BY: PIERRE GROSDIDIER

CONSOLIDATED INSURANCE PROGRAMS AND THE EXCLUSIVE REMEDY DEFENSE UNDER TEXAS LAW

The Texas's Workers' Compensation Act (Tex. Lab. Code Chap. 401 *et seq.*, the "Act") offers a qualified immunity to employers who provide workers' compensation insurance to their employees.[1] Under the Act, and barring an intentional act or gross negligence by the employer in cases of death, recovery of workers' compensation benefits is an injured employee's exclusive remedy from the employer. Workers' compensation expresses a compromise between the interests of employers and their employees when the latter suffer on-the-job injuries or death. The arrangement guarantees employees timely (albeit limited) financial compensation and, in exchange, spares employers the burden of litigation. One appellate court characterized this arrangement as two *quid pro quos* to employees and employers alike. The injured employee renounces his or her common law tort claims against the employer in exchange for a guarantee of limited recovery, and the employer agrees to pay workers' compensation premiums in exchange for legal immunity, in both cases regardless of fault.[2]

The exclusive remedy defense does not bar tort actions by the injured employee against third-parties, however. For example, in the construction industry, owners and general contractors ("GCs") often find themselves at the receiving end of an injured subcontractor employee's negligence lawsuit, even when these defendants are manifestly blameless.[3] An indemnity provision in the contract between the GC and its subcontractor affords some protection to the GC from such suits, but not to the subcontractor. The latter can have to pay for its prevailing employee's "third party over action"—after, and despite, having paid for the employee's workers' compensation.[4] When this happens, the subcontractor effectively pays twice. Even if the employee loses, the subcontractor may have to foot the defense costs.

The solution to third party over actions lies in Texas Labor Code § 406.123, which allows a GC and its subcontractor to "enter into a written agreement under which the general contractor *provides* workers' compensation insurance coverage to the subcontractor" and its employees.[5] Such an agreement "makes the general contractor 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]

A consolidated insurance program ("CIP"), colloquially known as a wrap-up or wrap, is one way a GC can enter into a written agreement with its subcontractors to provide workers' compensation. Wrap-ups vary greatly in scope, but in the construction industry they can provide coverage for workers' compensation and builder's risk, employer's, general, and excess liability.[8] Coverage can apply to a specific project site or to a succession of projects under a "rolling wrap." Either the owner or the GC can purchase and control a wrap-up, which is then referred to as an owner-controlled CIP ("OCIP") or a contractor-controlled CIP ("CCIP"), respectively.

This article reviews the main Texas cases that have

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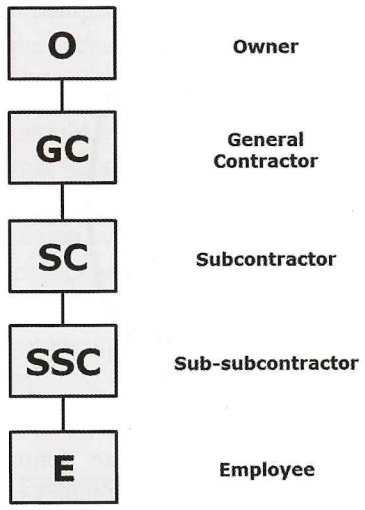
1. Tex. Lab. Code § 408.001. The immunity extends to the employer's agents and employees. *Id.* § 408.001(a).
2. Williams v. Razor Enters., Inc., 70 S.W.3d 274, 277 (Tex. App.—San Antonio 2002, no pet.).
3. Of course, owners and GCs are not without common law and statutory defenses against these lawsuits. *See* Pierre Grosdidier, *Employer Liability for Acts of an Independent Contractor*, Tex. Constr. L.J., Vol. 14, No. 1, 7 (Winter 2017).
4. *See, e.g.*, Brief of Tex. Bldg. Branch of the Associated Gen. Contractors of Am. *et al.* as Amici Curiae Supporting Appellant, *Manhattan Vaughn, JVP v. Garcia*, No. 01-16-00443-CV, at 7–9 (Tex. App.—Houston [1st Dist.]) (on appeal to the First Court of Appeals from the 80th Judicial District Court of Harris County). Pleadings are available on line at http://www.txcourts.gov/1stcoa/.
5. Tex. Lab. Code § 406.123(a) (emphasis added).
6. Tex. Lab. Code § 406.123(e).
7. Tex. Lab. Code § 408.001(a).
8. *See, e.g.*, Hunt Constr. Group, Inc. v. Konecny, 290 S.W.3d 238, 241 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Wrap-ups usually cover general and excess liability, or general, excess, and workers' compensation. Wrap-ups include builder's risk on occasion. For the pros and cons of using wraps, *see* Jacqueline P. Sirany and James Duffy O'Connor, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-Ups*, 22 Constr. Law, 30 (2002).

addressed whether the exclusive remedy defense applies to parties that partake in wrap-ups, whether OCIPs or CCIPs. These cases show that Texas Labor Code §§ 406.123 and 408.001, when applied to wrap-ups, present formidable obstacles to plaintiffs' third party over actions. Texas courts have repeatedly defeated plaintiffs' attempts to circumvent the exclusive remedy defense and have granted statutory protection to owners, GCs, subcontractors, sub-subcontractors and their employees in almost every possible situation. As this article shows, the case law strongly suggests that only an owner who requires its GC to impose a CCIP on the GC's subcontractors is not entitled the exclusivity defense. Each case discussion in this article is supported by a chart showing the relationship between the parties using the usual abbreviations of "O" for owner, "GC" for general contractor, and so forth as illustrated in Figure 1.

Figure 1. Construction project party chain and abbreviations.

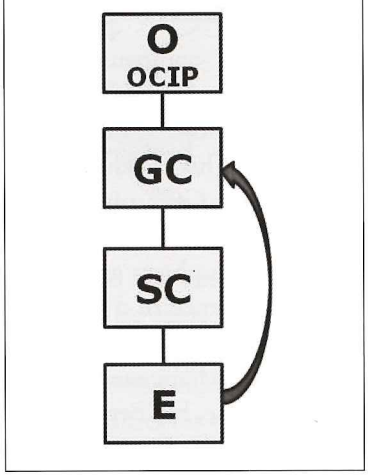


A. Courts broadly apply the exclusive remedy defense in OCIP cases.

1. The exclusive remedy defense applies to a GC sued by a subcontractor employee: *HCBeck v. Rice.*

In *HCBeck, Ltd. v. Rice*, the owner, FMR Texas Ltd., required its GC, HCBeck, to require all subcontractors to enroll into FMR's construction project's OCIP.[9] The owner retained the contractual right to cancel the OCIP, in which case the GC had to secure coverage for itself, the subcontractors, and their employees. The GC subcontracted with Haley Geer, which enrolled in the OCIP. Rice, a Haley Geer employee was injured on the job, collected workers' compensation benefits pursuant to the OCIP, and sued the GC for negligence (Figure 2).[10]

Figure 2. *HCBeck v. Rice* (E sued GC).



In summary judgment proceedings, Rice challenged whether the GC "provided" workers' compensation insurance to Haley Geer so as to qualify for the employer's exclusive remedy defense. The Texas Supreme Court held that a GC provides workers' compensation and enjoys statutory employer status when (1) it contractually compels its subcontractors to enroll in an OCIP and (2) it agrees to provide workers' compensation coverage should the owner decide to terminate the OCIP.[11] It did not matter that the GC did not obtain or directly pay for the insurance because "[t]he Act only require[d] that there be a written agreement to provide workers' compensation insurance coverage," as when the owner provided the OCIP.[12] Moreover, the coverage was backed by HCBeck's obligation in its contract with the owner to secure insurance coverage for the subcontractors should the owner elect to terminate its OCIP. In reaching its holding,

9. 284 S.W.3d 349, 350–51 (Tex. 2009).
10. Most, if not all, the wrap-up cases mention that the plaintiffs collected workers' compensation benefits. Nothing in the Act or the case law suggests that the case outcomes would be different if the plaintiffs declined to seek these benefits. It may be that the opinions make this point because it conclusively proves that a "written agreement" existed "under which the general contractor provide[d] workers' compensation insurance coverage to the subcontractor" and its employees, a requirement under § 406.123(a). *See, e.g.*, Austin Bridge & Road, LP v. Suarez, No. 01-16-00682-CV, 2018 WL 2049356, --- S.W.3d ---, at *17 (Tex. App.—Houston [1st Dist.] May 3, 2018, no. pet. h.) (not released for publication) (implying proof of existence of insurance because plaintiff "applied for and obtained death benefits pursuant to th[e] policy.").
11. *HCBeck, Ltd.*, 284 S.W.3d at 351–52, 354.
12. *Id.* at 353 (citing Tex. Lab. Code § 406.123(a)).

the Court reasserted that it "recognized a 'decided bias' *for* [finding workers' compensation] coverage." [13] But the Court concluded its opinion with an arguably broader holding. It held that the Act

> 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. [14]

The Court added that the OCIP in *HCBeck*, "established and paid for by [the owner] . . . , qualifie[d] under the Act as 'providing' workers' compensation insurance to subcontractors in a manner that [wa]s consistent with section 406.123(a)," thus allowing HCBeck to enjoy the Act's exclusivity defense. [15] This concluding language does not expressly mention the GC's obligation to provide back-up insurance. Logically, under this language, the GC should qualify as an employer as long as the OCIP is in place even in the absence of a back-up plan. This conclusion would be consistent with the Court's *dictum* that what matters is what happened, not what might have happened. [16] In this case, HCBeck provided workers' compensation insurance and Rice, the injured party, received his benefits. The concern is not what would have happened had the owner cancelled the OCIP. [17] Finally, the court added that

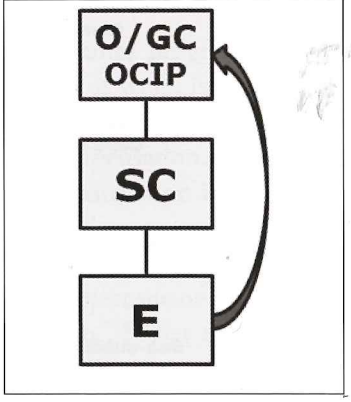
> [h]olding that HCBeck "provides" workers' compensation, even when it has not purchased the insurance directly, would allow multiple tiers of subcontractors to qualify as statutory employers entitled to the exclusive remedy defense.

This remark implies that the exclusive remedy applies to all tiers of subcontractors below a GC enrolled in a wrap, a conclusion that the court felt "seem[ed] consistent" with a wrap's avowed goal of maximizing workers' compensation insurance coverage. [18]

2. The exclusive remedy defense applies to an owner/GC sued by a subcontractor employee: *Entergy v. Summers.*

In *Entergy Gulf States, Inc. v. Summers*, the owner, Entergy, acting as its own GC, hired International Maintenance Corp. ("IMC") as subcontractor to perform various technical services. [19] Entergy provided workers' compensation insurance to IMC's employees through an OCIP. [20] Summers, an IMC employee, suffered a job-related injury, received benefits through Entergy's OCIP, and sued Entergy for negligence (Figure 3). The question in this case was whether Entergy, the owner, qualified as a GC under Texas Labor Code § 406.121(1) so as to enjoy the exclusive remedy defense. The Supreme Court held that it did. [21]

Figure 3. *Entergy v. Summers* (E sued O).



The Court noted that the statute defines a "general contractor" as "a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." [22] Relying on the common understanding of the terms in this definition,

13. *Id.* at 358 (emphasis in original).
14. *Id.* at 360.
15. *Id.*
16. *Id.* at 354–55, 359 n.4.
17. *See* Valadez v. MEMC Pasadena, Inc., No. 01–09–00778–CV, 2011 WL 743099, at *6 (Tex. App.—Houston [1st Dist.] March 3, 2011, no pet.) (mem. op.) ("It is the provision of coverage, not the responsibility in the event of its absence, that supports the exclusivity defense."). For the issue of whether the GC must offer a back-up plan to qualify as statutory employer, *see* Manhattan Vaughn, No. 01-16-00443-CV (Tex. App.—Houston [1st Dist.]) (on appeal from the 80th Judicial District Court of Harris County). The case is discussed in Pierre Grosdidier, *Construction Law Practice Tip: Manhattan v. Garcia is the Texas appellate OCIP case to watch*, Dec. 8, 2017; *see also* Halferty v. Flextronics Am., LLC, No. 13-16-00379-CV, 2018 WL 897979, --- S.W.3d ---, at *5 (Tex. App.—Corpus Christi Feb. 15, 2018, pet. filed) (not released for publication) (holding that owner/GC that merely required subcontractor to obtain workers' compensation coverage did not provide coverage under the Act because, *inter alia*, it did not commit to providing coverage in the alternative).
18. *HCBeck, Ltd.*, 284 S.W.3d at 359.
19. 282 S.W.3d 433, 435 (2009). The Supreme Court decided both *HCBeck* and *Summers* on the same day.
20. The term used in the opinion is an owner provided insurance program or OPIP.
21. *Id.* at 437.
22. Tex. Lab. Code § 406.121(1).

the Court held that a "general contractor is a person who takes on the task of obtaining the performance of work." [23] Because this was "precisely what Entergy did" when it hired IMC to perform services, and because this definition did not exclude owners, it followed that an owner could be a GC under the Act. Having provided workers' compensation insurance to a subcontractor through a written contract, Entergy enjoyed the exclusive remedy defense. [24]

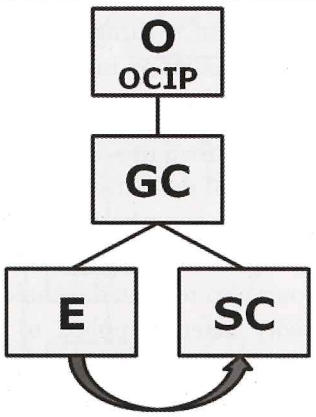
The majority opinion went to great lengths to refute the dissent's various arguments that the Act never covered, and was never intended to cover, premises owners. [25] In the Court's view, neither the Act's language nor its history supported the dissent's arguments. The original workers' compensation statute, enacted in 1917, spoke of "subscribers," not "general contractors." The term subscriber was unqualified and included "*all* purchasers of workers' compensation insurance," including premises owner-subscribers. [26] Moreover, the 1983 version of the Act retained the terms subscriber and deemed employers verbatim, disproving a legislative intent to create an owner exception to the exclusivity defense.

Excluding premises owners from the exclusive remedy defense also would not make sense because it would place contractors' employees at an advantage vis-à-vis the owners' own employees. The latter would be confined to workers' compensation benefits in case of injury, while the former could collect benefits and retain the right to sue the owner. The exclusion would also "fail[] to serve the public policy of encouraging workers' compensation coverage for all workers." [27] As one Justice noted in his concurring opinion, "[t]he Act's 'decided bias' is for coverage." [28]

3. The exclusive remedy defense applies to a subcontractor sued by a GC employee: *TIC Energy v. Martin.*

In *TIC Energy & Chem., Inc. v. Martin*, Dow Chemical Company, the owner, administered an OCIP for Union Carbide Corporation and its subcontractors (Union Carbide was effectively Dow's GC). [29] Martin, a Union Carbide employee, lost a leg at work, collected benefits through the OCIP and sued TIC, a Union Carbide subcontractor, for negligence (Figure 4). The question in this case was whether TIC was entitled to the exclusive remedy defense as an employee of the GC pursuant to Texas Labor Code §§ 406.123 and 408.001.

Figure 4. *TIC Energy v. Martin* (E sued SC).



The trial court denied TIC's motion for summary judgment based on the exclusive remedy defense, and the court of appeals affirmed. On appeal, Martin argued that TIC was an independent contractor that had assumed Union Carbide's responsibilities for the performance of work and that, pursuant to Texas Labor Code § 406.122(b), TIC was not an employee of the GC and could not invoke the exclusive remedy defense. [30] Section 406.122(b) expressly excludes subcontractors and their employees as employees of the GC under these conditions. In sum, according to Martin, Labor Code § 406.122(b) trumped § 406.123. In affirming the trial court, the court of appeals held that §§ 406.122(b) and 406.123 were "irremediably conflict[ed]" and that TIC had not "conclusively establish[ed] its affirmative defense because it [had] failed to negate section 406.122(b)'s applicability." [31]

The Supreme Court rejected the court of appeals' conclusion that the two sections of the Act were conflicted. The Court held that § 406.122 preceded § 406.123 in the statute's structure and, therefore, established the general rule, which § 406.123 excepted. As the Court explained

> Section 406.122(b) affirmatively excludes subcontractors as the general

23. *Summers*, 282 S.W.3d at 438.
24. *Id.* at 435, 438.
25. *See id.* at 438–44.
26. *Id.* at 438 (emphasis in original).
27. *Id.* at 444.
28. *Id.* at 451 (Hecht, J., concurring).
29. 498 S.W.3d 68, 70 (Tex. 2016).
30. *Id.* at 70–71 (citing Tex. Lab. Code § 406.122(b)).
31. *Id.* at 71.

> contractor's employees if they are operating as an independent contractor and have a written agreement evidencing the relationship. Section 406.123 in turn provides for an election by which a general contractor may become a statutory employer by agreeing, in writing, to provide workers' compensation insurance to the subcontractor. [32]

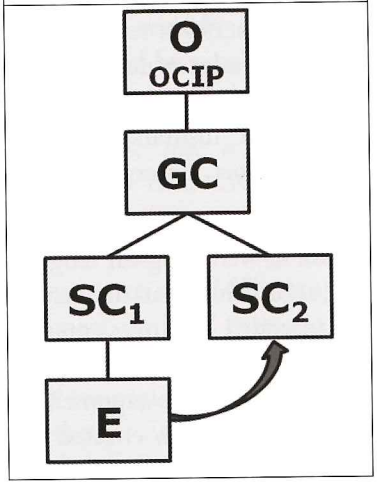
The Court concluded that this interpretation was "the only plausible reading of the statute." For this reason, the Court held that TIC was entitled to rely on the exclusive remedy defense and rendered judgment in TIC's favor. The Supreme Court also reiterated its holding in *HCBeck* that the exclusivity defense applied to "multiple tiers of subcontractors" because a contractor could provide workers' compensation insurance even when it purchased the coverage indirectly. [35]

Four appellate cases (three of which precede *TIC Energy*) also deal with employee claims against subcontractors. In each case the parties' postures are different from those in *TIC Energy*, but the results are the same, as discussed below (Sections A-4 to A-6 and Figures 5–7).

4. The exclusive remedy defense applies to a subcontractor sued by another subcontractor's employee: *Funes v. Eldridge Electric.*

In *Funes v. Eldridge Elec. Co.*, a subcontractor employee (Funes) sued another subcontractor (Eldridge) after Funes suffered an on-site injury allegedly caused by the negligence of an Eldridge employee (Figure 5). [36] Funes received workers' compensation benefits through the OCIP to which both subcontractors had been contractually obliged to subscribe by Clayco Construction, Inc., the GC. The parties disputed whether the exclusive remedy doctrine applied to Eldridge, the defendant-subcontractor. [37]

Figure 5. *Funes v. Eldridge* (E sued SC_2).



Funes argued (as Rice did in *HCBeck*) that § 406.123(a) required the GC to directly provide the workers' compensation insurance coverage to the subcontractors, as opposed to the owner. [38] The court used Webster's dictionary to construe the term "provide" as "to supply or to make available." Because the GC supplied or made insurance available to the subcontractors by forcing them to enroll in the OCIP, §§ 406.123(a) and (e) applied. To hold otherwise "would produce an unjust and unreasonable result." [39] It would leave the GC unprotected from suit despite the clear intent of §§ 406.123(a) and (e), and it would force the GC to purchase additional and duplicative insurance, defeating the OCIP's goal of protecting all parties to a construction project. The court held that the GC provided the insurance within the meaning of § 406.123(a), which made the GC the subcontractor's employer and the beneficiary of the Act's exclusive remedy provision. [40] And because the provision applied to the GC's employees, it also applied to subcontractors of all tiers and, therefore, barred Funes's tort claims against Eldridge. [41]

The court also rejected Funes's argument that Eldridge's exclusivity defense failed because no evidence showed

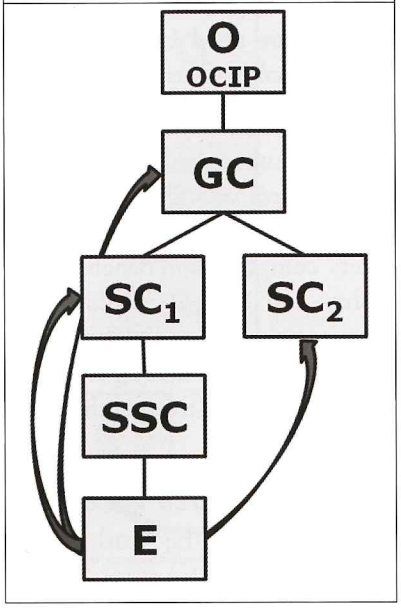
32. *Id.* at 76.
33. *Id.*
34. *Id.* at 78. The exclusivity defense also protects a subcontractor sued by the GC's employee when the GC provides workers' compensation through a CCIP. *See* Berkel & Co. Contractors, Inc. v. Lee, No. 14-15-00787-CV, 2018 WL 1403545, --- S.W.3d ---, at *5 (Tex. App.—Houston [14th Dist.] Jan. 23, 2018, no pet. h.), *op. on reh'g, reh'g en banc denied* (citing *TIC Energy*, 498 S.W.3d at 74.
35. *TIC Energy*, 498 S.W.3d at 74.
36. 270 S.W.3d 666, 667 (Tex. App.—San Antonio 2008, no pet.).
37. *Id.* at 668–69.
38. *Id.* at 670.
39. *Id.* at 671.
40. *Id.* at 672.
41. *Id.* at 672–73 (citing Etie v. Walsh & Albert Co., Ltd., 135 S.W.3d 764, 768 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). *Etie* is discussed in Section B.1 of this article.

that Clayco timely filed a copy of the OCIP with its workers' compensation insurance carrier, as required by § 406.123(f). [42] The court held that this omission was merely an administrative violation, per § 406.123(g), not a failure to satisfy an element of the exclusivity defense, as Funes argued. [43]

5. The exclusive remedy defense applies to a GC and to a subcontractor sued by a sub-subcontractor's employee: *Hunt Constr. v. Konecny* and *Austin Bridge & Road v. Suarez.*

In *Hunt Constr. Group, Inc. v. Konecny*, participation in the OCIP was mandatory for the GC and subcontractors of every tier. [44] Konecny, a sub-subcontractor employee injured his back at work, recovered workers' compensation benefits, and filed suit against Hunt, the GC, and two subcontractors, including the subcontractor that hired his employer (Figure 6). Konecny prevailed at trial and the three defendants appealed arguing that the Act barred Konecny's suit. [45] Konecny argued, *inter alia*, and as others have, that the exclusive remedy defense did not apply because the owner, not the GC, provided the workers' compensation insurance. [46] He argued that the court "should interpret 'provide' to mean 'purchase.'" [47] The court rejected this argument using the same reasoning and citing the same cases as in *Funes*. It held that the GC and the subcontractors were "deemed employees" under the Act and it reversed the trial court's judgment.

Figure 6. *Hunt v. Konecny* (E sued GC, SC_1, and SC_2).



The First Court of Appeals recently reached the same result in *Austin Bridge & Road, LP v. Suarez.* [48] In that case Baylor University, the owner, imposed an OCIP on its GC Austin Commercial, LP and its subcontractors and sub-subcontractors. Suarez, an employee of sub-subcontractor Derr & Isbell Construction, LLC, drowned during a bridge construction accident. All parties in the contractual chain were enrolled in the OCIP, which included coverage for workers' compensation. Suarez's family applied for and received death benefits through the OCIP. [49]

The plaintiffs sued Austin Bridge, the subcontractor that hired Derr & Isbell, among others, for negligence and gross negligence (in reference to Figure 6, E sued SC_1). The trial judge denied Austin Bridge's motion for summary judgment, which was based on the Act's exclusive remedy provision under §§ 406.123 and 408.001. The plaintiffs prevailed at trial with a judgment in excess of $17 million, but the court of appeals reversed and rendered a take-nothing judgment. The court reviewed and applied the reasoning in *HCBeck* and *TIC*, and held that Austin Bridge had "conclusively established its exclusive-remedy

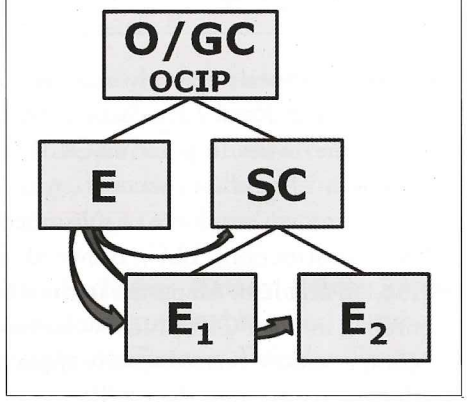
42. *Funes*, 270 S.W.3d at 673; *see* TEX. LAB. CODE § 406.123(f) ("A general contractor shall file a copy of an agreement entered into under this section with the general contractor's workers' compensation insurance carrier not later than the 10th day after the date on which the contract is executed.").
43. *Funes*, 270 S.W. 3d at 673; *see* TEX. LAB. CODE § 406.123(g) ("A general contractor who enters into an agreement with a subcontractor under this section commits an administrative violation if the contractor fails to file a copy of the agreement as required by Subsection (f).").
44. 290 S.W.3d at 240–41.
45. *Id.* at 242.
46. The Supreme Court decided *HCBeck* on April 3, 2009, after the appellate courts decided *Funes* and *Konecny* in 2008.
47. *Hunt Constr. Group* 290 S.W.3d at 245.
48. 2018 WL 2049356, at *1. Surprisingly, in light of the parties' identical relationships, *Suarez* does not cite to *Konecny*.
49. *Id.* at **2, 4–5.

defense." [50]

6. The exclusive remedy defense applies to a subcontractor sued by an owner's employee: *Garza v. Zachry Constr.*

In *Garza v. Zachry Constr. Corp.*, DuPont, acting as its own GC, hired Zachry as subcontractor to perform services in one of its plants. [51] Garza, a DuPont employee, was injured by the alleged negligence of two Zachry employees. Garza collected workers' compensation benefits through DuPont and sued Zachry and its two employees (Figure 7). [52] Under its contract with Zachry, DuPont agreed to furnish workers' compensation insurance to Zachry, but under a policy (an OCIP) other than the one that compensated its employee Garza.

Figure 7. *Garza v. Zachry* (E sued SC, E_1, and E_2).



The trial court granted the defendants summary judgment motion based on the Act's exclusivity defense. Garza appealed arguing, *inter alia*, that to the extent the exclusive remedy defense applied in this case, the bar "violate[d] his rights under the Texas Constitution's open courts provision." [53] This provision guarantees that every person "shall have remedy by due course of law." [54] This constitutional right has been construed as barring legislation that suppresses "common-law remedies for well-established common-law causes of action" unless there is a reasonable substituted statutory remedy, or when the legislation is a "reasonable exercise of the police power." [55]

As a threshold issue, the court stated its intent to construe the Act "liberally in favor of coverage" in order to afford employees the coverage "the Legislature created." [56] The court also reiterated that an owner could also be a GC under § 406.123, and that the immunity this section brought extended to all tiers of subcontractors under the OCIP. [57]

The court rejected Garza's first argument that § 406.123 barred only "claims brought by employees who are covered under the same workers' compensation policy as he." The court held that nothing in the Act implied that a GC's direct employee and its "deemed" employee could sue each other simply because they were covered by different policies. Such an outcome would be inconsistent with the intended purpose of workers' compensation (to encourage coverage) and would force GCs to purchase one policy for all. [58]

The court next also rejected Garza's open court provision argument, whereby Garza argued that because his workers' compensation arose from a policy other than DuPont's OCIP, he did not trade his right to receive workers' compensation benefits for the right to sue Zachry and its employees. In other words, Garza argued that his *quid pro quo* was with DuPont, not Zachry and its employees. [59] The court held that irrespective of whether DuPont covered its employees and contractors with one or more policies, Garza's *quid* was two-fold: his ability to claim benefits under the Act *and* his immunity from common law claims by DuPont's independent contractor employees. Garza's *quo* was likewise two-fold in that he relinquished his right to sue DuPont and its independent contractors. [60] The restriction on Garza's right to sue was "not unreasonable or arbitrary" and did not violate his rights under the Texas Constitution's open courts provision. [61]

50. *Id.* at **1, 17. *Suarez* is discussed in more detail in Pierre Grosdidier, *Construction Law Practice Tip: Plaintiffs' attorneys again fail to defeat CIP-based exclusivity defense*, May 10, 2018 (available at *www.haynesboone.com/people/g/grosdidier-phd-pierre*).
51. 373 S.W.3d 715, 717 (Tex. App.—San Antonio 2012, pet. denied).
52. *Id.*
53. *Id.*
54. *Id.* at 721 (citing Tex. Const. art. 1, § 13).
55. *Id.* at 723.
56. *Id.* at 722.
57. *Id.* at 718 (citing Entergy Gulf States, Inc. v. Summers 282 S.W.3d 433, 438 (2009); Etie v. Walsh & Albert Co., Ltd., 135 S.W.3d 764, 768 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)).
58. *Garza,* 373 S.W.3d at 723.
59. *Id.* at 722.
60. *Id.* at 724.
61. *Id.* at 725.

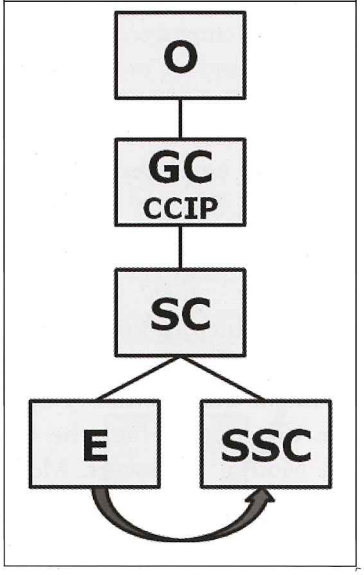
B. Courts also broadly apply the exclusive remedy defense in CCIP cases.

1. The exclusive remedy defense applies when a subcontractor employee sues a sub-subcontractor. [62]

In *Etie v. Walsh & Albert Co., Ltd.*, the Houston First Court of Appeals held that § 406.123(e)'s statutory employer/employee status extended to "all employees of all subcontractors, regardless of the tier they occupy." [63] The court also held that "all covered employees are fellow servants who are equally entitled to workers' compensation benefits and equally immune from suit." [64]

Etie was a subcontractor employee injured by the alleged negligence of a sub-subcontractor's employee. Etie recovered workers' compensation benefits through the GC's CCIP and sued Walsh & Albert, the sub-subcontractor, for negligence (Figure 8). [65] Both Etie and Walsh & Albert worked for Way Engineering, a subcontractor of Clark Construction Group, the GC. The GC's CCIP covered all subcontractors and their employees on the construction site. The trial court granted Walsh & Albert's summary judgment motion and Etie appealed arguing that Walsh & Albert was an independent contractor to whom § 406.123 did not apply. [66]

Figure 8. *Etie v. Walsh* (E sued SSC).



As noted, Texas Labor Code § 406.123(a) states that a GC may agree in writing to provide workers' compensation insurance coverage to a subcontractor and its employees. Pursuant to § 406.123(e), this agreement "makes the general contractor the employer of the subcontractor and the subcontractor's employees only" in relation to Texas' workers' compensation laws. As the *Etie* court observed, this language does not address the status of "lower tiers of subcontractors." [67] Etie argued that § 406.123 did not apply because Walsh & Albert admitted that it was an independent contractor, and independent contractors and their employees are not employees of the GC for the purpose of workers' compensation laws. [68]

The Court of Appeals rejected Etie's arguments and affirmed the summary judgment. It held that Way Engineering was both a subcontractor vis-à-vis Clark (the GC), but also a GC vis-à-vis Walsh & Albert. Because Way Engineering provided workers' compensation insurance to Walsh & Albert under the CCIP through its contracts with Clark and Walsh & Albert, the latter and its employees became deemed employees of Way Engineering. [69] Based on this

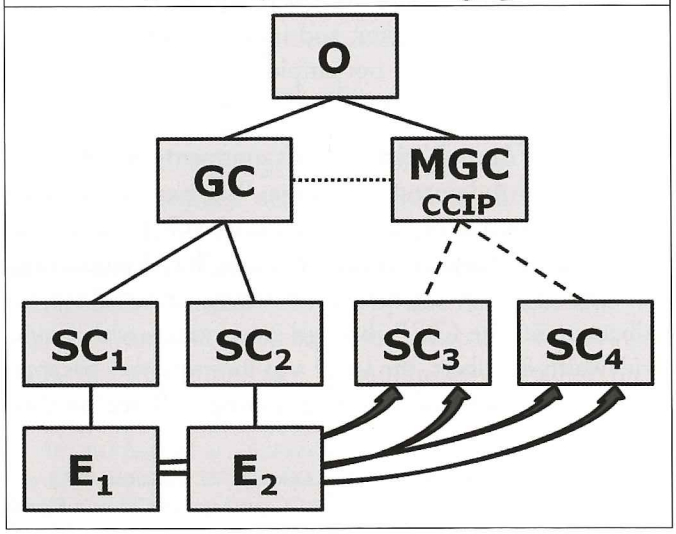
62. Berkel & Co. Contractors, Inc. v. Lee, No. 14-15-00787-CV, 2018 WL 1403545, --- S.W.3d ---, at *5 (Tex. App.—Houston [14th Dist.] Jan. 23, 2018, no pet. h.), *op. on reh'g, reh'g en banc denied*, held that the exclusive remedy defense protected a subcontractor from claims by a GC employee when the GC purchased a CCIP (as in Figure 4, but with a CCIP).
63. Etie v. Walsh & Albert Co., Ltd., 135 S.W.3d 764, 765 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)).
64. *Id.*
65. *Id.* at 765–66. *HCBeck* and *TIC Energy* hold likewise. HCBeck, Ltd. v. Rice 284 S.W.3d 349, 359 (Tex. 2009).; TIC Energy & Chem., Inc. v. Martin 498 S.W.3d 68, 74 (Tex. 2016). *Etie* was decided in 2004, *HCBeck* in 2009 and *TIC Energy* in 2016.
66. *Etie*, 135 S.W.3d at 766.
67. *Id.*
68. *Id.* at 766–67.
69. *Id.* at 767.

and other arguments, the court held that "the purposes of the Act are best served" by extending deemed employer/employee status to all tiers of subcontractors covered by a CCIP. All participating employees are entitled to workers' compensation benefits and are immune from suit. [70]

2. The exclusive remedy defense applies when a subcontractor employee sues a subcontractor of a managing GC.

In *Becon Constr. Co., Inc. v. Alonso*, two subcontractor employees sued two other subcontractors, Becon Construction and Bechtel Equipment Operations, Inc. following a crane accident (Figure 9). [71] A&L Industrial and Empire Scaffold, the plaintiffs' employers, worked for Performance Contractors, Inc., the GC, which had a contract with Motiva, the owner. Motiva contracted another party, the Bechtel-Jacobs Joint Venture, to act as Managing GC ("MGC"). Performance's (GC) contract with Motiva (O) required Performance to take its orders from the MGC (hence the dotted line in Figure 9). A&L Industrial and Empire Scaffold, therefore, took their instructions indirectly from the MGC. It seems that defendants Becon and Bechtel Equipment were under subcontract, directly or indirectly, to the MGC (hence the dashed lines in Figure 9). [72] The owner-MGC contract required the MGC to provide workers' compensation insurance to all project contractor and subcontractors, and the owner-GC contract required Performance and its subcontractors to enroll in the CCIP. [73]

Figure 9. *Becon v. Alonso* (E_1 and E_2 sued SC_3 and SC_4). MGC = Managing GC



The MGC's CCIP covered the injured employees. These employees recovered workers' compensation benefits following the accident but sued Becon and Bechtel Equipment nonetheless. The defendants permissively appealed after the trial court's denied their motion for summary judgment, which relied on the exclusive remedy defense.

On appeal, the employees argued, *inter alia*, that the exclusive remedy defense did not apply to Becon and Bechtel Equipment because "Performance and the respective subcontractors for whom they were working did not have written agreements that required Performance to provide them with the workers' compensation insurance coverage on the project at issue." [74]

Indeed, the master services agreements between Performance and the two subcontractors required the latter to obtain workers' compensation. The employees argued that the insurance provisions in these master services agreements pre-dated, and took precedence over, those in the Motiva project contracts. [75] The court of appeals rejected this argument, relying in part on the Supreme Court's dicta in *Summers* that the Act encourages the provision of workers' compensation. [76] The court held that the parties' contracts evinced a desire to create a single workers' compensation insurance policy for all. In particular, the Motiva-MGC contract required the MGC to create a CCIP for all, and the Motiva-Performance contract required the latter to take its direction from the MGC. Moreover, A&L Industrial and Empire Scaffold (the plaintiffs' employers) adjusted their contract price for the Motiva project to reflect the fact that the CCIP provided the workers' compensation insurance. This fact showed effective compliance with the master services agreements, which required these subcontractors to supply workers' compensation insurance to their employees. [77] For this and other reasons, the court held that the exclusive remedy defense applied to the employees' claims and it granted defendants' motion for summary judgment. [78] *Becon* shows again that courts look at what actually happened when they analyze exclusivity defenses,

70. *Id.* at 768.
71. 444 S.W.3d 824, 825-26 (Tex. App.—Beaumont 2014, pet. denied).
72. The opinion and the briefs are not clear on the contractual relationship between Becon and Bechtel Equipment and the MGC.
73. *Id.* at 826, 830.
74. *Id.* at 829.
75. *Id.* at 827.
76. *Id.* at 830.
77. *Id.* at 831.
78. *Id.* at 832, 834.

i.e., did the defendants provide or enroll in the wrap-up, and did the plaintiffs collect workers' compensation benefits? Who pays for the premiums and how "amounts merely to an accounting matter." [79]

The court also reversed the trial court's grant of the plaintiffs' no-evidence cross-motion for summary judgment. The plaintiffs had argued that the defendants could not invoke the exclusivity defense because the defendants presented no evidence that the CCIP complied with certain applicable Texas Department of Insurance regulations. [80] The court held that neither the Act nor the relevant regulations established the penalty for these violations, and that the Legislature's "decided bias in favor" of workers' compensation coverage could not support the employees' argument. [81] The court ordered that the plaintiffs take nothing. [82]

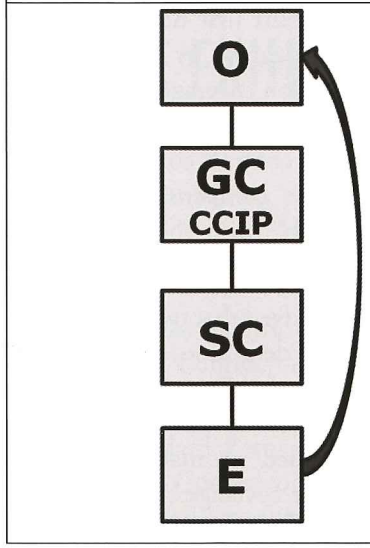
C. The exclusive remedy defense does not protect a party that merely requires another to provide workers' compensation insurance.

1. The exclusive remedy defense does not apply when a subcontractor employee sues an owner who required the GC to provide a CCIP: *Halferty v. Flextronics.*

Consider the situation where an owner and a GC sign a construction contract that requires the GC to provide workers' compensation benefits through a CCIP for the GC and its subcontractors of all tiers. Does the owner enjoy the exclusivity defense against claims asserted by an injured subcontractor employee who collected benefits from the wrap-up (Figure 10)?

The Corpus Court of Appeals effectively answered this question in the negative in *Halferty v. Flextronics Am., LLC.* [83] In this case, Flextronics (owner) hired Titan Datacom, Inc. (GC) to design a network and to pull cables at a Flextronics facility. [84] Their contract required

Figure 10. Parties' hypothetical relationships (E sued O).



that Titan

> . . . will provide, pay for and maintain in full force and effect [Workers' compensation insurance (and other policies)] 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. [85]

This language could be construed as a requirement that Titan offer its employees and subcontractors of all tiers a CCIP. But the record is clear that Outsource, LLC, Titan's subcontractor, provided its own workers' compensation insurance, *i.e.*, it did not rely on Titan for coverage. [86] 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. [87]

79. *Id.* at 831.
80. *Id.* at 825.
81. *Id.* at 833.
82. *Id.* at 834.
83. 2018 WL 897979, at *1. Parts of this Section C.1 were previously published in Pierre Grosdidier, *Limitations of Exclusivity Defense in Workers' Comp Cases*, Law360, Mar. 21, 2018.
84. The opinion and the pleadings present Flextronics as the GC and Titan as the subcontractor. But for the sake of consistency with this article (and because it comports with the case's facts), this discussion presents Flextronics as the owner and Titan as the GC, as in Figure 10. Whether Flextronics is an owner, a GC, or an owner/GC makes no difference in the end in light of *Summers*.
85. Appellant's Brief, *Halferty*, 2018 WL 897979, at 28. Pleadings are available on line at http://www.txcourts.gov/13thcoa/.
86. *Halferty*, 2018 WL 897979, at *4 n.3 ("the record shows that Halferty received benefits from Outsource's workers' compensation insurance provider"); 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).
87. *Halferty*, 2018 WL 897979 at *1.

Both sides invoked *HCBeck* to support their position. But the court of appeals 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." [88] The court also noted that nothing in the Flextronics-Titan contract compelled Flextronics to provide back-up workers' compensation coverage, as was HCBeck's contractual obligation should the owner in that case terminate its OCIP coverage.

The court also acknowledged that two appellate courts had adopted the dictionary definition of "to provide" as "to supply or make available." [89] 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 own coverage." [90]

To enjoy the Act's exclusivity defense, Flextronics needed "to do something more than simply passing the onus of obtaining coverage" downstream. [91] That "something more" could have been Flextronics's contractual commitment to provide back-up 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. [92]

A sliver of uncertainty remains as to *Halferty*'s holding as it relates to wrap-ups because the owner-GC contract arguably required Titan to provide a CCIP, which it did not. *Flextronics* is, therefore, neither an OCIP nor a CCIP case. [93] Be that as it may, the logic that the court used to arrive at its decision arguably does not depend on whether Halferty received benefits from a CCIP or from his employer's workers' compensation plan. Moreover, *Halferty*'s holding is consistent with that in *Valadez*. In that case, MEMC, the owner, required its contractor, Turner Industries Group, LLC, to maintain workers' compensation coverage for Turner's employees. [94] One of these employees, Valadez, was injured while performing work at MEMC. Valadez collected benefits from Turner's policy and sued MEMC for negligence. The trial court granted MEMC's summary judgment motion on basis of the Act's exclusivity defense. The First Court of Appeals reversed that decision because "MEMC has no contractual obligation to provide workers' compensation coverage for Turner or its employees." [95] The court held that "merely requiring the subcontractor to obtain its own workers' compensation insurance does not constitute 'providing' coverage within the meaning of the statute." [96] If this were the case, one might argue, all participants in the usual construction contractual chain (Figure 1) could push workers' compensation requirements down to the lowest-tier subcontractors and still enjoy the exclusivity defense. [97]

Flextronics filed its petition for review with the Supreme Court on May 1, 2018. If it survives this appeal, *Halferty* creates an incentive for owners and GCs to prefer OCIPs to CCIPs, because only the former will protect these parties from third party over actions.

88. *Id.* at *4.
89. *Id.* at *5 (citing *Merriam Webster's Collegiate Dictionary* (10th Ed. 1996); Hunt Constr. Group, Inc. v. Konecny, 290 S.W.3d 238, 245 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); Funes v. Eldridge Elec. Co., 270 S.W.3d 666, 671 (Tex. App.—San Antonio 2008, no pet.).
90. *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.) (GC does not provide workers' compensation coverage so as to benefit from the Act's exclusivity defense by contractually requiring subcontractor to obtain such coverage) (not a wrap-up case).
91. *Halferty*, 2018 WL 897979 at *5.
92. *Id.* at **4, 6.
93. *Id.* at **4 ("this case does not involve an OCIP").
94. Valadez v. MEMC Pasadena, Inc., No. 01–09–00778–CV, 2011 WL 743099, at *1 (Tex. App.—Houston [1st Dist.] March 3, 2011, no pet.) (mem. op.).
95. *Halferty*, 2018 WL 897979 at *3. The court of appeals affirmed the trial court's decision on the basis of MEMC's Texas Civil Practice & Remedies Code Chapter 95 defense. *Id.* at *9.
96. *Id.* at *4.
97. The court does not make this last argument in *Valadez*.