

THE WRAP UP OF WRAP-UPS? OWNER-CONTROLLED INSURANCE PROGRAMS AND THE EXCLUSIVE REMEDY DEFENSE

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I. INTRODUCTION

A large-scale, complex commercial construction project today often includes a developer, general contractor, and various subcontractors who work on different components of the project. In addition to the various parties, in many instances a complex web of insurance coverages result, due to contractual arrangements and indemnity agreements that often allocate and shift the loss of certain risks from the project to other involved parties.¹

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1. Robert J. Olson, *The OCIP or Wrap Policy*, INS. J. (July 3, 2006), <http://www.insurancejournal.com/magazines/mag-features/2006/07/03/71232.htm> (“In the traditional insurance model, lower tier subcontractors named the general

Owner-Controlled Insurance Programs (OCIPs), also referred to as Wrap-Up programs, streamline various insurance coverages into a single consolidated program—the OCIP—through which the owner establishes and administers coverage for the general contractor and all the subcontractors on the project.² The insurance coverages typically incorporated in the OCIP are workers' compensation, general and umbrella liability, employers' liability, and builder's risk–installation floater liability.³ Contractor's equipment and automobile liability coverage are not usually included.⁴ In addition to insurance coverage being bundled into a single centralized program, an integrated owner–contractor-managed safety program is a possible feature of the OCIP.⁵ Central administration of claim processing is also a possible feature of the OCIP.⁶

The central administration of insurance coverages, particularly workers' compensation insurance, through an OCIP administrator makes OCIPs particularly attractive to the owners of large-scale construction

contractor as an additional insured on their policy and provided a broad indemnity agreement that shifted the responsibility for losses arising out of the project to the subcontractor. The general contractor would provide a similar broad indemnity agreement to the developer and name the developer as an additional insured on the general contractor's policy.

Through the use of indemnity agreements and additional insured endorsements, those policies were configured in a pyramid fashion, with the liability pushed downstream onto the lower tier contractors' insurance policies. The general contractor and the developer sat at the top of the pyramid insulated from loss until all of the downstream contractors' policy were exhausted. If there were 20 to 30 contractors on the project, then there were 20 to 30 policies that could potentially respond to liability claims arising out of the project.”).

2. See Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures*, 32 *TRANSP. L.J.* 35, 47–49 (2004) (“OCIPs are a type of ‘wrap-up’ insurance procurement that allows the owner to establish and administer coverage for all project participants by ‘wrapping up,’ or bundling, multiple parties into a single consolidated program.”); see also Olson, *supra* note 1 (“[T]he developer, general contractor and all of the subcontractors become named insureds under a single policy that covers a single construction project . . .”).

3. Mary E. Borja, *Getting a Grip on OCIPs and CCIPs*, *REAL EST. FIN. J.* 54, 54 (Summer 2005).

4. *Id.*

5. U.S. GEN. ACCT. OFF., *GAO/RCED-99-155, TRANSPORTATION INFRASTRUCTURE: ADVANTAGES AND DISADVANTAGES OF WRAP-UP INSURANCE FOR LARGE CONSTRUCTION PROJECTS 7* (1999), available at <http://www.gao.gov/archive/1999/rc99155.pdf>.

6. *Id.* at 4–5.

projects. Advantages of an OCIP program include the payment of only the true cost of the insurance,⁷ efficient claims management,⁸ effective coordination of the program,⁹ and potentially significant cost savings.¹⁰ On the other hand, regulatory restrictions,¹¹ limitations due to cost,¹² potential management challenges,¹³ the possibility of gaps or overlaps in coverage,¹⁴ and experience-modification-rate issues¹⁵ are cited as disadvantages of

7. Borja, *supra* note 3, at 54 (“The owner or controlling contractor benefits by paying only true cost of the insurance rather than contractor mark-ups on the insurance charges, with any premium discounts, economies of scale, and dividends for good experience directly benefiting the owner or controlling contractor.”).

8. *Id.* at 54–55 (“An injury or accident is reported to only one insurer, which is responsible for all of the insured entities and coverages. The insurer is able to manage and coordinate claims management and loss control for all of the project participants.”).

9. *Id.* at 55 (“The coverages meet the project’s contractual requirements, which avoids the potential for participants’ failure to obtain required coverages, failure to name a higher tier entity as an additional insured, etc.”).

10. *Id.* (“The total insurance costs for the project may be lower through the use of a wrap-up program, rather than multiple individual policies. The continuity and uniformity of insurance coverage, the involvement of a single insurer, streamlined claims handling, and coordinated loss control all may contribute to lower overall insurance-related costs. Savings may also result from elimination of overlapping coverage.”).

11. *Id.* (“Some states restrict or prohibit OCIPs or [Contractor-Controlled Insurance Programs] CCIPs, particularly for public entities.”).

12. *Id.* (“The construction project must be large enough for a wrap-up to be cost-effective. Wrap-ups are reported to be most cost effective for projects larger than \$100,000,000 or on projects that generate at least \$1,000,000 in workers’ compensation premium. The size is necessary for the economies of scale to permit cost savings. (Although ‘rolling’ wrap-ups can be used for several medium sized construction projects.) On smaller projects, the administrative costs may outweigh the benefits of the OCIP or CCIP.”).

13. *Id.* (“Some owners have reported increased difficulty in managing subcontractors that are contractually required to repair damaged work where the subcontractor asserts that the owner’s OCIP administrator is delaying adjustment of the claim.”).

14. *Id.* (“The applicable statute of limitations may be longer than the completed operations coverage period under the OCIP or CCIP, leaving an exposure for the construction participants.”).

15. *Id.* at 56 (“A contractor with a good safety record could lose in a close bidding situation to a contractor with a lesser safety record if the workers’ compensation experience modifier is not taken into consideration as part of the bid process. (To eliminate the advantage to a contractor with a poor loss experience, some program sponsors will not accept bids with a workers’ compensation Experience Modification Rate above a specified percentage.)”).

OCIPs.

Although the benefits of OCIP programs have been noted in court decisions throughout the country,¹⁶ they have also received judicial scrutiny, which potentially jeopardizes the future availability of this form of insurance program. As of the publication of this Article, at least two courts have denied a participant in an OCIP program—whether an owner, general contractor, or subcontractor—the ability to successfully assert the exclusive remedy defense to bar a tort claim by the employee of a general contractor or subcontractor who would otherwise recover benefits for his or her injury through workers' compensation.¹⁷ However, at least two other courts that have noted the benefits and policy behind OCIPs require a ruling that the exclusive remedy defense is available.¹⁸

16. See, e.g., *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989, 991 n.1 (Me. 2003) (“The State uses OCIPs to save costs, secure better coverage, and have better safety programs. If a construction project does not have an OCIP, then each contractor and subcontractor has to procure its own insurance and the higher cost of the insurance is passed on to the State.”); *Indep. Ins. Agents of Okla., Inc. v. Okla. Tpk. Auth.*, 876 P.2d 675, 676 (Okla. 1994) (“Not only is a typical OCIP designed to reduce the cost of insurance premiums, it allows for a coordinated risk management and safety program for workers and visitors to the construction site. An OCIP also provides for insurance premium rebates to the policy owner for good construction safety records.”); *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 359 (Tex. 2009) (“Such a scheme seems consistent with the benefits offered by controlled insurance programs, which are designed to minimize the risk that the subcontractors’ employees will be left uncovered. . . . [Opposite schemes] would thwart the usefulness of controlled insurance programs that allow the highest-tiered entity to ensure quality and uninterrupted coverage to the lowest-tiered employees.”).

17. See *Culp v. Archer-Daniels-Midlands Co.*, No. 4:08CV3197, 2009 WL 1035246, at *4 (D. Neb. Apr. 17, 2009) (holding the workers’ compensation exclusive remedy defense under Nebraska law does not bar claims against an owner by a subcontractor’s employee when the subcontractor participated in a mandatory OCIP program); *Pride v. Liberty Mut. Ins. Co.*, No. 04-C-703, 2007 WL 1655111, at *4 (E.D. Wis. June 5, 2007) (holding the Wisconsin workers’ compensation statute does not preclude an injured worker at a project from bringing tort claims against subcontractors who were not his employer on the same project enrolled in an OCIP program).

18. See *Stevenson v. HH & N/Turner*, No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831, at *39 (E.D. Mich. Apr. 22, 2002) (“Allowing Plaintiff to recover in a common law tort action in the case at bar would contravene the entire policy behind the OCIP in this case: to reduce the cost of insurance and to allow for a coordinated risk management and safety program at the Project for all program participants and insureds, which includes both Defendants [contractors] and Motor City [subcontractors]. This finding is buttressed by the policy underlying worker’s compensation laws in Michigan.”); *HCBeck*, 284 S.W.3d at 350 (“A general workplace

One of the courts that ruled the exclusive remedy defense is available to a general contractor who participates in an OCIP program undertook the most extensive and comprehensive analysis of OCIPs and the exclusive remedy defense to date. The opinion in *HCBeck, Ltd. v. Rice* represents a significant step in ensuring the vitality of OCIP programs.¹⁹ Furthermore, the decision is consistent with the intent of establishing OCIP programs—promoting efficiency in insurance coverage and providing coverage of the lowest tiered employees.²⁰ Even more significantly, *HCBeck* preserves the intent of parties to OCIP programs—to provide an exclusive remedy with which a policy participant may seek compensation for injuries sustained while working on a project. While the *HCBeck* case represents a step in the right direction toward ensuring OCIP programs remain vital, caselaw remains unsettled as to whether an owner, general contractor, or subcontractor can assert the exclusive remedy defense when they participate in an OCIP program.

Despite the holding of the Texas Supreme Court in *HCBeck*, OCIP programs remain endangered in the wake of the decisions of *Pride v. Liberty Mutual Insurance Co.* in Wisconsin and *Culp v. Archer-Daniels-Midland Co.* in Nebraska. This Article analyzes the four main cases to date that have addressed the question of whether an owner, general contractor, or subcontractor participating in an OCIP program can assert the exclusive remedy defense. Part I briefly outlines workers' compensation and the exclusive remedy defense. Part II examines the *Stevenson*, *Pride*, and *Culp* decisions. Part III contends the Texas Supreme Court in *HCBeck* correctly answered the question of whether an owner, general contractor, or subcontractor participating in an OCIP program can assert the exclusive remedy defense. This Article concludes that future courts should follow the *HCBeck* decision. Courts should rule that owners, general contractors,

insurance plan that binds a general contractor to provide workers' compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to ensure that the subcontractors' employees receive the benefit of workers' compensation insurance.”).

19. See *HCBeck*, 284 S.W.3d at 360 n.7 (“To rule as the dissent suggests would likely do away with OCIPs in Texas, along with the benefits they provide to many large-scale developers.”).

20. *Id.* at 359–60 (“But if actually buying workers' compensation insurance is the only approved method of availing oneself of an immunity defense, then it makes no sense that the Legislature would enact an insuring scheme designed to promote the coverage of the lowest-tiered employees, only to require, in the end, employers who want the immunity defense to purchase workers' compensation insurance policies on the same employees at the same work site.”).

and subcontractors who participate in an OCIP program must be permitted to successfully assert the exclusive remedy defense upon an evidentiary showing it was the intention of all of the parties to the OCIP to provide an exclusive remedy with which a policy participant may seek compensation for injuries sustained while working on a project.

II. WORKERS' COMPENSATION AND THE EXCLUSIVE REMEDY DEFENSE

Today, each of the fifty states has its own workers' compensation system, which compensates employees who suffer injuries arising out of or in the course of employment. The advent of workers' compensation laws in the 1910s were passed largely in response to the result of many workers who were left uncompensated by the tort system following injuries sustained while inside the course of employment.²¹ The original goal of workers' compensation was to ensure compensation was provided to injured workers and to help reduce the costs related to workplace safety.²² In exchange for swift, real compensation, employers were granted immunity from tort actions for employee work-related injuries.²³

Thus, an employee who is injured within the scope of his or her employment under a state workers' compensation law today is generally limited to the exclusive remedy of workers' compensation,²⁴ unless a recognized exception under a specific state's law applies, such as the dual-capacity exception,²⁵ parent-sibling exception,²⁶ intentional tort exception,²⁷

21. See Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641–42 (1983) (“The passage of the original acts occurred largely in response to the plight of the many injured workers left uncompensated by the common law. Legislatures had begun to view accidents as the inevitable accompaniment of industrial production, whose costs, like any production costs, should be borne by the responsible industry and its consumers. In addition, this cost-internalization was seen as a way to foster industrial safety. Some employers sought the certainty of limited liability instead of the risk of unpredictable tort damages, and virtually all parties hoped to eliminate the heavy costs of litigation.” (citations omitted)).

22. *Id.* at 1642 (“From its beginnings, then, workers' compensation has aimed at both providing compensation to injured workers and helping to reduce costs related to workplace safety.”).

23. *Id.* at 1643 (“Employer immunity from tort actions for work-related injuries has frequently been deemed the quid pro quo that turn-of-the-century employees granted in exchange for the statutory guarantee of swift and certain compensation.” (citations omitted)).

24. *Id.* at 1642–43.

25. *Id.* at 1649 (“The dual capacity doctrine . . . [interprets] the exclusive remedy rule to bar only suits based on duties stemming from the employment

or the exception for suits by third parties against employers for contribution and indemnity.²⁸ As discussed earlier, the four courts that have ruled on whether the exclusive remedy defense of workers' compensation is available to an owner, general contractor, or subcontractor who participated in an OCIP program have arrived at varying conclusions.

relationship, not those based on independent duties generated by other relationships between employers and employees. Thus, employers that occupy additional roles with respect to their employees—such as manufacturer or lessor of workplace products or provider of medical services—cannot escape tort liability for breaching the duties associated with those roles. Instead, workers can sue their employers on grounds such as product liability for injuries caused by defects in employer-made equipment and malpractice for injuries caused by negligently administered medical treatment.” (citations omitted)).

26. *Id.* at 1649–50 (“Responding to a variant of the dual capacity situation, some courts have held worker suits against the parent and sibling corporations of their employers to be similarly exempt from the exclusive remedy rule. This exception helps to equalize the tort rights of workers employed by independent businesses and those of workers employed by corporations that are part of a larger corporate family. Without the exception, for example, if an employer corporation contracted with another corporation for safety services and the services were performed negligently, workers could sue the negligent corporation if it were outside the employer’s corporate family but not if it were a member of that family.” (citations omitted)).

27. *Id.* at 1650–51 (“Refusing to deem workers’ compensation a license for employers to abuse employees, these courts find it unacceptable to immunize employers from bearing full tort damages for intentional injuries. Most courts reconcile this exception with the exclusive remedy language by arguing that intentional torts fall outside the statutory scheme because they are not accidental or employment related as required by the statutes. Thus, tort action is permitted as an alternative, rather than an addition, to the workers’ compensation remedy.” (citations omitted)).

28. *Id.* at 1651–52 (“The final exception—third-party suits for contribution and indemnity from employers—seeks to distribute liability fairly between employers and third parties jointly responsible for worker injuries. When an accident is caused partly by a third party, the injured worker can sue that party for the entire amount of injury-related damages, no matter how small the third party’s role in the accident. Because the worker is required to repay any workers’ compensation benefits out of the tort recovery, the employer retains no liability for the accident. Thus, absent an exception, even a third party whose responsibility for an accident is minimal compared with the employer’s is liable for the full amount of damages, while the employer escapes all liability. Faced with this duty to pay the entire judgment, third parties frequently seek contribution or indemnity from employers. By allowing such recovery by third parties, some courts have created a de facto exception to the exclusive remedy rule: there is scant difference between having an employer reimburse a third party’s payment to a worker and having the employer pay the worker that amount directly.” (citations omitted)).

III. IS THE EXCLUSIVE REMEDY DEFENSE AVAILABLE TO A PARTICIPANT OF AN OCIP?: THE *STEVENSON*, *PRIDE*, AND *CULP* DECISIONS

A. *Stevenson v. HH & N/Turner*

The first main decision addressing the question of whether a participant in an OCIP program could assert the exclusive remedy defense was the ruling of the United States District Court for the Eastern District of Michigan in *Stevenson v. HH & N/Turner*.²⁹ In *Stevenson*, a subcontractor's employee was injured in a slip-and-fall accident involving snow and ice while the employee was on an outdoor project initiated by the Detroit Tigers, Inc., Detroit/Wayne County Stadium Authority, the Detroit Downtown Development Authority, and the City of Detroit.³⁰ The Detroit Tigers, the owner of the project, "contracted with [] HH & N/Turner, a joint venture comprised of [] Huber Hunt & Nichols and Turner Construction Company, to act as Construction Manager of the [Comerica Park] Project."³¹ HH & N/Turner then subcontracted with Motor City Electric to supply electrical work at the Comerica Park Project.³² The individual injured in the aforementioned slip-and-fall accident was an employee of Motor City Electric, and she asserted HH & N/Turner was negligent in failing to implement reasonable safety precautions to protect workers from the dangers of snow and ice on the work area of the premises.³³

The Detroit Tigers established an OCIP program, which provided, "comprehensive general liability and worker's compensation insurance to all contractors, properly enrolled subcontractors, and their employees working at the [Comerica Park] Project."³⁴ Participation in the OCIP program was optional, not mandatory, for the general contractor and subcontractor.³⁵

29. *Stevenson v. HH & N/Turner*, No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831 (E.D. Mich. Apr. 22, 2002).

30. *Id.* at *2. The employee was working on the Comerica Park Project. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at *2, *8.

34. *Id.* at *5.

35. *Id.* at *44.

The court held HH & N/Turner could successfully assert the exclusive remedy defense, citing the policy behind both the Michigan workers' compensation law and OCIP programs in general.³⁶ The court examined the Michigan workers' compensation statute and cited Michigan's statutory policy, which expressly allows an owner of a project to issue a separate workers' compensation policy to cover all employers and employees working on a project.³⁷ In addition, the court correctly engaged in an analysis of the benefits bestowed by this OCIP program and noted both the plaintiff as an employee and the owner received these program benefits.³⁸ In this case, the plaintiff received the benefit of guaranteed compensation through the subcontractor freely participating in the OCIP³⁹ and the owner was able to receive the benefit of coordinated risk management and avoided litigation effects, which could potentially cripple the project.⁴⁰

Most significantly, the court cited the policy rationale behind OCIPs and contended that allowing the plaintiff to recover in a tort action would contravene the policy behind OCIPs, which is to allow for the coordination of a risk management and safety program.⁴¹ Although the *Stevenson* Court lauded the benefits of OCIPs, another Midwestern court would undercut these gains just five years later, planting the seeds for successful challenges to OCIPs.

B. *Pride v. Liberty Mutual Insurance Co.*

Five years after the *Stevenson* decision, the United States District Court for the Eastern District of Wisconsin struck a blow against OCIPs in

36. *Id.* at *37.

37. *Id.* at *42 (“It is clear that the Michigan Legislature determined that in the relatively finite number of large construction projects, as determined by the conditions expressly provided in M.C.L. § 418.621(3), the owner of the project may issue a separate worker’s compensation insurance policy to cover all employers working on the construction site.”).

38. *Id.* at *43.

39. *Id.* (“When Motor City enrolled in the OCIP and accepted the Owner’s payment of its worker’s compensation premium, Plaintiff received the benefit of guaranteed compensation by the Owner for any personal injury sustained while working on the Project (*quid*).”).

40. *Id.* (“In return, the Owner sought to coordinate its risk management by implementing the OCIP and thus avoid the inherent danger and crippling effect that perpetual litigation can pose to timely completion of a large construction project such as the one at issue (*quo*).”).

41. *Id.* at *39.

*Pride v. Liberty Mutual Insurance Co.*⁴² In *Pride*, the plaintiff sustained personal injuries “when he fell while working at the Lambeau Field Redevelopment [P]roject.”⁴³ Lambeau Field Redevelopment, LLC, the developer of the project, created an OCIP.⁴⁴ The OCIP policy obtained was issued by Liberty Mutual Insurance Company.⁴⁵ All the subcontractors participating in the OCIP program were named insureds on the policy, including both the general contractor of the project, Turner Construction Company, and a subcontractor, Havens Steel.⁴⁶ The plaintiff was an employee of National Riggers & Erectors, Inc., another subcontractor, and sought to bring negligence claims against both Turner Construction Company and Havens Steel.⁴⁷

In contrast to *Stevenson*, which was cited as support by the defendants, the court in *Pride* held the exclusive remedy rule could only be asserted by employers, not other entities participating in an OCIP program that did not fulfill the employer role.⁴⁸ The court’s rationale in its decision centered on two bases: legislative intent and an analysis of the purposes of OCIPs.

Examining legislative intent, the court reasoned that if the Wisconsin Legislature intended the owner of an OCIP to be deemed the sole employer of any employee working for any entity on the project, it would have explicitly stated so.⁴⁹ In addition, the court noted the OCIP program instead still treated each contractor as a separate insured, and thus each contractor should still be considered a separate entity.⁵⁰

The *Pride* Court also examined the purposes behind OCIPs and dismissed the benefits of OCIPs in comparison to the interpretation of Wisconsin workers’ compensation law. While the court acknowledged the

42. *Pride v. Liberty Mut. Ins. Co.*, No. 04-C-703, 2007 WL 1655111 (E.D. Wis. June 5, 2007).

43. *Id.* at *1.

44. *Id.* at *2.

45. *Id.*

46. *Id.* at *1–2.

47. *Id.* at *1.

48. *Id.* at *4.

49. *Id.* at *3 (“If the legislature had truly intended to allow employers at a construction site to bundle together their worker’s compensation liability, it would have been simple enough to craft a provision stating that the owner of an OCIP-insured project is deemed the sole employer of any employee of any contractor injured on that project.”).

50. *Id.*

cost savings to participants provided by OCIPs,⁵¹ it rejected the contention an entity's participation in an OCIP brought about a watershed change in workers' compensation law.⁵² The court also expressed skepticism as to how OCIPs could provide for a less expensive insurance program providing more coverage to participants.⁵³ Finally, the court used the rationale the plaintiff did not explicitly bargain away any of his rights to the participants in the OCIP, thus a claim to these rights by all participants was illogical.⁵⁴

However, at no point in the *Pride* decision did the court analyze the actual language of the applicable documents creating the contractual arrangement among the owner, general contractor, and subcontractors involved in the case.

While the courts in *Stevenson* and *Pride* at least acknowledged the purposes of OCIPs in the discussion of the holdings, the United States District Court for the District of Nebraska did not address any policy issues concerning OCIPs in the *Culp v. Archer-Daniels-Midlands Co.* decision.

C. *Culp v. Archer-Daniels-Midlands Co.*

The *Culp v. Archer-Daniels-Midlands Co.* decision stands as an ominous one for the future of OCIPs in Nebraska. In *Culp*, the plaintiff, an employee of Jacobs Field Services North America, Inc. (Jacobs), incurred personal injuries while working at an Archer-Daniels-Midlands Company (ADM) agricultural-processing facility.⁵⁵ Jacobs and ADM were both contractual parties under a "Contractor's Agreement," wherein Jacobs, as

51. *Id.* ("By all accounts, OCIPs provide cost *savings* to those involved because they allow the owner to control the purchasing of a policy and presumably create premium savings by virtue of the owner's better bargaining position.").

52. *Id.*

53. *Id.* ("In fact, it remains wholly unclear why a *less* expensive insurance program would afford participants *more* coverage by insulating them from tort suits not just from their own employees but from employees of all other firms involved.").

54. *Id.* at *4 ("[T]here is no indication in this case that the plaintiff, an employee of National Riggers & Erectors, bargained away any of his rights as to Havens Steel or Turner Construction. It does not matter, in other words, how various contractors on the same project decide to divvy up costs for insurance coverage: whether each subcontractor buys his own insurance or whether they all fall under the policy purchased by the developer, their own contractual arrangement for insurance purposes does not transform nonemployers into employers. Allowing them to contract each other out of tort liability would afford the other employers a *quid* without any additional *quo* going to the injured employee.").

55. *Culp v. Archer-Daniels-Midlands Co.*, No. 4:08CV3197, 2009 WL 1035246, at *1 (D. Neb. Apr. 17, 2009).

an independent contractor, agreed to perform certain industrial services that required entry by Jacobs's employees onto ADM's property.⁵⁶ The Contractor's Agreement required "Jacobs to maintain workers' compensation insurance to cover injuries [to its employees] occurring on ADM's premises."⁵⁷

However, an "Insurance Addendum to Contractor's Agreement" between Jacobs and ADM mandated Jacobs's participation in an OCIP managed by ADM.⁵⁸ Under Nebraska caselaw, an employer for the

56. *Id.*

57. *Id.* The insurance provision stated:

During the progress of the work and while any of the employees of CONTRACTOR [Jacobs] or its subcontractors remain at the site, CONTRACTOR shall maintain the following types and amounts of insurance, and shall furnish OWNER [ADM] with its certificates and the certificates of its subcontractors therefore prior to commencement or continuation of any work at the site.

Worker's Compensation Insurance . . . for all CONTRACTOR'S employees employed in connection with the contract, work order and/or purchase order as may be required by the state in which the work is to be performed. This insurance shall include borrowed servant or alternate employer endorsement stating that an action brought against OWNER by an employee of CONTRACTOR under theory of "Borrowed Servant["] or "Alternate employer" will be treated as a claim against CONTRACTOR

Id. (citation omitted).

58. *Id.* The Insurance Addendum to Contractor's Agreement stated:

OWNER and CONTRACTOR entered into this Insurance Addendum to Contractor's Agreement as of the 30 day of April, 2003. In consideration of the work orders, purchase orders, agreements and covenants entered into and to be entered into concerning work to be done and service to be provided to OWNER and other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, the parties agree as follows:

1. To secure Workers Compensation including Employers Liability insurance and Comprehensive Commercial General Liability insurance for CONTRACTOR'S on premises work at ADM in a cost effective manner, CONTRACTOR shall participate in the OCIP program identified and described in Addendum Exhibit 1. CONTRACTOR accepts and shall strictly adhere to all provisions of the OCIP program as stated in Addendum Exhibit 1, including but not limited to the safety and loss prevention guidelines and reporting requirements. CONTRACTOR understands and agrees that the coverages afforded to CONTRACTOR by participation in the OCIP program are those coverages, terms, conditions and exclusions described in the

purposes of workers' compensation does not include an owner who requires its contractor or contractors to take out workers' compensation insurance.⁵⁹ Thus, if the owner required the contractor, or a contractor required a subcontractor, to obtain workers' compensation insurance, the owner and contractor, respectively, would not be considered a statutory employer;⁶⁰ however, if that obligation was relieved, the respective party would be considered a statutory employer.⁶¹

Focusing both on the Contractor's Agreement and the Insurance Addendum to Contractor's Agreement, the plaintiff argued the Contractor's Agreement required the contractor to obtain workers' compensation insurance and the Addendum only had the effect of describing the manner in which Jacobs, as the contractor, was to obtain workers' compensation insurance.⁶² In response, ADM argued the

applicable policy forms. CONTRACTOR has reviewed the applicable policy forms with its insurance agent and legal counsel and is not basing its decision to participate in the OCIP program upon any representation, summary or statement by OWNER or its agents.

2. For CONTRACTOR'S on premises work at ADM, CONTRACTOR'S participation in the OCIP program shall satisfy CONTRACTOR'S duties and obligations set forth at Section IX A., B. and D. of the Contractor's Agreement and at Section IX J., K. and L. of the Contractor's Agreement to the extent said paragraphs refer and relate to the purchase of Commercial General Liability insurance and Workers Compensation including Employer's Liability insurance

Id. at *1-2.

59. *See id.* at *4.

60. *See supra* note 59 and accompanying text.

61. *Culp v. Archer-Daniels-Midlands Co.*, No. 4:08CV3197, 2009 WL 1035246, at *3 (D. Neb. Apr. 17, 2009). In *Rogers v. Hansen*, the court stated:

[A]n owner who employs an independent contractor to do work which is in the usual course of business of the owner, and who fails to require the independent contractor to procure workmen's compensation insurance, is liable as a statutory employer under § 48-116 Obviously, the work of a subcontractor is ordinarily within the usual course of business of the principal contractor, and we have specifically held that under the provisions of § 48-116, when a contractor fails to require a subcontractor to carry workmen's compensation insurance and an employee of the latter sustains a job-related injury, the contractor is a statutory employer and, with the immediate employer subcontractor, is jointly and severally liable to pay compensation under the terms of the Workmen's Compensation Act.

Id. (quoting *Rogers v. Hansen*, 317 N.W.2d 905, 908 (Neb. 1982)).

62. *Id.* at *4.

Addendum relieved Jacobs's obligation to obtain workers' compensation insurance, and thus, ADM should be afforded the exclusive remedy defense as the statutory employer.⁶³

Despite the fact the Addendum explicitly stated the "CONTRACTOR'S participation in the OCIP program shall satisfy CONTRACTOR'S duties and obligations set forth at Section IX A., B. and D. of the Contractor's Agreement" and clearly noted participation in the OCIP satisfied the requirement to obtain workers' compensation insurance, the court summarily found the contractor, Jacobs, "was, in reality, obligated to be insured under the contractual arrangement between the parties" because the Addendum made Jacobs's participation in the OCIP program mandatory.⁶⁴

Therefore, the court essentially ruled ADM, as the owner of the OCIP, could not be considered the plaintiff's statutory employer, and thus, the exclusive remedy defense was inapplicable.⁶⁵ The *Culp* Court not only summarily dismissed the unambiguous language in the Addendum, it did not address any of the policy rationales behind the use of OCIPs or give effect to the intention of the parties, which was for ADM, as the owner, to provide insurance through the OCIP. Despite the fact the owner's insurance company paid workers' compensation payments to the plaintiff,⁶⁶ the *Culp* court still incorrectly held the exclusive remedy defense did not apply.

Despite setbacks for OCIPs in the *Pride* and *Culp* cases, the Texas Supreme Court delivered the most comprehensive analysis of OCIPs in the 2009 decision of *HCBeck, Ltd. v. Rice*.

IV. THE OCIPs STRIKE BACK: THE *HCBECK* DECISION

In 2009, the Texas Supreme Court, in *HCBeck, Ltd. v. Rice*, reversed the trend of *Pride* and *Culp* in holding that under the Texas workers' compensation statute, a general contractor who, by use of a written OCIP

63. *Id.*

64. *Id.* at *1-2, *4.

65. *Id.* at *4 ("Because ADM is not Plaintiff's statutory employer, it is considered a third-person subject to common-law liability . . .").

66. *Id.* at *5 ("It is undisputed that Plaintiff received payments from Zurich under the workers' compensation policy which covered both ADM and Jacobs. However, the language of Neb. Rev. Stat. § 48-148 is clear that the statute only operates to release an employer from common law suit when the employer pays, and the employee accepts, workers' compensation benefits.").

agreement, “provides” workers’ compensation insurance to a subcontractor’s employees is entitled to assert the exclusive remedy defense.⁶⁷ *HCBeck* provides future courts with a detailed roadmap in analyzing both statutory and policy issues surrounding OCIPs.

In *HCBeck*, FMR Texas Ltd., the owner of a company constructing an office campus, contracted with HCBeck, Ltd. to work on the construction project.⁶⁸ The plaintiff, Charles Rice, an employee of a subcontractor, Haley Greer, incurred personal injuries while working on the construction project.⁶⁹ A “Construction Management Agreement” (Agreement) required HCBeck, the general contractor, and all subcontractors working on the project to enroll in the OCIP, which was to be administered by the owner, FMR Texas Ltd.⁷⁰ Pursuant to the Agreement, the owner secured workers’ compensation insurance covering the entire project and also paid the premiums.⁷¹ In the event of the owner terminating the OCIP, the Agreement required the general contractor to secure, at the owner’s cost, other insurance at the same level as the workers’ compensation coverage required in the OCIP that covered itself and all subcontractors and employees.⁷² A subcontract between the

67. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009).

68. *Id.*

69. *Id.* at 351.

70. *Id.* at 350. The Construction Management Agreement stated:

Prior to commencement of the Work, the Owner [FMR], at its option and cost, may secure and thereafter, except as otherwise provided herein, maintain at all times during the performance of this Agreement [workers’ compensation insurance] . . . with the Owner, the Construction Manager [HCBeck], subcontractors, and such other persons or interests as the owner may name as insured parties

Id. (alterations in original).

71. *Id.* at 351.

72. *Id.* at 353. The provision states:

ALTERNATE INSURANCE: The Owner [FMR] is not required to furnish the OCIP. If [FMR] elects to terminate the OCIP at any time, [FMR] will give subcontractor written notice. In the event of OCIP termination, Subcontractor and lower-tier subcontractors will be required to provide Alternate Insurance. Alternate Insurance is the coverage required by the [FMR/HCBeck] Contract Documents if the OCIP is not in force or does not apply. . . .

. . . .

If [FMR] elects to exclude this Agreement, or any portion thereof, from the OCIP or for any reason [FMR] is unable or unwilling to furnish [the OCIP] . . .

general contractor and Haley Greer as subcontractor incorporated the Agreement.⁷³

The plaintiff argued the subcontract between the general contractor and subcontractor obligated the *subcontractor*—not the general contractor—to provide its own insurance coverage if the owner terminated the OCIP.⁷⁴ In addition, the plaintiff argued because the general contractor did not pay premiums for the insurance of the subcontractor’s employees, the general contractor, for statutory purposes, did not “provide” insurance⁷⁵ and, consequently, was not qualified as his statutory employer under Texas law.⁷⁶ The general contractor, on the other hand, argued it was entitled to assert the exclusive remedy defense because the Agreement specified the OCIP “shall” apply to all work performed by the general contractor and subcontractors and, but for the subcontract between the general contractor and subcontractor, the plaintiff “would not be working on a project that contractually provided workers’ compensation insurance covering [the subcontractor’s] employees.”⁷⁷

The Texas Supreme Court engaged in arguably the most comprehensive analysis of OCIPs to date. The court focused on four distinct points in ruling a general contractor is entitled to assert the exclusive remedy defense when participating in an OCIP program. First, the court carefully analyzed the text of the contract language of the Agreement and the subcontract between the general contractor and subcontractor and the effect of the contractual documents if the owner terminated the OCIP program.⁷⁸ Second, the court noted the interest of

the Construction Manager shall secure such insurance at the Owner’s cost

Id. (alterations in original).

73. *Id.* at 351.

74. *Id.*

75. Texas law states: “Recovery of workers’ compensation benefits is the exclusive remedy of an employee covered by workers’ compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.” TEX. LAB. CODE ANN. § 408.001(a) (West 2006 & Supp. 2010). Further, section 406.123(a) provides: “A general contractor and a subcontractor may enter into a written agreement under which the general contractor *provides* workers’ compensation insurance coverage to the subcontractor and the employees of the subcontractor.” *Id.* § 406.123(a) (emphasis added).

76. *HCBeck*, 284 S.W.3d at 351.

77. *Id.*

78. *See id.* at 352–54.

the general contractor in maintaining its statutory defenses.⁷⁹ Third, the court discussed the intent and purposes of the Texas workers' compensation statute.⁸⁰ Finally, and most significantly, the court discussed the potential ramifications and effects of a contrary ruling to the future of OCIP programs.⁸¹

One argument made by the plaintiff was, in the event of an OCIP termination, the obligation to obtain workers' compensation insurance would be placed upon the subcontractor as his employer, and not the general contractor.⁸² However, addressing the first point and examining the contract documents, the court noted the subcontract between the general contractor and subcontractor specifically required the parties to refer to the Agreement between the owner and general contractor, which placed the responsibility of obtaining workers' compensation insurance on the general contractor if the OCIP was not in force.⁸³ The court also disposed of the plaintiff's argument that the general contractor did not "provide" workers' compensation insurance because it did not obligate itself to pay the premiums for the plaintiff's insurance by clarifying Texas law does not require a general contractor to directly pay for this, but rather only be certain coverage is provided.⁸⁴

Second, the court also addressed the interest of the general contractor to preserve its statutory defenses.⁸⁵ The dissent argued "contracting for" insurance coverage is not equivalent to "providing" under the statute and contended the contractual documents provided no assurance the general contractor would not abandon its obligation under the contract and leave the employee at risk of an uncovered injury.⁸⁶ However, the Court responded that under Texas law, there is no guarantee any employer will provide workers' compensation for employees—although public policy

79. *Id.* at 354.

80. *See id.* at 355–59.

81. *Id.* at 359–60.

82. *Id.* at 353.

83. *Id.*

84. *Id.* ("HCBeck complied in all respects with the provision in the Act that expressly allows it to enter into a written agreement to provide workers' compensation insurance to its subcontractors and their employees. Texas Labor Code [section] 404.123(a) does not require a general contractor to actually obtain the insurance, or even pay for it directly. The Act only requires that there be a written agreement to provide workers' compensation insurance coverage." (citation omitted)).

85. *See id.* at 354.

86. *Id.* at 361–62 (Johnson, J., dissenting).

encourages it—and one of the incentives for employers to provide workers’ compensation insurance is the benefit of the exclusive remedy defense—to which an employer is definitely not entitled if it does not provide workers’ compensation insurance.⁸⁷

In its third main point, the court addressed the intent and purpose of the Texas workers’ compensation statute.⁸⁸ In 1983, the statute was amended to provide that “prime contractors” could enter into written agreements to provide workers’ compensation to subcontractors.⁸⁹ In addition, the court cited the purpose of workers’ compensation and the exclusive remedy defense—in exchange for prompt remuneration, an employee forfeits common law remedies from his or her employer.⁹⁰ The court also acknowledged a series of cases in which it recognized a “decided bias” *for* coverage and an interpretation of the statute that favors blanket coverage to all workers on a site.⁹¹

87. *Id.* at 354 (majority opinion) (citing TEX. LAB. CODE. ANN. § 408.001(a)).

88. *Id.* at 355–59.

89. *Id.* at 357. The court quoted Texas Government Code section 311.023:

A subcontractor and prime contractor may make a written contract whereby the prime contractor will provide workers’ compensation benefits to the subcontractor and to employees of the sub-contractor. . . . [T]he contract may provide that the actual premiums (based on payroll) paid or incurred by the prime contractor for workers’ compensation insurance coverage for the subcontractor and employees of the subcontractor may be deducted from the contract price or any other monies owed to the sub-contractor by the prime contractor. In any such contract, the subcontractor and his employees shall be considered employees of the prime contractor only for purposes of the workers’ compensation laws of this state . . . and for no other purpose.

Id. (alteration in original) (quoting Act of May 28, 1983, 68th Leg., Reg. Sess. (1983)).

90. *Id.* at 358 (“The workers’ compensation act was adopted to provide prompt remuneration to employees who sustain injuries in the course and scope of their employment. . . . The act relieves employees of the burden of proving their employer’s negligence, and instead provides timely compensation for injuries sustained on-the-job. . . . In exchange for this prompt recovery, the act prohibits an employee from seeking common-law remedies from his employer, as well as his employer’s agents, servants, and employees, for personal injuries sustained in the course and scope of his employment.” (quoting *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 142 (Tex. 2003))).

91. *Id.* at 358–59. “[T]hese interpretations are persuasive on the point that multi-tiered contractor relationships are prevalent throughout Texas, and that interpreting the statute in a way that favors blanket coverage to all workers on a site aligns more closely with the Legislature’s ‘decided bias’ for coverage.” *Id.* at 359 (citations omitted).

Finally, and most significantly, the court delineated the benefits of OCIP programs and the policy reasons behind a rule allowing a general contractor to assert the exclusive remedy defense when it is a participant in an OCIP program.⁹² The court noted the rule is consistent with the purpose of OCIPs, which is to minimize the risk of employees of subcontractors being left uncovered.⁹³ The court then remarked if actually purchasing the workers' compensation insurance would be the only way to receive the benefit of the exclusive remedy defense, it would not make sense that the Texas "Legislature would enact an insuring scheme designed to promote the coverage of the lowest-tiered employees, only to require, in the end, employers who want the immunity defense to purchase workers' compensation insurance policies on the same employees at the same work site."⁹⁴ Also, the court mentioned a contrary rule would "result[] in duplicative coverage and inefficient use of resources."⁹⁵

With the question of whether the exclusive remedy defense should be available to a general contractor or subcontractor participating in an OCIP program beginning to emerge in courts throughout the country, the court in *HCBeck* provides the most comprehensive guidance on the issue to date. Unlike the decisions in *Pride* and *Culp*, the court in *HCBeck* addressed not only statutory interpretation, but it comprehensively examined the text of the contractual documents at issue and the effect of those documents in the event an OCIP program terminated during the life of the project. Finally, the *HCBeck* Court addressed the policy surrounding workers' compensation insurance—allowing an employee to receive prompt remuneration in exchange for waiving common law remedies—and discussed the intent and purposes of OCIP programs.

V. CONCLUSION

The *HCBeck* Court correctly held a general contractor who participates in an OCIP program and provides workers' compensation coverage to a subcontractor's employees is entitled to assert the exclusive remedy defense. Courts addressing this issue should follow the *HCBeck* decision and hold owners, general contractors, and subcontractors participating in an OCIP program be permitted to successfully assert the exclusive remedy defense upon an evidentiary showing it was an intention

92. *Id.* at 359–60.

93. *Id.* at 359.

94. *Id.* at 360.

95. *Id.*

of all of the parties to the OCIP to provide an exclusive remedy under which a policy participant may seek compensation for injuries sustained while working on a project.

Such a rule not only preserves the purposes of OCIP programs, but the rule would most importantly preserve the intention of the parties to an OCIP. In construing insurance contracts, “the primary objective of policy interpretation is to determine the objectives of the parties and ascribe plain and ordinary meaning to the language of the policy wherever possible to effect their intent.”⁹⁶ The intention of the parties, which should be a cardinal principle to uphold, would be best respected under such a rule—and would also truly prevent a wrap up of insurance “wrap-ups.”

96. ERIC MILLS HOLMES & MARK S. RHODES, *HOLMES’S APPLEMAN ON INSURANCE*, 2D § 5.1, at 10 (Eric Mills Holmes et al. eds., 1996).