inc. v. St. Paul Fire and Marine Ins. Co., 227 Ill.2d 102, 879 N.E.2d 305 (Ill. 2007)

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Interpretation of CGL Exclusions Regarding Defective Construction

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I. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

j. Damage To Property

“Property damage” to:

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Interpretation of CGL Exclusions Regarding Defective Construction

Florida	United States Fire Ins. Co. v. J.S.U.B., 979 So.2d 871 (Fla. 2007)
California	Maryland Cas. Co. v. Reeder, 221 Cal.App.3d 961 (1990) Food Pro Int'l, Inc. v. Farmers Ins. Exch., 169 Cal.App.4 th 976 (2008)
South Carolina	Auto-Owners Ins. Co. v. Newman, _ S.E.2d _ (S.C. 2008) L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 621 S.E.2d 33 (S.C. 2005)
Arizona	Lennar Corp. v. Auto-Owners Ins. Co., 151 P.3d 538 (Ariz. 2007)
Texas	Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007) Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co., _ S.W.3d _ (Tex. 2009)
North Carolina	The Travelers Ind. Co. v. Miller Building Corp., 221 Fed. Appx. 265 (2007) Production Systems, Inc. v. Amerisure Ins. Co., 605 S.E.2d 663 (N.C. 2004) John S. Clark Co. v. United National Ins. Co., 304 F.Supp.2d 758 (M.D.N.C. 2004)
Georgia	McDonald Construction Co. v. Bituminous Cas. Co., 632 S.E.2d 420 (Ga. 2006)
Illinois	Stoneridge Dev. Co. v. Essex Ins. Co., 888 N.E.2d 633 (Ill. 2008)

Professional Liability Exclusion

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of or failure to render any professional services by you.

Professional services include:

- (1) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
- (2) Supervisory or inspection activities performed as part of any related architectural or engineering activities.

This exclusion does not apply to your operations in connection with construction work performed by you or on your behalf.



John Jacks

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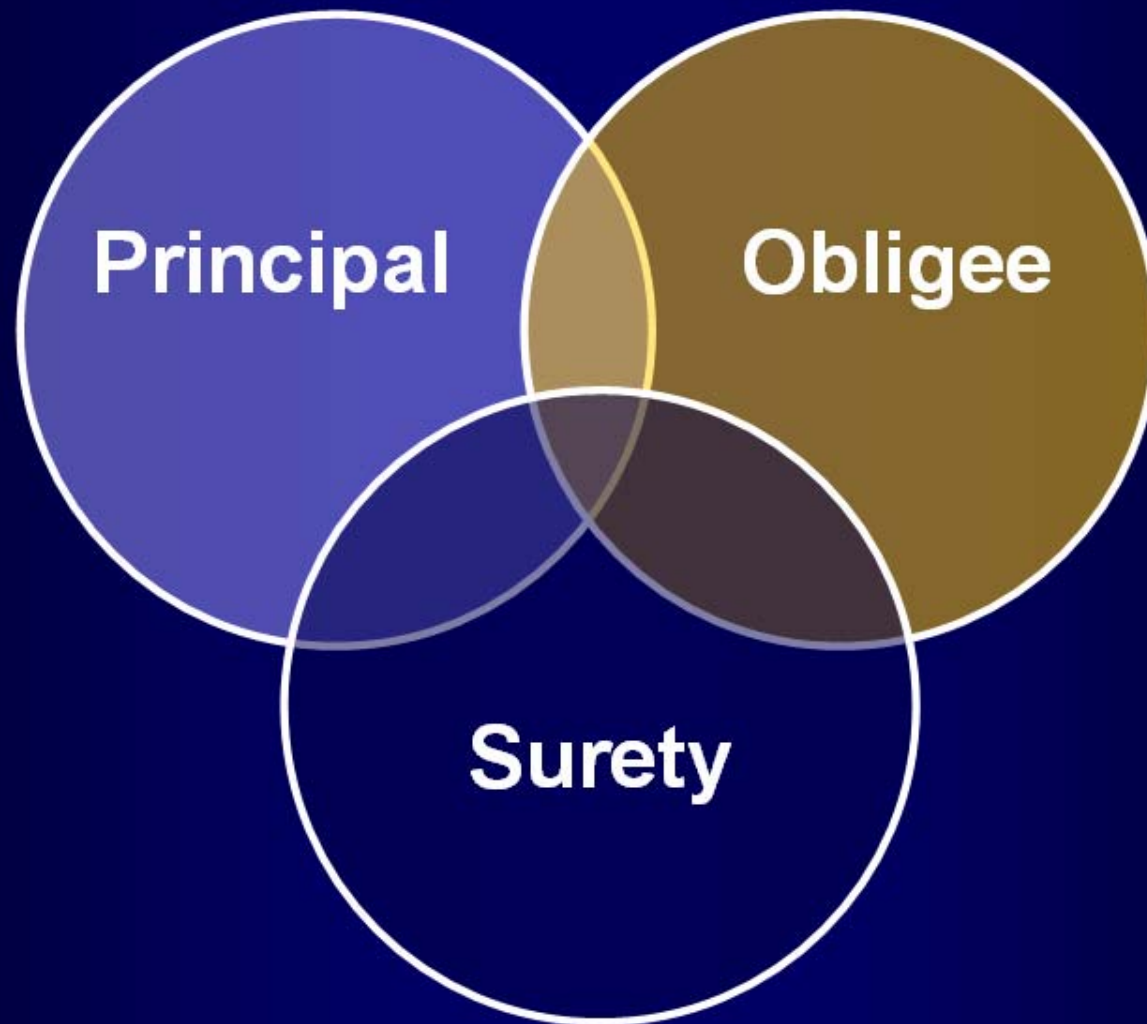
jjacks@travelers.com

**THE INTERSECTION
BETWEEN GENERAL
LIABILITY COVERAGE
AND SURETY**





What is Surety Bonding?



COVERAGE

What and Who does the Surety Cover?

- It covers nothing. But, it does guarantee successful completion of the underlying contract
- It “obligates” vs. “covers”
- It substitutes for the contractor’s conscience
- Consequently, it does not “cover” anyone
- It protects the Obligee, not the Principal

Impact of YOUR Claim Handling and Negotiations

IN WHICH CHAIR DO YOU SIT?

- GL adjuster for the General Contractor
 - a. GC's Surety
 - b. Subcontractor's Surety

- GL adjuster for the subcontractor
 - a. Subcontractor's surety
 - b. GC's Surety



PRIORITY OF COVERAGE: HORIZONTAL v. VERTICAL EXHAUSTION

Jeffrey J. Vita

Saxe Doernberger & Vita, P.C.

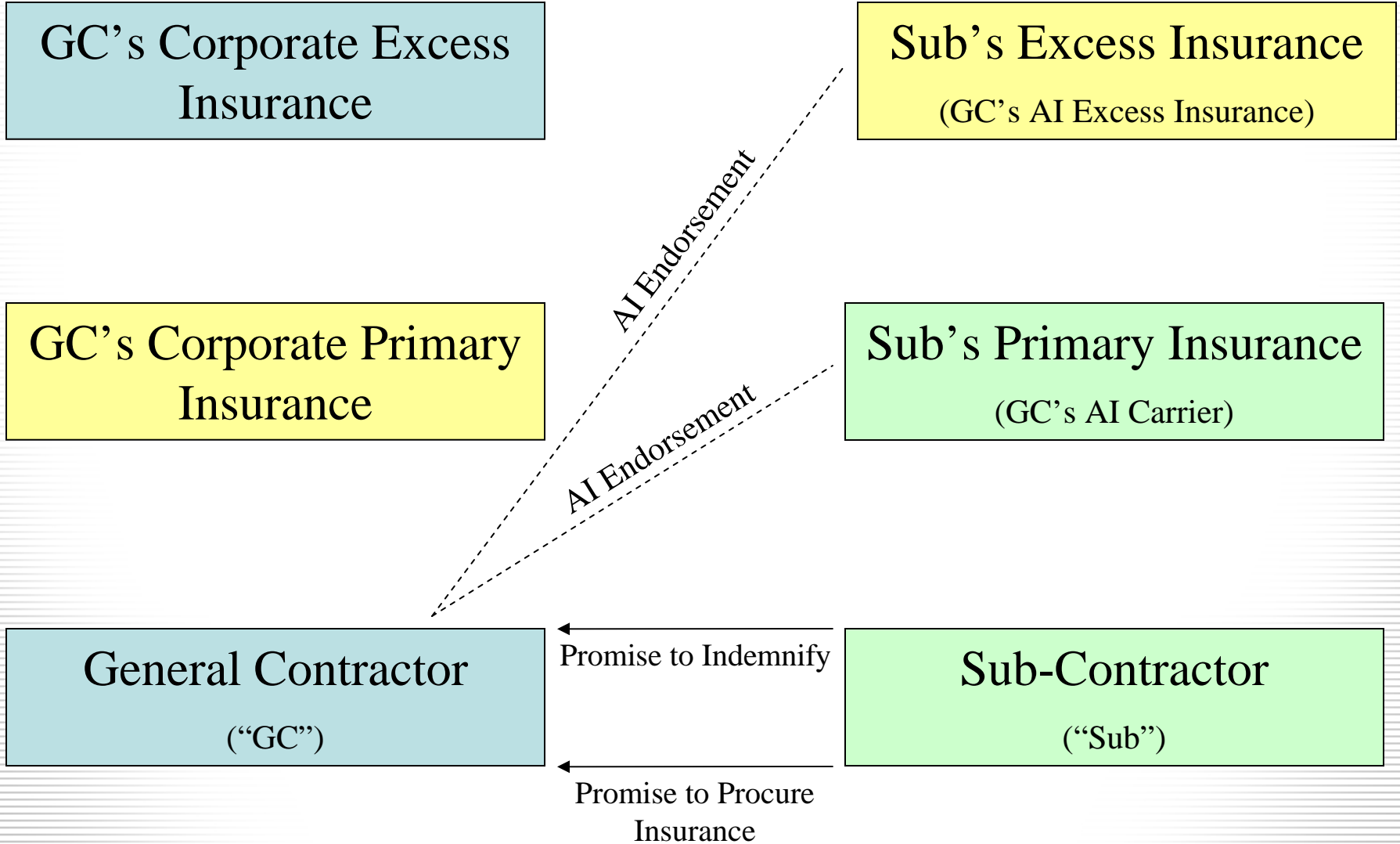
May 28, 2009

“Advocates For Policyholders in Insurance Coverage Disputes”

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Priority of Coverage





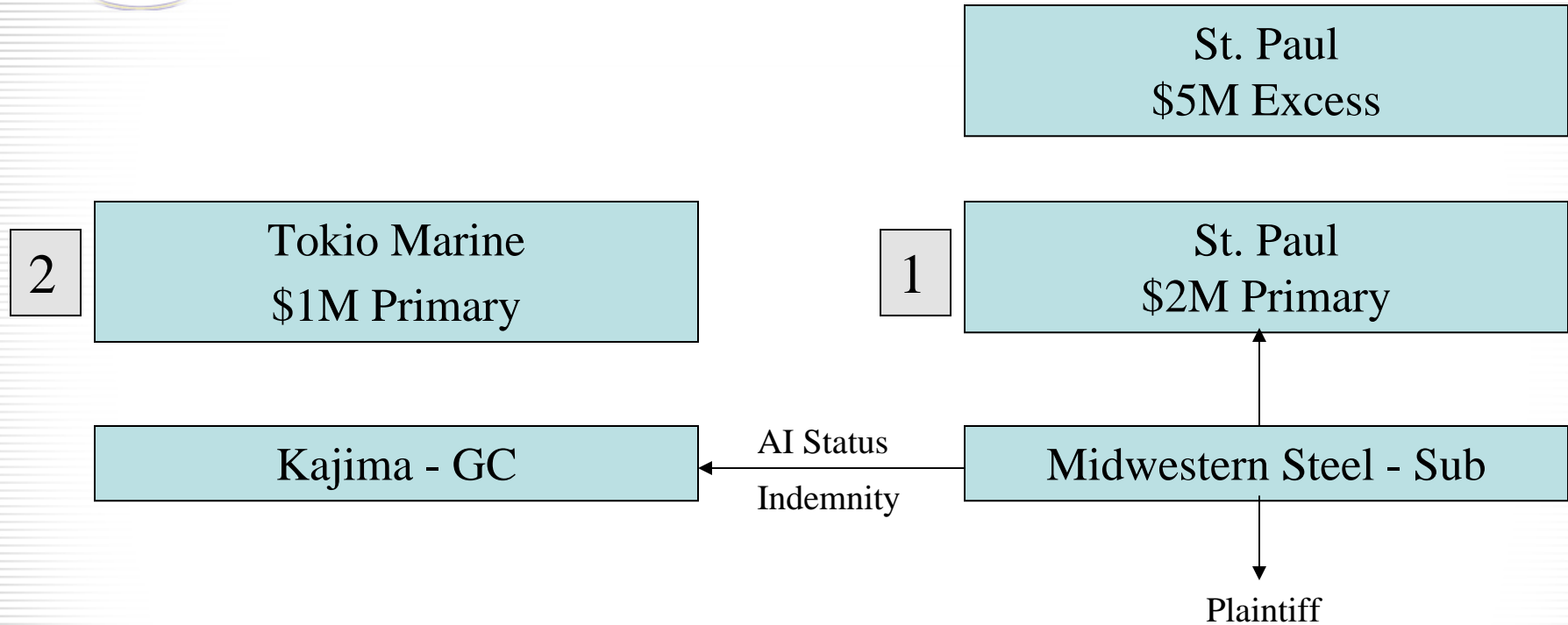
1) Illinois View

2) New York/California View

3) 5th/8th Circuit View



Illinois View – Kajima Construction Services, Inc. and Tokio Marine and Fire Insurance Co. v. St. Paul Fire and Marine Ins. Co.



Contract – required \$1M Primary/\$5M Excess

Obtained - \$2M Primary/\$5M Excess

Settlement - \$3M: St. Paul \$2M/Tokio Marine \$1M

DJ – Tokio Marine sought reimbursement of \$1M

Result – St. Paul \$2M/Tokio Marine \$1M

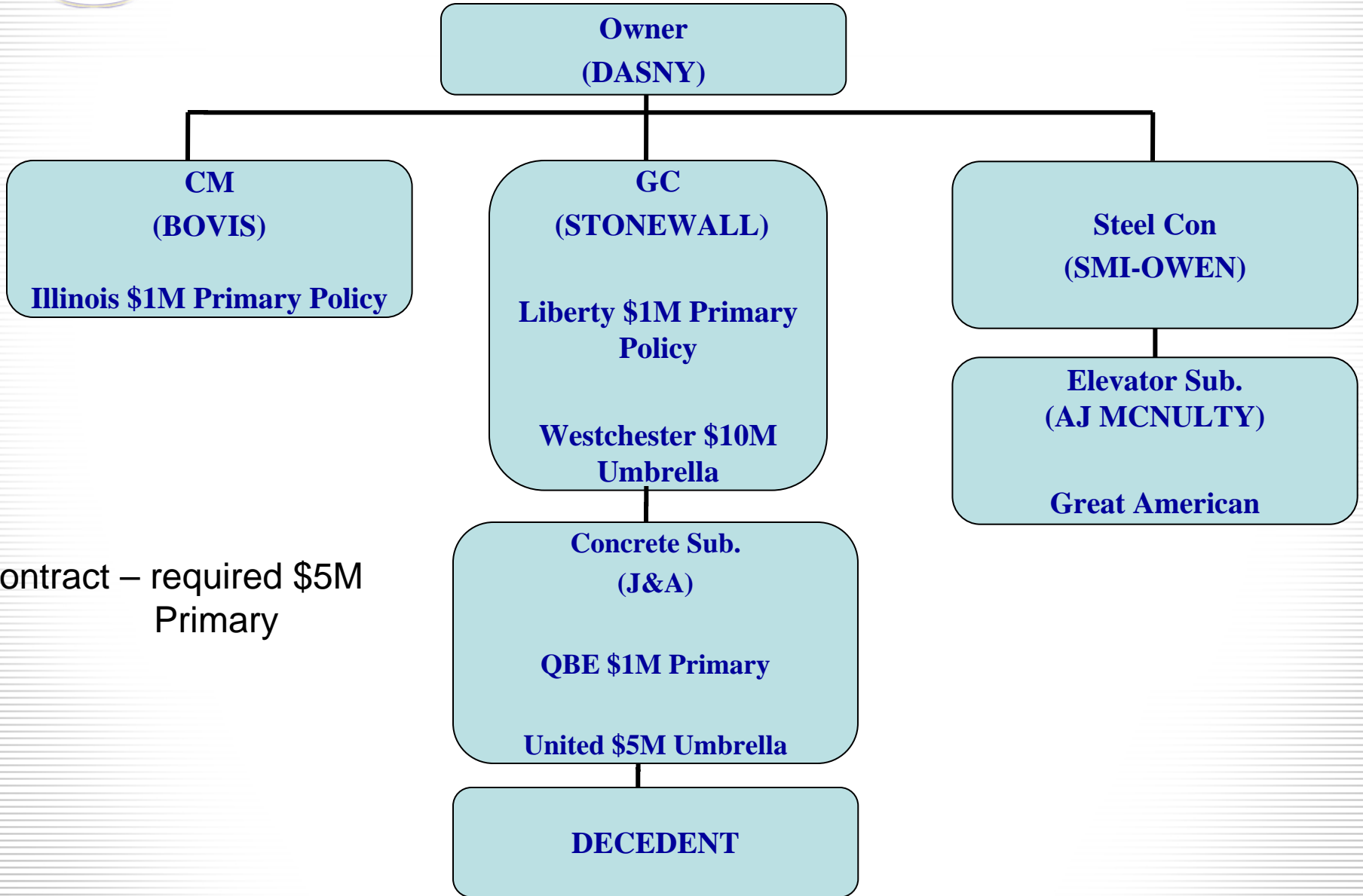


Does the subcontract impact AI coverage?

- *Pecker Iron Works v. Travelers*, 99 N.Y. 2d 391 (2003)
- *Bovis v. Great Amer. Ins. Co.*, 855 N.Y.S. 2d 459 (2008)



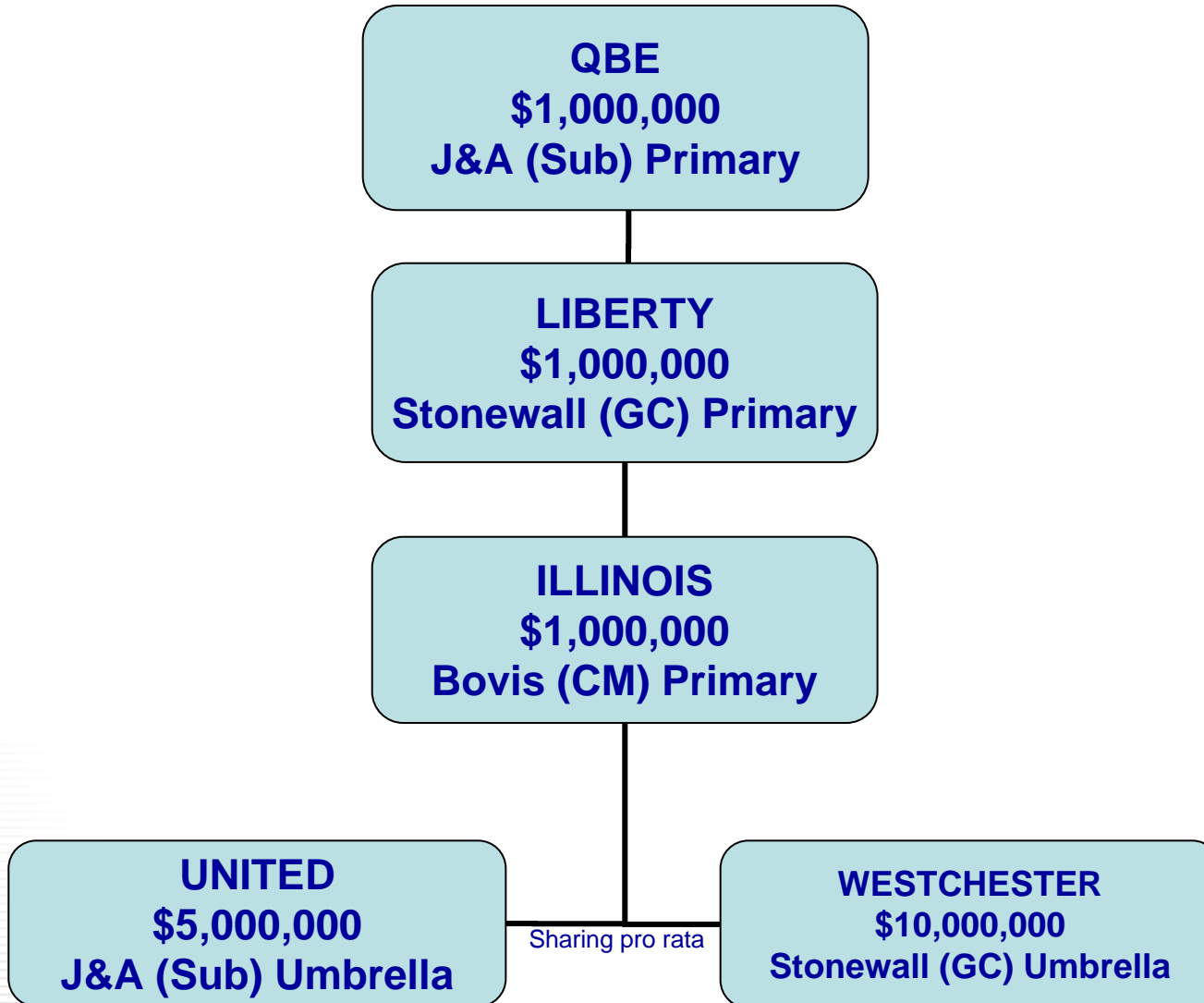
New York View – Bovis v. Great Amer. Ins. Co.



Contract – required \$5M Primary

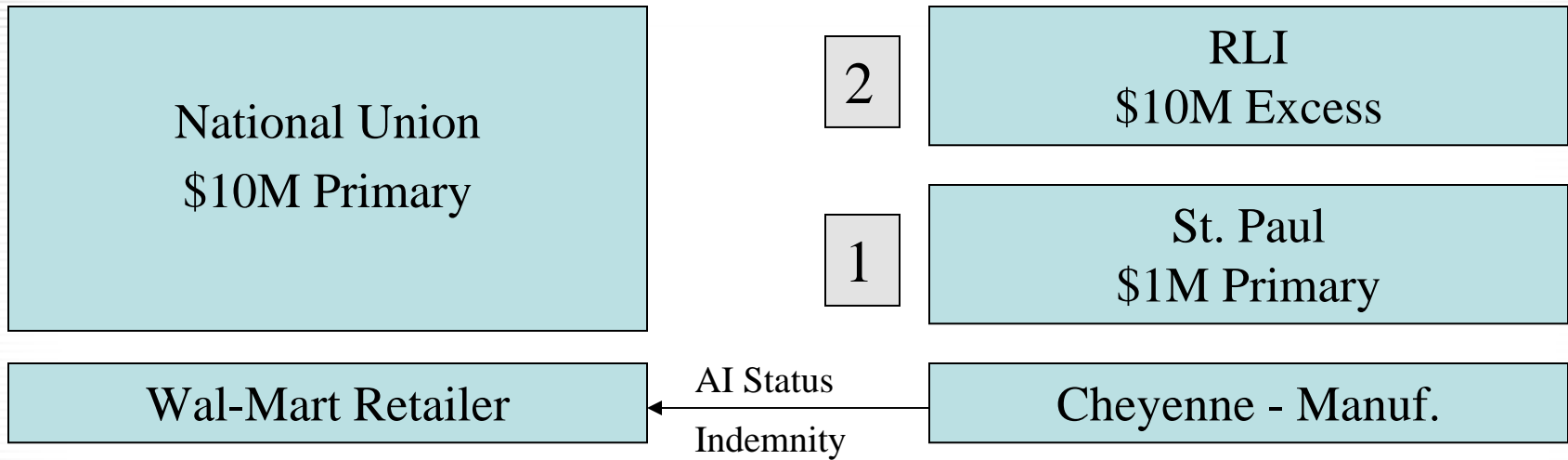


Appellate Court Apportionment of AI Coverage for Bovis





- Vertical Exhaustion/Circuitry of Litigation
- Wal-Mart Stores, Inc. v RLI Ins. Co., 292 F.3d 583 (8th Cir 2002)
- American Indemnity Lloyds v Travelers Property Casualty Ins. Co., 335 F.3d 429 (5th Cir 2003)



Contract – required \$2M Primary

Obtained - \$1M Primary/\$10M Excess

Settlement - \$11M: St. Paul \$1M/RLI \$10M

DJ – Wal-Mart and National Union sought to avoid contributing to \$10M paid by RLI

Result – St. Paul \$1M/RLI \$10M



- Review contracts and Wrap-Up manual re: insurance requirements
- Does contractor's corporate primary policy have a Wrap-Up exclusion?
- Wrap-Up policies (primary and excess) are "closer to the risk"; vertical exhaustion should apply



THANK YOU!

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