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. Along with the various parties, in many instances a complex web of insurance coverages result, along with contractual arrangements and indemnity agreements which often allocate and shift the loss of certain risks arising out of the project to other parties. Owner-Controlled Insurance Programs (OCIPs, also referred to as “Wrap-Up” programs), streamline various insurance coverages into a single consolidated program (the OCIP), where the owner, through the OCIP, establishes and administers coverage for the general contractor and all the subcontractors on the project.2

1 Attorney, Engles, Ketcham, Olson & Keith, P.C., Omaha, Nebraska. J.D., Saint Louis University, 2008; B.A., Grinnell College, 2005. The author would like to thank his colleagues at the Engles, Ketcham, Olson & Keith law firm, particularly Albert Engles and Dan Ketcham, for their mentoring in the area of insurance law. He would also like to thank his parents, Dennis and Salud Marzen of Dougherty, Iowa, and his younger brother Christopher and Ryan for their kind, unending support, encouragement, and sacrifices to help make this essay possible. The author remains solely responsible for all in this essay and for any errors which occur. The author can be reached at marzen@alumni.grinnell.edu.

2 See Insurance Journal, The OCIP or Wrap Policy, http://www.insurancejournal.com/magazines/west/2006/07/03/features/71232.htm (last visited August 21, 2010) (“In the traditional insurance model, lower tier subcontractors named the general 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”).
project. The insurance coverages typically incorporated in the OCIP are worker’s compensation, employers’ liability, general and umbrella liability, and builders risk/installation floater liability, but automobile liability and contractor’s equipment coverage are not usually included. In addition to insurance coverage being bundled into a single program, an integrated owner-contractor managed safety program is a typical feature of the OCIP as well as central administration of claims.

The central administration of insurance coverages, particularly worker’s compensation insurance, through an OCIP administrator makes OCIPs particularly attractive to the owners of large-scale construction projects. The fact that the owner pays only the true cost of the insurance, efficient claims management, effective coordination of the program, and potentially significant cost savings are all cited as advantages of an OCIP program. On the other hand,

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3 See Stephen Wichern, Protecting Design-Builders Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures, 32 Transp. L.J. 35, 47-48 (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”).

4 Mary E. Borja, Getting a Grip on OCIPs and CCIPs, Real Estate Finance Journal 54 (2005).


6 Borja, supra note 4, 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”).

7 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”).

8 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.”).

9 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”).
regulatory restrictions, cost restrictions, potential management challenges, the possibility of gaps in coverage or overlapping coverage, and experience modification rate issues are cited as disadvantages of OCIPs.

Although the benefits of OCIP programs have been cited in court decisions throughout the country, OCIP programs have also received judicial scrutiny which potentially jeopardize the future availability of this form of insurance program. The scrutiny that at least two courts to

10 Id. (“Some states restrict or prohibit OCIPs or CCIPs, particularly for public entities”).

11 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”).

12 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”).

13 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”).

14 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.”).

15 See Independent Insurance Agents of Oklahoma, Inc. v. Oklahoma Turnpike Authority, 876 P.2d 675, 676 (Okla. 1994) (“Not only is a typical OCIP designed to reduce the cost of insurance programs, 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 records’); American Protection Insurance Co. v. Acadia Insurance 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. If a project does have an OCIP, then the State decides what coverage and coverage limits are necessary, arranges for that insurance, and pays the premiums. The cost of the insurance is deducted from the contract price paid to each contractor or subcontractor”); HCBeck, Ltd. v. Rice, 284 S.W.3d 349, 359 (Tex. 2009) (“Holding that HCBeck “provides” workers’ compensation, even when it has not purchased the insurance directly, would allow multiple tiers of subcontractors to qualify as statutory employers entitled to the exclusive remedy defense. 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”).

16 See Pride v. Liberty Mutual Insurance Co., 2007 U.S. Dist. LEXIS 40833, *2 (E.D. Wis. 2007) (holding that Wisconsin Worker’s Compensation statute does not preclude an injured worker at a project from bringing tort claims against subcontractors on the same project enrolled in an OCIP program who were not his employer); Culp v. Archer-Daniels Midlands Company, 2009 U.S. Dist. LEXIS 32884, *12 (D. Neb. 2009) (holding the worker’s
date have taken is to deny a participant (whether an owner, general contractor, or subcontractor) in an OCIP program 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 their injury through worker’s compensation. However, at least two other courts have ruled the exclusive remedy defense is available.\(^\text{17}\)

One of the courts which ruled the exclusive remedy defense is available to a general contractor who participates in an OCIP program, the Texas Supreme Court, undertook the most extensive and comprehensive analysis of OCIPs and the exclusive remedy defense to date in *HCBeck, Ltd. v. Rice*. The opinion represents a significant step in ensuring that OCIP programs remain vital.\(^\text{18}\) Furthermore, the decision sounds consistent with the intent of OCIP programs, which are designed to promote efficiency in insurance coverage and coverage of the lowest-tiered employees.\(^\text{19}\) Even more significantly, *HCBeck* preserves the intention of parties to OCIP programs, which is typically 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

\(^{17}\) See *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009) (“A general workplace 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”); *Stevenson v. HH & N/Turner*, 2002 U.S. Dist. LEXIS 26831, *\text{39} (E.D. Mich. 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 and Motor City. This finding is buttressed by the policy underlying worker’s compensation laws in Michigan”).

\(^{18}\) *Id.* at 360, n. 1. (“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”).

\(^{19}\) *Id.* at 359-360. (“But if 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”).
represents a step in the right direction toward ensuring OCIP programs remain vital, caselaw is
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 Texas Supreme Court’s holding 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 Company* in Nebraska. This article analyzes the four main
cases to date which have addressed the question of whether an owner, general contractor, or
subcontractor who participates in an OCIP program can assert the exclusive remedy defense. Part
I briefly outlines worker’s compensation and the exclusive remedy defense. Part II examines the
*Stevenson* (Michigan), *Pride* (Wisconsin) and *Culp* (Nebraska) decisions. Part III contends that
the Texas Supreme Court in *HCBeck* correctly answered the question of whether an owner,
general contractor, or subcontractor who participates in an OCIP program can assert the
exclusive remedy defense. This article concludes that future courts should follow the *HCBeck*
decision and rule that owners, general contractors, and subcontractors who participate in an
OCIP program be permitted to successfully assert the exclusive remedy defense upon an
evidentiary showing that it was an 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. WORKER’S COMPENSATION AND THE EXCLUSIVE REMEDY DEFENSE

Today, each of the 50 states has its own worker’s compensation system which
compensates employees who are injured arising out of or in the course of employment. The
advent of worker’s 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.\textsuperscript{20} The goals of worker’s compensation originally was to ensure compensation was provided to injured workers and to help reduce the costs related to workplace safety.\textsuperscript{21} In exchange for swift compensation, employers were granted immunity from tort actions for work-related injuries.\textsuperscript{22}

Thus, an employee who is injured within the scope of his or her employment under a state worker’s compensation law is generally limited today to his/her exclusive remedy of worker’s compensation\textsuperscript{23} unless a recognized exception under that state’s law applies, such as the dual capacity exception,\textsuperscript{24} parent-sibling exception,\textsuperscript{25} intentional tort exception,\textsuperscript{26} or suits by third

\textsuperscript{20} See Note, Exceptions to the Exclusive Remedy Requirements of Workers’ Compensation Statutes, 96 Harv. L. Rev. 1641, 1641-1642 (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”).

\textsuperscript{21} 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”).

\textsuperscript{22} 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”).

\textsuperscript{23} Id. at 1642-1643. (1983) (“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”).

\textsuperscript{24} Id. at 1649. (The dual capacity doctrine interprets “the exclusive remedy rule to bar only suits based on duties stemming from the employment 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”).

\textsuperscript{25} Id. at 1649-1650. (“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
parties against employers for contribution and indemnity. As described earlier, the four courts who have ruled on whether the exclusive remedy defense of worker’s compensation is available to an owner, general contractor, or subcontractor participated in an OCIP program have arrived at varying decisions.

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 case which addressed 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 the Stevenson v. HH & N/TURNER decision. In Stevenson, a subcontractors’ employee was injured in a slip and fall injury on snow and ice on an outdoor project (“Comerica Park Project”) embarked upon by the Detroit Tigers, Detroit/Wayne

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”).

26 Id. at 1650-1651. (“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”).

27 Id. at 1651-1652. (The exception of “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”).

County Stadium Authority, the City of Detroit, and the Detroit Downtown Development Authority.\textsuperscript{29} The Detroit Tigers, the owner of the project, contracted with Defendant HH & N/Turner, a joint venture comprised of two entities, for HH & N/Turner to be Construction Manager of the Project.\textsuperscript{30} HH & N/Turner then subcontracted with Motor City Electric to furnish electrical work at the Project.\textsuperscript{31} An employee of Motor City Electric, the subcontractor, was injured in the slip and fall injury and asserted that HH & N/Turner was negligent in failing to implement reasonable safety precautions to protect workers from the danger of snow and ice on the premises.\textsuperscript{32}

The Detroit Tigers, the owner of the project, established an OCIP program which provided, at the owner’s expenses, comprehensive general liability and worker’s compensation insurance to all contractors, properly enrolled subcontractors, and their employees working at the Project.\textsuperscript{33} Participation in the OCIP program by the general contractor and subcontractor was optional, not mandatory.\textsuperscript{34}

The Court held HH & N/Turner could successfully assert the exclusive remedy defense, citing both the policy behind both Michigan worker’s compensation law and OCIP programs in general.\textsuperscript{35} The Court examined the Michigan worker’s compensation statute and cited

\textsuperscript{29} Id. at *2.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at *8.
\textsuperscript{33} Id. at *5.
\textsuperscript{34} Id. at *44.
\textsuperscript{35} Id. at *37.
Michigan’s statutory policy, which expressly allows an owner of a project to issue a separate worker’s compensation policy to cover all employers and employees working with the project. In addition, the Court correctly engaged in an analysis of the benefits received by the OCIP program and noted the fact that both the Plaintiff and the owner benefited from the program. In this case, Plaintiff received the benefit of guaranteed compensation through the subcontractor who participated in the OCIP freely and the owner was able to receive the benefit of coordination of risk management and avoid the effect of litigation which could potentially cripple the project.

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. Although the Stevenson Court lauded the benefits of OCIPs, another Midwestern court would undercut them just five years later and plant the seeds of successful challenges to OCIPs.

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

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36 *Id.* at *42. (“It is clear that the Michigan Legislature determined that in the relatively finite number of large construction project, 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”).

37 *Id.* at *43. (“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”).

38 *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”).

39 *Id.* at *39. (“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 and Motor City”).
Five years later, the United States District Court for the Eastern District of Wisconsin would strike a blow against OCIPs in the *Pride* decision. In *Pride*, the Plaintiff incurred personal injuries when he fell while working on the Lambeau Field Redevelopment Project.\(^\text{40}\) Lambeau Field Redevelopment, LLC, the owner of the project, created an OCIP and obtained a policy issued by Liberty Mutual Insurance Company.\(^\text{41}\) Both the general contractor of the project, Turner Construction Company, and a subcontractor, Havens Steel, participated in the OCIP program and all the subcontractors were named insureds on the policy.\(^\text{42}\) 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.\(^\text{43}\)

In contrast to *Stenvenson*, which was cited by the Defendants, the Court in *Pride* held that the exclusive remedy rule could be asserted only by employers, not other entities who participate in an OCIP program.\(^\text{44}\) The Court’s rationale in its decision centered around two bases – legislative intent and an analysis of the purposes of OCIPs.

Examining legislative intent, the Court reasoned that if the Wisconsin Legislature truly intended the owner of an OCIP to be deemed the sole employer of any employee working for any entity on the project, it would explicitly state so.\(^\text{45}\) In addition, the Court noted that the OCIP


\(^\text{41}\) *Id.* at *4.

\(^\text{42}\) *Id.* at *1-2.

\(^\text{43}\) *Id.* at *1.

\(^\text{44}\) *Id.* at *13.

\(^\text{45}\) *Id.* at *7. (“If the legislature had truly intended to allow employers at a construction site to bundle together their worker’s 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 injured on that project”).
program still treats each contractor as a separate insured, and thus that each contractor would still be considered a separate entity.\textsuperscript{46}

The \textit{Pride} court also examined the purposes behind OCIPs, and dismissed the benefits of OCIPs compared to Wisconsin worker’s compensation law. While the \textit{Pride} court acknowledged that OCIPs provide costs savings to participants,\textsuperscript{47} it rejected the contention that an entity’s participation in an OCIP “effected a watershed change in worker’s comp law.” \textsuperscript{48} The court also expressed skepticism as to how OCIPs could provide for a less expensive insurance program which provides more coverage.\textsuperscript{49} Finally, the court also cited the rationale that the Plaintiff did not explicitly bargain away any of his rights to the participants in the OCIP.\textsuperscript{50}

However, at no point in the \textit{Pride} decision did the Court analyze the actual language of the applicable contractual documents between the owner, general contractor, and subcontractors involved in the case.

\textsuperscript{46} \textit{Id.} at *7-8. (“Instead of grouping the contractors together, however, the OCIP treats each contractor as a separate insured. This suggests that, while the state allows a developer of a large construction project to save costs and headaches by obtaining an OCIP, each contractor is still considered a separate entity”).

\textsuperscript{47} \textit{Id.} at *8. (“By all accounts, OCIPs provide cost \textit{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”).

\textsuperscript{48} \textit{Id.} (“While OCIPs apparently have a streamlining effect and allow for certain cost savings, such benefits appear rather pedestrian in relation to the defendants’ suggestion that OCIPs have effected a watershed change in worker’s comp law”).

\textsuperscript{49} \textit{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”).

\textsuperscript{50} \textit{Id.} at *12. (“There 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 \textit{quid} without any additional \textit{quo} going to the injured employee”).
While the courts in *Stevenson* and *Pride* at the very least acknowledged the purposes of OCIPS in their discussion of their holdings, the United States District Court for the District of Nebraska did not address any policy issues concerning OCIPS in the *Culp* decision.

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

The decision of the United States District Court for the District of Nebraska in *Culp v. Archer Daniels-Midlands Company* stands as an ominous one for the future of OCIPS in Nebraska. In *Culp*, the Plaintiff, an employee of Jacobs Field Services North America (“Jacobs”), incurred personal injuries while working at an Archer Daniels-Midlands Company (ADM) agricultural facility. Jacobs and ADM were both contractual parties under a “Contractor’s Agreement” where Jacobs, as an independent contractor, would perform certain industrial services which required Jacobs’ employees to enter upon ADM’s property. The “Contractor’s Agreement” included a provision which required Jacobs to maintain worker’s compensation insurance for injuries to its employees occurring on ADM’s premises.

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52 *Id.* at *2.*

53 *Id.* at *2-3.* The insurance provision stated: “IX. INSURANCE

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.

A. 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 an OWNER by an employee of CONTRACTOR under theory of “Borrowed Servant” or “Alternate employer” will be treated as a claim against CONTRACTOR …”
However, an “Insurance Addendum to Contractor’s Agreement” between Jacobs and ADM mandated that Jacobs participate in an OCIP managed by ADM. Under Nebraska caselaw, for the purposes of worker’s compensation, an employer does not include an owner who requires his contractor to take out worker’s compensation insurance. Thus, if the owner required the contractor/subcontractor to obtain workers’ compensation insurance, then the owner would not be considered a statutory employer; however, if that obligation was relieved, it would be considered a statutory employer.

Focusing both on the “Contractor’s Agreement” and “Insurance Addendum to Contractor’s Agreement,” the Plaintiff argued that the Contractor’s Agreement required the contractor/subcontractor to obtain worker’s compensation insurance, and that the Addendum only had the effect of describing the manner in which Jacobs, the contractor, was to obtain

54 Id. at *3-5. 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 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 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 representations, 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 to the extent said paragraphs refer and relate to the purchase of Commercial General Liability insurance and Workers Compensation including Employer’s Liability insurance …”

55 Id. at *10. (“As we construe this section [Neb. Rev. Stat. § 48-116] the word ‘employer’, as used therein, does not include an owner who requires his contractor to take out compensation insurance, and neither does it include a contractor who sublets and requires his subcontractor to take out such insurance.”) Hiestand v. Ristau, 135 Neb. 881, 284 N.W. 756 (1939).
workers’ compensation insurance.\textsuperscript{56} ADM argued in response that the Addendum relieved Jacobs’ obligation to obtain worker’s compensation insurance, and thus should be afforded the exclusive remedy defense.\textsuperscript{57}

Despite the fact that the “Insurance Addendum to Contractor’s Agreement explicitly stated that 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”\textsuperscript{58} and clearly states participation in the OCIP satisfied the requirement to obtain worker’s compensation insurance, the Court summarily stated that the contractor, Jacobs, “was, in reality, obligated to be insured under the contractual arrangement between the parties” since the Addendum made Jacobs’ participation in the OCIP program mandatory.\textsuperscript{59}

Therefore, the Court essentially ruled that the owner of the OCIP could not be considered Plaintiff’s statutory employer and thus the exclusive remedy defense was inapplicable.\textsuperscript{60} The Culp Court not only in effect summarily dismissed the unambiguous language in the Insurance Addendum, it declined to address any of the policy reasons behind OCIPs nor did it give effect to the intention of the parties which was for the owner (ADM) to provide insurance through the OCIP. Even despite the fact the owner’s insurance company of the OCIP paid worker’s

\begin{footnotes}
\footnotetext{56}{Id. at *11.}
\footnotetext{57}{Id. at *10-11.}
\footnotetext{58}{Id. at *6.}
\footnotetext{59}{Id. at *11-12.}
\footnotetext{60}{Id. at *14.}
\end{footnotes}
compensation premiums\textsuperscript{61}, the \textit{Culp} Court still incorrectly held the exclusive remedy defense did not apply.

Despite setbacks for OCIPs in the \textit{Pride} and \textit{Culp} cases, the Texas Supreme Court delivered the most comprehensive analysis of OCIPs in the \textit{HCBeck} decision in 2009.

\textbf{IV. THE OCIPS STRIKE BACK: THE HCBECK DECISION}

In 2009, the Texas Supreme Court in \textit{HCBeck, Ltd. v. Rice} reversed the trend of \textit{Pride} and \textit{Culp} in holding that under the Texas worker’s compensation statute, a general contractor who, by use of a written agreement (OCIP), “provides” worker’s compensation insurance to a subcontractor’s employees is entitled to assert the exclusive remedy defense.\textsuperscript{62} \textit{HCBeck} provides future courts with a detailed roadmap in analyzing both statutory and policy issues surrounding OCIPs.

In \textit{HCBeck}, the owner of a company constructing an office campus (FMR Texas Ltd.) contracted with HCBeck, Ltd. to work on the construction project.\textsuperscript{63} The Plaintiff (Charles Rice), an employee of a subcontractor (Haley Greer), incurred personal injuries while working on the construction project.\textsuperscript{64} A “Construction Management Agreement” required HCBeck (the general contractor) and all subcontractors working on the project (including Haley Greer) to enroll in the

\textsuperscript{61} Id. at *13-14. (“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”).

\textsuperscript{62} HCBeck, Ltd. v. Rice, 284 S.W.3d 349, 350 (Tex. 2009).

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 351.
OCIP, which was to be administered by FMR Texas Ltd. (the owner).\textsuperscript{65} Pursuant to that same Agreement, the owner secured worker’s compensation insurance covering the entire project and also paid the premiums.\textsuperscript{66} In the event of the owner terminating the OCIP, the Agreement required the general contractor to secure, at the owner’s cost, other insurance covering itself and all subcontractors and employees at the same level as the workers’ compensation coverage required in the OCIP.\textsuperscript{67} A subcontract between the general contractor and subcontractor (Haley Greer) incorporated the “Construction Management Agreement” into that subcontract.\textsuperscript{68}

The Plaintiff argued that the subcontract between the general contractor and subcontractor obligated the subcontractor – not general contractor – to provide its own insurance coverage if the owner terminated the OCIP.\textsuperscript{69} In addition, since the general contractor paid no premiums for the insurance of the subcontractor’s employees, the Plaintiff also argued that the

\textsuperscript{65} 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 ….”

\textsuperscript{66} Id. at 351.

\textsuperscript{67} Id. at 351, 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.”

It further states:

“If [FMR] elects to exclude this Agreement, or any portion thereof, from the OCIP or for any reason [FMR] is unable to unwilling to furnish [the OCIP] … the Construction Manager shall secure such insurance at the Owner’s cost ….”

\textsuperscript{68} Id. at 351.

\textsuperscript{69} Id.
general contractor did not “provide”70 insurance and was not qualified as his statutory employer under Texas law.71 The general contractor, on the other hand, argued it was entitled to assert the exclusive remedy defense72 since the “Construction Management Agreement” specified that the OCIP “shall” apply to all work performed by the general contractor and subcontractor 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.”73

The Texas Supreme Court engaged in arguably the most comprehensive analysis of OCIPs to date. The Court focused on four distinct points in ruling that a general contractor is entitled to assert the exclusive remedy defense when it participates in an OCIP program.74 First, the Court carefully analyzed the text of the contract language of the “Construction Management Agreement” and the subcontract between the general contractor and subcontractor and the effect of the contractual documents if the owner terminated the OCIP program75; second, the Court

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70 Tex. Lab. Code § 408.001(a) states as follows:

“Recovery of worker’s 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.”

In addition, Tex. Lab. Code § 406.123(a) states as follows:

“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.”

71 Supra note 62 at 351.

72 Id.

73 Id.

74 Id. at 350.

75 Id. at 352-354.
cited the interest of the general contractor in maintaining its statutory defenses; third, the Court discussed the intent and purposes of the Texas Worker’s Compensation Statute; and finally, and most significantly, discussed the potential ramifications and effects of a contrary ruling to the future of OCIP programs.

One of the Plaintiff’s arguments was that in the event of an OCIP termination, the obligation to obtain worker’s compensation insurance would be placed upon his own employer (the subcontractor) and not the general contractor. However, addressing the first point and examining the contract documents, the Court noted that the subcontract between the general contractor and subcontractor specifically required the parties to refer to the “Construction Management Agreement” between the owner/general contractor, which places the responsibility of obtaining worker’s compensation insurance on the general contractor if the OCIP is not in force. The Court also disposed of Plaintiff’s argument that the general contractor did not “provide” worker’s compensation insurance since it did not obligate itself to pay the premiums for the Plaintiff’s insurance, since Texas law does not require a general contractor to actually pay for it directly.

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76 Id. at 354.
77 Id. at 355-359.
78 Id. at 359-360.
79 Id. at 353.
80 Id. at 353.
81 Id.
82 Id. ("HCBeck complied in all respects with the provision in the Act that allows it to enter into a written agreement to provide workers’ compensation insurance to its subcontractors and their employees. TEX. LAB. CODE § 406.123(a). That provision 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").
Second, the Court also addressed the issue of the interest of the general contractor to preserve its statutory defenses. The dissent argued that “contracting for” insurance coverage does not equal “providing” under the statute, and contended the contractual documents provide no assurance that the general contractor would not abandon its obligation under the contract and leave the employee at risk of an uncovered injury. However, the Court responded that under Texas law, there is no guarantee that any employer will provide workers’ compensation for employees (although public policy encourages it) and one of the incentives for employers to provide worker’s compensation insurance is the benefit of the exclusive remedy defense – which it is not entitled to if it does not provide worker’s compensation insurance.

In its third main point, the Court addressed the intent and purpose of the Texas worker’s compensation statute. In 1983, the statute was amended to state that “prime contractors” could enter into written agreements to provide workers’ compensation to subcontractors. 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

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83 *Id.* at 354.

84 *Id.*

85 *Id.*

86 *Id.* at 355-359.

87 *Id.* at 356-357. *Tex. Gov’t Code § 311.023* states as follows:

“A subcontractor and prime contractor may make a written contract whereby the prime contractor will provide workers’ compensation benefits to the sub-contractor 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 sub-contractor 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.”
employer. The Court also acknowledged a series of cases in which the Texas Supreme Court recognized a “decided bias” for coverage, and recognized an interpretation of the statute which favors blanket coverage to all workers on a site.  

Finally, and most significantly, the Court cited 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. The Court noted that the rule is consistent with the purpose of OCIPs, which is to minimize the risk that employees of subcontractors would be left uncovered, and remarked that if actually purchasing the worker’s compensation insurance would be the only way to receive the benefit of the exclusive remedy defense, then it would make no sense 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 policies on the same employees at the same work site.” Also, the Court also mentioned the rationale that a contrary rule would lead to the result of duplicative coverage and inefficient use of resources.

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88 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”).

89 Id. at 358-359. (“These 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”).

90 Id. at 359-360.
91 Id. at 359.
92 Id. at 359-360.
93 Id. at 360.
With the question of whether the exclusive remedy defense should be available to a
general contractor or subcontractor participating in an OCIP program is beginning to emerge in
courts throughout the country, the Court in *HCBeck* gives 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 comprehensively examined the text of the contractual
documents at issue and the effect of those documents in the event that OCIP program terminated
during the middle of the project. Finally, the *HCBeck* Court addressed the policy surrounding
workers’ compensation insurance, which allows 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 ruled in its holding that 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 which
address this issue should follow the *HCBeck* decision and hold that owners, general contractors,
and subcontractors who participate in an OCIP program be permitted to successfully assert the
exclusive remedy defense upon an evidentiary showing that it was an 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.

Such a rule not only preserves the purposes of OCIP programs, but the rule would most
importantly preserve the intention of all of the parties in an OCIP. One of the fundamental rules
in the construction of insurance contracts, as a general principle, is that “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." The intention of the parties, which should be a cardinal principle to be upheld, would be best respected under such a rule – and also truly prevent a wrap up of insurance “wrap-ups.”

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94 HOLMES’ APPLEMAN ON INSURANCE 2d, § 5.1 at 10.