Construction Law Practice Tip: Manhattan v. Garcia is the Texas Appellate OCIP Case to Watch

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PRACTICES Construction Litigation

Texas courts have been kind to owner controlled insurance programs ("OCIPs").[1] Over the last decade, the Texas Supreme Court and several appellate courts have extended statutory employer-status protection to various OCIP participants. This protection arises from Texas's Workers' Compensation Act (the "Act"), which offers a qualified immunity to employers who provide workers' compensation insurance to their employees.[2] Under the Act, and barring an intentional act or gross negligence by the employer, recovery of workers' compensation benefits is an injured employee's exclusive remedy. The protection can extend to parties beyond an employee's direct employer. For example, a general contractor's ("GC") immunity can be extended to claims by a subcontractor's employee if the GC agrees in writing to provide workers' compensation insurance to the subcontractor and its employees.[3]

What if subcontractors obtain workers' compensation insurance through an OCIP, paid for by the owner—not by the GC? In the landmark case of *HCBeck, Ltd. v. Rice*, the Texas Supreme Court held that a GC 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, as the owner contractually could at any time.[4] It did not matter that the GC, HCBeck, did not directly pay for the insurance because "[t]he Act only require[d] that there be a written agreement to provide workers' compensation insurance coverage."[5] 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.

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.[6]

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 exclusive remedy defense.[7] Significantly, *HCBeck*'s concluding language does not expressly mention the GC's obligation to provide backup insurance. This obligation is implied in *HCBeck* by the fact that the owner retained the right to terminate the OCIP and that the GC had to provide coverage. But, logically, under *HCBeck*'s concluding language, the GC could unconditionally qualify under the Act if the owner-GC contract denied the owner the right to terminate the OCIP. Indeed, in that case, why should the GC have an obligation to provide alternate coverage?

In *Manhattan Vaughn, JVP v. Garcia*, the First Court of Appeals is asked to decide precisely this question.[8] The plaintiff, Garcia, an employee of Manhattan Vaughn's subcontractor, was killed during demolition work for owner Texas A&M University. Garcia's direct employer was enrolled in a

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GC-imposed OCIP and Garcia's family collected death benefits. Nonetheless, Garcia's family sued Manhattan Vaughn (the GC) and prevailed at trial with a $54 million jury verdict. The trial court denied Manhattan Vaughn's OCIP defense-based motion for summary judgment.

Manhattan Vaughn reiterated its OCIP defense on appeal.[9] Citing *HCBeck* and the Act, it argued that it "provided" workers' compensation insurance to Garcia and, therefore, enjoyed immunity from suit. Garcia conversely argued that Manhattan Vaughn enjoyed no such immunity because it did not meet *HCBeck*'s second prong, *i.e.*, it did not commit to provide alternate insurance "if the subcontractor fail[ed] to" obtain workers' compensation insurance.[10] In its Reply Brief, citing *HCBeck*, Manhattan Vaughn insisted that merely "requiring enrollment in an OCIP... is sufficient to trigger the [Act's] exclusive remedy provision."[11] Manhattan Vaughn also distinguished the facts in the case in that its prime contract did not permit Texas A&M to terminate the OCIP, as the owner-GC contract did in *HCBeck*.[12] According to Manhattan Vaughn, "*HCBeck*'s discussion about hypothetical termination and alternate insurance" was, therefore, "inapplicable."[13]

This is a case to watch for construction law practitioners. The Court of Appeals heard oral argument on October 24, 2017, and a decision is pending. But with a $54 million jury verdict at stake, this appellate decision might not mark the end of the case.

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[1] The same can be said about contractor controlled insurance programs ("CCIP").

[2] Tex. Lab. Code § 408.001.

[3] *Id.* § 406.123(a), (e).

[4] 284 S.W.3d 349, 350−52 (Tex. 2009).

[5] *Id.* at 353 (citing Tex. Lab. Code § 406.123(a)).

[6] *Id.* at 360.

[7] *Id.*

[8] No. 01-16-00443-CV (Tex. App.—Houston [1st Dist]) (on appeal from the 80th Judicial District Court of Harris County). Pleadings are available online.

[9] The OCIP issue is only one among several in this appeal.

[10] Appellees' Brief at 11−12. The actual language in *HCBeck* is that "*HCBeck* is ultimately responsible for obtaining alternate workers' compensation insurance *in the event [owner] terminated the OCIP.*" *HCBeck*, 284 S.W.3d at 352 (emphasis added).

[11] Appellant's Reply Brief at 15 (citing *HCBeck*, 284 S.W.3d at 350).

[12] *Id.* at 16.

[13] *Id.*

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