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Limitations Of Exclusivity Defense In Workers' Comp Cases

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In *Halferty v. Flextronics America LLC*, the Corpus Christi Court of Appeals followed its Houston sister court in holding that a general contractor, or GC, that required its subcontractor to maintain workers' compensation insurance for the subcontractor's employees did not "provide" coverage pursuant to Texas Labor Code Section 406.123(a) so as to enjoy the exclusive remedy defense.[1] The case is important because it confirms that the higher participants in the usual construction contractual chain (owners, GCs, and higher-tier subcontractors) cannot merely push workers' compensation requirements down to the lowest-tier subcontractors and still enjoy the exclusivity defense. The defense's applicability starts with the party that provides the coverage, not the party that contractually imposes it below.

For example, all parties in the construction contractual chain enjoy the exclusivity defense when an owner provides and imposes an owner-controlled consolidated insurance program, or OCIP, on its GC and its subcontractors of all tiers.[2] But a GC that merely imposes the workers' compensation coverage on its subcontractor does not. By implication, an owner that requires a GC to provide a contractor-controlled CIP, or CCIP, to its employees and its subcontractors of all tiers is not entitled to the exclusivity defense. This limitation applies despite Texas higher courts' propensity to allow parties to raise this defense in CIP cases, in part because of the Texas Supreme Court's and the Legislature's "'decided bias' for [finding workers' compensation] coverage" in these cases.[3]

The Texas's Workers' Compensation Act[4] offers a qualified immunity to employers who provide workers' compensation insurance to their employees. This immunity extends to the employer's agents and employees. Injured employees renounce their common law rights to sue their employers in exchange for timely (albeit limited) financial compensation — their exclusive remedy vis-à-vis their employers. The exclusive remedy defense does not bar tort actions by injured employees against third parties, however. Injured subcontractor employees in the construction industry commonly sue the GC, or the owner or both, for their own negligence in so-called third-party over actions.[5]

The solution to third-party over actions lies in Texas Labor Code Section 406.123(a), which allows a GC and its subcontractor to "enter into a written agreement under which the GC provides workers' compensation insurance coverage to the subcontractor" and its employees. Such an agreement "makes the GC the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws."[6] The exclusive remedy defense then extends to the GC, which is immune from tort claims by the subcontractor and its employees, who then become its "deemed employees."[7]

The GC must do more than merely require its subcontractors to provide their employees with workers' compensation coverage in a written contract. Two Texas appellate courts have held that a GC that simply requires its subcontractors to provide coverage does not itself qualify as a provider so as to enjoy the exclusive remedy defense. In *Halferty*, Flextronics, acting as owner/GC, hired Titan Datacom Inc. to design a network and to pull cables at a Flextronics facility. Their contract required that Titan:

> . . . provide, pay for and maintain in full force and effect [Workers' compensation insurance (*inter alia*)] covering [Titan], those of any and all subcontractors, or anyone else directly or indirectly employed by any of them, and anyone for whose acts any of them may be liable.[8]

This language could be construed as a requirement that Titan offer its employees and sub-subcontractors of all tiers a CCIP, colloquially known as a contractor-controlled wrap-up, which is one way a GC can enter into a written agreement with its subcontractors to provide workers' compensation. But it appears that Outsource LLC, Titan's subcontractor, provided its own workers' compensation insurance.[9] Be that as it may, Halferty, an Outsource employee, fell from a ladder, collected workers' compensation benefits, and sued Flextronics for negligence because one of its employees allegedly precipitated Halferty's fall. The trial court granted Flextronics summary judgment based on its exclusivity defense but the Corpus Christi Court of Appeals reversed and remanded.

Both sides in *Flextronics* invoked the Texas Supreme Court's landmark *HCBeck* decision to support their position.[10] *HCBeck* is usually construed to hold that a GC enjoys the exclusivity defense when it and its subcontractors enroll in an OCIP, and the GC commits to provide backup coverage should the owner cancel the OCIP.[11] The *Halferty* court found *HCBeck* "instructive, but distinguishable." The court first noted that *Halferty* did not involve an OCIP "paid for by Flextronics," and that the workers' compensation coverage "began with Titan — not with Flextronics." The court also noted that nothing in the Flextronics-Titan contract compelled Flextronics to provide backup workers' compensation coverage, as was HCBeck's contractual obligation should the owner in that case terminate its OCIP coverage.

The court also noted that the dictionary definition of "to provide" was "to supply or make available." Drawing on this definition, the court held that:

> Flextronics did not conclusively establish that it supplied or made available workers' compensation insurance coverage simply by requiring its subcontractors by written agreement to "provide, pay for and maintain" its (sic) own coverage.[12]

To enjoy the act's exclusivity defense, Flextronics needed "to do something more than simply passing the onus of obtaining coverage" downstream. That "something more" could have been Flextronics' contractual commitment to provide backup coverage, or financial penalties imposed on subcontractors that failed to provide coverage. For these reasons, the court concluded that Flextronics did not provide coverage under the act and, therefore, was not entitled as a matter of law to the exclusive remedy defense.

Halferty's holding is consistent with that in *Valadez v. MEMC Pasadena* Inc., a 2011 decision by Houston's First Court of Appeals.[13] In that case, MEMC hired Turner Industries Group LLC to perform maintenance work at its facility. The parties' contract required Turner to provide its employees with workers' compensation insurance. Valadez, a Turner employee, injured himself at MEMC's facility, collected workers' compensation benefits, and sued MEMC for negligence. The trial court granted MEMC's motion for summary judgment based on the exclusivity defense. The court of appeals affirmed, but on basis of MEMC's separate Texas Civil Practice & Remedies Code Chapter 95 argument. It held that "merely requiring the subcontractor to obtain its own workers' compensation insurance d[id] not constitute 'providing' coverage within the meaning of the statute."

As in *Halferty*, both parties in *Valadez* argued that *HCBeck* controlled the case's disposition. MEMC argued that it provided coverage because it contractually compelled Turner to provide the coverage, even if Turner, not MEMC, paid for the premiums. MEMC supported its argument with the fact that HCBeck paid no insurance premiums and still enjoyed the exclusivity defense. Valadez argued that the case was distinguishable from *HCBeck* because MEMC, unlike HCBeck, was not obligated to provide backup coverage. According to Valadez, MEMC must have been contractually obligated to pay for the insurance premiums, or to reimburse Turner for same, in order to qualify as a coverage provider under the act.

Reviewing prior case law, the court saw little merit in Valadez's first argument, holding that "it is the provision of coverage, not the responsibility in the event of its absence, that supports the exclusivity defense." The court also ascertained the meaning of "to provide" under Section 406.123(a). Like earlier cases, it adopted this term's dictionary definition as "to supply or make available," and held that MEMC did neither when it merely required Turner to provide its own coverage. For these reasons, the court concluded that MEMC did not qualify as an employer under the act, and that it could not uphold the trial court's summary judgment for MEMC on the basis of the exclusivity defense.

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[1] No. 13-16-00379-CV, 2018 WL 897979, --- S.W.3d ---, at *1 (Tex. App.—Corpus Christi Feb. 15, 2018, no pet. h.) (not released for publication).

[2] *Entergy Gulf States Inc. v. Summers*, 282 S.W.3d 433 (2009) (owner); *HCBeck Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009) (GC; possibly subject to the condition that the GC provide backup coverage); *TIC Energy & Chem. Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016) (subcontractors); *Etie v. Walsh & Albert Co. Ltd*., 135 S.W.3d 764 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (sub-subcontractors of all tiers) (CCIP case that should also apply to OCIPs; cited in *TIC Energy*, 498 S.W.3d 76 n.45).

[3] *HCBeck*, 284 S.W.3d at 358–59 (emphasis in original).

[4] Tex. Lab. Code Chap. 401 *et seq*., the "act"

[5] Of course, owners and GCs are not without common law and statutory defenses against these lawsuits. See Pierre Grosdidier, Employer Liability for Acts of an Independent Contractor, Construction Law Journal, Vol. 14, No. 1, Winter 2017, p. 7.

[6] *Id*. § 406.123(e)

[7] *Id*. § 408.001(a).

[8] Appellant's Brief, *Halferty*, 2018 WL 897979, at 28. Pleadings are available on line at http://www.txcourts.gov/13thcoa/.

[9] Appellant's Brief, *Halferty*, 2018 WL 897979, at 2 ("It is undisputed that both Titan and Outsource purchased workers' compensation insurance to cover all of their respective employees."); see also Clerks' Record, No. 03-16-00419-CV (sic), *Halferty v. Flextronics Am. LLC*, at 108 ("Q: And your workers' comp coverage, that was through Outsource, right? A: Yes. I think that was, yes.") (Deposition transcript of Patrick Halferty, 187:8-10).

[10] *Halferty*, 2018 WL 897979, at *3.

[11] *HCBeck*, 284 S.W.3d at 350-52; but see Pierre Grosdidier, *Construction law practice tip: Manhattan v. Garcia is the Texas appellate OCIP case to watch*, Dec. 8, 2017, available on the author's firm web page.

[12] *Halferty*, 2018 WL 897979, at *5 (citing *Valadez v. MEMC Pasadena Inc*., No. 01-09-00778-CV, 2011 WL 743099, at *4 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.) (discussed hereinafter).

[13] *Valadez*, 2011 WL 743099, at *4.