Construction Law Journal

Summer 2019 Volume 15, Number 1

IN THIS ISSUE:

ONE-SATISFACTION AT A TIME—ALLOCATING SETTLEMENT PROCEEDS IN A MULTI-PARTY CONSTRUCTION DISPUTE

CURRENT STATUS OF CONTROLLED INSURANCE PROGRAMS UNDER TEXAS LAW

THE IMPORTANCE OF BEING INJURED - - A POTENTIAL PROBLEM WITH THRID-PARTY CAUSES OF ACTION IN TEXAS CONSTRUCTION DEFECT CASES

TEXAS SALES AND USE TAX FOR THE CONSTRUCTION INDUSTRY

CONDOMINIUM CONSTRUCTION-DEFECT LITIGATION LOOKS TO COOL OFF FOLLOWING *MOSAIC RESIDENTIAL* APPELLATE DECISIONS

Official Publication of the Construction Law Section of the State Bar of Texas • www.constructionlawsection.org

BY: PATRICK J. WIELINSKI[1]

CURRENT STATUS OF CONTROLLED INSURANCE PROGRAMS UNDER TEXAS LAW

I. INTRODUCTION

Construction-related risks are complex simply due to the nature of many construction projects, especially when several parties are alleged to have caused or contributed to a loss or injury. Under these circumstances, consideration must be given to the contractual relationships whereby considerable risks are transferred or allocated among the parties. Of course, each of those parties maintains insurance coverage to help manage those risks that are only compounded by the technical aspects of the endeavor of construction. The stakes are high, and an understanding of these relationships is critical to navigating through the morass of issues that can be encountered.

Due to the presence of multiple parties in close proximity and contractual relationships between them throughout a modern construction project, the construction industry has traditionally presented unique challenges to the insurance industry in terms of insured risks. This is especially true, considering that all of the tiers on a project traditionally maintain separate insurance to protect their own interests, and perhaps those of upper tiers whom they are required to name as additional insureds or to indemnify. As a result, complex indemnity clauses are used to attempt to transfer risk among the tiers on the project. Presumably the cost of separate insurance, including the contractual liability insurance to insure complex indemnity obligations, is passed on to the owners in the price of the work.

The high cost of separate insuring programs throughout the tiers created the driving force behind the development of controlled insurance programs or wrap-ups. The elimination of duplicative insurance coverage and the inherent conflicts between insurers as to a specific claim spurred the desire to achieve economies of scale and cost savings. Moreover, the ability to theoretically provide better coverage increased the impetus of many owners and general contractors to consider this option. For example, the inability of many subcontractors to obtain effective construction defect coverage, particularly in residential construction, has caused owners and general contractors to consider wrap-up policies on many projects. Alternatively, this coverage may be provided on a "rolling" basis, that is, in the form of a blanket policy that covers a number of projects for one owner or general contractor.

The use of wrap-up insurance programs has engendered much controversy between owners, contractors and subcontractors as to the relative benefits and problems associated with them. On one hand, owners point to the economies of scale that can be achieved, as well as extended coverage, particularly for long tail property damage claims involving defective work. As to jobsite injuries, owner or contractor-sponsored workers compensation insurance can provide exclusive remedy protection to all tiers on the project, eliminating the costly and time-consuming internecine conflicts between the parties and their insurers that invariably follow a bodily injury on the job. At the same time, contractors point to negatives such as coverage gaps, disruption of their own insurance programs and simple mismanagement associated with some wrap-ups. In an attempt to address these issues, some large contractors have moved toward sponsorship of their own contractor controlled insurance programs.

This article focuses on the development of the wrap-up under both statutory and case law. Controlled insurance programs have only recently become the subject of statutory regulation under Chapter 151, Consolidated Insurance Programs, of the Texas Insurance Code. While wrap-ups have been in use for several decades, case law is still relatively scant. It will also touch on certain of the relative advantages and drawbacks associated with these programs generally and under Texas law. One issue that bears particular attention is the extension by Texas courts of statutory immunity on projects where workers compensation is provided through a single sponsor.

1. Pat Wielinski is a principal in the law firm of Cokinos | Young in its Dallas-Fort Worth office located in Irving, Texas.Pat practices in the areas of construction, insurance coverage and risk management.He is Past Chair of the Insurance Law Section of the State Bar of Texas and regularly lectures to construction, insurance, and legal groups on insurance coverage and risk management issues. Pat is a member of the AGC of America Surety Bonding and Construction Risk Management Forum and as part of that forum, he monitors the status of insurance law on a national basis as applied to construction risks, filing amicus curiae briefs for a number of Texas and national construction trade organizations, including the AGC of America, in important cases to the industry. Pat is a Fellow of the American College of Coverage Counsel, and has been recognized by Chambers USA – Texas Construction and Insurance Law and as a Texas Super Lawyer. Most recently, Best Lawyers named him 2019 Lawyer of the Year for Construction Litigation in Dallas/Fort Worth.The author sincerely thanks Travis Brown and Amy Rauch, his colleagues at Cokinos Young, for their assistance and contributions to this effort.

II. WRAP-UP TERMINOLOGY

As is the case with any specialized endeavor, wrap-ups have their own set of acronyms and terminology.

A. Wrap-Up. A wrap-up is an insurance/risk management/safety program provided to all of the parties on a construction project, usually for the duration of the construction operations. The wrap-up typically includes commercial general liability (CGL) insurance, workers compensation and employers liability insurance, umbrella liability insurance and often builders risk insurance. Automobile liability and contractors equipment coverage are usually not included. Tiers that are covered will usually include the contractor, subcontractors, and sub-subcontractors through the lower tiers. Smaller subcontractors, offsite fabricators and suppliers are usually not included.

B. OCIP. An "owner controlled insurance program," as the name implies, is purchased by the owner to insure the contractors and subcontractors on the project. Oftentimes, the owner is also a named insured on the policies.

C. CCIP. The general contractor or construction manager sponsors or provides the "contractor controlled insurance program." One of the theoretical bases for choosing a CCIP over an OCIP is the contractor's experience and ability to better control the contracting process, risk management and safety.

D. CIP. Short for "controlled insurance program," CIP is another acronym that describes wrap-ups in general and includes both OCIPs and CCIPs. Regardless of the labels – CIP, OCIP or CCIP – they in essence amount to misnomers, in that the party that remains in control of the insurance program is usually the insurer.

E. Sponsor. The sponsor is the party, whether the owner, the general contractor or the construction manager, that obtains and provides the wrap-up coverages for the project or projects. The Texas statute refers to the sponsor as the "principal," defined as "the person who procures the insurance policy under a consolidated insurance program."[2]

F. TPA. The "third party administrator" is the firm that handles administrative responsibilities on the CIP, including claims administration, loss control and risk management information gathering.

G. Rolling Wrap. A "rolling wrap" or "ROCIP" is a controlled insurance program administered by one sponsor, such as a large general contractor or owner, for use on more than one project. Public institutional owners often sponsor rolling wraps for their building programs.

III. STATUTORY REGULATION OF WRAP-UPS IN TEXAS

House Bill 2093, the Consolidated Insurance Programs Bill, was passed by the legislature and was signed into law on June 17, 2011, adding Chapter 151, "Consolidated Insurance Programs" to the Texas Insurance Code, effective as of January 12, 2012. The regulation of consolidated insurance programs appeared to be a relatively minor portion of the new statute, receiving little attention because the construction anti-indemnity provisions added at the last minute to the Bill emerged as the tail wagging the dog.[3]

A. Subchapter 151 A: General Provisions

Subchapter A sets out the general provisions of Chapter 151 that are applicable to wrap-ups. The statute refers to "consolidated insurance programs," rather than the more commonly used term "controlled insurance program," but the two terms are interchangeable. "Consolidated insurance program" is defined as "a program under which a principal [sponsor] provides general liability insurance coverage, workers' compensation insurance coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects."[4] As such, the definition encompasses owner controlled insurance programs ("OCIPS") where the owner is the sponsor, contractor controlled insurance programs ("CCIPS") where the contractor sponsors the program, as well as rolling CIPS since the applicability of the chapter to multiple construction projects is specifically addressed.

> A construction project to which the statute applies is defined as follows:
>
> > "Construction project" means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents. A construction project

2. Tex. Ins. Code § 151.001(8).
3. The anti-indemnity provisions are found at Subchapter C of Chapter 151.
4. Tex. Ins. Code § 151.001(1).

> under this chapter does not include a single family house, townhouse, duplex, or land development directly related thereto.[5]

Therefore, Chapter 151 does not regulate residential CIPS that may be sponsored by residential developers.

Section 151.051 is essentially the only provision in the statute that regulates the terms and content of a CIP. It sets out the requirement that a CIP that provides general liability insurance coverage must provide completed operations coverage for a period of not less than three years.[6] Thus, despite the designation of the statute as "Consolidated Insurance Programs," little actual regulation of a CIP is provided for, and the requirement that there be completed operations coverage maintained for not less than three years falls short of the ten year statute of repose that applies to construction work in Texas. The result is coverage that is in effect for less than the ten year period of exposure to liability of a contractor or subcontractor arising out of its work. A significant problem arises where the corporate policy maintained by a participant in a wrap-up contains an exclusion as to work performed on a project that was the subject of a wrap-up. The corporate policy may explicitly exclude coverage for the wrapped project, leaving a significant gap in coverage.[7]

B. Statutory Notice Requirements Governing Enrollment in Wrap-Ups

Chapter 151 was amended in 2015, and effective January 1, 2016. The amendment consisted of a series of sections setting out requirements as to information to be provided to a potential enrollee (participant) in a wrap-up for which the enrollee seeks to be a contractor or subcontractor. The sections provide for the deadlines and means for providing information, including a copy of the actual insurance policy or policies promulgated as part of the CIP, and the effect of noncompliance. The requirements were added to increase transparency for potential enrollees, i.e., for lower tier enrollees, in order to assist them in the valuation of the insurance coverages available under the wrap-up and, once enrolled, to ensure that the policy or policies themselves are provided at the request of the enrollee.

While most CIPs include a CIP manual to be disseminated to all participants as part of the contract or subcontract documents, the added transparency required by these provisions was apparently aimed at reducing possible mistrust between lower tiers and upper tiers as to the information pertaining to the adequacy and quality of the insurance coverages being provided by the upper tier sponsor.

The core provision of the statute regarding increased transparency for CIPs is § 151.103, which sets out the information that must be provided by the principal (sponsor) before entering into a construction contract for a project that will be wrapped. This section provides that if a construction contract requires a person to enroll in a consolidated insurance program, not later than the 10th day before the date the principal enters into a contract with that person, the sponsor is required to provide the following information:

(1) Contact information, including the phone number and email address for the program administrator, the principal's risk manager, and the insurer's contact person for filing a claim for each type of insurance coverage provided in the program.

(2) The criteria for eligibility for enrollment into the program.

(3) A description of the project site covered by the program coverages.

(4) A summary of the insurance coverages to be provided to the contractor under the program, including the policy form number and issuing organization if the policy is a standardized insurance policy (such as ISO),[8] or if the policy is not standardized, a sample policy form.[9] In practical terms, compliance with this requirement may prove to be difficult in some instances, where the insurer, let alone the actual policy form, may still be under negotiation. This is especially true as to the CGL form, which may be heavily manuscripted through endorsements. The statutory requirements may incentivize the sponsor to endeavor to provide the information. In addition, the per occurrence and aggregate limits

5. Tex. Ins. Code § 151.001(2).
6. Tex. Ins. Code § 151.051.
7. *See infra* notes 14–17 and accompanying text for a discussion of wrap-up exclusions.
8. ISO stands for Insurance Services Office is the organization that promulgates the standard policy forms.
9. Tex. Ins. Code § 151.003(A).

of the insurance coverage, together with any sublimits, must be provided, as well as the term of the coverages for each limit and sublimit, if any, and any material endorsements to the policy.[10]

(5) A summary of insurance coverages to be provided by the contractor. This requirement relates to the insurance that must be maintained by the contractor under its own corporate program as to operations and work not included within the wrap-up, including naming the principal or sponsor as an additional insured on those policies.

(6) Instructions on how to include or exclude costs of insurance provided by the program in the enrollee's proposal for work on the project. A key element of the enrollment process is for the enrollee to provide a bid including insurance costs under its corporate program, as opposed to the costs under the wrap-up, so that they can be compared.

(7) A description of the audit or claims procedures related to the program that may result in additional costs to the contractor, including policy deductibles or other assessments. Both the contract and the wrap-up manual should allocate the amount of any deductible between the parties.

(8) A description of the contractor's duties relating to reporting payroll and retention of documentation, and claims and participation in safety inspections and incident reporting. Payroll and documentation is essential for calculating the premium to be charged to the principal under the program.

Where a contractor enters into a subcontract with a lower tier, the contractor must provide that lower tier the same information set out in § 151.003 that the contractor has received from the principal or sponsor.[11] In that manner, Chapter 151 sets out the mechanism whereby the statutory requirements for disclosure of information are met by the contractor vis-à-vis the subcontractor, and thus, down through the lower tiers. In addition, § 151.005 provides that the policy, coverage and program information required to be provided under § 151.003 must be accurate, and the person who receives the information provided by the principal or the contractor pursuant to §§ 151.003 and 151.004 may justifiably rely on that information to decide whether to enter into the construction contract. This section highlights the important role that proper and adequate insurance coverage plays in the construction process.

In turn, § 151.006 sets out the consequences of failing to provide the § 151.003 information to an enrollee. Subsection (a) states that a person may not be required to enter into a construction contract that requires enrollment in a CIP unless the person has been provided the required information. If that information is not provided to a person within the 10-day period under § 151.003 or § 151.004, as applicable, that person may elect not to enroll in the CIP. Further, under Subsection (b), if a person elects not to enroll in the CIP under Subsection (a), as a result of having not been provided with the required information within 10 days, a principal or contractor may provide the information after the 10-day period under §§ 151.003 or 151.004, as applicable. Then the person must select whether to enroll in the CIP not later than the 10th day after the date that the information is provided under Subsection (b). In that event, under Subsection (d), the principal or contractor, as applicable, is required to compensate that person with whom it contracts and who obtains insurance coverage under Subsection (c) for the actual cost of that insurance coverage. Therefore, the statute provides a mechanism whereby a party that elects not to enroll in the CIP can provide its own equivalent insurance at the cost of the principal or contractor. Nevertheless, though the procedure exists, it is somewhat unlikely that a party who declines to enroll in the CIP would contract to perform work on the project. In the event that it did, issues could arise as to the coordination between the CIP coverage applying to other participants and the contractor's own coverage if a loss involving that contractor implicated both coverages.

C. Compliance with Requests for Copies of Wrap-Up Insurance Policies

Section 151.007 provides that a contractor may request in writing from the principal, or from the party with which the contractor has a direct contractual relationship, a complete copy of the insurance policy that provides

10. Tex. Ins. Code § 151.003(4)(B).
11. Tex. Ins. Code § 151.004.

coverage for the contractor under the CIP. That copy must be provided to the requesting contractor no later than the 30th day the request was sent, or the 60th day after the date the contractor's work covered by the consolidated insurance programs begins on the construction project.[12] Section 151.008 goes on to provide that it is a material breach of the contractor's construction contract to fail to provide a complete copy of the insurance policy before the later of the 75th day after the request was sent or the 90th day after the date the contractor's work covered by the CIP begins on a construction project. As such, that failure would trigger the remedies for breach of the contract between the parties. If the contractor requests a hard copy of the policy, it must be provided in that form, otherwise, the policy can be transmitted by facsimile or email, or alternatively, by providing the requesting contractor access to the information on the principal's or the principal's agent's website.[13]

While the notice and compliance provisions provide little in the way of substantive regulation of the terms, content or operation of wrap-ups in Texas, compliance with the notice provisions in the enrollment process should render the wrap-up manual for the particular project more readily available to potential enrollees at an earlier date. More particularly, the request and compliance provisions as to copies of the actual policies may speed the underwriting issuance of the CGL and umbrella policies in the wrap-up. Those policies may be heavily manuscripted and may be the subject of more lengthy negotiation and issuance. Under prior practice, those policies sometimes were not issued until months after construction commenced.

IV. THEORETICAL ADVANTAGES OF CIPS

CIPs initially gained popularity due to the potential savings in insurance costs among the tiers on a construction project. The programs were particularly well-suited for use on large commercial and public projects. The insurance costs of individually insured contractors that were included in their bids would be reduced by the provision by the sponsor, usually the owner, of a single insurance program insuring all participants. The sponsor could verify savings in the bids by requiring the contractor and subcontractors to bid the job with their insurance cost and without their insurance cost in contemplation of the use of a wrap.

Nevertheless, there are significant contingent factors that impact the realization of substantial savings under CIPs. Those factors include: (a) a project of sufficient dollar value to extract such savings; (b) risk management capabilities to effectively administer the CIP; and (c) above all, adequate coverage to apply to claims when needed.[14] While the emphasis may have changed somewhat from potential cost savings to the availability of broader coverage, these three factors are still major determinants in whether a particular CIP will be successful.

Commentators point to numerous advantages of a CIP, including (a) mass buying power; (b) elimination of overlapping and duplicating coverages; (c) elimination of layers of hold harmless agreements and their ultimate costs; (d) reduced commissions, operating, and insurance costs; (e) higher limits of coverage and assurances as to the quality of coverage for all parties on the project; (f) certainty of protection and reduced gaps in coverage; (g) centralized cost control and streamlined claims processing; and (h) centralized and improved safety programs.[15] Specifically with regard to the provision of workers compensation insurance under a wrap-up policy, savings are achieved by including a comprehensive site-specific safety program that governs all the trades in order to reduce losses. This benefit is credited with increasing worker morale and increasing productivity.[16] Moreover, cost savings are achieved by economies of scale that allow the sponsor to maintain higher deductibles or retentions.

Other potential benefits of a wrap-up insurance program that are frequently pointed out include reduced litigation, increased compliance with regulatory standards, control of insurance coverage, solving insurance availability problems, improved productivity, cost control and the enhanced ability to use smaller contractors due to wider availability of insurance through the CIP.[17] For the most part, all of these benefits result in increased stability on a project through the ability of a large owner or contractor to negotiate enhanced insurance coverage and to put in place safety and other programs to manage the risks of the project.

Specifically as to Texas, CIPs may have an added advantage as to the applicability of the Texas Anti-Indemnity Act. The Act voids indemnity provisions in construction contracts to the extent they require an indemnitor to indemnify

12. Tex. Ins. Code § 151.007.
13. Tex. Ins. Code § 151.009.
14. Donald S. Malecki, *Wrap-Ups: Who Is Really In Control?*, Malecki On Ins. (Malecki Communications Co., Ft. Thomas, KY), March 1999.
15. Margaret Glass, *The Gift that Keeps on Giving: Wrap-Up Insurance Coverage*, 59 DRI For Def., no. 10, October 2017, at 60; Jacqueline P. Sirany & James Duffy O'Connor, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-Ups*, 22 Construction Law. 30 (2002).
16. Sirany & O'Connor, *supra* note 15, at 33 n.2.
17. Anne Hickman & Jack P. Gibson, Construction Risk Management, Chapter IX, Wrap-Up/OCIP (2018), *available at* https://www.irmi.com/online/default.aspx.

or defend the indemnitee against a claim caused by the indemnitee's negligence.[18] It also voids additional insured provisions in construction contracts, as well as additional insured provisions or endorsements in insurance policies, to the extent they require or provide coverage the scope of which is prohibited under the statute for an indemnity agreement.[19] As a result, additional insured carriers have relied on the anti-indemnity statute to deny additional insured coverage to general contractors for various defect claims. However, the statute specifically does not apply to OCIPS and CCIPs.[20] Therefore, in Texas, OCIPs or CCIPs have an added benefit of avoiding the limitations imposed by the anti-indemnity statute, particularly with respect to insurance coverage for upper tier contractors.

Many of these advantages of a wrap-up program may be less important than others, or virtually non-existent. Unfortunately, further discussion of these issues is beyond the scope of this article.

V. THEORETICAL DISADVANTAGES OF CIPS

Traditional disadvantages that are pointed out with regard to wrap-up programs include: (a) non-managing participants' loss of control of their project insurance program; (b) disruption of the participants' own comprehensive insurance programs; (c) gaps in coverage that require special endorsements to close; (d) possibly short completed operations coverage; (e) projected savings lost to administrative costs; (f) disruption of current broker relationships; (g) lack of coverage for offsite contractors, fabricators and suppliers; and (h) high administrative costs to participants in satisfying program requirements and enrollment.[21] Criticisms also include coverage gaps, mismanagement of claims, perceived injustices in insurance credit tracking and less than adequate cost savings as potential problems.[22] Other disadvantages of OCIPs and CCIPs may include high administrative costs and burdens, financial risk due to large self-insured retentions or deductibles, decreased volume discount for contractors, and documentation and reporting burdens. However, much the same may be said as to any deficient corporate insurance program, and the success of any CIP is largely due to sound administration and risk management practices.[23] In that sense, the results of a particular program may not always be dependent upon the selection of a wrap format itself, but rather on the day-by-day management and handling of claims in a particular CIP.

Of course, one of the major limiting factors as to the use of a wrap-up program is the size of the project. Only projects that are large enough in size to generate the premium and cost savings are suitable for wrap-ups, and alternatively, groups of projects that are suitable to wrap-up together in a rolling wrap-up. It is difficult to generalize, but the relative disadvantages to sponsorship or enrollment in a CIP are often project-specific and must be weighed carefully against the purported advantages of the CIP.

VI. IMPORTANCE OF CONTRACT DOCUMENTS

A controlled insurance program is not only made up of insurance policies; it is also a product of the contract for the project. The contract usually contains a CIP insurance manual that is appended to and becomes a part of the contract documents. It is also appended to the subcontracts of all participating subcontractors, and as stated above, typically describes the program, including the insurance coverages and the mechanism to enroll. Note that in addition to the coverages in the wrap, the contract documents and subcontracts set out the coverages that the participant must maintain outside of the CIP, primarily automobile liability and CGL coverage for offsite exposure.[24] It should be noted that a trend is to provide CGL liability-only wraps that do not include workers compensation, which has usually been a traditional element of many CIPs.

Coordination of the CIP program and coverages with the CIP insurance manual is critical in order to avoid potential gaps or ambiguities. Issues can often arise as to the identity of participants in a wrap. For example, in *O & G Industries, Inc. v. Aon Risk Services Ne., Inc.*,[25] the court held that the insurance broker assumed a direct obligation to the developer and subcontractors by agreeing to procure coverage under a CCIP on their behalf and to provide a subcontract addendum to that effect. The umbrella/excess policy failed to follow form as to coverage for defense costs provided under the primary CGL policy. The developer and subcontractors, therefore,

18. Tex. Ins. Code § 151.102.
19. Tex. Ins. Code § 151.104.
20. Tex. Ins. Code § 151.105(1).
21. Sirany & O'Connor, *supra* note 15, at 30.
22. Sandy M. Kaplan, Kimberly S. Bunting & Amy Hobbs Iannone, *OCIPs, CCIPs, and Project Policies*, 29 Construction Law. 11 (Summer 2009).
23. Grace V.B. Garcia & M. Matthew Madden, Jr., *May I Have This Dance? To Wrap or Not*, 57 DRI For Def., no. 6, June 2015.
24. Note that this is essentially the information required to be provided to enrollees under Tex. Ins. Code § 151.103.
25. *O & G Industries, Inc. v. Aon Risk Services Ne., Inc.*, No. 3:12–CV–723 (JCH), 2013 WL 424774 at *265-66 (D. Conn. Jan. 29, 2013).

had standing to bring tort claims against the insurance broker for failing to procure CGL and umbrella/excess liability insurance coverage that included defense cost coverage in excess of the CCIP policies, as requested by the general contractor. The broker owed a duty of care to the developer and its subcontractors that participated in the CCIP because the developer and subcontractors were foreseeable beneficiaries of the contractor's service agreement with the broker, despite the terms in the service agreement that disclaimed third party beneficiaries.

VII. COURT RECOGNITION OF CIP THEORETICAL UNDERPINNINGS

Courts have recognized the theory behind the use of a CIP on a construction project. For example, in a seminal case, the court set out the theoretical bases for an OCIP as follows:

> Under an OCIP, the owner of a large construction project purchases and provides for consolidated "on-site" public liability and workers compensation insurance coverage during the construction period. The owner is the "insured" and policy coverage is extended to all who work "on-site" under a contract with the owner. As the Authority notes, this concept differs from the practice of contractors and subcontractors buying such insurance coverage piecemeal and then passing the costs to the owner by including them in their bids and contracts. 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.[26]

More recently, the courts in *Zurich American Ins. Co. v. Acadia Ins. Co.*[27] and *Factory Mutual Ins. Co. v. Peri Formworks Systems, Inc.*[28] recognized the purpose of CIPs. The *Zurich* court noted that OCIPs make insurance programs for construction projects "more equitable, uniform and efficient."[29] They eliminate costs of overlapping coverage and delays caused by coverage and other types of disputes between parties involved in the project while simultaneously protecting contracting parties by "bringing the risk of loss from the project within the insurance coverage of the OCIP."[30] Similarly, the court in *Factory Mutual Ins. Co. v. Peri Formworks Systems* explained that an OCIP is a type of "wrap-up" insurance program that "seeks to distribute, share, and manage risk at construction sites" by generally covering the owner or developer, contractors and subcontractors, and potentially architects and engineers, and typically includes builders risk, general liability, and workers compensation/employers liability insurance.[31]

VIII. SCOPE OF CIP PROTECTION - PROJECT PARTICIPANTS

Not all parties on a particular construction project that is wrapped are enrolled in the CIP. Typically, suppliers are not included, nor are offsite fabricators. Moreover, in some CIPS, participants with subcontract values below a minimum floor may not be included. These participants must insure risks associated with their operations through their own insurance programs, as is the case with traditional construction projects.

An appropriately underwritten or endorsed policy, together with a properly drafted CIP insurance manual, is critical to the determination of the insured entities in the event of a claim. *Alpha Construction & Engineering Corp. v. Ins. Co. of the State of Pennsylvania.*[32] illustrates the importance of clearly setting out the participants in a CIP and coordinated coverage under the CIP policies. In that case, the court determined that inspection consultants who allegedly caused injury to a pedestrian while performing work on a Maryland Transit Administration

26. *Independent Ins. Agents v. Turnpike Authority*, 876 P.2d 675, 676 (Okla. 1994).
27. *Zurich American Ins. Co. v. Acadia Ins. Co.*, 243 F. Supp. 3d 1201, 1208 (D. Colo. 2017).
28. *Factory Mutual Ins. Co. v. Peri Formworks Systems, Inc.*, 223 F. Supp. 3d 1133, 1143 (D. Or. 2016).
29. *Zurich Am. Ins.*, 243 F. Supp. 3d at 1208.
30. *Id.*
31. *Factory Mutual Ins. Co. v. Peri Formworks Systems*, 223 F. Supp. 3d at 1143. For similar statements, see *Kraft Co., Inc. v. J&H Marsh & McLennan of Fla., Inc.*, No. 2:06-CV-6-FtM-29DNF, 2006 WL 1876995, at *1 (M.D. Fla. July 5, 2006) (a CCIP is a type of wrap-up insurance program that seeks to distribute, share and manage risks at construction sites through a single carrier); and *American Protection Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989 (Me. 2003).These cases, including *Independent Insurance Agents* and *American Protection v. Acadia*, were relied upon by the Texas Supreme Court in *TIC Energy & Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016), and *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009), as to the salutary benefits of controlled insurance programs in connection with upholding statutory immunity among the participants in an OCIP under the Texas Workers Compensation Act.See the discussion of both Texas Supreme Court cases below as to the effect of wrap-up insurance programs on the exclusive remedy under Texas law.
32. *Alpha Construction & Engineering Corp. v. Ins. Co. of the State of Pennsylvania*, 601 F. Supp. 2d 684 (D. Md. 2009) *aff'd in part, vacated in part*, 402 Fed. Appx. 818 (4th Cir. 2010).

construction project were not insureds under the general liability policy issued as part of the OCIP. In reaching its decision, the court considered an endorsement to the general liability policy that provided that those contractors or subcontractors who were not provided workers compensation and employers liability coverage under the OCIP were not insured under the policy.[33] Although noting the provision was not artfully worded, the court concluded that because the consultants were not provided workers compensation and employers liability coverage under the OCIP, they were not insureds under the general liability policy.[34]

IX. SCOPE OF CIP PROTECTION - POTENTIAL INSURANCE COVERAGE ISSUES

One of the most frequently asserted advantages of a CIP is enhanced insurance coverage, particularly for traditionally difficult risks to insure such as construction defects. In fact, the prevalence of residential construction defect claims spurred the development and fueled the popularity of CIPs as a means to address gaps in coverage faced by residential developers and contractors. The theory behind enhanced coverage is that due to the economies of scale, sponsors of OCIPs on large projects or rolling wrap-ups should be able to negotiate more comprehensive coverage, particularly for subcontractors. The results of these efforts, however, have been somewhat mixed.

A. Covered Exposures

The following are comments and caveats as to coverages and risks that are frequently included in a CIP.

1. Commercial General Liability Coverage

The centerpiece of any CIP, as is the case for any individual contractor's program, is CGL coverage. The policy applies to bodily injury, property damage, and certain intentional torts denominated as personal and advertising injury liability. More particularly, the CGL policy provides contractual liability, broad form property damage (enhanced property damage coverage for certain construction business risks), and premises and operations coverages. A CGL policy issued as part of a CIP may be written on a manuscript form, or may be written on the standard ISO form with manuscript endorsements attached to accomplish coverage extensions (or restrictions) as part of the CIP.

2. Completed Operations Issues

One of the traditional issues relating to wrap-up insurance programs has been the length of the completed operations coverage provided under a CIP policy, sometimes referred to as the completed operations tail. Completed operations is the coverage under a commercial general liability policy and an umbrella liability policy that provides the contractor with insurance coverage for property damage occurring after the contractor has completed its work or that portion of the work has been turned over to the owner for its intended use. Due to the ever-increasing concerns generated by construction defect litigation, completed operations coverage has been extended under many wrap-up programs to the period of the statute of repose. For example, in Texas, it is virtually the rule, rather than the exception, to see a ten-year completed operations period in wrap-ups in order to dovetail with the Texas statute of repose. Prior to this development, completed operations periods of only one to three years were common. A short completed operations period can cause problems with coordination between a contractor's own liability insurance program and the CIP. Once the CIP completed operations period expires, coverage may be excluded under the contractor's own insurance program for property damage to projects that were subject to a wrap-up.[35] Issues relating to this potential gap are discussed later in this article in the coordination section.

Another issue that has been pointed out with regard to completed operations coverage under OCIPs is the fact that under the standard CGL insurance policy forms typically used in wrap programs, the term "completed operations" is defined as property damage occurring away from the named insured's premises. In the event the owner, and sponsor, of the OCIP is also a named insured on the policy, the completed operations coverage may not apply to a claim by the owner.[36] However, a denial of completed operations coverage to the owner may be academic, since the completed operations coverage should apply on behalf of any involved contractor or subcontractor that is also a named insured on the policy.

Since a CIP is usually written on a standard CGL policy form, claims are handled under the principles of state law applicable to a particular claim. For cases addressing insurance coverage for defective construction under an OCIP, see *Pavarini Construction Co. (Se) Inc. v. Ace*

33. *Id.* at 689.
34. *Id.* at 689-90.
35. Despite these issues, TEX. INS. CODE § 151.051 requires only a 3-year tail.
36. Malecki, *supra* note 14.

American Ins. Co. (structural damage to a condominium building caused by a subcontractor's defective installation of reinforcing steel within concrete columns, beams, and walls was "property damage" under Florida law, so insured was entitled to recover its remediation costs from its excess CGL insurer under OCIP);[37] and *Tweet/Garot-August Winter, LLC v. Liberty Mutual Fire Ins. Co.*[38] (denying coverage for repair and replacement costs of defective mechanical system under OCIP for renovation of Lambeau Field due to lack of property damage and applicable business risk exclusions).

3. Elimination of Restrictive Exclusions

Due to the superior bargaining power and higher premiums typically associated with the wrapping up of a large project or group of projects, the CIP sponsor may be successful in eliminating certain restrictive endorsements and thus broadening coverage for the participants. For example, due to the frequency of construction defect claims in connection with single-family homes, subdivisions and condominium projects, residential or habitational exclusions have become the rule, rather than the exception, in policies issued to parties involved with residential construction. It has become a particularly acute problem for many subcontractors, the primary operations of which involve residential construction. Wrap-ups have been particularly successful in eliminating these exclusions, thus providing subcontractors that are enrolled in residential wrap-ups with liability insurance that they could not otherwise obtain. The trade-off for elimination of the exclusions is the enhanced quality control and emphasis on safety that are expected to accompany a larger wrap-up program.

4. Manuscript Modifications of Standard CGL Coverage

Since wrap-ups are frequently written for large projects, or to wrap a number of projects on a rolling basis, they frequently include manuscript endorsements that affect the typical coverage provided to a contractor under its own insurance program, particularly the CGL policy. Unfortunately, an impression exists that all of these types of manuscript endorsements may extend coverage for areas that are typically difficult to insure, such as construction defects.

A wrap-up program must be examined closely to determine the scope of coverage being provided. Typically, the wrap-up insurance manual in the contract documents describes the coverage being provided in somewhat more detail than the insurance specifications in the contract itself. This may be the only description of the coverage available at the time the project is bid because, unfortunately, the actual insurance policies, particularly the commercial general liability and umbrella policies, may not be issued until well after the project commences, or even after claims arise. While project manuals and insurance specifications may appear to indicate that standard coverage is being provided, the terms of the actual policy may dictate otherwise.

For example, the wrap-up manual usually indicates that coverage is provided for third party bodily injury and property damage arising from an enrolled subcontractor's work. Frequently, the policy may be endorsed to eliminate certain exclusions that apply to property damage that occurs during construction operations, most notably exclusions j(5) and j(6). Those exclusions state that the insurance does not apply to property damage to that particular part of real property on which the named insured or its subcontractors are performing operations, if the property damage arises out of those operations or if the property must be restored, repaired or replaced because the named insured's work was incorrectly performed on it. The policy also states that exclusion j(6) does not apply to property damage within the products-completed operations hazard. While these two provisions are framed as exclusions, Texas courts have generally relied on the "particular part" formulation to narrowly interpret the scope of them.[39] Thus, these exclusions are generally regarded as preserving some coverage for property damage exposures during operations.

However, the deletion of these exclusions is usually accompanied by the attachment of another endorsement to the actual CIP policy that states that the insurance does not apply to property damage at or to the project insured under this policy during the course of construction, up to the substantial completion of the project. In other words, although a wrap-up CGL may provide a ten-year completed operations period for completed operations coverage, the policy purports to exclude coverage for property damage while construction at the project site is in progress. This

37. *Pavarini Constr. Co. (SE) v. Ace Am. Ins. Co.*, 161 F. Supp. 3d 1227, 1232-33 (S.D. Fla. 2015).
38. *Tweet/Garot-August Winter, LLC v. Liberty Mut. Fire Ins. Co.*, No. 06-C-800, 2007 WL 445988 at *13(E.D. Wis. Feb. 7, 2007).
39. *See Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 557 F.3d 207, 213 (5th Cir. 2009) (Defective condominium building; exclusion j(5) applies only to the particular part of a project upon which operations are actively occurring at the time of the property damage; exclusion j(6) applies only to property damage to the particular part of the property that is defective, and not to the damage to non-defective property); *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 371 (5th Cir. 2008) (exclusion j(6) did not exclude coverage for damage to an entire aircraft, but only to the aircraft's electrical system on which the insured performed faulty work).

exclusion creates a significant gap for participants on that project for property damage occurring during the course of operations depending upon their ability to coordinate coverage with their own insurance program.

This type of endorsement is found in many CIPs, particularly OCIPs, and is frequently labeled a "Builders Risk Exclusion." The apparent intent is to exclude coverage for operations risks involving property damage to the work under the CGL policy so that the insured looks to the builders risk coverage to provide protection. However, CGL policies and builders risk policies seldom provide corresponding coverage, and frequently, a builders risk policy may leave gaps in coverage, particularly for damages such as consequential or soft costs. Moreover, a builders risk policy may contain a broad exclusion for faulty work. As set out above, there may be some coverage for that exposure under the CGL policy. As a result, parties often look to the CGL policy for that coverage. Additionally, the builders risk policy is a first party property policy and does not include a duty to defend the contractor or subcontractor against a liability claim arising out of the property damage. Therefore, an endorsement excluding such coverage from the wrap-up CGL policy should be avoided.

Some CIPs may also alter the typical defense obligation. The OCIP in *Amerisure Mutual Ins. Co. v. Arch Specialty Ins. Co.,*[40] which insured a high rise construction project, contained an endorsement modifying the standard supplementary payments provision under the policy. In a standard CGL policy, the supplementary payments provision specifically states that the insurer's payment of expenses it incurs in the insured's defense "will not reduce the limits of insurance." In other words, an insurer typically pays the insured's defense costs in addition to the policy limits. However, in the CIP before the court, the endorsement deleted the "will not reduce the limits of insurance" provision and replaced it with the following: "These payments will reduce the limits of insurance."[41] This transformed the policy into an "eroding limits" policy.[42] As a result, the OCIP insurer's duty to defend the insured subcontractor ended when the policy limits were exhausted by the payment of judgments, settlements, and defense costs. Therefore, the OCIP insurer did not breach its duty to defend the subcontractor when it withdrew from the defense on the basis of exhaustion.

While the above examples in some cases are anomalies, the tendency to add manuscript endorsements to the wrap-up liability policy can result in confusion, and in certain cases, even less coverage than normal for problem risks such as construction defects. To the extent possible, the contractor considering participation in a wrap-up and its broker, agent or counsel should obtain as much information as possible from the contract documents, particularly the wrap insurance specifications and the wrap-up manual, as to the scope of coverage to be provided under the wrap-up policies. Of course, the best practice is to obtain and review the actual policies.

5. Workers Compensation and Employers Liability

Most CIP programs include workers compensation and employers liability coverage for the participants. It is this issue that has generated considerable attention from the Texas Supreme Court during recent years. Those issues are discussed below in connection with wrap-up programs and the exclusive remedy.

Issues and concerns are often raised by participants as to the effect of information reporting by the CIP administrator on their experience rating for future insurance, particularly their experience modifiers[43] as to workers compensation. The experience rating of each participant on the wrapped project is reported for the calculation of the participant's individual modifier.

As a participant in a CIP, a contractor may have less influence over the claims management process than they do over their own program. Many participants perceive a delay in receipt of their loss information from the CIP insurer as compared to their own insurer. Delay affects a contractor's ability to accurately estimate loss for subsequent bids. In addition, there is a potential for errors in assignment of losses to a contractor as to a claim in which it was not involved, affecting that contractor's future experience modifiers or premiums. These issues require that the participants closely review and monitor loss runs from the wrapped project and that the administrator provide loss information on a timely basis

40. *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270 (5th Cir. 2015).
41. *Id.* at 273.
42. *Id.* at 275.
43. "Experience Modifier" is "[a] factor developed by measuring the difference between the insured's actual past experience and the expected or actual experience of the class. This factor may either be a debit or credit and, therefore, will increase or decrease the standard premium in response to past loss experience." *Experience Modifier*, IRMI, https://www.irmi.com/term/insurance-definitions/experience-modifier (last visited Apr. 11, 2019).

and be amenable to the correction of any errors.[44]

While workers compensation waivers of subrogation are prevalent as to many construction projects, they are nearly universally relied upon in CIPs to reduce the threat of litigation between a workers compensation carrier and the general liability insurer as to injured employees on the wrapped project. Subrogation recoveries usually reduce the experience modifier of the employer, and the inability to subrogate may have a tendency to raise that modifier.

As previously stated, a growing number of wrap-up programs, particularly those placed with a goal of addressing the risk of construction defects, may be CGL only and exclude workers compensation.

6. Umbrella Liability Coverage

Most CIPs provide umbrella liability coverage in excess of the CGL limits and the employers liability component of the workers compensation coverage. Again, due to economies of scale, the sponsor of a CIP may be in a better position to negotiate higher umbrella limits for the project.

7. Builders Risk Coverage

Where builders risk coverage is appropriate, most wrap-ups provide it. That policy provides the typical property coverage for damage to the work while the project is under construction. Since those policies usually insure the interests of the owner, the general contractor, and lower tier subcontractors, builders risk fits nicely within the concept of a wrap-up program, even in a traditional non-wrapped insurance arrangement where other coverages are provided by each contractor and subcontractor.

An example of a case discussing coverage under a builders risk policy issued as part of an OCIP for a construction project is *Factory Mutual Ins. Co. v. Peri Formworks Systems, Inc.*[45] In that case, the coverage dispute arose out of the construction of a building on the Hillsboro Oregon campus of Intel Corporation. Intel sponsored an OCIP for the project, and a problem developed during the pouring of the concrete. The repair caused a loss for the general contractor and the concrete flooring subcontractor. The builders risk insurer under the OCIP paid the claim and asserted a subrogation claim against the sub-subcontractor that provided design services, advice, and oversight for the use of equipment in the construction of the building, including the shoring and supports for the concrete floor. In turn, the sub-subcontractor, who was not enrolled in the OCIP, asserted third-party claims against the concrete flooring subcontractor for contractual indemnity and statutory contribution.[46] The subcontractor argued that the sub-subcontractor's claim was barred by the anti-subrogation, under which an insurer cannot seek subrogation from its own insured. The subcontractor argued that, assuming that it was an insured of the builders risk insurer, by virtue of the sub-subcontractor's third-party claims, it was being asked ultimately to pay its insurance company for losses covered by an insurance policy. The sub-subcontractor countered that the subcontractor was not an "insured" under the builders risk policy; rather, only Intel and its affiliates were considered "insureds" under the policy.[47]

The court disagreed, finding that the term "insured" under the builders risk policy included OCIP-approved contractors and subcontractors, in addition to the project owner and its affiliates. Therefore, the anti-subrogation rule barred the sub-subcontractor's contribution claim against the subcontractor. In reaching this conclusion as to the meaning of "insured" under the policy, the court pointed out that the policy's property insured clause stated that the policy insured the interests of the OCIP-enrolled contractors and subcontractors. Additionally, under the policy's loss adjustment clause, the approved contractors were automatically added as insureds.[48]

The court also looked to the purpose behind builders risk policies and OCIPs, to support its interpretation of "insured." For instance, builders risk policies are intended to shift the risk of loss from the builders (i.e., the contractors and subcontractors) onto the insurer. Thus, if "insured" meant only the owner and its affiliates as the sub-subcontractor contended, and did not include contractors and subcontractors, the builders risk policy would fail in its purpose.[49] Further, "in the context of OCIPs, contractors and subcontractors are provided coverage and are insureds under the various policies,

44. For a more in-depth discussion of these issues, see Hickman & Gibson, *supra* note 17, at Chapter IX, Wrap-Up/OCIP. *See also* Kaplan, Bunting & Iannone, *supra* note 22, at 14 (since calculation of a participant's experience modifier is an important measure in the construction industry, making sure workers compensation claims are handled quickly and that workers are brought back to work as soon as possible are critical elements as to minimizing the impact on a participant's experience modifier and insurance costs).
45. *Factory Mut. Ins. Co. v. PERI Formworks Sys.*, 223 F. Supp. 3d 1133 (D. Or. 2016).
46. *Id.* at 1136.
47. *Id.* at 1136-37.
48. *Id.* at 1139, 1141-42.
49. *Id.* at 1143.

including builder's risk policies."[50] Finally, the fact that the contractors and subcontractors, including the concrete flooring subcontractor, were required to pay their share of the insurance premiums provided additional evidence that these contractors and subcontractors were insureds under the policies. The court stated that it would be unreasonable for contractors and subcontractors to be expected to pay a portion of insurance premiums if they were not also insureds and entitled to coverage under the policies.[51]

B. Potentially Uncovered Exposures

As is the case with most contractors' own insurance programs, there are certain risks that are not covered under a typical wrap-up program.

1. Professional Services

CIPs typically do not include coverage for professional liability, particularly for contractors. That risk is also usually excluded by endorsement to most CGL policies issued to contractors. Nevertheless, on some large projects, the adequacy of the professional liability coverage of individual architects, engineers, consultants and other design professionals is frequently questioned. As a result, project-specific professional liability policies have been developed and may be added to the CIP. Of course, they provide coverage only to the extent of professional design exposure.

Project-specific professional liability insurance programs are becoming more popular, where one policy insures the entire design team. One of the factors that has led to the use of such policies is the relatively low limits and the inclusion of defense costs within those limits under a typical professional liability policy issued to an architect or engineer. For a case addressing issues relating to an owner's attempt to recover under a project-specific liability policy it purchased for a design team, see *Mohegan Tribal Gaming Auth. v. Kohn Pedersen Fox Assocs.*, 36 Conn. L. Rptr. 225, 2003 WL 23177993 (Conn. Super. Ct. Dec. 23, 2003).

2. Environmental Liability

Commercial general liability policy forms and endorsements typically exclude environmental liabilities through a pollution exclusion. This exclusion also applies to a wrap-up program policy. As is the case with any contractor involved in projects presenting these types of risks, pollution legal liability (PLL) or contractors pollution liability (CPL) policies are needed. Where an environmental risk is involved in a wrapped project, CPL or PLL policies may be purchased as part of the CIP. In the event mold exposure exists, the CPL policy should be endorsed to include coverage for mold.

3. Offsite Exposures

As mentioned above, wrap-up programs usually do not provide coverage for offsite contractors. In other words, coverage is not provided for general liability, workers compensation and umbrella liability exposures of off-site fabricators and suppliers.

Courts that have addressed this issue have generally determined coverage based upon the enrollment of a particular participant in the CIP. For example, *American Protection Ins. Co. v. Acadia Ins. Co.* involved a dispute between Kemper, the OCIP insurer for the state of Maine on a juvenile detention facility project, and Acadia, the workers compensation insurer of Accidental Anomalies (the actual name), the steel subcontractor on the project.[52] The employee was injured while unloading steel columns at the project site that were to be used by another subcontractor. Accidental Anomalies, per its subcontract, was to furnish, FOB jobsite, all of the structural steel and to fully install all metal fabrications complete and without exception. Accidental Anomalies was enrolled in the OCIP. Kemper initially paid the workers compensation benefits to the injured employee, but filed a lawsuit seeking a declaration that Acadia was responsible for the benefits on the theory that the unloading activities were not insured under the OCIP. The court rejected this argument, stating that the plain meaning of the OCIP contract was that subcontractors covered under the OCIP were covered for work done at the project site, but they were required to have their own insurance to cover accidents that occur away from the project site. Here, the unloading activities were performed at the project site, and the subcontractor, having been enrolled in the OCIP for onsite operations, was entitled to coverage.

Another case involving issues relating to performance of onsite versus offsite activities is *Zurich American Ins. Co. v. Pennsylvania Manufacturers' Association Ins. Co.*[53] In that case, the court ruled that an OCIP insurer, rather than the contractor's personal general liability insurer, was responsible for defense and settlement costs in a defective

50. *Id.* at 1143.
51. *Id.*
52. *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 Me. 6, 814 A.2d 989.
53. *Zurich Am. Ins. Co. v. Pennsylvania Mfr.'s Ass'n Ins. Co.*, No. A-4260-01T1, 2003 WL 23095605 (N.J. Super. Ct. App. Div. May 7, 2003).

work claim asserted by the owner against the general contractor, since the OCIP applied to activities at the construction site and the general liability insurer's policy excluded the payroll for those working onsite under the OCIP. In addition, the insurance certificate provided by the contractor stated the personal general liability policy applied only to offsite activities.

4. Cross-Suits Exclusions

Underwriters sometimes attach a cross-suits endorsement to a CGL policy issued as part of a CIP. That endorsement excludes coverage for claims made and lawsuits filed between named insureds on the policy. Also known as the "insured versus insured exclusion," such an endorsement has the effect of preventing a contractor or a subcontractor from filing suit to trigger coverage under the wrap-up policy against another participant. For example, it could affect the ability of the general contractor to file suit against a subcontractor that caused a loss in order to trigger coverage under the CIP policy. The issue is exacerbated under an OCIP where the owner is also a named insured, and the presence of this exclusion could prevent it from making a claim or filing suit against even the general contractor for claims such as for defective workmanship. Often, exceptions for the owner or the general contractor are added to the endorsement in order to preserve their ability to file claims. However, when the policy becomes manuscripted, there is a greater chance that coverage gaps may exist. Therefore, the attachment of such endorsements should be resisted by the sponsor.

5. Warranty Liability

The CGL coverage for operations on many CIPs terminates when the project is complete and may not take into account operations coverage for warranty liability. As such, a gap in coverage may occur when the participant's employee returns to the project to perform warranty work. The warranty work is not part of the completed operations exposure. One commentator points to an anomalous situation as follows:

> Suppose six months after completion, the contractor is called out to perform warranty work, and someone is hurt as a result of the warranty work being performed. Most likely, that injury would not be covered by the CIP because most sponsors stop the ongoing operations coverage when the project is completed, and do not extend it to the warranty period. Contrast that result to a situation where, during the time that the warranty work is under way, a patron of the completed facility trips and is injured on work that was put in place during the term of the CIP. That would be a completed operations exposure, and typically would be covered by the CIP, even if both injuries occurred on the same day.[54]

Moreover, it may be difficult for the participant to insure this warranty liability under its individual insurance program since many CGL policies issued to construction contractors exclude liability arising out of projects that were subject to a CIP program. Moreover, it may be difficult to sort out coverage between the participant's policy and the CIP arising out of work that was completed while the CIP was in place, but was the subject of warranty work. As a result, most CIP policies now are issued with endorsements that extend coverage for bodily injury and property damage arising out of repair work after the completion of the project in order to cover bodily injury or new property damage that is not to the work that is completed.

X. ADEQUACY OF LIMITS

Again, due to the economies of scale that can theoretically be achieved by purchasing one insurance program to cover a large construction project or a group of projects that are rolled into one wrap-up, the theory is that higher limits benefiting all participants can be achieved. While, to a certain extent, participation in a wrap-up program can result in higher limits available to individual participants, an issue arises as to the adequacy of limits where claims by numerous participants deplete the limit. Alternatively, a catastrophic loss resulting in major damage to the project or numerous injuries or deaths has the potential to deplete the entire limit available for all participants. In addition, even though there may be a ten-year completed operations period, the wrap limit is seldom replenished on an annual basis.

In other words, even though it may, at first blush, appear that higher limits are available through an OCIP, the fact that those limits are shared among all parties requires that potential participants undertake a closer investigation as to the adequacy of the limits provided.

54. Kaplan, Bunting & Iannone, *supra* note 22, at 16.

XI. EFFECT ON LITIGATION AND JOINT DEFENSE

A particular notion that is associated with CIPs is the notion of joint defense of claims. While the wrap-up contemplates an "all-for-one, one-for-all" approach to retention of counsel and joint defense of claims, policy endorsements to that effect and contractual and insurance manual provisions, are all subject to the caveat that such a joint defense is possible only in the absence of conflicts of interest under the law. Those conflicts tend to arise more often than not, particularly as to construction defect claims, which usually involve not only a claim against the contractor, the owner, or subcontractors, but also claims among all of those parties. For that reason, it is extremely difficult to defend all affected parties with a single counsel. It is also difficult to appoint a single counsel to represent a particular group, such as the subcontractors, with separate counsel only for the contractor or the owner. The claims among all of the parties are usually too complex to allow a single counsel to handle claims against multiple parties consistent with ethical rules and obligations. At the same time, the complexity and number of claims among the parties seems to do little to reduce cross claims for indemnification among them.

Commensurate with the notion that all parties involved are insured under the same policy, there is a tendency for many wrap-up insurers to spend a considerable amount of time, particularly early on, in investigating and pursuing insurers of third parties outside the wrap-up, or even parties inside the wrap. To many participants, this runs contrary to representations made to them when they enrolled in the CIP. Of course, in the event the wrap-up includes gaps in coverage, it is often extremely difficult for a participant to obtain a defense under its own corporate liability policy, largely because those policies usually include a wrap-up exclusion, as discussed more fully below.

XII. WRAP-UP EXCLUSIONS AND COORDINATION WITH THE CONTRACTOR'S OWN COVERAGE

One of the more important issues that has been addressed throughout this article is the duration of the wrap-up coverage, primarily the length of the completed operations period. Another important issue is the availability and possible exhaustion of the limits of the wrap-up program, and even the possible insolvency of the wrap-up insurer. All of these issues implicate how the contractor's own insurance will fill in any gap created by a wrap-up policy that no longer exists, whether through expiration by its own terms, exhaustion of limits or insolvency of the insurer. Unfortunately, many contractors may find that they have little protection from their own insurance in this respect. In that connection, the standard ISO endorsement, CG 21 54 01 96, "Exclusion—Designated Operations Covered by Consolidated (Wrap-Up) Insurance Program," states as follows:

> The following exclusion is added to paragraph 2., Exclusions of COVERAGE A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I—Coverages):
>
> This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved.
>
> This exclusion applies whether or not the consolidated (wrap-up) insurance program:
>
> (1) Provides coverage identical to that provided by this Coverage Part;
>
> (2) Has limits adequate to cover all claims; or
>
> (3) Remains in effect.[55]

The effect of a standard wrap-up endorsement could be devastating since it provides the contractor with no "tail" or coverage in excess of the CIP limits so as to fill in coverage gaps in the CIP. In other words, in the event that the wrap-up terminates, for whatever reason, the participant will have no coverage under its own policy. For example, assume that a wrap-up's limits are exhausted by a serious claim during the first year of the completed operations period. In year three, another claim arises, implicating the participant's completed work on the project, but no limits remain to provide coverage under the CIP. That participant will have no coverage if its own

55. Copyright, Insurance Services Office, Inc., 1994.

policy is endorsed with the above provision.

The insured general contractor faced this situation in *First Mercury Ins. Co. v. Waterside Condominium Association.*[56] There, the developer of a condominium project purchased a CGL policy, but the policy did not cover completed operations. Instead, the developer deposited $1 million in an account to pay potential completed operations claims, suits, or actions against, and attorney's fees and costs incurred by the developer, the general contractor, and any subcontractor of the general contractor approved by the developer arising out of or related to the project. The ultimate issue was whether this arrangement constituted a "wrap-up program. The insured general contractor purchased its own CGL policies with First Mercury Insurance Company, which contained the standard wrap-up exclusion endorsement set out above. After the project was turned over to the condominium association, the association sued the insured, alleging that its faulty construction of the condominium project resulted in water intrusion and extensive property damage. The parties settled and entered into a stipulated judgment for $5.2 million in favor of the association. First Mercury denied coverage for the association's claims in part based on the wrap-up exclusion. The insured argued that no wrap policy was issued for the project because the policy issued to the developer insured only the developer and the general contractor, did not identify the subcontractors as insureds, covered only ongoing operations, and was labeled as a CGL policy. In contrast, according to the insured, a wrap policy is intended to cover all contractors on a project and provides coverage for the entirety of the statutory limitations period.[57]

The court first determined that the term "consolidated (wrap-up) insurance program" in and of itself was ambiguous because consolidated insurance programs are not uniform, so the term was susceptible to more than one plausible interpretation. However, within the context of the wrap-up exclusion and the broader policy, the court concluded that while the exclusion did not specify any particular location or construction project with a wrap-up program, it also did not "in any way eliminate" the condominium project. Therefore, as long as the developer's insurance program was a consolidated insurance program, the exclusion would apply. In light of an email from the insured's broker confirming that the insured and its broker believed that the developer provided a wrap-up insurance program for the project that would be excluded under the insured's 2007-2008 policy, the court found that the insured was "in no position" to contend that the project fell outside the scope of the exclusion.[58] Thus, the developer's CGL policy together with the $1 million set aside for completed operations claims constituted a "wrap-up" program within the exclusion.

A preferable option for the contractor would be for its corporate general liability policy to provide excess or "difference in conditions" ("DIC") coverage as to any wrap-up program in which the contractor participates or has participated. In other words, in the event the wrap-up policy provides no coverage whether due to expiration, termination or simply a lack of coverage for the particular risk, the contractor's own coverage will step in to fill the gap. Such an endorsement would provide something to the effect that "[w]ith respect to 'bodily injury' or 'property damage' arising out of either your ongoing operations or operations included within the 'products-completed operations hazard' at a location that is covered by a controlled (wrap-up) insurance program, the policy to which this endorsement is attached shall apply as excess insurance over any coverage available under the wrap-up insurance policies."[59]

Note that in the absence of an endorsement to the participant's own liability policy, such as CG 21 54 01 96, limiting coverage for bodily injury or property damage that occurs on a project that is subject to a wrap-up, there may be issues as to coordination between the contractor's own coverage and that of the wrap-up. However, some courts have found CG 21 54 01 96 to be ambiguous.[60]

As previously stated, such coordination problems should not arise where an excess endorsement, set out immediately above, is attached to the contractor's policy. But the issue does arise where the contractor's policy is silent as to wrap-up projects, or where there is an issue as to whether the injury falls within the wrap-up or is outside the wrap-up, thus triggering the contractor's own policy. In these instances, courts typically resolve these coordination

56. *First Mercury Ins. Co. v. Waterside Condominium Association*, No. 3:12–cv–02348–ST, 2013 WL 6383883 (D. Or. Dec. 5, 2013).
57. *Id.* at *9.
58. *Id.*
59. *Wrap-Up Difference In Conditions (DIC) Coverage*, IRMI, https://www.irmi.com/online/crm/ch009/1l09h000/al09h070.aspx#jd_wrap_up_dic_coverage (last visited Apr. 11, 2019).
60. *See Thompson v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 249 F. Supp. 3d 606 (D. Conn. 2017); *Welcome v. Just Apartments, LLC*, No. A-3650-06T2, 2008 WL 2696252 (N.J. Super. Ct. App. Div. 2008).

issues by finding the wrap-up policy provides coverage for CIP-related injuries, and the contractor's policy provides coverage for non-CIP claims.

For example, in *Thompson v. National Union Fire Ins. Co. of Pittsburgh, PA.*, the court, applying Georgia law, determined that a similarly worded wrap-up exclusion endorsement in the insured subcontractor's umbrella policy was ambiguous. In that case, the underlying plaintiffs sued the insured subcontractor for harm caused by a power plant explosion in Middletown, Connecticut. The subcontractor sought coverage under its commercial umbrella policy, which contained a wrap-up exclusion endorsement stating that the policy did not apply to "any liability arising out of any project insured under a 'wrap-up' or similar rating plan." The insurer argued that since the power plant project was insured under a CCIP, the wrap-up exclusion applied. The court disagreed, noting that the policy did not define the terms "wrap-up," "similar rating plan," "insured under," or "project" within the exclusion. Rather, the plaintiffs argued and the court agreed that the umbrella insurer failed to show that the term "wrap-up" had one, unambiguous meaning, particularly when its own policies and witnesses defined the term in a number of different ways. As a result, the court held that the wrap-up exclusion did not unambiguously void coverage for the insured. Therefore, under the doctrine of *contra proferentem* and in accordance with Georgia's rules of contract construction, the policy would be construed in favor of coverage for the insured.[61]

However, in *National Union Fire Ins. Co. v. American & Foreign Ins. Co.*, the court, without discussing a wrap-up exclusion, determined that the fact that the contract with the general contractor stated that policies provided as part of the OCIP would be "primary insurance and non-contributing with respect to persons engaged in performance of work at the Project Site" did not render the contractor's own CGL policy excess over the OCIP umbrella policy.[62] The court noted that the evidence did not show that the contractor's CGL policy, which was written before the contractor "even became part of the... project, was intended to exclude coverage for liabilities also covered by the OCIP.[63] Thus, based on the policies' respective "other insurance" provisions, the OCIP umbrella policy was excess over the contractor's own CGL policy.

This issue as to whether the wrap-up policy or a contractor's own CGL policy covers a particular claim also arises in the context of additional insured coverage, often where an additional insured carrier is arguing that the wrap-up exclusion bars coverage for an upper-tier contractor seeking additional insured coverage when the project is insured under a CIP. This situation was recently before the Fourth Circuit Court of Appeals in *Continental Casualty Co. v. Amerisure Ins. Co.*, 886 F.3d 366 (4th Cir. 2018). There, an employee of a sub-subcontractor (CSS) hired to erect the steel structure on a hospital construction project sued the general contractor and the steel subcontractor on the project for work-related injuries he suffered after falling thirty feet. The general contractor was insured under the hospital's rolling OCIP ("ROCIP"). The subcontractor and CSS were not enrolled in the ROCIP. The subcontractor had its own CGL policy with Continental Casualty Company, on which the general contractor was an additional insured. CSS had corporate CGL and umbrella policies with Amerisure, on which the general contractor and subcontractor were both additional insureds. The general contractor and subcontractor sought defense and indemnity as additional insureds under the Amerisure policies.

Amerisure denied coverage on the basis of a CIP exclusion in its policies because the hospital had a ROCIP in effect on the date of the employee's accident. The CIP exclusion in the Amerisure policies was worded slightly differently than the one in CG 21 54 01 96. It excluded coverage for bodily injury arising out of "*[CSS's] ongoing operations . . .* if such operations were at any time *included* within a 'controlled insurance program' for a construction project in which you are or were involved."[64]

According to the court, the CIP exclusion applied only if (1) the employee's injuries "arose out of" CSS's operations and (2) CSS's operations were "included" in the ROCIP. Thus, any injuries allegedly arising out of the operations of the general contractor or the subcontractor were not subject to the exclusion. More specifically, the court determined that the first condition was not satisfied because the allegations in the employee's complaint

61. *Thompson*, 249 F. Supp. 3d at 608-10.

62. *National Union Fire Ins. Co. v. American & Foreign Ins. Co.*, No. CV 04-7257 PA (PLAx), 2006 WL 4757339, at *4 (C.D. Cal. Feb. 9, 2006). *But see Massachusetts Port Authority v. Ace Prop. & Cas. Ins. Co.*, No. 033954BLS, 2004 WL 1194738 (Mass. Super. Ct. May 4, 2004) (finding that while the project owner's Airport Owners and Operators liability policy was "clearly excess" to the OCIP by virtue of its other insurance provision, if the "ultimate result" of the underlying bodily injury lawsuit was "grounded upon something not covered by the OCIP policy," there would be nothing for the Airport Owners and Operators policy to be in excess of; therefore, the OCIP policy would be primary only if there was overlapping coverage for the owner under both policies in connection with the ultimate resolution of the underlying lawsuit).

63. *National Union*, 2006 WL 4757339 at *4.

64. *Continental Cas. Co.*, 886 F.3d at 372 (emphasis in original).

presented a distinct possibility that his injuries arose from the operations of the general contractor and subcontractor, rather than CSS. In particular, the court pointed out that while the employee was undoubtedly performing work for CSS at the time of the accident, a number of allegations related to the failures of the general contractor and subcontractor to property supervise CSS's operations and safety procedures. The employee also alleged that his injuries were caused by their independent failure to provide adequate safety equipment and procedures. Since the employee's injuries arguably arose out of operations other than those exclusively performed by CSS, the CIP exclusion did not apply, and Amerisure had a duty to defend.[65]

Because the court found that the first condition of the CIP exclusion was not satisfied, it did not analyze the second condition. However, even if the first condition had been met, the court likely would have reached the same result under the second condition because CSS was not enrolled in the ROCIP. Consequently, its operations would not have been "included" in a controlled insurance program within the terms of the exclusion. Also on that issue, see *D.R. Horton Los Angeles Holding Co., Inc. v. American Safety Indemnity Co.*, where the court held that the wrap-up exclusion in a subcontractor's CGL policy did not eliminate its insurer's duty to defend a developer because the developer's wrap-up policies insured the developer, not the subcontractor, and the work at issue was the subcontractor's defective grading work.[66]

However, in *Structure Tone, Inc. v. National Casualty Co.*, the court determined that the wrap-up exclusion in the subcontractor's policy excluded coverage for the project owner and the construction manager in the underlying personal injury action because they were being provided coverage in the underlying action pursuant to a CCIP issued by another insurer.[67]

XIII. WRAP-UP PROGRAMS AND THE EXCLUSIVE REMEDY

The increasing prevalence of CIPs as a means to provide adequate insurance, both in terms of coverage and limits, has raised issues as to the validity of a CIP to prevent claims between the participants and their employees on the wrapped project. As previously stated, one of the goals of a CIP is to eliminate the costs associated with litigation between the tiers of participants, especially since all tiers share the same insurance. In Texas, this issue has played out in the courts in the context of extending exclusive remedy protection to all tiers of participants on a wrapped project. Stated otherwise, once the project is wrapped, are all participants statutory employers for purposes of the Texas Workers Compensation Act? The Texas Supreme Court and various courts of appeals have addressed these issues, including whether the owner under an OCIP is entitled to such protection.

A. Exclusive Remedy and Statutory Employer Status under the Workers Compensation Act

The bedrock of workers compensation systems, including in Texas, is the exclusive remedy rule. In exchange for providing workers compensation insurance for its employees, the employer receives immunity from tort liability, and statutory workers compensation benefits are the employee's exclusive remedy for a work injury.[68] Nevertheless, the Workers Compensation Act does not prevent an injured worker from seeking tort recovery against third parties for causing or contributing to the injury. The availability of a third party action is particularly problematic for the construction industry. Due to the presence of multiple tiers in close proximity, and the contractual relationships among them, the construction

65. *Id.*
66. *D.R. Horton Los Angeles Holding Co., Inc. v. American Safety Indemnity Co.*, No. 10CV443 WQH (WMc), 2012 WL 33070 (S.D. Cal. Jan. 5, 2012).
67. 13 N.Y.S.3d 52 (N.Y. App. Div. 2015). For additional examples of cases in which courts have analyzed the interplay between a CIP and the wrap-up exclusion in a contractor's own CGL policy, see the following cases: *Amerisure Mutual Ins. Co. v. Houston Casualty Co.*, No. CV-17-02269-PHX-DGC, 2019 WL 1014843 (D. Ariz. Mar. 4, 2019) (wrap-up exclusion in HVAC and plumbing subcontractor's CGL policy negated insurer's duty to defend insured against claims arising out of water damage to building caused by a pipe rupture because subcontractor was an "enrolled contractor" under a Wrap-up Program Change Endorsement for its installation work at the property during construction and property damage was included within the wrap-up policy's products-completed operations hazard); *Employers Mutual Casualty Co. v. Fast Wrap Reno One, LLC*, No. C 17-03837 JSW, 2019 WL 480542 (N.D. Cal. Feb. 7, 2019) (wrap-up exclusion in subcontractor's CGL policy did not apply to property damage to building caused by rain penetrating subcontractor's allegedly faulty containment barrier because subcontractor was not enrolled in CCIP for project and its work was not included within CCIP's coverage); *TNT Equipment Inc. v. Amerisure Mutual Ins. Co.*, No. 6:15-cv-1461-Orl-37DAB, 2016 WL 5146198 (M.D. Fla. Sept. 21, 2016) (wrap-up exclusion applied to exclude coverage to an equipment lessor seeking additional insured coverage for the underlying personal injury action because the insured lessee was the stucco subcontractor on a hotel construction project covered under an OCIP and the underlying claim arose out of the insured's operations or operations performed on the insured's behalf on the project, specifically its use and control of scaffolding equipment (which it had leased from the lessor) that collapsed, resulting in the underlying injuries of an employee of a second-tier subcontractor to insured); and *A.W. Interiors, Inc. v. Travelers Indemnity Co.*, 44 F. Supp. 3d 1071 (D. Colo. 2014) (wrap-up exclusion in insured subcontractor's CGL policy, which excluded coverage for property damage arising out of insured's operations performed on or from all premises covered under a CCIP or OCIP or wrap-up, applied to negate insurer's duty to defend insured in underlying construction defect suit because insured's allegedly defective work in installing pocket door tracks in hotel was on "premises covered" by original project owner's wrap-up policy and nothing suggested that insured performed allegedly defective work outside of project site).
68. Tex. Lab. Code § 408.001.

jobsite is an area ripe for third party claims. This close proximity, in conjunction with the exclusive remedy rule, fosters lawsuits aimed at recovery over and above the statutory workers compensation benefits. Unfortunately, these third party actions frequently bear little relationship to the actual responsibility of another tier for a jobsite injury.

In recognition of this state of affairs, the Texas Workers Compensation Act[69] allows a general contractor and a subcontractor (as those terms are defined in the Act) to enter into a written agreement under which the general contractor can provide workers compensation insurance to the subcontractor and its employees. That agreement renders the general contractor the employer of the subcontractor and the subcontractor's employees for purposes of the workers compensation laws, including the exclusive remedy rule found in Section 408.001 of the Workers Compensation Act. At the same time, allowing the general contractor to provide workers compensation insurance for the benefit of its subcontractors and their employees advances the purpose of the workers compensation laws by making workers compensation coverage more available to those subcontractors who might not otherwise be able to provide the protection for their own employees.

Wrap-up programs raise intriguing issues with regard to § 406.123. Certainly, under an OCIP, the owner provides workers compensation insurance to the contractor and subcontractors on the project. The statute, however, specifically addresses a "written agreement" between a "general contractor" and a subcontractor. So the question becomes whether an owner is a general contractor, as that term is defined in the Act, such that it is entitled to exclusive remedy protection. Similarly, under a CCIP, the general contractor provides workers compensation coverage to subcontractors and lower tiers and is afforded exclusive remedy protection as a result. But under an OCIP, the issue is whether the CIP documents, the CIP manual and other associated documents constitute a "written agreement" on the part of a general contractor to provide workers compensation insurance to the lower tiers and their employees. There is also the question of the extent to which lower tiers of contractors on the project are entitled to immunity from third party actions brought by employees of other tiers.

As the case law on these issues comes into clearer focus, Texas courts have consistently favored a broad extension of the workers compensation exclusive remedy rule throughout all tiers of contractors and subcontractors on a project with a wrap in place. When an OCIP is in place, tort immunity extends even to the owner. The Texas Supreme Court first began to clarify these issues in the cases of *Entergy Gulf States, Inc. v. Summers*[70] and *HCBeck, Ltd. v. Rice*,[71] a pair of opinions issued on the same day in April 2009. The Court provided further clarification with its 2016 opinion in *TIC Energy & Chemical, Inc. v. Martin*.[72]

B. Section 406.123 of the Workers Compensation Act

> Section 406.123 of the TEXAS LABOR CODE provides in relevant part as follows:
>
> (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.
>
> * * *
>
> (d) If a general contractor . . . elects to provide coverage under Subsection (a) or (c), then, notwithstanding Section 415.006, the actual premiums, based on payroll, that are paid or incurred by the general contractor or motor carrier for the coverage may be deducted from the contract price or other amount owed to the subcontractor or owner operator by the general contractor or motor carrier.
>
> (e) An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of workers compensation laws of this state.

C. Owner as General Contractor under § 406.123

In *Entergy Gulf States, Inc. v. Summers*, the Texas Supreme Court, on rehearing, addressed the definitions of "general contractor" and "subcontractor" in TEXAS LABOR CODE § 406.121 that determines entitlement to exclusive remedy immunity under § 406.123(a). The Court's analysis

69. TEX. LAB. CODE § 406.123.
70. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009).
71. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009).
72. *TIC Energy & Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016).

directly addressed whether Entergy, a premises owner, could be a "general contractor" so as to provide workers compensation coverage to a subcontractor for purposes of Entergy's entitlement to the protection of the exclusive remedy.[73]

Summers was injured while working at Entergy's plant as an employee of IMC, a maintenance contractor. Entergy provided workers compensation insurance for the project under an OCIP. After collecting workers compensation benefits under the OCIP, Summers filed a third party action to recover from Entergy, as the premises owner. Therefore, the issue before the Court was whether an owner-general contractor relationship could satisfy the requirements of § 406.123(a) so as to allow the owner to avail itself of the exclusive remedy. Reviewing the definition of "general contractor" as set out in § 406.121, and as applied in § 406.123, the Court found the necessary relationship so as to uphold exclusive remedy protection for Entergy, the project owner.[74] The term "general contractor" is defined in § 406.121 as follows:

> "General contractor" means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.[75]

This definition was last revised in 1993, and that revision applied to the claim before the Court.

The Court determined that Entergy, as owner, had undertaken to procure the performance of maintenance work at its facility within that definition. Therefore, Entergy was a "general contractor" as contemplated in § 406.123. So by sponsoring the OCIP, the Court found that Entergy had entered into a written agreement to provide workers compensation coverage to subcontractors and their employees, thus entitling it to statutory immunity under § 406.123. The Court observed that it would be contrary to the state's strong public interest of encouraging workers compensation insurance coverage to deprive Entergy of statutory immunity once it became a subscriber by taking out a workers compensation policy for the entire worksite.[76] Therefore, an owner that provides workers compensation coverage in an OCIP has statutory immunity from third party actions filed by injured workers at the jobsite.

Based on the analysis in *Entergy*, the federal district court in *Doss v. United States*, held that the United States qualified as a "general contractor" under § 406.123(a) and was able to assert the exclusive remedy defense.[77] The United States entered into a contract with a contractor ("LSI") that governed LSI's supplying of additional workforce to support the Army's mission and reimbursed LSI for the premium costs of workers compensation coverage that it purchased.

In *Garza v. Zachry Construction Corp.*,[78] the question was whether the employees of a subcontractor were "deemed employees" of the premises owner/general contractor for purposes of the exclusive remedy. Garza worked for DuPont as an operator at DuPont's plant in Ingleside, Texas. Zachry was a subcontractor performing various services at the plant, and Morales and Rodriguez were Zachry employees who worked at the same DuPont plant. Garza sued Zachry, Morales, and Rodriguez after he was injured while operating a railcar with them. He alleged the negligence of Morales and Rodriguez caused the accident.[79]

Under its contract with Zachry, DuPont agreed to provide workers compensation insurance to Zachry. The court held that the agreement to provide workers compensation insurance created the legal fiction of DuPont as the "deemed employer" and Zachry and its employees as "deemed employees," consistent with § 406.123, which states an agreement such as the one entered into between DuPont and Zachry makes DuPont "the employer of" Zachry and Zachry's employees only for purposes of the workers compensation laws of this state. Therefore, the court held that Garza's action was barred by the exclusive remedy.[80]

Finally, in *Powell v. Valero Energy Corp.*,[81] the court applied *Entergy* in a straightforward manner to find that a

73. *Entergy*, 282 S.W.3d at 435.
74. *Id.* at 437.
75. Tex. Lab. Code § 406.121(1).
76. *Entergy*, 282 S.W.3d at 444.
77. *Doss v. United States*, 793 F. Supp. 2d 859, 866 (E.D. Tex. 2011).
78. *Garza v. Zachry Construction Corp.*, 373 S.W.3d 715,717 (Tex. App.—San Antonio 2012, pet. denied).
79. *Id.* at 718.
80. *Id.* at 721.
81. *Powell v. Valero Energy Corp.*, No. 13-18-00209-CV, 2019 WL 961958 (Tex. App.—Corpus Christi Feb. 28, 2019, no pet. h.).

refinery owner ("Valero") provided workers compensation as a "general contractor," as contemplated by § 406.123, pursuant to a written agreement with the general contractor ("Qualspec"), which required Qualspec to participate in a rolling OCIP ("ROCIP") that included workers compensation coverage. The court in *Powell* also addressed several of the issues that arise from the *HCBeck* case, as discussed below.

D. Written Agreements to Provide Workers Compensation

The Texas Supreme Court decided *HCBeck, Ltd. v. Rice*[82] on the same day as *Entergy.* The issue before the Court was whether HCBeck, the general contractor, entered into a written agreement to provide workers compensation to Haley Greer—a subcontractor and the employer of Charles Rice, who was injured on a project jobsite. The project was insured under an OCIP program provided by the owner ("FMR"). The court of appeals held that there was no "written agreement" for HCBeck to provide coverage due to what the court viewed to be the optional nature of maintaining the OCIP in the contract documents. That holding ignored the fact that HCBeck entered into a contract incorporating the terms of the FMR OCIP, and those same terms were incorporated into a subcontract with Rice's employer, Haley Greer. In the prime contract with FMR, HCBeck also bound itself to provide alternate insurance in the event the OCIP option was not exercised. On appeal, the Texas Supreme Court determined that the analysis should focus on what actually happened—the OCIP was in effect and the injured employee collected worker compensation benefits—and not a hypothetical scenario of what might have happened if the OCIP were terminated.[83]

Thus, in the words of the Court, the issue before it in *HCBeck* was the interpretation of the term "provide" in § 406.123 and whether the legislative intent contemplated a scenario in which the conduit between an owner and a subcontractor, i.e., the general contractor, "provides" workers compensation to subcontractors as contemplated by that section.[84] As a result, the Court undertook an extensive discussion of what constitutes a written agreement to provide workers compensation under § 406.123. The Court focused on the terms of the OCIP documents themselves, and in reviewing the effect of § 406.123, the Court stated as follows:

> That provision does not require a general contractor to actually obtain the insurance, or even pay for it directly. The Act only requires that there be a written agreement to provide workers compensation insurance coverage. In this case, the coverage that was actually provided to Haley Greer by FMR under the agreement was backed by HCBeck's specific obligation assuring that Haley Greer remained covered in the event FMR decided not to continue its OCIP.[85]

Thus, even though HCBeck did not actually obtain or purchase the coverage, since the subcontract incorporated the OCIP documents, the subcontract (together with the general contract OCIP provisions) constituted an agreement to provide workers compensation insurance.

The Court also extensively discussed the legislative intent behind the use of the term "to provide" and the intent behind the provision of insurance through an OCIP. It concluded that even where a general contractor does not purchase the insurance directly, the benefits of a controlled insurance program, that is, to promote coverage of the lowest-tiered employees and to avoid duplicative coverage and inefficient use of resources, are served. It further concluded that its holding—that HCBeck provided workers compensation insurance even when it had not purchased the insurance directly—would allow multiple tiers of subcontractors to qualify as statutory employers entitled to the exclusive remedy defense. According to the Court, that scheme was consistent with the benefits of an OCIP.

However, a single sentence from the *HCBeck* opinion has given lawyers for injured workers an incentive to argue otherwise. Specifically, the Texas Supreme Court worded its holding as follows:

> We hold that HCBeck "provides" workers' compensation insurance under the Act because the insurance plan incorporated into both its upstream contract with FMR and its downstream subcontract with Haley Greer included workers' compensation coverage to Haley Greer's employees, *and because the*

82. *HCBeck, Ltd. v. Rice,* 284 S.W.3d 349 (Tex. 2009).
83. *Id.* at 356.
84. *Id.* at 351.
85. *Id.* at 353-54.

> *contracts specify that HCBeck is ultimately responsible for obtaining alternate workers' compensation insurance in the event FMR terminated the OCIP.*[86]

Lawyers for injured workers have argued that, in addition to the actual provision of workers compensation insurance through the OCIP, i.e., the injured worker was covered at the time of the accident, the second part of this holding creates an additional "ultimate responsibility" or "backup insurance" requirement. There is no such requirement in the language of the statute, and no Texas court of appeals has interpreted the *HCBeck* holding in this manner. In fact, in *Valadez v. MEMC Pasadena, Inc.*, the court went out of its way to clarify that it is "the provision of coverage, not the responsibility in the event of its absence, that supports the exclusivity defense."[87] In *Powell v. Valero*, discussed above, after applying *Entergy* to dispose of the argument that an owner was not a "general contractor," the court turned to the injured worker's argument that Valero did not "provide" workers compensation coverage because the ROCIP documents provided that the ROCIP may not apply to certain work. The court held, however, that in determining whether Valero provided workers compensation coverage, "it is of no consequence that coverage might not have been made available for other services."[88] Nonetheless, injured workers have had varying degrees of success in the trial courts defeating summary judgment on this basis. Until Texas courts provide additional clarity on this issue, careful contract drafting in compliance with the *HCBeck* opinion is of great importance to upper tiers on a wrapped project.

In fact, in *Austin Bridge & Road, LP v. Suarez*, the court overturned a $17,720,000 verdict against Austin Bridge & Road, LP ("ABR"), the upper tier contractor. In doing so, the court discussed the contract documents argument for provision of "alternate coverage" under § 406.123.[89] That case involved a jobsite death during the construction of McLane Stadium at Baylor University. ABR was a subcontractor on the project for Austin Commercial. The deceased was employed by an ABR subcontractor and was working on a pedestrian bridge over the Brazos River when his man-lift tipped and he fell off a barge and into the Brazos River. The worker drowned as a result of the accident.

Baylor purchased an OCIP including workers compensation for the McLane Stadium project. Accordingly, ABR moved for summary judgment on the basis of the exclusive remedy as extended by § 406.123. The trial court denied summary judgment and, in fact, awarded plaintiff a "no evidence" summary judgment on this issue. ABR appealed, and the court relied heavily on *HCBeck*. The court found that the general contractor, Austin Commercial, "provided" workers compensation through its prime contract with Baylor, which incorporated the OCIP and required enrollment by all contractors and subcontractors on site. The court went on to note that:

> Here, as in *HCBeck*, the Project Owner Baylor provided insurance through an OCIP, and the contract between Baylor and the General Contractor Austin Commercial provided for alternative coverage—to be obtained by Austin Commercial "and/or one or more of its Subcontractors or Sub-Subcontractors" as "replacement insurance" at Baylor's expense—thereby providing assurance that subcontractors would remain covered in the event Baylor discontinued its OCIP.[90]

Therefore, until the Texas Supreme Court provides clarity on this issue, when a wrap is in place, it is important that the contract documents provide for this type of "backup insurance."

Another post-*HCBeck* case demonstrates the importance of contract drafting when seeking the protection of the exclusive remedy rule pursuant to § 406.123. In *Briggs v. Toyota Manufacturing of Texas*, the issue before the court was whether the owner, Toyota, entered into a "written agreement" to provide workers compensation to its contractors and subcontractors that worked on the construction of its San Antonio assembly plant.[91] The project was insured by an OCIP purchased by Toyota. Toyota's OCIP manual provided that "the Contractor and all tiers of Subcontractors . . . will be insureds under this OCIP," and that the Contractor and all tiers of subcontractors were required to delete the insurance costs for the Toyota furnished insurance from their contract bid.[92] The manual identified Mitsui as Toyota's workers

86. *Id.* at 351-52 (emphasis added).
87. *Valadez v. MEMC Pasadena, Inc.,* No. 01-09-0078-CV, 2011 WL 743099 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.).
88. *Powell,* 2019 WL 961958 at *4.
89. *Austin Bridge & Road, LP v. Suarez,* 556 S.W.3d 363 (Tex. App.—Houston [1st Dist.] 2018, pet. pending).
90. *Id.* at 382.
91. *Briggs v. Toyota Manufacturing of Texas,* 337 S.W.3d 275 (Tex. App.—San Antonio 2010, no pet.).
92. *Id.* at 280.

compensation carrier, and Mitsui issued certificates of insurance to the subcontractors on the project, including the injured worker's employer. The court held that the OCIP did not constitute a written agreement to provide workers compensation because, unlike in *HCBeck*, none of the contracts and subcontracts referenced the OCIP or Toyota's requirement that the contractors' and subcontractors' bids be reduced by the cost of the OCIP.[93]

Toyota attempted to rely on the OCIP Manual of Insurance Procedure, which detailed how the OCIP was to operate, as evidence of an agreement. The court, however, determined that the OCIP manual was not a written agreement for purposes of the Texas Workers Compensation Act because its own language made clear that it was not intended to be considered a contractual document or to alter any provisions of the actual contract documents between Toyota and the contractors/subcontractors. The manual further provided, "Not every company involved with the project will be insured through the OCIP."[94] This case highlights the importance of drafting the contract documents in consideration of the existence of the CIP, particularly incorporating the CIP manual into the contract.

The court also noted that there was no evidence that the OCIP manual, or any other written agreement, was filed with the insurance carrier for purposes of complying with the requirements of § 406.123(f) (requiring the general contractor to file a copy of the agreement to provide workers compensation coverage with its workers compensation carrier or, if self-insured, the Workers Compensation Division) and § 406.123(g) (making the failure to file a copy of the written agreement in accordance with subsection (f) an administrative violation).[95]

E. "General Contractors" and "Subcontractors" Under § 406.123

As discussed above, § 406.123 provides a "general contractor" with statutory immunity where it has entered into an agreement to provide workers compensation to a "subcontractor." The term "subcontractor" is defined in § 406.121 as "a person who contracts with the general contractor to perform all or part of the work or services that the general contractor has undertaken to perform."[96] Where such an agreement is entered into, the general contractor becomes the employer of the subcontractor and the subcontractor's employees for purposes of the workers compensation laws, i.e., statutory immunity.

As can be seen, the terms "general contractor" and "subcontractor" are not necessarily defined according to the relative positions of the parties within the tiers on the project, but rather according to the parties with whom they contract. Based on *Entergy*, the owner meets the statutory definition of "general contractor" because it procures performance of work. As a general contractor, it can enter into an agreement with the general contractor, regarded as a subcontractor in the statute, to provide workers compensation coverage and gain immunity from suit by the employees of the subcontractor. In *Entergy* and *HCBeck*, the OCIP documents provided the agreement for providing workers compensation.

F. Wrap-Up Participants as Fellow Employees

In *TIC Energy & Chemical, Inc. v. Martin*, the Texas Supreme Court clarified that when an OCIP is in place, tort immunity pursuant to the exclusive remedy rule extends to all tiers of contractors and subcontractors on the project that participate in the OCIP.[97] The Court in *TIC Energy* framed the issue as follows:

> [W]hether a subcontractor is entitled to the exclusive-remedy defense as a fellow employee of the general contractor's employees by virtue of the general contractor's written agreement to provide workers' compensation insurance to the subcontractor.[98]

The case involved a worker, Martin, who was employed by the general contractor, Union Carbide, at one of its plants. Martin was injured in a workplace accident and recovered workers' compensation benefits through an OCIP administered by Union Carbide's parent company ("Dow").[99] Martin sued his employer, TIC Energy, a subcontractor providing maintenance services at the facility where Martin was injured, alleging that TIC's employees negligently caused his injury.

TIC claimed the exclusive remedy defense as Martin's

93. *Id.* at 283.
94. *Id.* at 284.
95. *Id. See also Williams v. Traylor-Massman-Weeks, LLC,* No. 10–2309, 2012 WL 1106652 (E.D. La. Apr. 2, 2012) (engineering company was not insured under CCIP where company failed to complete steps required under CCIP manual for enrolling).
96. Tex. Lab. Code § 406.121(5).
97. *TIC Energy & Chemical, Inc. v. Martin,* 498 S.W.3d 68 (Tex. 2016).
98. *Id.* at 69.
99. *Id.* at 70.

deemed "fellow employee" based on § 406.123 of the Labor Code and produced evidence of a written agreement with Union Carbide, under which Union Carbide provided workers' compensation coverage under an OCIP to TIC and its employees. Martin argued that the exclusive remedy provision did not apply to TIC because it was an independent contractor, and § 406.122(b) of the Labor Code provides that, in such circumstances, a subcontractor like TIC is not an employee of the general contractor. That section provides:

> (b) A subcontractor and the subcontractor's employees are not employees of the general contractor for purposes of this subtitle if the subcontractor:
>
> (1) is operating as an independent contractor; and
>
> (2) has entered into a written agreement with the general contractor that evidences a relationship in which the subcontractor assumes the responsibilities of an employer for the performance of work.[100]

The Court observed that the exclusive remedy defense extends to the employer's employees who are covered under the workers compensation policy. The Court cited *HCBeck* and concluded that Martin's employer, Union Carbide, as the general contractor, and TIC, as the subcontractor, had an agreement that complied with § 406.123, and that TIC was engaged as an "independent contractor" as contemplated in § 406.122(b). The Court stated that "[t]he sole matter in dispute is the legal effect [§§] 406.122(b) and 406.123 have when agreements meeting the terms of both govern the general contractor and subcontractor relationship."[101]

The Supreme Court concluded that § 406.122(b) sets out a general rule, and § 406.123 provides a permissive exception to the general rule.[102] Accordingly, the Court concluded that "[t]aken together, the only plausible reading of the statute is that section 406.122 states a general rule of employment status for workers' compensation purposes and section 406.123 deviates from that rule by creating the fiction of another."[103] The Texas Supreme Court expressly rejected Martin's construction of § 406.123 as not permitting lower-tier subcontractors and their employees to assert the exclusive remedy bar as fellow employees of higher-tier contractors and their employees, finding that such a construction ran counter to *HCBeck* and the purposes of the Workers Compensation Act. The Court ultimately held that TIC was entitled to rely on the exclusive remedy defense as Martin's "co-employee."

In *TIC Energy*, the Texas Supreme Court relied on a previous appeals court case, *Etie v. Walsh & Albert Co.*[104] In that case, the Houston Court of Appeals held that where a general contractor provides workers compensation insurance to subcontractors on the project, all lower tiers on that project are entitled to immunity from third party suits by injured employees.[105] There, Clark, the general contractor, provided a single workers compensation insurance policy to cover all subcontractors and their employees who worked on an Enron project. Clark subcontracted part of the work to Way Engineering, and Way Engineering, in turn, sub-subcontracted the sheet metal work to Walsh & Albert. Etie, an employee of Way Engineering, was injured at the jobsite, allegedly due to work performed by Walsh & Albert. After recovering workers compensation benefits, Etie filed a third party action against Walsh & Albert, which defended the claim, asserting that it was entitled to immunity under § 406.123(a). On the other hand, Etie contended that the employees of Walsh & Albert were not employees of Clark, the general contractor, who had provided the workers compensation insurance, since they were employees of an independent contractor under Tex. Labor Code § 401.012(b)(2). The court rejected this argument, holding that the provision of workers compensation insurance transforms an independent contractor into a "deemed employee."[106]

The court determined that since Clark exercised an option, as part of its subcontract with Way Engineering, to provide workers compensation coverage for all employees at the jobsite, and since Way Engineering's subcontract with Walsh & Albert incorporated by reference all of the provisions of the contract between Clark and Way Engineering, Walsh & Albert and its employees were also covered by the workers compensation insurance policy that Clark provided. As such, the court concluded that Walsh & Albert was entitled to immunity from suit. The court stated as follows:

100. Tex. Lab. Code § 406.122(b).
101. *TIC Energy*, 498 S.W.3d at 74.
102. *Id.* at 75.
103. *Id.* at 76.
104. *Etie v. Walsh & Albert Co.*, 135 S.W.3d 764 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).
105. *Id.* at 768.
106. *Id.* at 767.

> We are persuaded that the 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.[107]

Taken together, these cases demonstrate the broad application of the exclusive remedy rule under § 406.123. Although careful drafting remains important, an OCIP or CCIP that includes workers compensation coverage can provide comprehensive tort immunity throughout the tiers of participants on a project.

CONCLUSION

Relatively speaking, CIPS are still a new concept within both the construction and the insurance industries. Initially, cost savings may have driven their development. But more recently, the development of CIPs has been propelled by the provision of adequate coverage to the participants on a construction project in light of the explosion of construction defect litigation and serious bodily injury claims. As with any developing concept, there are pros and cons depending upon a party's status as an owner, general contractor, subcontractor, sub-subcontractor or supplier. Nevertheless, in light of the difficulties that have been encountered as to insuring risks such as construction defects under traditional individual programs, wrap-up or project specific insurance will continue to gain momentum. And of course, as that momentum increases, so will the means to address many of the issues set out in this paper. These developments have spurred the Texas legislature to begin regulating these programs. While current regulation is relatively light, it is likely that such regulation will be extended as CIPs continue to be used to insure risks in the construction industry.

107. *Id.* at 768.