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MANAGING CONSTRUCTION RISKS UNDER CONTROLLED INSURANCE PROGRAMS

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TABLE OF CONTENTS

I. Introduction.....1

II. Nomenclature.....2

 A. Wrap-Up2

 B. OCIP3

 C. CCIP.....3

 D. CIP3

 E. TPA.....3

 F. Rolling Wrap3

III. Advantages and Disadvantages of CIPs3

 A. Advantages of CIPs.....3

 B. Disadvantages of CIPs4

IV. Scope of OCIP Protection - Project Participants5

V. Scope of CIP Protection - Insurance Coverage.....5

 A. Covered Exposures6

 1. CGL Coverage6

 a. Completed Operations Issues.....6

 b. Elimination of Restrictive Exclusions7

 c. Manuscript Anomalies7

 2. Workers Compensation and Employers Liability.....8

 3. Umbrella Liability Coverage 9

 4. Builders Risk Coverage9

 5. Project Professional Coverage.....9

 B. Risks Typically Excluded Under Wrap-Up Programs.....9

 1. Professional Services10

 2. Environmental Liability.....10

 3. Offsite Exposures.....10

 4. Warranty Liability.....11

VI. Adequacy of Limits.....12

VII. Safety Programs and Risk Control.....12

VIII. Effect on Litigation.....13

 A. The Myth.....13

 B. The Reality.....13

 C. Joint Defense Agreements15

IX.	Wrap-Up Exclusions and Coordination with the Contractor’s Own Coverage	15
X.	Wrap-Up Programs and the Exclusive Remedy	17
	A. Exclusive Remedy and Statutory Employer Status under the Workers Compensation Act	17
	B. Section 406.123 of the Workers Compensation Act.....	18
	C. <i>Entergy v. Summers</i>	19
	D. <i>HCBeck v. Rice</i>	20
	E. “General Contractors” and “Subcontractors” under §406.123	21
	F. Other Case Law.....	21
	G. The “ <i>Entergy</i> Bill”	23
XI.	Senate Bill 1551 Regulation of CIPs	23
XII.	Conclusion	24

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**By
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I. Introduction

Construction-related risks are complex simply due to the intricate nature of some construction projects, such as risks involving steel erection, HVAC systems, concrete, foundations and exterior cladding, to name a few. On the other hand, many construction claims involve another layer of complexity due to the relatively large number of parties involved, especially when several parties are alleged to have caused or contributed to a loss or injury, and even more so where those parties all have some contractual relationship. Under these circumstances, consideration must be given not only to the insurance coverages for each of those parties, but also to the contractual relationships whereby risks are transferred or allocated among them. Of course, these types of multi-party situations often accompany the other types of complexity discussed above, in that the difficulties are often compounded in terms of the underlying technical facts, as well as the bodily injury, property damage or other loss that has occurred. 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 those parties on a 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 on their liability policies. Moreover, construction is an endeavor that gives rise to considerable risks, both economic and catastrophic. As a result, complex indemnity clauses are used to attempt to transfer considerable risks 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 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 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.

Wrap-up insurance programs on public projects are subject to statutory regulation, setting a floor on the size of projects for which they are allowed. Practically, the same is true with all wrap-up programs in which economies of scale dictate the feasibility of the use of such a program on a given project. Moreover, these programs usually “wrap” CGL and workers compensation coverage, which often raises issues as to the negative effect on the experience modifier of participating contractors.

The use of wrap-up insurance programs has engendered much controversy between owners and contractors 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. 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, often on a rolling basis.

Suffice it to say that wrap-up success stories as well as horror stories abound. This paper focuses on the relative advantages and drawbacks associated with wrap-up programs, including the scant case law that focuses on specific issues surrounding these programs. One issue that has received treatment by the courts is the extension of statutory immunity on projects where workers compensation is provided through an OCIP. In addition, recent legislative attempts in Texas to regulate wrap-ups will be discussed, all with the hope that, armed with a bit more knowledge, the parties can maintain, or even restore, control of construction risks through the controlled insurance program.

II. Nomenclature

Terminology used in this paper and in general as to wrap-up insurance programs is as follows.

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. “Controlled insurance program,” 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. 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.

F. Rolling Wrap. A “rolling wrap” is a controlled insurance program administered by one sponsor, such as a large general contractor or owner, for use on more than one project.

III. Advantages and Disadvantages of CIPs

As previously set out, CIPs gained popularity due to potential cost savings. The 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 savings in the bids would be verified by requiring the contractor and subcontractors to bid the job including their insurance cost, and without their insurance cost, in contemplation of the use of a wrap.

Nevertheless, significant contingent factors exist as to the realization of substantial savings with regard to CIPs. Those factors include: (a) a project of sufficient dollar value to extract such savings; (b) the risk management capabilities to effectively administer the CIP; and (c) above all, adequate coverage to apply to claims when needed. DONALD S. MALECKI, “*Wrap-Ups: Who is Really in Control?*” MALECKI ON INSURANCE (March 1999). While the emphasis may have changed somewhat from potential cost savings to availability of broader coverage, these three factors are still major determinants in whether a particular CIP will be successful.

A. Advantages of CIPs

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 and operating costs; (e)

higher limits of coverage; (f) certainty of protection and reduced gaps in coverage; (g) centralized cost control and claims processing; and (h) centralized and improved safety programs. JACQUELINE P. SIRANY AND JAMES DUFFY O'CONNOR, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-Ups*, 22 WTR CONST. LAW 30 (2002). Specifically with regard to the provision of workers compensation 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, a benefit that is credited with increasing worker morale and increasing productivity. *Id.* at 33, n 2. 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, including increased compliance with regulatory standards, control of insurance coverage, solving insurance availability problems, improved productivity, cost control and enhanced ability to use smaller contractors due to wider availability of insurance through the CIP. INTERNATIONAL RISK MANAGEMENT INSTITUTE, CONSTRUCTION RISK MANAGEMENT (2006), available at <http://www.irmi-online.com>. 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.

Certain of these advantages of a wrap-up program, as touted by commentators (and insurers), may be less important than others, or virtually non-existent. Many of these issues will be addressed below.

B. Disadvantages of CIPs

At the same time, there are disadvantages that are pointed out with regard to wrap-up programs. Those disadvantages include: (a) non-managing participants' loss of control of the 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. SIRANY AND O'CONNOR, *supra* at 30.

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.

It should be noted that in cases that involve litigation of CIPs, courts have recognized the theory behind the use of a CIP on a construction project. For example, in the classic case, *Independent Ins. Agents v. Turnpike Authority*, 876 P.2d 675, 676 (Okla. 1994), 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.

For similar statements, see *Kraft Co., Inc. v. J&H Marsh & McLennan of Florida, Inc.*, 2006 WL 1876995 (M.D. Fla. July 5, 2006); *American Protection Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989 (Me. 2003). These cases, including *Insurance Agents of Oklahoma* and *American Protection v. Acadia*, were relied upon by the Texas Supreme Court in *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 this case below as to the effect of wrap-up insurance programs on the exclusive remedy under Texas law.

IV. Scope of OCIP Protection - Project Participants

Not all participants on a particular construction project that is wrapped are participants in the OCIP. Typically, suppliers are not included, nor are offsite fabricators. Moreover, in some CIPs, participants with subcontract values below a minimal 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. As to issues involving offsite exposures, see below.

V. Scope of CIP Protection - Insurance Coverage

One of the most frequently asserted advantages of a CIP is enhanced insurance coverage, particularly for such traditionally difficult risks to insure such as construction defect. In fact, the dramatic increase in 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. The results of these efforts, however, have been somewhat mixed.

A. Covered Exposures

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

1. CGL Coverage

The centerpiece of any CIP, as is the case for any individual contractor's program, is commercial general liability (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, premises and operations coverage and certain medical payments. A CGL policy issued as part of a CIP may be written on a manuscript form, or may be written on the standard Insurance Services Office (ISO) form with manuscript endorsements attached to accomplish coverage extensions (or restrictions) as part of the CIP.

a. Completed Operations Issues

One of the traditional issues relating to wrap-up insurance programs has been the length of the completed operations coverage (sometimes referred to as the completed operations tail) provided under a CIP policy. Completed operations is the coverage under a commercial general liability and 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, primarily in the residential sector, 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 now becoming more common to see a ten-year completed operations period as to wrap-ups. 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 is usually excluded under the contractor's own insurance program for property damage to projects that were subject to a wrap-up. Issues relating to this potential gap are discussed later in this paper in the coordination section.

Another issue that has been pointed out with regard to completed operations coverage under OCIPs is the fact that under 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. See DONALD S. MALECKI ON INSURANCE (March 1999). 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.

b. 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 outbreak of construction defect claims in connection with single-family homes, subdivisions and condominium projects, insurers over the last few years have begun to include residential exclusions in policies issued to parties involved with residential construction. It has become a particularly acute problem with regard to 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.

c. Manuscript Anomalies

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 commercial general liability policy. Unfortunately, there may exist an impression that these types of manuscript endorsements may extend coverage for areas that are typically difficult to insure. One of these areas is construction defect.

A wrap-up program must be examined closely to determine the scope of coverage being provided. Typically, the contract documents include a wrap-up insurance manual that 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 are experienced. 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.

As an actual example, the wrap-up manual on a recent project indicated that coverage was provided for third party bodily injury and property damage arising from an enrolled subcontractor's work. An endorsement to the actual policy when issued stated that the insurance did not provide coverage or a duty to defend against any 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 the particular wrap-up provided a ten year completed operations period for coverage, the policy purported to exclude coverage for property damage while construction at the project site was in progress. This exclusion created 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.

Another actual example is an early OCIP on a public project that included an endorsement modifying the standard definition of “your product” in the CGL policy. That standard definition specifically excludes real property from the definition of “your product,” so that the exclusion does not apply to a construction project, that is, real property. On the other hand, the endorsement redefined the term “your product” as the project itself. In other words, participants were arguably without coverage for property damage to the entire project.

While the above examples are certainly 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 defect. To the extent possible, the contractor considering participation in a wrap-up, 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.

2. 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 the past year or two. 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 on their experience rating for future insurance, particularly their experience modifiers 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 and be amenable to the correction of any errors. For a more in-depth discussion of these issues, *see* INTERNATIONAL RISK MANAGEMENT INSTITUTE, CONSTRUCTION RISK MANAGEMENT, Chapter IX, Wrap-

Up/OCIP (2006), available at <http://www.irmi-online.com>. SANDY M. KAPLAN, KIMBERLY S. BUNTING AND AMY HOBBS IANNONE, *OCIPs, CCIPs, and Project Policies*, 29 THE CONSTRUCTION LAWYER 11, 14 (Summer 2009)(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 a critical element as to minimizing the impact on a participants experience modifier and insurance costs).

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 do so may have a tendency to raise that modifier.

3. Umbrella Liability Coverage

Most CIPs provide umbrella liability coverage in excess of the CGL and 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.

4. 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 under construction, and 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.

5. Project Professional Coverage

On many 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 are added with increasing frequency to the CIP by sponsors.

B. Risks Typically Excluded Under Wrap-Up Programs

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.

As set out above, 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 Authority v. Kohn Pedersen Fox Associates*, 36 Conn. L. Rptr. 225, 2003 WL 23177993 (Conn. Super. Dec. 23, 2003).

2. Environmental Liability

Due to the use of the standard commercial general liability policy forms, environmental and pollution liability risks are typically excluded under a wrap 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.*, 814 A.2d 989 (Me. 2003), 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. 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 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.

In *St. Paul Fire & Marine Ins. Co. v. Motiva Enterprises, LLC*, No. H-04-4252 (S.D. Tex.), St. Paul issued an OCIP that wrapped maintenance and capital improvement operations at Motiva's Port Arthur refinery. Employees of Hydro Tank, a subcontractor hired by Motiva to perform various operations, including the cleaning of a mixing tank, were injured by hydrogen sulfide exposure. St. Paul filed a declaratory judgment action against Motiva, acknowledging that it had issued liability policies to the OCIP, but claiming that Hydro Tank was not a participant. Instead, St. Paul contended that other policies maintained by Motiva outside the OCIP applied. The action was eventually dismissed without a determination by the court.

Another case involving issues relating to performance of onsite versus offsite activities is *Zurich American Ins. Co. v. Pennsylvania Manufacturers' Association Ins. Co.*, No. A-4260-01T1, 2003 WL 23095605 (N.J. Super. App. Div. May 7, 2003). In that case, the court ruled that an OCIP insurer was responsible for defense and settlement costs in a defective work claim asserted by the owner against the general contractor, rather than the contractor's personal general liability policy, 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 that the general liability policy applied only to offsite activities.

4. 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.

KAPLAN, BUNTING AND IANNONE, *supra* at 16.

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.

VI. 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 adequacy of limits where claims by numerous of the 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. 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.

VII. Safety Programs and Risk Control

Another of the major benefits attributed to wrap-up programs is an increased emphasis on safety, and thus, control of onsite risks. In fact, effective safety and risk control is one of the cornerstones of cost savings contemplated on most wrapped projects.

Commentators with experience on CIPs advocate the inclusion of a safety manual in the contract documents, as well as obtaining reassurances and commitments from subcontractors as to safety and risk control. Subcontractor programs should be examined, and any nonconformity or deficiencies as to the CIP should be remedied. While a full discussion of this topic is beyond the scope of this paper, an effective risk control program on a CIP should emphasize: (a) identification and treatment of site hazards; (b) identification and establishment of authority and reporting requirements according to tier on the project; (c) emphasis of the owner's role and commitment to project safety; (d) emphasis on the sponsor's role and commitment to project safety; (e) promulgation of written risk control programs; (f) assurance of minimum training for all workers on the jobsite; (g) regular work area inspections; (h) participation in applicable OSHA voluntary protection programs; (i) tracking of violations and assessment of penalties; (j) maintenance of an effective substance abuse program; (k) emphasis on fire protection; (l) provision of protection for public safety and visitors to the job site; (m) provision for project security; (n) maintenance of industrial hygiene and environmental protection; (o) establishment

of emergency/contingency fund; and (p) maintenance of medical facilities, including first aid and emergency transportation. For an in-depth discussion of these topics, *see* INTERNATIONAL RISK MANAGEMENT INSTITUTE, GARY E. BIRD, *THE WRAP-UP GUIDE* (4th Ed. 2007), *available at* <http://www.irmi-online.com>.

VIII. Effect on Litigation

A. The Myth

A typical CIP is structured with a single insurer providing the general liability, umbrella liability and workers compensation coverage for all of the participants. The natural conclusion would be that elimination of multiple insurers insuring each tier separately would reduce litigation between the parties over jobsite injuries, accidents or property damage. Unfortunately, such has not always been the case. In a recent presentation, one commentator opined that a unified defense of claims arising out of an incident on a wrapped project “is still a myth.” *See* JASON WEINTRAUB, *Lessons Learned on Wrap-Ups*, 27th IRMI Construction Risk Conference, San Diego, California (October 31, 2007). While the premise appears to be logical, the provision of insurance coverage by a single insurer may not significantly reduce litigation.

B. The Reality

One of the reasons that litigation among the tiers of participants is not necessarily reduced is because the CGL policy naming all participants as named insureds includes a “separation of insureds” provision that provides as follows:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part of the first Named Insured, this insurance applies:

- (a) As if each Named Insured were the only Named Insured;
and
- (b) Separately to each insured against whom claim is made or ‘suit’ is brought.

In other words, a separation of insureds clause requires that each insured participant in the OCIP program, as a named insured on the general liability policy, is entitled to have coverage, including defense and indemnity available to it, evaluated separately from every other insured. This translates into a separate defense for each party involved in a jobsite accident, including in the case of an injury to a worker, the employer-subcontractor, the general contractor, and most likely, the owner.

At the same time, complex claims such as construction defects have traditionally fostered inter-insurer litigation over their relative obligations owed to various parties involved in the claim. It appears that the use of a single insurer to provide coverage to all of the parties may engender reduced insurance company versus insurance company litigation. In other words, issues involving “other insurance,” that is, whether one party’s coverage is primary or excess, may be eliminated. Elimination of these insurer versus insurer issues, which often require separate coverage litigation, could reduce costs associated with many construction defect claims. See MARY E. BORJA, *The Latest Word on OCIPs and CCIPs*, MEALEY’S CONSTRUCTION DEFECT CONFERENCE (October 17-18, 2005).

In addition to the separate obligations owed by insurers to participants, most contract documents in a wrapped project, like those in a traditional non-wrapped project, include elaborate indemnity and contractual risk transfer mechanisms. Recognition of the single insurer concept is thwarted by the obligations created between the tiers by these types of provisions.

Moreover, as stated above, some CIPs do not live up to their billing, that is providing broad coverage with high limits. In the event of a significant loss where all participants are scrambling for coverage, coverage gaps created by narrower than expected coverage and less than adequate limits further foster litigation among the tiers.

By and large, most courts, when faced with a coverage dispute involving a wrapped project, may proceed to resolve the issues without regard to the fact that all participants are insured under the same policy. For example, *Broadmoor Anderson v. National Union Fire Ins. Co. of Louisiana*, 912 So.2d 400 (La. App. 2 Cir. 2005), involved a coverage dispute between National Union, the CGL insurer on an OCIP policy sponsored by Hollywood Casino Shreveport, and the general contractor on the project. Specifically, the dispute involved completed operations coverage for leaking shower pans installed by a subcontractor. After acknowledging the existence of the OCIP in its opinion, the court proceeded to resolve the construction defects as if each participant—the general contractor and the responsible subcontractor—were separately insured. As such, there are very few cases that analyze such disputes in terms of the existence of the wrap-up program.

For an example of a case that did somewhat undertake that analysis, see *KSW Mechanical Services, Inc. v. American Protection Ins. Co.*, 40 A.D.3d 709, 835 N.Y.S.2d (2007). In that case, the trial court ruled that KSW Mechanical, a subcontractor under an OCIP, could not recover on the OCIP policy for its equipment that was damaged by another subcontractor on the project. The court held that KSW did not have the right to file a damage claim against the OCIP insurer because KSW was a named insured under the program and could not be a third-party claimant at the same time. KSW appealed, seeking compensatory and punitive damages. KSW, along with the amicus curiae, American Subcontractors Association, argued that its status under the OCIP policy should not affect its eligibility for damages.

On appeal, the Appellate Division found no conduct on the part of the insurer that would warrant punitive damages and that the claim amounted to nothing more than a private breach of contract dispute between an insurer and its insured. As to compensatory damages, the court held that the policy did not specifically permit the recovery of consequential damages in the event of breach by the insurer and that KSW did not establish that those damages were traceable to the insurer's alleged untimely processing of claims.

The determination that KSW, a mechanical contractor, could not pursue an otherwise covered claim under the CGL policy because it did not constitute a "third party claimant" may at first seem mystifying even though KSW suffered property damage as a result of the actions of another subcontractor on the project. Nevertheless, in defense of the court in *KSW*, a more conventional approach would have been to have the offending subcontractor that damaged KSW's equipment make the claim on the OCIP, thus rendering KSW a third-party claimant, and allowing the offending subcontractor to seek coverage in order to pay KSW's claim.

C. Joint Defense Agreements

The inability to reduce the raft of litigation, particularly with regard to construction defect claims, has led OCIP sponsors to resort to alternative methods in order to reduce litigation. One such method is a joint defense agreement whereby participants in the wrap-up are required to sign a joint defense agreement consenting to representation by a single counsel in the event of third-party claims. Of course, this approach raises issues with regard to conflicts of interest and requires a common interest on the part of the defendants. Such common interest may be difficult to find where the claim originates among the participants and not from a third party. Moreover, confidential information provided by participants to a single defense lawyer is an issue.

IX. Wrap-Up Exclusions and Coordination with the Contractor's Own Coverage

One of the more important issues that has been addressed throughout this discussion 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 possible insolvency of the wrap-up insurer. All of these issues implicate how the contractor's own insurance will fill 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 (Insurance Services Office) 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 with 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.

The 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 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 policy is endorsed with the above provision.

A preferable option for the contractor is for its 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. Such an endorsement would provide as follows:

With respect to “bodily injury” or “property damage” arising out of either your ongoing operations or operations included with the “products-completed operations hazard” the policy to which this endorsement is attached shall apply as excess insurance over any coverage available under a consolidated (wrap-up) insurance program.

Note that in the absence of an endorsement to the participant’s own liability policy limiting coverage as to bodily injury or property damage that occur 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. This issue would, of course, not arise where the contractor’s policy is

endorsed with CG 21 54 01 96. Nor should such a problem arise where an excess endorsement set out immediately above, is attached to the contractor's policy.

This 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 issues by finding the wrap-up policy provides coverage for CIP-related injuries, and the contractor's policy provides coverage for non-CIP claims. *See Massachusetts Port Authority v. Ace Property & Cas. Ins. Co.*, 2004 WL 1194738 (Mass. Super. May 4, 2004).

X. 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? Recently, 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 that in Texas, is the exclusive remedy rule whereby the employer provides workers compensation insurance for its employees in exchange for immunity from suit above and beyond the statutory benefits provided by the insurance. TEX. LAB. CODE §408.001. Nevertheless, the exclusive remedy under the Workers Compensation Act does not prevent an injured worker from seeking recovery against third parties for causing or contributing to the injury. The availability of a third party action on a construction project 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 jobsite is an area ripe for third party claims. It is this close proximity that fosters lawsuits that may bear little relationship to the actual responsibility of another tier for a jobsite injury, unlike the prototypical third-party injury, involving for example, an unreasonably dangerous piece of machinery. In that situation, such a claim involves true third party liability, as opposed to allegations of liability arising out of the number of parties at work on the construction site.

In recognition of this state of affairs, the Texas Workers Compensation Act, in TEX. LAB. CODE §406.123, provides that a general contractor and a subcontractor (as those terms are

defined in the Act) can enter into a written agreement under which the general contractor provides workers compensation insurance to the subcontractor and its employees. That agreement, and the provision of workers compensation insurance pursuant to it, renders the general contractor the employer of the subcontractor and the subcontractor's employee for purposes of the workers compensation laws. As such, the general contractor, having provided workers compensation coverage, is protected by 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 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 to the contractor and subcontractors on the project, and under a CCIP, the general contractor provides workers compensation coverage to subcontractors and lower tiers. 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. At least with regard to OCIPs, these issues have now been addressed by the Texas Supreme Court in the relatively recent cases of *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009) and *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009), a pair of opinions issued on the same day in April of 2009.

B. Section 406.123 of the Workers Compensation Act

The statutory employer provision of TEX. LAB. CODE §406.123, 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. *Entergy v. Summers*

In *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009), the Texas Supreme Court, on rehearing, addressed the definitions of "general contractor" and "subcontractor" in TEX. LAB. CODE §406.121 that determines entitlement to exclusive remedy immunity under §406.123(a). The court's analysis 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.

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. 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.

Id. at 437. This definition was last revised in 1993, and that revision applied to the claim before the court.

The Supreme Court determined that Entergy, as owner, had undertaken to procure the performance of maintenance work at its facility within that definition. Therefore, pursuant to §403.123 of the Texas Workers Compensation Act, Entergy, as a "general contractor," through sponsoring the OCIP, had entered into a written agreement under which Entergy provided workers compensation to subcontractors and their employees, thus entitling it to statutory immunity as required under § 403.123. 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 taking out a workers compensation policy for the entire worksite. *Id.* at 444. Therefore, an owner that provides workers compensation in an OCIP has statutory immunity from third party actions filed by injured workers at the jobsite.

D. HCBeck v. Rice

As previously stated, the Texas Supreme Court decided *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009), on the same date as *Entergy*. The issue before the court in *HCBeck* 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 FMR, the owner, as part of the construction of an office campus project. The court of appeals, in *Rice v. HCBeck, Ltd.*, 2006 WL 908761 (Tex. App.—Fort Worth Apr. 6, 2006), held that HCBeck did not provide that coverage pursuant to written agreement obligating HCBeck to provide workers compensation coverage, due to what it viewed to be the optional nature of 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 Haley Greer, Rice’s employer, and also bound itself to provide alternate insurance in the event the OCIP option was not exercised. Despite this optional nature of the OCIP program in the contract documents, the Texas Supreme Court determined that the analysis should focus on what actually happened, and not a scenario if the OCIP were terminated, since the OCIP was in effect and the injured employee collected worker compensation benefits. *Id.* at 356.

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. *Id.* at 355–356.

As a result, the Supreme Court undertook an extensive discussion of what constitutes a written agreement to provide workers compensation under §406.123. In determining that it did, 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.

Id. at 353–54. 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 went into an extended discussion of 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, in holding that HCBeck provided workers compensation 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.

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 with 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.” 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 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. Other Case Law

The entitlement of the various tiers on a construction project to rely on the exclusive remedy was also addressed in *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). 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. 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. LAB. 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.”

The Houston Court of Appeals 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:

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.

Id. at 768.

Two other courts of appeals in Texas, during the pendency of the *HCBeck* appeal to the Texas Supreme Court, reached essentially the same conclusion as *Entergy* and *HCBeck*. In *Construction Group, Inc. v. Konecny*, ___ S.W.3d ___, 2008 WL 5102276 (Tex.App. – Houston [1st Dist.] July 9, 2009, petition filed), the court held that the term “provides” in §406.123 means “to supply or make available” and that a general contractor that enrolled the subcontractors in workers compensation insurance provided by an owner through an OCIP was entitled to statutory immunity. A similar case is *Funes v. Eldridge Electric Co.*, 270 S.W.3d 666 (Tex.App. – San Antonio 2008). There, the court held that a drywall subcontractor was entitled to statutory immunity where the owner provided the workers compensation coverage through an OCIP. As to the effect of §406.123, the court held that under the dictionary definition of “provided,” the general contractor “supplied and made available” workers compensation coverage to the subcontractors, so that the subcontractors and general contractor all were entitled to statutory immunity protection. The court specifically determined that it did not matter that the owner had actually set up or paid for the program, as long as the subcontract agreements incorporated and implemented a workers compensation insurance program.

G. The “Entergy Bill”

Earlier this year in the 81st Legislative Session, Representative Helen Giddings introduced House Bill 1657. That bill sought to legislatively abrogate the *Entergy* opinion while the Supreme Court’s original 2007 opinion, upholding the status of *Entergy* as a statutory employer, was on rehearing. The bill sought to amend the definition of “general contractor” in §406.121. As originally introduced, that definition would be modified to require that a general contractor is a person that undertakes to perform work or services for the benefit of another, effectively eliminating owners that contract for work on their own projects to attain general contractor status. A similar revision to the definition of subcontractor was proposed, i.e., a person who contracts with a general contractor to perform all or any part of the work or services that the general contractor has contracted with another party to perform. House Bill 1657 was not passed, but there is likely to be activity on the same front in future legislative sessions. The bill was passed by the House, but was not reached by the Senate, and thus, it did not pass.

XI. Senate Bill 1551 and Regulation of CIPs

Also in the last legislative session, Senator Carona introduced Senate Bill 1551, seeking to amend Title 2 of the Texas Insurance Code to add Chapter 151, “Consolidated Insurance Programs,” to Subtitle C, “Programs Affecting Multiple Lines of Insurance.” While this bill did not emerge from the State Affairs Committee, it garnered attention throughout the insurance and construction industries. The bill sought to regulate and set standards for CIPs in the State of Texas and had strong support among subcontractor trade groups. Prior to its introduction, input was sought and received from general contractor groups, representatives of the insurance industry and public owners. The bill sought to address numerous of the issues addressed in this paper, and of particular concern to subcontractor groups was the disruption of their individual insurance programs when enrolling in a CIP. At the same time, owner and general contractor groups sought to maintain or enhance the overall cost advantages and to foster the goal of reduced litigation through the use of wraps.

The bill addresses many issues and even though it was not passed, it serves as something of a road map of issues that may eventually be addressed legislatively, or contractually addressed throughout the construction and insurance industries. Issues addressed in the bill as introduced included:

- Definitions, particularly the project site definition as relates to adjacent property.
- Specified coverages and inclusion of all participants as named insureds on the policies.
- Restrictions on requirement of additional insureds on participants’ separately maintained insurance.
- Duration of CGL coverage; including the statute of repose, inclusion of premises coverage as to warranty work, notice procedures for changes in the CIP, including nonpayment of premium.

- Notice provisions as to reduction in limits.
- Restrictions on indemnity and subrogation among participants.
- Defense of each participant in the event of litigation against them.
- Ratings, standards, deductibles and penalties.
- Limits of coverage.
- Disclosure of the CIP and regulation of procedure for bidding a CIP project.
- Program administration and access to information.

As can be seen, the bill attempts to address numerous concerns perceived by participants in and sponsors of CIPS.

XII. Conclusion

Relatively speaking, CIPS are still a new concept within both the construction and the insurance industries. While cost savings may have driven their initial development, the provision of adequate coverage to the participants on a construction project in light of the explosion of construction defect litigation and the possibility of serious bodily injury, have also driven the development. As with any developing concept, there are pros and cons depending upon a party's status as 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 defect 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.