

*In some jurisdictions, the procurement of insurance under a wrap-up program has resulted in the extension of the exclusivity rule to other entities involved in a wrap-up project, such as the owner, general contractor, and even other subcontractors. Not all courts agree, however.*

# Application of the Workers Compensation Exclusivity Rule Under Wrap-Up Insurance Programs

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## **Introduction**

In most states, employers are legally required to purchase workers compensation insurance for the benefit of their employees.<sup>1</sup> The related expense for this coverage can be significant, especially in the construction industry, which is considered to have some of the highest workers compensation insurance costs of any industry.<sup>2</sup> In fact, a construction company's workers compensation premiums can consist of as much as five percent of its employment-related expenses.<sup>3</sup> Naturally, this is a consequence of the risk of bodily injury involved in construction work as compared to most other

industries (i.e., the greater the risk of bodily injury, the higher the insurance premiums).

Nevertheless, while the cost of insurance can be significant, the benefit afforded to the employer by acquiring "comp" coverage is also substantial. By purchasing workers compensation insurance, employers receive tort immunity for work-related injuries to their employees. This means that employees cannot sue their employers for negligence but instead must accept, as the sole remedy, payment of benefits set forth under the relevant state or federal<sup>4</sup> workers compensation statutes.<sup>5</sup> This statutory restriction is known as the "exclusivity rule." Under this rule, employee recovery is confined to medical expenses and injury

(or death) benefits, which are based on the gravity of the injury and the resulting impact on wages.<sup>6</sup> Not surprisingly, just as construction contractors endure some of the highest costs for workers compensation, they are also some of the largest beneficiaries of the exclusivity rule protection.

In a traditional construction project, each contractor purchases its own liability and workers compensation insurance. Accordingly, each receives exclusivity protection from work-related claims involving their respective employee(s).<sup>7</sup> However, an alternative to insuring construction-related liability by conventional methods is to obtain coverage through a project-specific consolidated insurance program, commonly referred to as a “wrap-up” program. Unlike the standard insuring approach where each company buys its own insurance, a wrap-up program insures the owner and all enrolled contractors<sup>8</sup> under the same group of policies, including workers compensation insurance.<sup>9</sup> In certain instances, the procurement of insurance under a wrap-up has resulted in the derivative benefit of an extension of the workers compensation exclusivity rule beyond merely the direct employer to other entities involved in a wrap-up project, such as the owner, general contractor, and even other subcontractors. Not all courts have agreed, however, that exclusivity protection is expanded solely by virtue of the fact that a construction project is insured through a wrap-up.

This article examines the reasoning of the courts confronting the scope of the exclusivity rule in the wrap-up context, both in cases where a broad application is applied and in cases where it is rejected. As a backdrop for this analysis, a discussion of certain general concepts involving workers compensation and wrap-up insurance is warranted.

## Background

Workers compensation in the United States has its origins in the labor movement of the early 20th century “progressive era,” which sought to improve working conditions and increase workers’ rights. Prior to the passage of workers compensation laws, employees had to overcome overwhelming obstacles in order to recover any payment for work-related injuries.<sup>10</sup> This was due to a legal precedent applied by the majority of courts, which favored big business. Accordingly, courts often adhered to “fellow-worker”<sup>11</sup>

and “contributory negligence” doctrines, which absolved employers from liability when a coworker of the injured person, or the injured party him- or herself, shared any blame for the injuries. Workers were thus required to show that the employer was solely responsible for the harm incurred. Workers also had to defeat employer claims that the injury in question involved an “assumption of risk,” i.e., that the employees knew and understood the dangers of the particular job for which they were hired and accepted such dangers as part of employment. This doctrine required employees to prove that the cause of injury was not an apparent danger associated with the job.<sup>12</sup>

The labor movement brought with it an evolution in thinking with regard to the protection of employees injured in the course of performing their work-related duties. A shift in the pendulum occurred from a system designed to protect industry to a system designed to protect the worker. To counter the legal inequities that often left employees without just compensation for work-related injuries, legislation was eventually passed throughout the 50 states that required employers to pay fair compensation to injured workers, irrespective of who was at fault. Wisconsin was the initial state to successfully pass a bill, in 1911, and Mississippi the final state to adopt a “comp” statute in 1948.<sup>13</sup> The obligation imposed by most states to have insurance for the necessary payment of benefits to injured workers either was included in the initial versions of the respective statutes or added later.<sup>14</sup>

## The Workers Compensation *Quid Pro Quo*

Workers compensation law is principled on an exchange of rights between employers and employees; specifically, the exclusive remedy protections afforded to employers and the guaranteed “no-fault” workers compensation benefits provided to employees. This exchange of rights is referred to as the *quid pro quo*.

The *quid* for the employer, i.e., the limitations on liability set forth under prevailing workers compensation laws, can be significant due to the fact that an award in a negligence action has the potential of being substantially higher than an amount recoverable under workers compensation (especially in cases where the injury is significant, including death, and the liability of the employer is not in doubt). The *quo* is equally significant, because employees are entitled to workers compensation benefits even when

the employer is not to blame for the injury, so long as the harm is considered to be “work-related.”<sup>15</sup> In fact, workers are entitled to compensation benefits even when they cause their own injuries, no matter how careless their actions, thus receiving payment in instances where the courts would otherwise afford no remedy. An additional advantage for employees is that they are given the benefit of the doubt when determining whether a particular loss is considered to be “work related.” Examples of such liberal construction include injuries sustained off-site during work breaks and injuries sustained after hours at “work sponsored” social functions.<sup>16</sup> The broad interpretation of benefit entitlements is generally viewed to be a matter of public policy and public welfare because the injured party will be temporarily or permanently unable to work or may not be able to perform the same (higher-earning) job duties that could be performed prior to the injury, thereby diminishing (or eliminating) earning capacity.

Recognition of the importance of the *quid pro quo* has often been noted by courts in their decisions involving workers-compensation-related disputes. California, for example, acknowledged this principle in *Goldman v. Wilsey Foods Inc.*, stating:

This [workers compensation] scheme, exclusive of all other statutory and common law remedies, reflects a legislated “*quid pro quo*.” Having balanced the sacrifices and gains of employers and employees, the Legislature created a workers’ compensation scheme reflecting a fundamental social compromise, in which employers accepted liability without fault to pay compensation to injured employees in exchange for exemption from employees’ civil actions for damages.<sup>17</sup>

Virginia has similarly stated:

We resolve the question [at hand] by reference to the fundamental nature of the workers’ compensation scheme. As frequently stated, the Workers’ Compensation Act (the Act) is based upon a *quid pro quo*, a societal exchange wherein employees are provided a purely statutory form of compensation for industrial injuries. The remedy is modest, but relatively certain. Claimants are free from the necessity of

proving negligence and resisting such affirmative defenses as contributory negligence and assumption of the risk. In exchange, employers under the canopy of the Act are sheltered from common-law liability in tort.<sup>18</sup>

Summarily stated, the *quid pro quo* is the foundation upon which workers compensation laws are based.

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#### **The “Statutory Employer” Rule**

In keeping with the *quid pro quo*, the application of the exclusivity rule is usually limited to the direct employer of the injured worker. Therefore, except in a small number of states, the exclusivity rule does not prohibit an injured party from filing a negligence lawsuit against a company other than his or her direct employer, such as a project owner or other contractors that are purportedly responsible for the harm incurred.<sup>19</sup> Likewise, nonexempt entities are not subject to the “no-fault” rule imposed under workers compensation laws and therefore can raise defenses as to responsibility for the alleged injuries.<sup>20</sup>

There is, however, an exception to this general rule in the instance where the company directly employing the injured worker does not procure the required workers compensation insurance (or is not sufficiently self-insured). In such cases, an overseeing entity, such as a general contractor, may be held to be a “statutory employer” (also referred to as a “principal employer”) and required by law to pay the injured employee’s workers compensation benefits. States impose this statutory obligation on certain upstream companies in order to provide a safeguard for workers in the event that an actual employer fails to abide by its obligation. As one court has stated:

The apparent legislative purpose of constituting the principal contractor a statutory employer is to prevent evasion of the [workers compensation] act; to protect the employees of subcontractors who are not financially responsible; to induce all employers to carry

insurance; or to make the principal contractor a guarantor of the personal injury obligations of the subcontractor.<sup>21</sup>

When an overseeing entity assumes responsibility for workers compensation payments, thus becoming the statutory employer, it likewise receives the protections of the exclusivity rule. There is an intuitive logic behind the extension of this entitlement, insofar as the company that actually provides the injured employee with workers compensation benefits receives the right of exclusivity, thereby maintaining the purpose of the *quid pro quo*. Conversely, and consistent with this reasoning, a direct employer that neglects to obtain the required workers compensation typically surrenders the right of exclusivity and is thereby exposed to tort liability.<sup>22</sup>

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#### Origins of Wrap-Up Programs

Wrap-up programs were originally used to insure the construction of World War II defense plants. Over the next five decades, the use of wrap-ups remained relatively limited, and they were purchased mainly for government work such as transportation construction projects. In the last 10 to 15 years, however, wrap-ups have become an increasingly popular method of insuring large-scale construction projects (typically \$100 million or more), including nongovernment jobs.<sup>23</sup> The proliferation of these programs is due largely to an increase in availability and affordability, given that a greater number of insurers have entered the wrap-up market.<sup>24</sup>

In many ways, the increased supply of wrap-up coverage is the result of an increase in legal claims involving faulty and defective residential construction,

most notably with regard to condominium construction. Many insurers stopped insuring residential construction work, which affected the availability of insurance for contractors. As a result, more project owners and general contractors are looking to wrap-ups to insure their projects.<sup>25</sup>

#### Fundamentals of Wrap-Up Programs

Wrap-ups are generally divided into two categories: those where the insurance is purchased and controlled by the project owner, known as "Owner Controlled Insurance Programs" (OCIP), and those where the insurance is purchased and controlled by the general contractor, known as a "Contractor Controlled Insurance Programs" (CCIP). The cost for procurement of the wrap-up insurance, borne by the party purchasing the coverage, is typically offset by a reduced contract bid-price by the contractors enrolled in the program.

The subcontractor's price deduction, accounting for the cost of insurance, is usually handled in one of two ways: the subcontractor is asked to either submit a bid that reflects the removal of the insurance costs (known as the "net bid" method), or to submit a bid that includes insurance costs that are later subtracted out of the bid price by the owner or general contractor (known as the "gross bid" method).<sup>26</sup> The net bid approach is easier for owners or general contractors because they do not have to undertake the administrative burden of determining the appropriate deduction for each contractor. The gross bid method, alternatively, ensures that the true cost of insurance is actually being removed from the bid price (i.e., under the net bid approach it is hard to confirm whether the subcontractor has removed 100 percent of the insurance cost from its bid submission). Awareness of the actual amount of insurance removed from the subcontractor's bid pricing in turn allows the owner to track the amount of the insurance cost savings achieved by utilizing a wrap-up program.

#### Advantages of Wrap-Up Programs

There are several advantages to wrap-up insurance programs, which have made them an attractive alternative to the traditional means of insuring a construction project. With respect to workers compensation, the advantages include lower premiums and increased safety through coordinated project-safety programs that are often implemented under

wrap-up projects (which in turn affect the cost of workers compensation coverage).<sup>27</sup> Other benefits include uniformity of policy limits and insuring provisions,<sup>28</sup> greater flexibility in the selection of subcontractors,<sup>29</sup> and assurance that the insurance is properly maintained (i.e., there is no risk that a project subcontractor will cancel its policy midproject or fail to timely pay the premiums). The key benefit of such programs, however, is the avoidance of project disruptions that occur when owners, contractors, and subcontractors sue each other (and each other's insurance companies) when a loss occurs on the project.

When all parties are covered by the same insurance, the need for the project participants to finger-point and seek indemnity from one another is eliminated because the money utilized to compensate the loss comes from the same source: the wrap-up policy. Disputes between insurers that cover the various parties to the construction project are also avoided. Thus, there is no disagreement over priority between insurers or whether a particular party is entitled to additional insured coverage in the underlying case. The project continues smoothly, and overall costs are reduced, as the attorney fees typically associated with litigation between contractors (and their insurers) are eliminated. Wrap-ups also facilitate cooperation among contractors. Contractors will undertake a unified defense against the plaintiff's claims, as opposed to the traditional strategy where blame is cast between one another, which consequently bolsters the plaintiff's case.

### **Interplay of the Workers Compensation Exclusivity Rule and Wrap-Up Programs**

As previously mentioned, a statutory employer is bestowed with the protection of exclusivity because it assumes the obligation of paying for compensation benefits as a result of the direct employer's failure or inability to do so. A twist on the statutory employer rule occurs in instances where workers compensation insurance is purchased under a wrap-up program. This is due, in large part, to the fact that the owner (in the case of an OCIP) or general contractor (in the case of a CCIP) has acquired the workers compensation insurance protecting the subcontractors' employees, thus arguably qualifying as a statutory employer in

the literal sense.

Yet, a critical distinction from the conventional statutory employer scenario is the fact that subcontractors participating in a wrap-up program are not abandoning their obligation to provide workers compensation to their employees; i.e., they are not avoiding their statutory obligation to purchase workers compensation for their workers.

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Instead, the subcontractors are required to yield control of purchasing decisions of the insurance to the project owner or general contractor as a condition of participation in the construction project. Their mere participation in the wrap-up ensures that there will be workers compensation insurance in place for their employees. Moreover, while payment for the insurance is not made directly by the project subcontractors, the subcontractors are indirectly paying for the workers compensation insurance by accepting a lower contract fee (subtracting the insurance costs from their contract fees).

These distinctions and others have caused debate and friction between wrap-up participants, who on the one hand claim to be statutory employers and project employees and on the other seek to pursue tort claims against contractors other than their direct employers.

As described in more detail below, the workers compensation quandary involving wrap-up insurance programs has been addressed by a handful of courts across the country. The outcomes are varied, as are the explanations provided by the courts in support of their particular conclusions.

## Courts Affording Exclusivity Protection

### *Outcome Based Upon "Payment" for Workers Compensation Insurance*

An expansive view of the exclusivity rule has been adopted by courts that have interpreted state workers compensation statutes to condition exclusivity protection on the "purchase" of the insurance. For example, the following statutory language is open to such an interpretation:

The provisions of this section shall not extend immunity to any principal employer from a civil action brought by an injured employee or his dependent ... unless such principal employer has *paid* compensation benefits under this chapter to such injured employee or his dependent for the injury or death which is the subject of the action.<sup>30</sup>

A literal reading of the above-cited, or similar, language supports the conclusion that an entity is entitled to "exclusivity" immunity so long as it pays for the workers compensation: "payment" being the pivotal act.

A notable case applying this rationale is *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984). In that case, the United States Supreme Court held that the general contractor, Washington Metropolitan Transit Authority, could not be sued by its subcontractors' employees for injuries sustained while working on a Metro project. Interpreting the Longshore and Harbor Workers' Compensation Act (LHWCA),<sup>31</sup> the court concluded that the general contractor satisfied the statutory definition of "employer" and thus was subject to the "exclusivity rule." It reasoned that the general contractor, as purchaser of the workers compensation insurance that protected the plaintiffs, was accordingly entitled to the benefits of the exclusivity protection:

In order to prevent subcontractor employees from going uninsured, WMATA went to the considerable effort and expense of purchasing "wrap-up" insurance on behalf of all of its subcontractors ... WMATA guaranteed that every Metro subcontractor would satisfy and keep satisfied its primary statutory obligation

to obtain workers' compensation coverage ... Under these circumstances, it is clear that WMATA remains entitled to § 5(a)'s<sup>32</sup> grant of tort immunity.<sup>33</sup>

In response to the *Johnson* ruling, Congress amended the language of the LHWCA in order to permit injured workers for whom workers compensation was obtained under wrap-up programs to pursue negligence actions against general contractors.<sup>34</sup> Yet, despite this statutory amendment, the reasoning of *Johnson* has since been applied by courts interpreting workers compensation statutes that did not incorporate the changes adopted in the LHWCA.<sup>35</sup>

Another case subscribing to the "payment" theory is *Bishel v. Connecticut Yankee Atomic Power Co.*, 771 A.2d 252 (Conn. App. Ct. 2001). This Connecticut case involved a subcontractor's employee who slipped on ice at the defendant's power plant. The employee received workers compensation paid pursuant to an OCIP established by the defendant. The defendant therefore claimed to be a statutory employer under Connecticut General Statute § 31-291. The court agreed, noting the specific intent of the legislature to protect those that pay for workers compensation:

During the discussions concerning the adoption of an amendment to § 31-291 that limited immunity for principal employers ... Representative Joseph A. Adamo responded to a question from Representative Linda N. Emons that asked whether a general contractor or a principal employer would be immune from civil liability if it paid for workers compensation insurance for its subcontractors, stating: "You're absolutely right ... *If the principal employer or the general contractor wanted to go out and buy workers' compensation insurance for four or five other subcontractors' employees at the premiums that they are today, so be it. I guess he could. And once he paid those benefits, yes, he would be immune because he's in fact the person paying the workers' [compensation] benefits.*"<sup>36</sup>

While perhaps overly literal, as evidenced by the congressional response to the *Johnson* decision (amending the LHWCA), the assessment of exclusivity protection based on payment of compensation benefits cannot be overlooked as a potential reason

on which a court may award immunity to an owner or general contractor insuring a construction project under a wrap-up program.

*Outcome Based Upon “Furnishing”  
of Workers Compensation Insurance*

Broad application of exclusivity protection also has been rendered by the Texas courts, which have interpreted the Texas Labor Statutes to afford tort claim exemption to any project entity that “facilitates” the acquisition of workers compensation insurance. Thus, a contractor need not be the actual purchaser of the coverage in order to receive immunity. Two cases in particular, *HCBeck Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009) and *Etie v. Walsh & Albert Co.*, 135 S.W.3d 764 (Tex. App. 2004), highlight the expansiveness of the workers compensation exclusivity rule as applied in Texas. The analysis of these decisions begins with an assessment of the Texas Labor Code, which provides in relevant part:

- (a) 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 ...
- (e) An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor’s employees only for purposes of the workers’ compensation laws of this state.<sup>37</sup>

In *HCBeck*, the Texas Supreme Court determined that the state labor code affords protection to a general contractor, so long as the general contractor “provides” workers compensation insurance. The case involved a subcontractor’s employee who was injured on the jobsite, collected workers compensation insurance under a wrap-up policy, and thereafter sought additional recovery from the general contractor in a negligence lawsuit. Notably, the general contractor, *HCBeck*, did not purchase the workers compensation coverage; rather, it was the owner, FMR, that purchased the insurance through an OCIP. Nevertheless, the court noted that the term “provides” does not require a party to actually pay for the insurance, but instead has a more expansive reading:

[T]he Texas workers’ compensation insurance scheme, as enacted by the Legislature, was intended to make the exclusive remedy defense available to a general contractor who, by use of a written agreement with the owner and subcontractors, provides workers’ compensation insurance coverage to its subcontractors and the subcontractors’ employees. The OCIP in this case, established and paid for by FMR pursuant to its contract with *HCBeck*, qualifies under the Act as “providing” workers’ compensation insurance to subcontractors in a manner that is consistent with section 406.123(a).<sup>38</sup>

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*It held that a contractor is entitled to statutory employer protection through the mere facilitation of insurance coverage paid for by a third party or by virtue of a promise to step in and acquire insurance if necessary.*

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The *HCBeck* court concluded that the general contractor fulfilled its obligation to “provide” workers compensation insurance by virtue of requiring its subcontractor, Haley Greer, to enroll in the OCIP and, further, by virtue of a contractual promise to procure workers compensation insurance for Haley Greer in the event that the OCIP was rescinded or otherwise no longer in place.<sup>39</sup> It held that a contractor is entitled to statutory employer protection through the mere facilitation of insurance coverage paid for by a third party or by virtue of a promise to step in and acquire insurance if necessary (even though it did not have to act upon such a promise in that particular instance).

In *Etie v. Walsh & Albert Co.*, a Texas appellate court found that a sub-subcontractor was entitled to exclusivity protection for an injury sustained by an employee of a subcontractor, thus extending the statutory employer rule to subcontractors. The interesting aspect of this case is that immunity was extended to the company *hired* by the contractor employing the

injured worker. In other words, the lower-tier subcontractor successfully asserted the exclusivity bar against the employee of a higher-tier subcontractor. Despite the fact that the sub-subcontractor could not be construed in any way to be an employer of the injured worker, the appellate court nevertheless interpreted the Texas labor code to require tort immunity to all contractors enrolled in a wrap-up, regardless of the tier they occupy or their connection to the injured worker:

[T]he purposes of the Act are best served by deeming immune from suit all subcontractors and lower tier subcontractors who are collectively covered by workers' compensation insurance. *We hold that the Act's deemed employer/employee relationship extends throughout all tiers of subcontractors when the general contractor has purchased workers' compensation insurance that covers all of the workers on the site. All such participating employers/subcontractors are thus immune from suit. We further hold that the participating employees are fellow servants, equally entitled to workers' compensation benefits and equally immune from suit.* By so holding, we do not abrogate the right of an injured worker to sue a subcontractor or its employees when that subcontractor retains its status as an independent contractor by choosing not to participate in workers' compensation coverage. Nor do we abrogate the right of an injured worker to sue a third-party who is not a covered employee, e.g., a delivery person whose negligence causes an injury to a covered employee. We simply extend the statutory employer/employee relationship to lower tier subcontractors when they are covered by workers' compensation insurance.<sup>40</sup>

By virtue of its participation in the wrap-up program, each contractor, subcontractor and sub-subcontractor was considered to have "provided" the workers compensation coverage. Thus, "[b]ecause all tiers of subcontractors here *provided* and were covered by workers' compensation coverage, Etie's exclusive remedy was the workers' compensation benefits he received."<sup>41</sup>

The *Etie* decision offers the most expansive interpretation of a workers compensation statute possible

and establishes an unprecedented advantage to project contractors of every tier. This greatly incentivizes wrap-up participation in Texas, albeit to the detriment of the project workers.<sup>42</sup>

#### *Outcome Based upon Purpose of a Wrap-Up Program*

Expansive application of the exclusivity rule has also been found to be consistent with the objectives of a wrap-up insurance program, which, as previously mentioned, are primarily to minimize costs and disruptions associated with litigation between contractors and their individual insurers when an injury occurs at the project (i.e., to coordinate the risk management associated with the particular construction project). This paramount objective of wrap-up insurance is thought to be frustrated if a project contractor or owner can be personally sued for a purported act of negligence committed against another project contractor's employee, thereby instigating cross-claims by the contractors in an attempt to apportion blame elsewhere.

In *Stevenson v. HH & N/Turner*, No. 01-CV-74705-DT, 2002 U.S. Dist. LEXIS 26831 (E.D. Mich. Apr. 22, 2002), the Federal District Court for the Eastern District of Michigan expressed this rationale in finding that a subcontractor's employee, insured through an OCIP, could not sue the project owner for injuries involving deficiencies in jobsite safety:

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. Indeed, the Owner, under the OCIP, insures the entire bundle of property interests on the work site for the mutual benefit of all employers working on the site ... *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 ...*<sup>43</sup>

The *Stevenson* decision illustrates an analysis of the scope of exclusive remedy protections based upon the principles behind wrap-up programs and work-

ers compensation benefits. The court's approach in *Stevenson* is distinct from the conclusions rendered in *Johnson*, *Bishel*, *HCBeck*, and *Etie*, which focused instead on a dissection of the language of the particular workers compensation statutes at issue.

#### *Outcome Based upon the Quid Pro Quo*

Alternatively, some courts have considered whether there is a true *quid pro quo* when determining whether a wrap-up contractor enjoys the right of exclusivity protection. As with an assessment based on the intended purpose of wrap-up coverage, consideration of the *quid pro quo* looks beyond the language of the particular "comp" statute at issue. The *Stevenson* decision made reference to the *quid pro quo* exchange as an additional basis for conveying exclusive remedy protection to the general contractor:

When Motor City enrolled in the OCIP and accepted the Owner's payment of its workers' compensation premium, Plaintiff received the benefit of guaranteed compensation by the Owner for any personal injury sustained while working on the Project (*quid*). 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*).<sup>44</sup>

The earlier case of *Washington Metropolitan Area Transit Authority v. Johnson* also noted that its conclusion was in harmony with the *quid pro quo*. It determined that the plaintiff had ensured that there was workers compensation coverage in place for the Metro project employees and thereby was entitled to exemption from negligence actions brought by project workers: "It is reasonable to infer that Congress intended the term 'employer' to have [a] broad meaning ... This is particularly so inasmuch as granting tort immunity to contractors that comply with § 4(a) is consistent with the *quid pro quo* underlying workers' compensation statutes."<sup>45</sup>

#### **Courts Denying Exclusivity Protection**

Courts subscribing to the narrow point of view that exclusive remedy protection is not automatically extended to wrap-up participants aside from the direct

employer have offered varying explanations, which are discussed below.

#### *Outcome Based Upon Voluntary (as Opposed to Obligatory) Payment of Workers Compensation Benefits*

One argument advanced in support of limiting exclusivity protection is premised upon the distinction between the *requirement* of a statutory employer to assume payment of workers compensation benefits because of a direct employer's failure to comply with its legal obligations and the *voluntary* payment of workers compensation premiums that is accepted by the owner or general contractor under a wrap-up program.

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*An owner or contractor that chooses to purchase the workers compensation coverage under a wrap-up program, with the purpose of achieving certain financial benefits, does not enjoy the same protections as a party that has the obligation to afford workers compensation insurance thrust upon it.*

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It is thus concluded that an owner or contractor that *chooses* to purchase the workers compensation coverage under a wrap-up program, with the purpose of achieving certain financial benefits, does not enjoy the same protections as a party that has the obligation to afford workers compensation insurance thrust upon it. In other words, the wrap-up scenario does not involve a subcontractor's breach of its obligation to acquire "comp" coverage but instead involves the owner's or general contractor's own voluntary decision to assume control of insurance procurement.

The case of *Wensel v. Boyles Galvanizing Co.*, 920 F.2d 778 (11th Cir. 1991) (interpreting Florida law) notes the dichotomy between required compensation payments and voluntary payments in its finding that the construction manager, B&V, was not entitled to

an exclusivity defense merely because the workers compensation was acquired by the project owner under a wrap-up program. Rather, the right to exclusivity immunity exists only in cases where there is a corresponding *duty* to provide a subcontractor's worker with "comp" benefits:

The Supreme Court of Florida has clearly explained that only an entity statutorily required to provide workers' compensation insurance may be an "employer" for the purpose of [immunity] ... The [Owner] OUC contractually assumed responsibility for providing workers' compensation coverage under a so called "wrap insurance" program but was under no statutory duty to do so ... Since the OUC is not an "employer" under [Florida statute], B&V cannot be an employer's safety consultant. While it is commendable that the OUC provided workers' compensation insurance and that B&V assisted, this does not entitle the [defendant] to the exclusivity defense ... In Florida, an employer is entitled to the exclusivity defense to the extent that such employer has a *duty* to provide workers' compensation coverage.<sup>46</sup>

Similar reasoning was applied in the case of *Burger v. Midland Cogeneration Venture*, 507 N.W.2d 827 (Mich. Ct. App. 1993), which involved a boiler subcontractor's employee that was injured when he slipped on a wet pipe. The employee, Burger, brought a negligence claim against the general contractor and the project owner under a theory of premises liability. The owner and contractor responded by asserting that they were Burger's statutory employers, and therefore immune from liability, on the basis that Burger received workers compensation insurance under a wrap-up program.

The court disagreed and instead found that a party is considered a statutory employer under Michigan's "comp" statute only when a direct employer is legally exempt from the requirement to procure workers compensation insurance or, alternatively, has failed in its obligation to obtain workers compensation insurance.<sup>47</sup> In this instance, the subcontractor (direct employer) was considered to be in compliance with its workers compensation obligations by virtue of the fact that it "secured" the necessary insurance for its

employees through its participation in the wrap-up policy. Moreover, because Burger's employer had complied with Michigan's workers compensation statute, the statutory employer conditions had not been met and, therefore, exclusive remedy protection was not extended to the defendants:

An employer qualifies as a statutory employer under § 171 if it contracted with another employer not subject to the act or who has not complied with § 611 of the act. To comply with § 611, an employer must secure payment of workers' compensation benefits either by being self insured, by obtaining insurance, or by insuring with the Accident Fund ... By purchasing the wrap-up policy, [the owner] complied with the requirement of § 611 that it secure payment of workers' compensation benefits by obtaining insurance. Further, by contracting with [the owner, the general contractor] complied with the requirement of § 611 that it secure payment of workers' compensation benefits by obtaining insurance. Similarly, because [the subcontractor] was a named insured under the wrap-up policy, it also complied with § 611. This being the case, neither defendant can be a statutory employer under § 171 because neither defendant contracted with someone who was not subject to the act or who had not complied with § 611, because each was subject to the act and each complied with § 611, as did [the subcontractor]. Because neither defendant qualifies as a statutory employer under § 171, neither defendant was entitled to protection under the exclusive remedy provision ....<sup>48</sup>

The *Burger* decision is similar to *Wensel* and *Black*, insofar as in each case the owner or general contractor or both were not forced to undertake workers compensation payments for the benefit of a subcontractor's injured employee. Simply stated, there was no failure on the part of the direct employer to secure workers compensation coverage, as the participation in a wrap-up satisfied this obligation.<sup>49</sup>

#### *Outcome Based upon Absence of Quid Pro Quo*

While the courts in *Stevenson* and *Johnson* concluded that there is a sufficient *quid pro quo* between a wrap-up purchaser and the project employees,

other courts have reached the opposite conclusion, finding that wrap-up procurement does not entail an exchange of rights that can legitimately be considered a true *quid pro quo*. Instead, these courts have found that a wrap-up contractor or owner essentially gives up little, if anything, to the subcontractor-employee. Therefore, the foreclosure of negligence actions by the injured worker against wrap-up participants other than the direct employer is fundamentally unfair to the injured worker. One federal court has noted this point and further commented that the owner is already benefited by cost savings achieved through an OCIP and should not receive the additional benefit of immunity without providing something to the project workers in return:

[W]hile 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 workers' comp law. 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 .... It does not matter, in other words, how various contractors on the same project decide to divy [sic] 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.<sup>50</sup>

The holding in *Pride* is based on a perspective that extension of tort immunity to other members of a wrap-up contravenes the fundamental purpose of workers compensation as an exchange of rights between the employer and employee. Applying the privileges of statutory employer status to companies that provide no greater benefit to the employee than what is received from the direct employer would in essence allow the owner/general contractor to have its proverbial cake and eat it, too. The outcome reached

in *Pride*, which contrasts the reasoning applied in *Stevenson* and *Johnson*, demonstrates that the meaning of *quid pro quo*, and what is considered sufficient give and take, are subject to differing interpretations.

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*Therefore, the foreclosure of negligence actions by the injured worker against wrap-up participants other than the direct employer is fundamentally unfair to the injured worker.*

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## Conclusion

The expansion of exclusivity protection to project owners and contractors other than the direct employer can be viewed as an unintended result of the consolidation of insurance through wrap-up programs. Wrap-up commentators and those entities that market wrap-up insurance products seldom, if ever, list the broadened scope of exclusivity protection among the advantages that a wrap-up program offers. Nevertheless, irrespective of whether the exclusivity implications are an intended or unintended consequence of wrap-ups, the importance of such implications should not be overlooked. The likelihood is that the use of wrap-up programs will continue to increase. As a result, a greater number of project owners, contractors, and workers are likely to be affected by this issue.

An adherence to the philosophy that wrap-up participants are entitled to tort immunity under the exclusivity rule can substantially reduce the potential costs associated with injury liability that contractors otherwise would endure. This could drastically impact the overall, aggregate cost of construction.

However, what is potential gain to owners and construction companies can be a significant loss to construction workers. By simply working on a project insured through a wrap-up, a decision over which the workers have no control, they potentially surrender what could otherwise be a much larger recovery for bodily injury. Notably, from the employee's perspective, there is no fundamental difference in the

relationship with the employer, the owner, and the other contractors on the project; the only change is the manner in which the workers compensation insurance is obtained. Hence, where one worker injured on an OCIP project could be preempted from pursuing recovery for negligence, another worker across town, working on a project insured through conventional means, could potentially receive a substantially higher recovery for an identical injury.

Determining the overall impact that wrap-up programs may have upon workers compensation law is difficult and perhaps premature, as there are still many jurisdictions that have not yet chimed in on the issue. Moreover, it is not unforeseeable that courts that have already rendered opinions could revisit the matter. As mentioned, the outcomes may be dictated by the language of the particular workers compensation statutes that are at issue. However, policy implications such as the fundamental premise of the *quid pro quo* and the overarching goals of wrap-up participation are also likely to be examined and re-examined by the courts. Given the significance of the potential impact upon construction industry employers and employees alike, the application of the workers compensation exclusivity rule under wrap-up insurance programs is an issue that should be closely monitored.

## Endnotes

- 1 An employer's failure to obtain workers compensation coverage is subject to fines and other penalties. However, certain states allow for some exemptions from this requirement. For example, some states will permit larger companies that meet certain financial criteria to "self-insure" their workers compensation risks (i.e., establish a separate fund for workers compensation injuries). Similarly, small companies with only a few employees, such as sole-proprietorships and partnerships, may likewise be entitled to self-insure under certain conditions. Texas is the only state that does not require an employer to purchase workers compensation insurance. If, however, a company chooses not to provide compensation insurance, it surrenders the protection of the exclusivity rule that is discussed in the body of this article.
- 2 See The Center for Construction Research and Training, *The Construction Chart Book: The U.S. Construction Industry and Its Workers*, 4th ed., (Silver Spring: CPWR, 2007): § 49.
- 3 See *id.*
- 4 Workers compensation is typically a matter of state law.

However, maritime employees are subject to federal workers compensation requirements provided under the Longshore and Harbor Workers' Compensation Act.

- 5 A number of states have an exception to the general rule that an employee cannot sue his employer for injuries sustained on the job in cases where the employer's conduct is deemed to be intentional or reckless.
- 6 The specific formula for benefit payments varies by legal jurisdiction. Most states have injury tables setting forth the appropriate compensation for a particular injury. These tables are often divided into different benefit categories such as: temporary partial, temporary total, permanent partial, and permanent total benefits. See American Educational Institute, *Workers' Compensation Benefits: Educating the Insurance Professional*, 5<sup>th</sup> ed., (2005): 35; Little, J.W., et al., *Workers' Compensation: Cases and Materials*, 5<sup>th</sup> ed., (West Group, 2004): 377-92.
- 7 Typically, when construction projects are insured through traditional means, commercial general liability coverage is also purchased. The owner is added as an additional insured under the liability policies obtained by the general contractor and subcontractors, while the general contractor is added as an additional insured under the subcontractors' policies.
- 8 Wrap-up coverage is usually limited to those contractors that are performing work on-site. Thus, for example, a company that performs prefabricating work for the project at its own factory likely would not be an insured under a wrap-up.
- 9 Wrap-ups most often consist of commercial general liability and workers compensation insurance. On occasion a wrap-up program also will provide builders risk and/or professional liability coverage.
- 10 See generally Burton, J.F., Jr., "Workers' Compensation in the United States: A Primer." *Perspectives on Work* (Labor and Employment Relations Association, Summer 2007): 11.
- 11 The "fellow-worker" or "fellow-servant" doctrine harshly deprived an employee of recovery against the employer when the injury was in any way attributable to the conduct of a co-employee. See, e.g., *Randall v. Baltimore & Ohio R.R. Co.*, 109 U.S. 478, 485 (U.S. 1883) ("[T]he general rule of law ... exempts the corporation from liability to its own servants for the fault of their fellow servants").
- 12 See, e.g., *Pomer v. Schoolman*, 875 F.2d 1262, 1269 (7th Cir. 1989) ("[a]t common law a worker was deemed to have assumed the risks of his employment, provided they were apparent; if one of the risks materialized and he was injured, it was his tough luck").
- 13 Workers compensation statutes had been introduced in

- other states prior to Wisconsin's 1911 statute, including: Maryland (1902), Massachusetts (1908), Montana (1909), and New York (1910). However, these earlier statutes were struck down by the courts as unconstitutional. See Boggs, C.J., *Workers' Compensation History: The Great Tradeoff*, MyNewMarkets.com (July 29, 2008), available at <http://www.mynewmarkets.com/articles/91833/workers-compensation-history-the-great-tradeoff> (last visited August 19, 2010).
- 14 In 1917, the United States Supreme Court, in the case of *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917), determined that states could require employers to secure the payment of workers compensation by way of (a) state controlled insurance, (b) insurance from an authorized private insurance corporation, or (c) a deposit of securities.
  - 15 Naturally, workers compensation involves "on-the-job" injuries. It typically does not apply in instances where a person is hurt outside of work.
  - 16 See, e.g., *Dependents of Pacheco v. Orchids of Hawaii*, 502 P.2d 1399, 1401 (Haw. 1972) (employee killed in a car accident while en-route to cash her check at a nearby bank was entitled to workers compensation death benefits because she was on an office break at the time, stating "[w]e adopt as a general rule the proposition that an employee, who is allowed to venture off-premises during an authorized work break, and who is injured in the course of reasonable and necessary activity incidental to such break, should be compensated"); *Maycheck v. Tibbets Water & Waste Inc.*, 401 N.Y.S.2d 916 (N.Y. App. Div. 1978) (employee participating on a softball team that was formed under the sponsorship of the employer's assistant superintendent was entitled to compensation benefits for injuries received during a softball game, due to the apparent authority of the assistant superintendent to organize a recreational activity on the corporate employer's behalf).
  - 17 265 Cal. Rptr. 294, 299 (Cal. Ct. App. 1989) (internal citations and quotations omitted).
  - 18 *Roller v. Basic Constr. Co.*, 384 S.E.2d 323, 325 (Va. 1989).
  - 19 In a minority of states, the exclusivity rule flows upstream, irrespective of any wrap-up program. This means that the protection not only applies to the direct employer but also to those entities that have control and authority over the direct employer, such as a general contractor. These states include: Colorado, see *Buzard v. Super Walls Inc.*, 681 P.2d 520, 523 (Colo. 1984); Georgia, see *England v. Beers Constr. Co.*, 479 S.E.2d 420, 423 (Ga. Ct. App. 1996); Kentucky, see *Pennington v. Jenkins-Essex Constr. Inc.*, 238 S.W.3d 660 (Ky. Ct. App. 2006); Mississippi, see *Salyer v. Mason Techs. Inc.*, 690 So. 2d 1183, 1186 (Miss. 1997); New Mexico, see *Street v. Alpha Constr. Servs.*, 143 P.3d 187, 189 (N.M. Ct. App. 2006); Oklahoma, see *Newport v. Crane Serv. Inc.*, 649 P.2d 765, 767 (Okla. 1982); and Pennsylvania, see *McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d 938 (Pa. Super. Ct. 1998). In most of these cases, the court concluded that the supervising entities were entitled to exclusive remedy protections because they provided a fail-safe to the employees by offering compensation insurance in the event that their direct employer fails in this obligation, thereby satisfying the fundamental premise of the *quid pro quo*.
  - 20 When a third party is allegedly responsible for the injury, the workers compensation insurer usually has the ability to assert a lien upon any recovery against the third party in a negligence action.
  - 21 *Hobbs-Western Co. v. Craig*, 192 S.W.2d 116, 119 (Ark. 1946).
  - 22 See, e.g., *Hernandez v. Chavez Roofing Inc.*, 286 Cal. Rptr. 919, 921 (Cal. Ct. App. 1991) ("[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy. [The defendant] chose not to pay that price, so it should not be immune from liability"); *Tuper v. Barker Street Int'l Concrete Floor Co.*, No. 92-0922, 1995 Mass. Super. LEXIS 789, at 4 (Mass. Super. Ct. Mar. 20, 1995) ("[n]owhere does the statute state or even suggest that a worker who has recovered benefits from a general contractor's insurer is barred from pursuing his personal injury claim against his own uninsured employer... To the contrary, the law has sought to penalize uninsured employers by exposing them to strict liability").
  - 23 See International Risk Management Institute, *The Wrap-Up Guide* (Gibson, J.P. ed., 4<sup>th</sup> ed. 2006): 1, 7.
  - 24 See Senet, T.L., *Nuts & Bolts of Modern Wrap-Up Liability Insurance*, URS Claims Resource Fall 2008 Newsletter, available at <http://www.gglt.com/CM/Custom/TOCPublications.html> (last visited August 20, 2010).
  - 25 See *id.*
  - 26 See IRMI, *supra* note 23, at 47-51.
  - 27 Under the traditional approach, each subcontractor is separately responsible for safety as to its own particular part of the job.
  - 28 Under the traditional model, the amount of coverage and particular exclusions often vary from policy to policy. Thus, it is very difficult for project participants to grasp the amount and scope of coverage that is actually insuring the project. The overall limits of coverage tend to be greater under a wrap-up, and the scope of coverage is typically broader than what individual contractors can acquire on their own.
  - 29 Certain subcontractors interested in working on a construction project may be unable to participate because they cannot purchase the insurance required by the owner or

- general contractor (e.g., it may not be able to secure the amount of coverage needed or obtain a policy containing language required by the trade agreement, such as specific additional insured endorsements.). When insurance is obtained by the owner or general contractor under a wrap-up, the subcontractor could potentially be hired and insured through the wrap-up policies.
- 30 Conn. Gen. Stat. § 31-291 (2010) (emphasis added).
- 31 At the time of the *Washington Metro* decision, the District of Columbia transit authority was subject to the LHWCA because it did not have its own workers compensation laws. In 1982, the District enacted a workers compensation statute. See *Black v. Kiewit Constr. Co.* No. 89-1834, 1990 U.S. Dist. LEXIS 3951 (D.D.C. Apr. 9, 1990).
- 32 Section 5(a) states that “the liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this Act, an injured employee . . . may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages . . .” 33 U.S.C. § 905(a) (2010).
- 33 *Johnson*, 467 U.S. at 940.
- 34 Section 4 of the LHWCA, for example, provides:  
 In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.  
 33 U.S.C. § 904(a) (2010).
- 35 See, e.g., *Shin Hyon-Su v. Maeda Pac. Corp.*, 905 F.2d 302 (9th Cir. 1990); and *Keener v. Washington Metro. Area Transit Auth.*, 800 F.2d 1173 (D.D.C. Cir. 1986).
- 36 *Bishel*, 771 A.2d. at 255, n.11 (emphasis added, internal citations omitted). Interestingly, the workers compensation program involved in *Bishel* was self-funded by the defendant. Thus, the monies received by the injured worker actually came directly from the defendant. It is therefore plausible that *Bishel* could be distinguished from cases where the monies received by the injured worker come from an insurer, i.e., an argument that when the compensation benefits come from an insurance company, the owner does not actually “pay” the workers compensation. However, the quoted excerpt of the Connecticut legislature’s discussion about workers compensation statutes suggests that purchase of insurance is sufficient to afford the owner exclusivity protection.
- 37 Texas Labor Code § 406.123 (2010).
- 38 *HCBeck*, 284 S.W.3d at 360.
- 39 The court emphasized the fact that if the owner decided to terminate the OCIP, *HCBeck* was “contractually obligated to obtain the insurance to cover the employees” because the contract specified that *HCBeck* “shall secure the alternate insurance.” *HCBeck*, 284 S.W.3d at 353.
- 40 *Etie*, 135 S.W.3d at 768 (emphasis added).
- 41 *Id.* (emphasis added).
- 42 Another Texas case of note is *Entergy Gulf States Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009). *Entergy* considered whether a premises owner that hires contractors to perform work on its premises and provides workers compensation insurance pursuant to an OCIP is entitled to invoke the exclusive remedy defense under the workers compensation act. Notably, the Texas statute concerning the workers compensation statutory employer rule specifically referenced “general contractors” but made no mention of “owners.” Therefore, the court examined whether an owner could serve “as its own general contractor for the purpose of qualifying for immunity as a statutory employer of its contractors’ employees.” (*Id.* at 436.) The conclusion was that *Entergy* qualified under the Texas Labor Act’s definition of general contractor and therefore was entitled to assert the exclusive remedy doctrine. One commentator summed up the holding as follows: “a premises owner can protect itself from negligence claims brought by contractor employees by (1) acting as its own general contractor, (2) providing for workers’ compensation coverage for the employees in the contract, and (3) by paying the premiums as a part of the contract price.” Gray, J.S., *Texas Supreme Court Reaffirms Controversial Workers’ Compensation Decision*, 47 *Houston Lawyer* 54 (July/Aug. 2009).
- 43 *Stevenson*, 2002 U.S. Dist. LEXIS at 38-39 (emphasis added, internal citations omitted).
- 44 *Id.* at 43.
- 45 *Washington*, 467 U.S. at 936.
- 46 *Wensel*, 920 F.2d. at 783-84 (emphasis in original); see also *Black v. Kiewit Constr. Co.*, No. 89-1834, 1990 U.S. Dist. LEXIS 3951 (D.D.C. 1990), holding that a general contractor who is not required to purchase workers compensation insurance for subcontractor’s employees is not granted immunity from suits by those employees.
- 47 The Michigan statute provides in relevant part:  
 (1) Each employer under this act, subject to the approval of the director, shall secure the payment of compensation under this act by either of the following methods:

(a) By receiving authorization from the director to be a self-insurer. In the case of an individual employer, the director may grant that authorization upon a reasonable showing by the employer of the employer's solvency and financial ability to pay the compensation and benefits provided for in this act and to make payments directly to the employer's employees as the employees become entitled to receive the payment under the terms and conditions of this act and pursuant to R 408.43c of the Michigan administrative code .... [Or]

(b) By insuring against liability with an insurer authorized to transact the business of workers' compensation insurance within this state.

Mich. Comp. Laws § 418.611(1) (2010).

48 *Burger*, 507 N.W.2d at 830.

49 A slight variation of this reasoning was applied by the United States District Court for the District of Nebraska in the case *Culp v. Archer-Daniels-Midlands Co.*, 2009 U.S. Dist. LEXIS 32884 (D. Neb. 2009), which found that defendant, Archer-Daniels-Midlands (ADM), was not a statutory employer of an injured worker employed by an independent contractor. ADM had argued that it was immune from tort liability, as a statutory employer, because it had provided workers compensation coverage to the injured worker through an OCIP. Nebraska law, which governed the issue, provides that an entity is considered a statutory employer when it does not require its independent contractors to purchase workers compensation insurance. The court held that ADM had indeed required its independent contractor to procure workers compensation insurance by virtue of the fact that the contractor was obligated to participate in the OCIP. It was thus determined that ADM did not enjoy statutory immunity because there was no meaningful distinction between an independent contractor being required to purchase workers compensation on its own and being required to participate in a wrap-up program. While the *Culp* case is unlike *Burger Wensel* and *Black* insofar as it does not distinguish a voluntary payment of workers compensation insurance from an involuntary payment, it is similar in the regard that it involves a case where the direct employer is considered to have procured workers compensation insurance for its employee by way of its wrap-up insurance participation, and therefore, the upstream employer is not entitled to exclusivity immunity.

50 *Pride v. Liberty Mut. Ins. Co.*, No. 04-C-703, 2007 U.S. Dist LEXIS 40833, at 8, 12 (E.D. Wis. 2007). See also *Pouge v. Oglethorpe Power Corp.*, 477 S.E.2d 107, 109 (Ga. 1996) (“[w]hile it is true that the contract benefitted the [direct] employer by providing for the payment of premiums ... the contract did not benefit Pogue as a workers' compensation insurance contract would. We conclude that Oglethorpe did not provide workers' compensation benefits to Pogue by purchasing a ‘wrap-up’ workers' compensation insurance policy”). In addition, the dissenting judges in the *HCBeck* case also referenced the lack of a *quid pro quo* as a basis for its disagreement with the majority's holding:

The Court's decision extends statutory immunity to *HCBeck* without requiring a corresponding substantive *quid pro quo* from it as was intended by the Legislature. The decision enlarges the number of entities that can claim that which an employee ostensibly provides by releasing his or her common law right to sue—immunity from suit—by merely contracting for someone else such as the subcontractor or the owner of a project to secure and maintain insurance for the subcontractor. All *HCBeck* did here was facilitate communications between FMR and Haley Greer and agree that *HCBeck* might in the future provide workers' compensation insurance for Haley Greer. That goes beyond what the Legislature intended.

*HCBeck*, 284 S.W.3d at 361.

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