



# **HORIZONTAL v. VERTICAL EXHAUSTION: PRIORITY OF COVERAGE IN CONSTRUCTION LOSSES**

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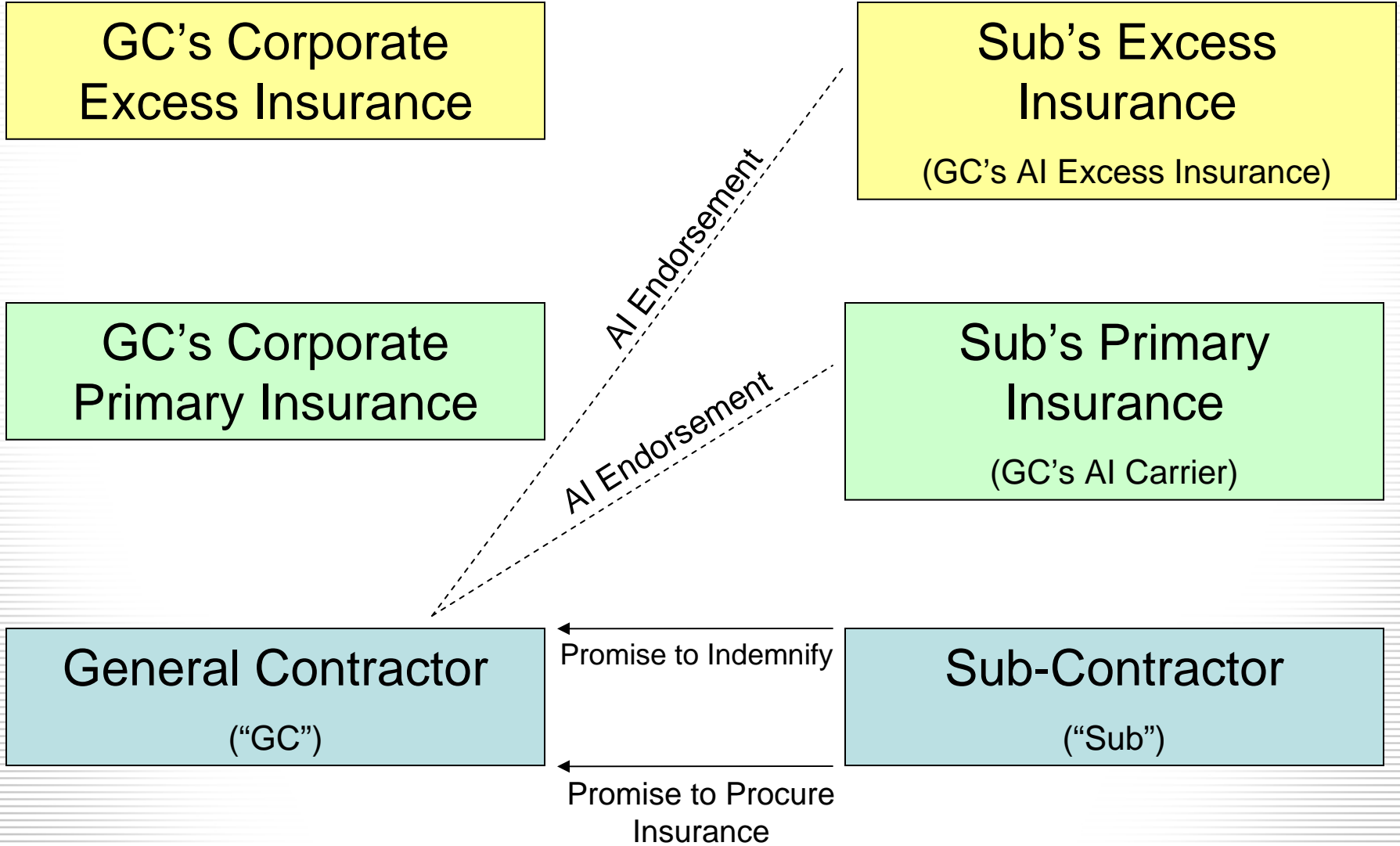


Jeffrey J. Vita is a founding partner of Saxe Doernberger & Vita, P.C., a Connecticut-based firm dedicated to the representation of policyholders in insurance coverage disputes. In the last several years, Mr. Vita has focused his practice on the representation of business policyholders in insurance coverage matters implicating coverage under comprehensive general liability, directors & officers, professional liability, commercial property, and health insurance related policies.

Mr. Vita has handled coverage cases related to construction, professional liability, healthcare, business interruption, employment, disability, and environmental claims. He has successfully tried numerous cases to conclusion and has handled many commercial arbitrations and mediations. He also has authored numerous articles on insurance coverage issues and has lectured frequently on a variety of insurance coverage topics including additional insured issues, bad faith claims, allocation of coverage, wrap-up coverage, and the duty to defend.



# Priority of Coverage





## 1) Illinois View

- Focuses upon traditional rules of primary v. excess without examining language

## 2) New York View

- Focuses primarily upon the language within the policy

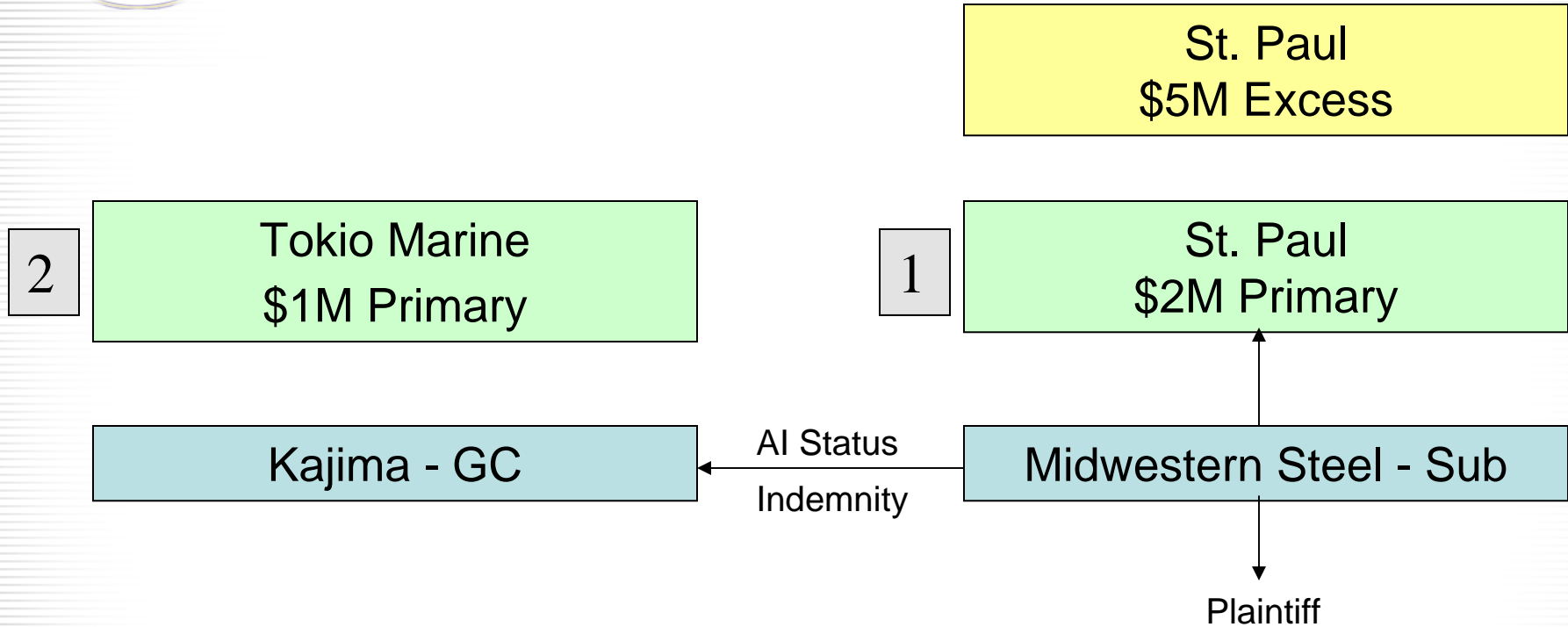
## 3) Indemnity View

- Focuses primarily upon the language of the subcontractor agreements



# Illinois View

- Kajima Constr. Servs. v. St. Paul Fire and Marine Ins. Co., 227 Ill. 2d 102 (2007)
- North River Ins. Co. v. Grinnell Mut. Reinsurance Co. 369 Ill. App. 3d 563 (2006)



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

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

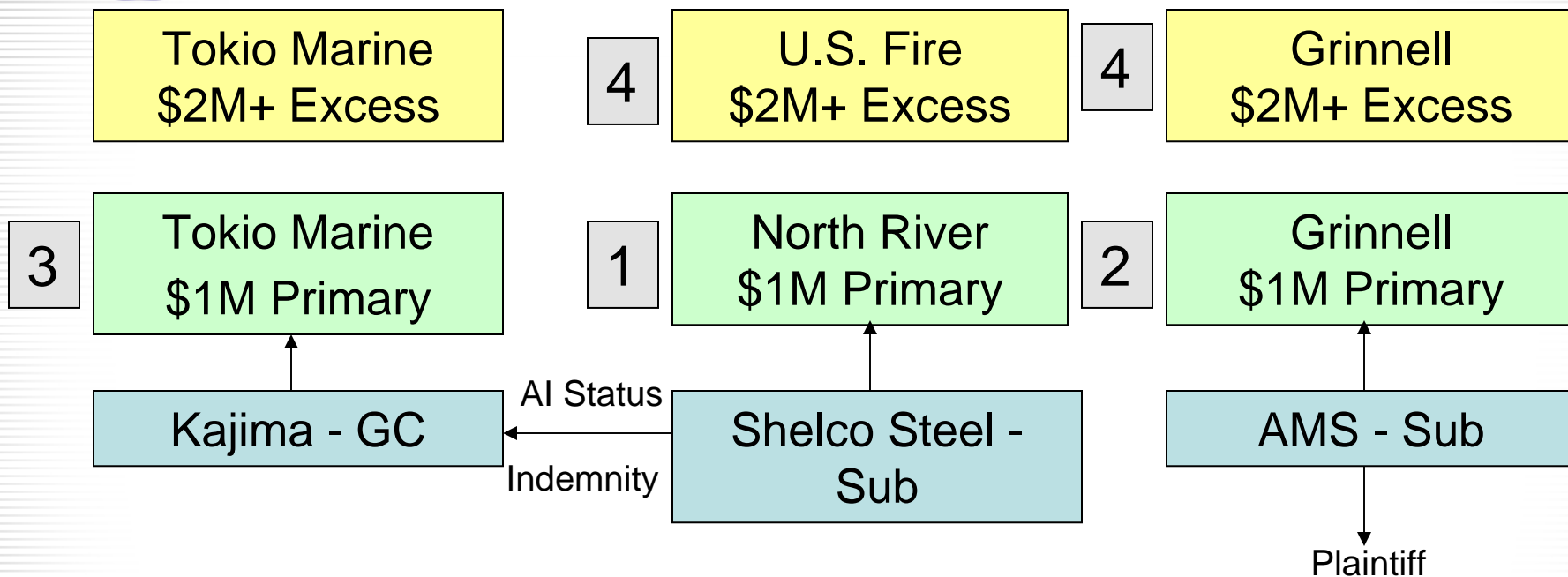
Settlement - \$3M: St. Paul \$2M/Tokio Marine \$1M

DJ – Tokio Marine sought reimbursement of \$1M

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



# North River



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

Settlement - \$4M: North River \$1M/Grinnell \$1M/U.S. Fire \$2M

DJ – U.S. Fire sought reimbursement from Tokio and Grinnell

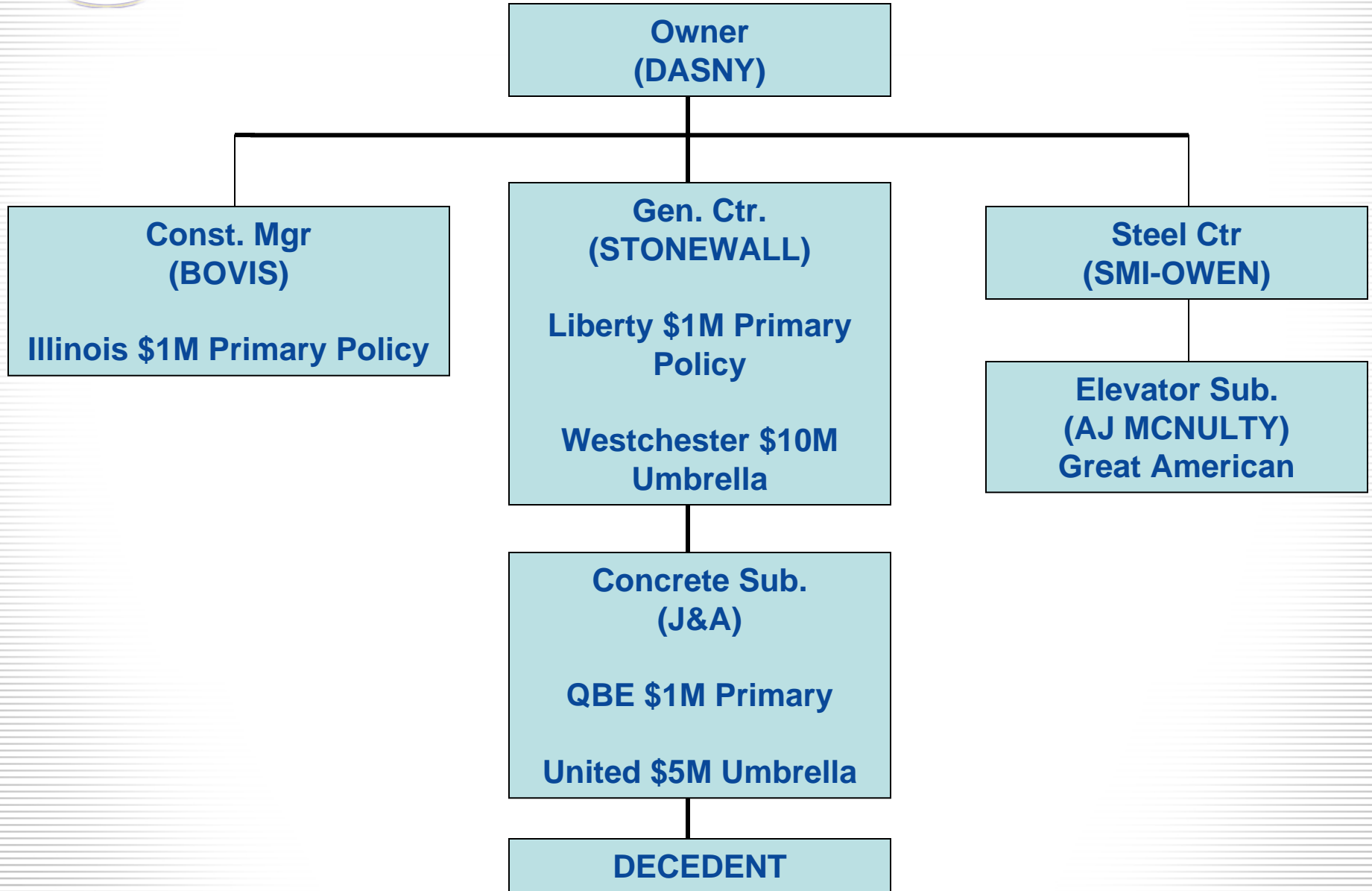
Result – North River \$1M, Grinnell \$1M, Tokio Marine \$1M, Grinnell (excess) \$500k, and U.S. Fire (excess) \$500k



- *Bovis v. Great Amer. Ins. Co.*, 855 N.Y.S. 2d 459 (2008)
- *Tishman Constr. Corp. v. Great Am. Ins. Co.*, 861 N.Y.S. 2d 38 (2008)

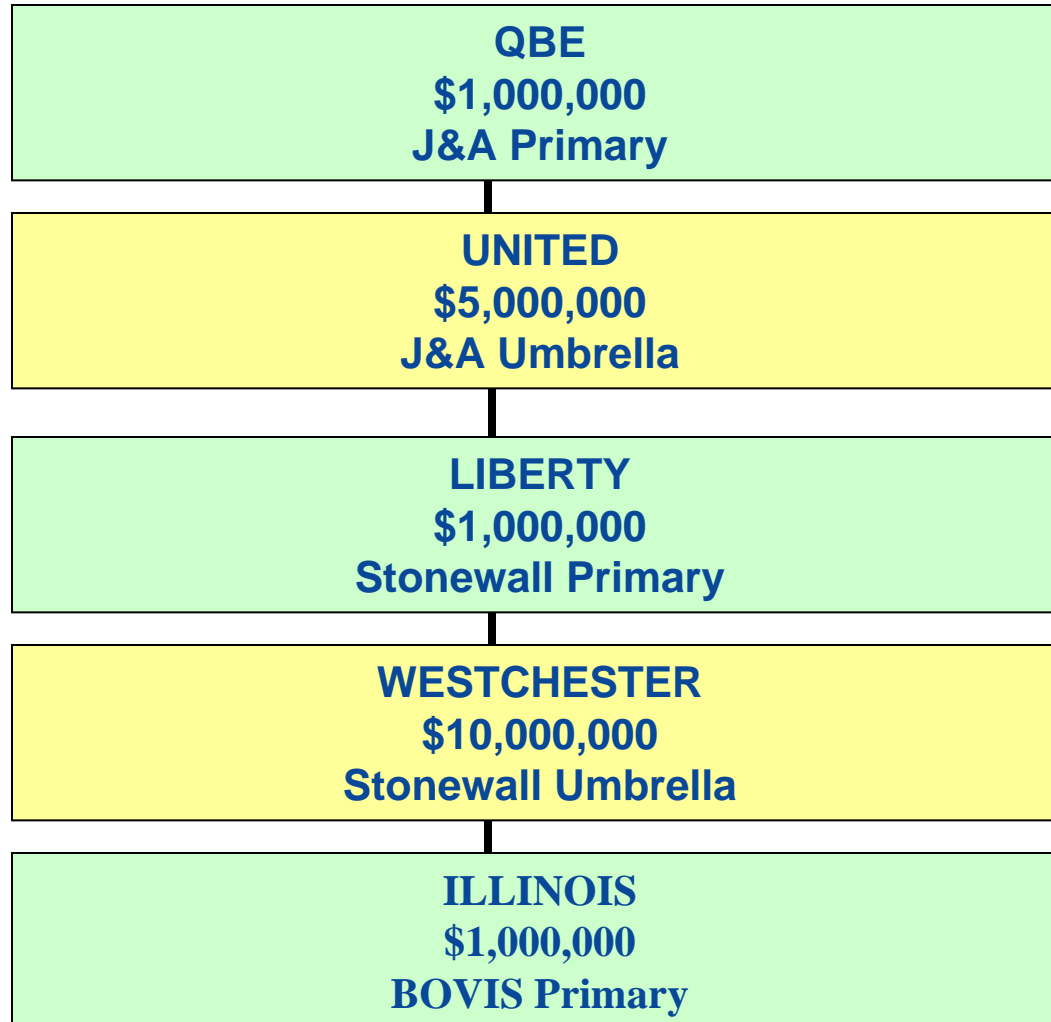


# Bovis



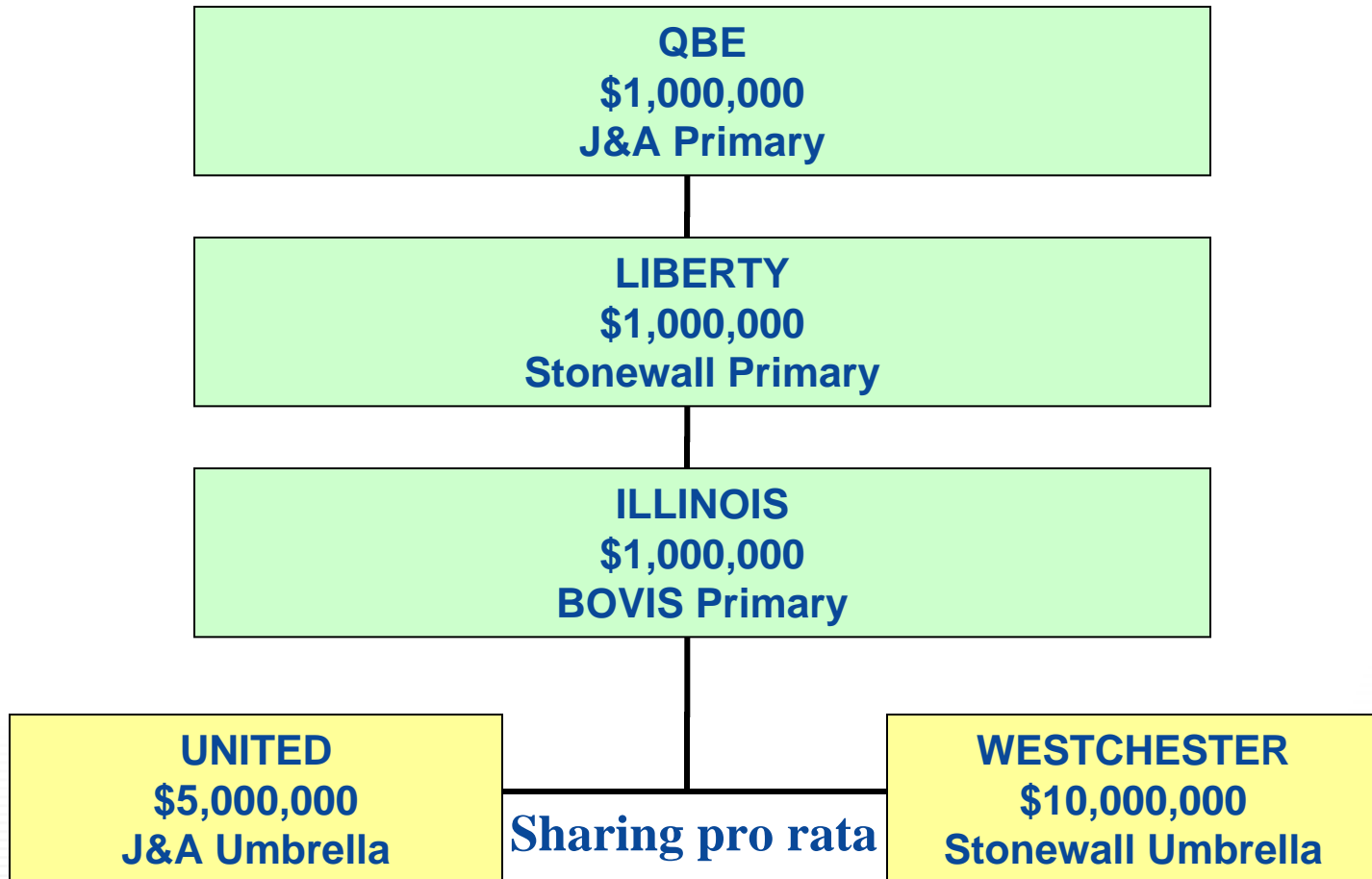


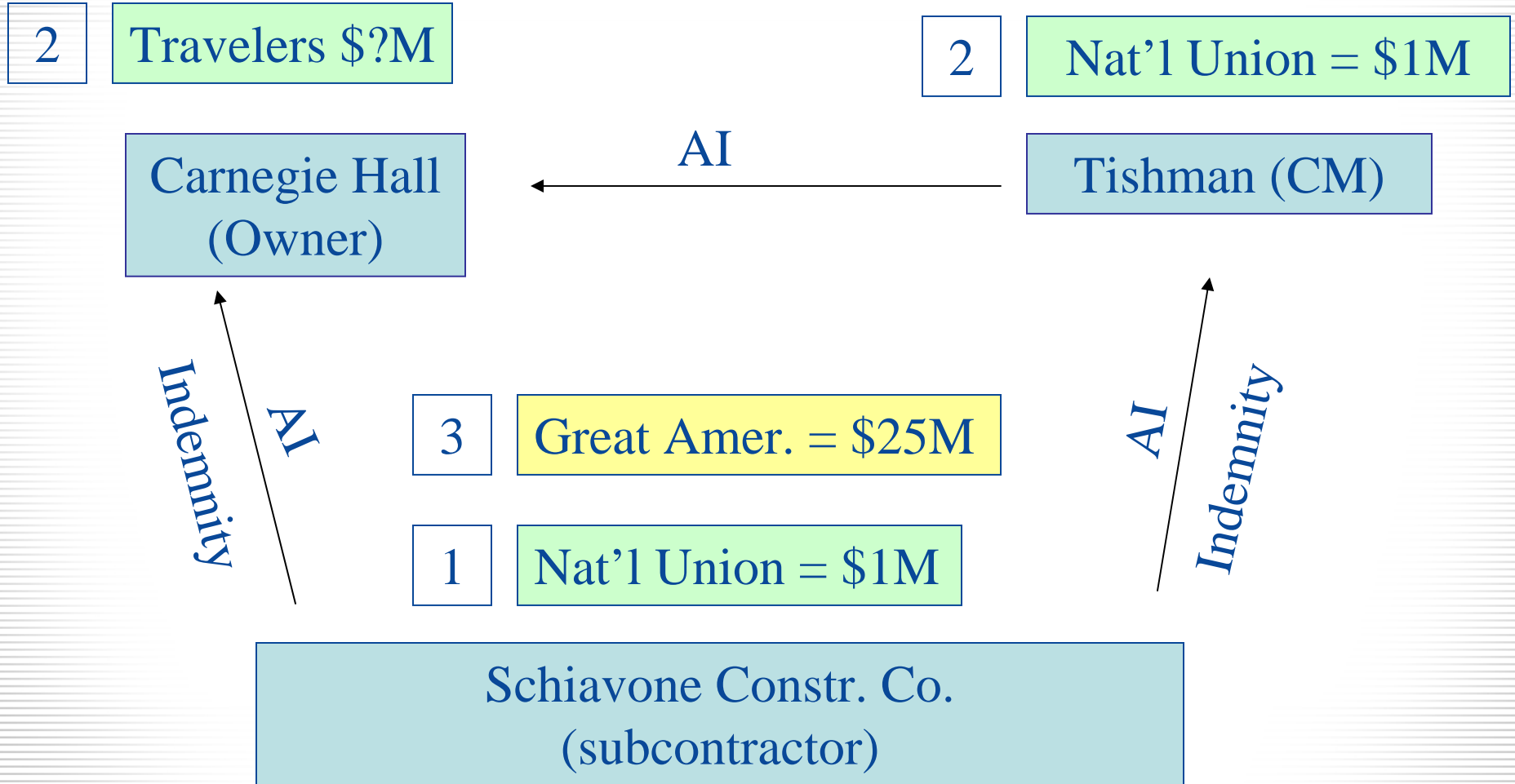
## Trial Court Apportionment of AI Coverage for Bovis





## Appellate Court Apportionment of AI Coverage for Bovis

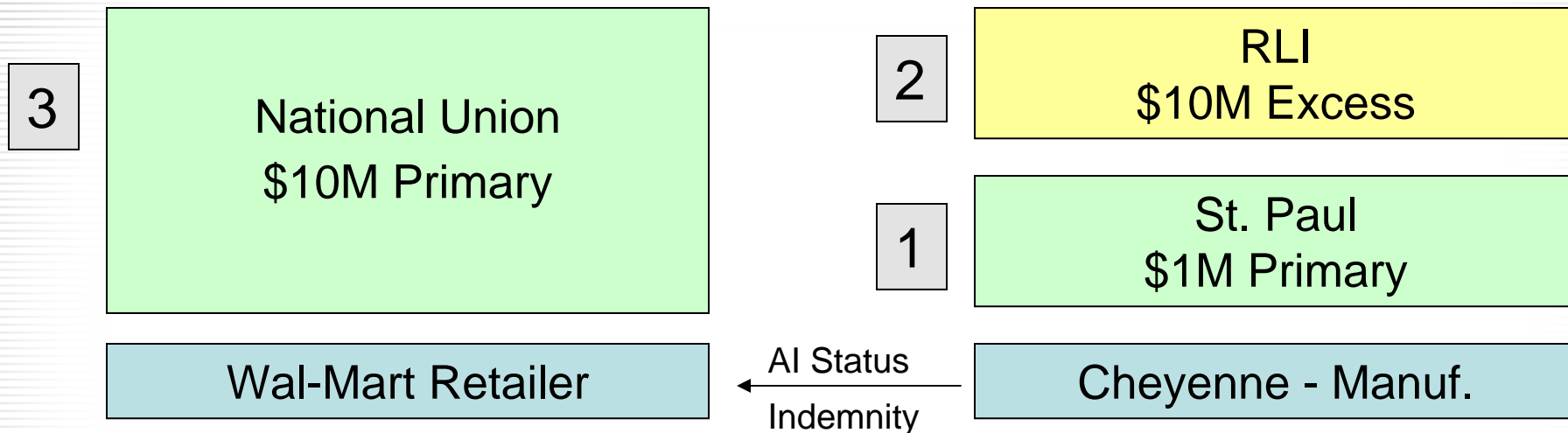






## Vertical Exhaustion/Circuitry of Litigation

- 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)
- Hertz Equip. Rental Corp. v. Ammon Painting Co. 2009 MO. App. LEXIS 1131 (Mo. App. 2009)



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





# Wrap-Up Programs

- Application of vertical/horizontal exhaustion theories in wrap-up context
- Nat'l Union Fire Ins. Co. of P.H. v. Amer. & Foreign Ins. Co. 2006 U.S. Dist LEXIS 96778 (C.D. Cal. 2006)



# Wrap-Up Programs

## Nat'l Union

3

Nat'l Union  
OCIP  
Excess  
\$25M

2

American  
and  
Foreign  
CGL  
\$1M

1

Aetna  
OCIP  
\$2M

Oakland  
(Enrolled Subcontractor)



# Risk Management Tips

- 1) Modify the GC's (Indemnitee's) Policy
- 2) Modify the Contract
- 3) Modify the Sub's (indemnitor's) Policy/Policies



# Modify the GC's Policy

## Standard ISO Language

### 4. Other Insurance

#### b. Excess Insurance

This insurance is excess over:

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.



# Modify the GC's Policy

## Recommended Language

The following is added to SECTION IV – Other insurance:

It is agreed that this policy is **excess** over that portion of the loss for which the Insured has other valid and collectible insurance, as an Additional Insured on a Liability Insurance policy issued to a subcontractor of the Insured whether such policy is on a **primary, excess, umbrella, or contingent basis.**



# Modify the Contract

- 1997 AIA A401 (No AI Requirement)
- 2007 AIA A401 (No Primary Requirement)

§13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

- Consensus DOCS 750

9.2.11 ADDITIONAL LIABILITY COVERAGE Contractor \_\_\_\_ shall/\_\_\_\_\_ shall not (indicate one) require Subcontractor to purchase and maintain liability coverage, primary to Contractor's coverage under Subparagraph 9.2.10.



# Modify the Contract

Sample Manuscript Language (best):

Subcontractor is required to add contractor as an additional insured per (CG 20 10 1185) endorsement or equivalent (CG 20 37 10 01 is acceptable if it is accompanied by CG 20 10 10/01 or CG 20 37 07 04 and CG 20 10 07 04). **All coverage shall be primary and non-contributory with any other insurance available to contractor or owner.**



# Recommendations for Contract

1. Obtain AI status
2. Specify AI endorsement
3. Specify limits required
4. Specify that all AI coverage (whether purchased as primary, excess, or umbrella) shall be primary to any other insurance maintained by GC
5. Specify that GC's insurance will be excess of and not contribute with AI coverage regardless of "other insurance" clause
6. Specify "vertical exhaustion" in certain jurisdictions
7. Obtain broad indemnification from subcontractor



# Modify the Sub's Policy

## Specimen St. Paul AI Endorsement

2. The following is added to the Other primary insurance section. This charge broadens coverage.

We'll consider this insurance to be primary to and non-contributory with the insurance issued directly to additional protected persons listed below if:

- your contract specifically requires that we consider this insurance to be primary or primary and non-contributory; or
- you request before a loss that we consider this insurance to be primary or primary and non-contributory insurance.

- **Modify sub's Primary and Excess Policy**



# Thank you!

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