1-1-2012

OCIPs in the Future of the Insurance Industry: Legal and Regulatory Considerations

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OCIPS IN THE FUTURE OF THE INSURANCE INDUSTRY: LEGAL AND REGULATORY CONSIDERATIONS

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I. INTRODUCTION

OCIPs (Owner-Controlled Insurance Programs, or "Wrap-Up" programs) are becoming increasingly popular today among the owners, general contractors, and subcontractors who participate in typically large-scale construction projects.[2] Through an OCIP program, an owner of the

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[2] *See generally* Mary E. Borja, *Getting a Grip on OCIPs and CCIPs*, 21 REAL EST. FIN. J. 54, 55 (Summer 2005); Mu Chapter of the Sigma Pi Fraternity of the United States, Inc. v. Ne. Constr. Servs., 684

project, generally through an "OCIP Administrator,"[3] manages, consolidates, and streamlines insurance coverage (usually including workers' compensation, general and umbrella liability, employers' liability, and builder's risk – installation floater liability) for the prime (general) contractor and any and all subcontractors working on the project.[4] An OCIP program also typically includes a safety program for all employees who work on the construction project site.[5] The advantages of OCIPs for owners are significant in large-scale projects: increased owner control,[6] obtaining the ability to define the scope of coverage and obtain broader insurance coverage with higher limits than a general contractor or subcontractor could individually,[7] efficient claims management[8] and

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N.Y.S.2d 872, 875 (N.Y. Sup. Ct. 1999) ("Such plans [owner-controlled insurance programs] are especially useful in the construction industry where multi-party projects abound, most involving potentially dangerous operations attended by high risks of property damage due to fire and other accidents. Inevitably, the marketplace imposes the costs of such risks upon the owner as the ultimate beneficiary of the work. The owner, as money manager of the project, is in a unique position to coordinate the project, including its insurance program. It behooves the owner to require an insuring plan which provides maximum protection, at minimum costs, while reducing or eliminating delays, disputes and eventual litigation.").

3 *See* Chad G. Marzen, *The Wrap Up of Wrap-Ups? Owner-Controlled Insurance Programs and the Exclusive Remedy Defense*, 59 DRAKE L. REV. 867, 868 (2011); *see also* Borja, *supra* note 2, at 55.

4 *See* Marzen, *supra* note 3, at 867-68; *see also* Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures*, 32 TRANSP. L.J. 35, 47-49 (2004) ("OCIPs are a type of 'wrap-up' insurance procurement that allows the owner to establish and administer coverage for all project participants by 'wrapping up,' or bundling, multiple parties into a single consolidated program.").

5 *See* Marzen, *supra* note 3, at 868; *see generally* U.S. GEN. ACCOUNTING OFFICE, RCED-99-155, TRANSPORTATION INFRASTRUCTURE: ADVANTAGES AND DISADVANTAGES OF WRAP-UP INSURANCE FOR LARGE CONSTRUCTION PROJECTS 7 (1999), *available at* http://www.gao.gov/archive/1999/rc99155.pdf.

6 *See* Wichern, *supra* note 4, at 48 ("A primary aspect of an OCIP is, as the name implies, increased owner control. Under owner controlled insurance programs, an owner takes total responsibility for insurance coverage and so has direct control over the selection of an insurer, allowing the owner to monitor the insurer's performance and insolvency.").

7 *Id.* at 48-49 ("[A]n owner controlled insurance program allows the owner to define the scope of coverage. Owners using OCIPs have the ability to obtain broader insurance coverage with higher dedicated limits. Specific to the issue of design risk coverage in design-build projects, owners administering OCIPs can include a professional liability insurance policy that will provide coverage for all of the design professionals on the project, even without a direct contract with the design professionals. Such an approach will provide comprehensive protection for the owner regardless of the coverage that the individual professionals may or may not have. Additionally, 'an owner can purchase broader and more uniform coverage for the OCIP than each design professional could purchase individually in a stand-alone policy.' By directly establishing and administering owner controlled insurance programs, a design-build owner eliminates the apprehension that the specific endorsements and limitations of the particular policies of the parties involved will result in an insurance gap.").

8 *See* Marzen, *supra* note 3, at 869; *see also* Borja, *supra* note 2, at 54-55 ("An injury or accident is reported to only one insurer, which is responsible for all of the insured entities and coverages. The insurer is

greater coordination of the program,[9] and arguably most significantly from the owner's perspective, cost-savings.[10]

A key cited advantage of the OCIP is the intention that the utilization of an OCIP program will result in a decrease of litigation.[11] Despite this cited advantage, reported cases involving OCIPs continue to persist and appear to be on the increase. In 2005, only 7 cases were reported nationwide; in 2006, the number rose to 8; in 2007, 10; in 2008, 14; and by 2009, 21 cases were reported. In 2010, 19 cases were reported and as of the middle of in 2011, 10 cases have been reported.[12]

There are some states that have placed statutory restrictions and/or prohibitions on OCIPs.[13] However, there are only 12 states (Alaska, Arizona, California, Connecticut, Florida, Kansas, Michigan, Nevada, New Jersey, New Mexico, North Carolina, and Virginia) to date that have even enacted any statute concerning OCIPs.[14]

In this Article, I contend that the future availability of OCIPs in the insurance industry may largely be dictated on statutory grounds. It is a call for state legislatures to critically examine the policies and purposes of

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able to manage and coordinate claims management and loss control for all of the project participants.").

[9] *See* Marzen, *supra* note 3, at 869; *see also* Borja, *supra* note 2, at 55 ("The coverages meet the project's contractual requirements, which avoids the potential for participants' failure to obtain required coverages, failure to name a higher tiered entity as an additional insured, etc.").

[10] *See* Marzen, *supra* note 3, at 869; *see also* Borja, *supra* note 2, at 55 ("The total insurance costs for the project may be lower through the use of a wrap-up program, rather than multiple individual policies. The continuity and uniformity of insurance coverage, the involvement of a single insurer, streamlined claims handling, and coordinated loss control all may contribute to lower overall insurance-related costs. Savings may also result from elimination of overlapping coverage.").

[11] Ruth Kochenderfer and James P. Bobotek, *Construction Wrap-Up Policies: An Overview and Analysis of Selected Coverage Issues, in* NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 1, 6 (LexisNexis ed., Winter 2010) ("Despite increased use of wrap-up programs, the number of published decisions regarding the issues that arise under wrap-up programs is relatively sparse. One reason may be that an often-heralded benefit of a wrap-up program – to decrease litigation – has succeeded. There are nevertheless some reported decisions and, with respect to other issues, analogous decisions may offer insight into how similar disputes may be treated by courts when determining coverage under a wrap-up program.").

[12] These numbers were compiled by a natural language search on Lexis-Nexis using the keywords "OCIP" and "wrap-up." Only cases reported involving owner-controlled insurance programs are included in the totals.

[13] *See* Borja, *supra* note 2, at 55 ("Some states restrict or prohibit OCIPs or [Contractor-Controlled Insurance Programs] CCIPs, particularly for public entities.").

[14] ALASKA STAT. § 21.36.475 (2010); ARIZ. REV. STAT. ANN. § 41-621(S) (2011) (West); CAL. GOV'T. CODE §§ 4420, 4420.5 (West 2008); CONN. GEN. STAT. ANN. § 49-41(e) (West 2008); FLA. STAT. ANN. § 255.0517 (West 2011); KAN. STAT. ANN. § 40-5403 (West 2009); MICH. COMP. LAWS ANN. § 418.621(3) (West 2011); NEV. REV. STAT. ANN. §§ 616B.710, .712, .717, .720, .722, .725, .727, .730, .732, .735, .737 (West 2010); N.J. STAT. ANN. § 18A:7G-44 (West 2010); N.M. STAT. ANN. § 52-1-4.2 (West 2011); N.C. GEN. STAT. ANN. § 58-31-65 (West 2010); VA. CODE ANN. § 2.2-4308.1 (West 2011).

OCIPs and enact legislation which provides guidance to the industry and courts. First, two cases, one from the Supreme Court of Oklahoma in 1993 and the other a recent 2011 decision from the Supreme Court of Alaska, emphasize the necessity of state statutes which clearly define OCIPs and expressly authorize their permissibility. In *Independent Insurance Agents of Oklahoma v. Oklahoma Turnpike Authority,* the Supreme Court of Oklahoma decided the question of whether Oklahoma law even permitted the use of an OCIP.[15] Most recently, the Supreme Court of Alaska held in *State v. Alyeska Pipeline Service Co.* that an Alaska statute governing OCIPs did not govern (and thus did not prohibit) non-construction OCIPs.[16] Both of these cases serve as examples which heighten the necessity of state statutory guidance.

Second, there is an emerging split of authority among jurisdictions and courts concerning whether a premises owner, general contractor, and/or subcontractor is entitled to assert the exclusive remedy defense to bar the claims of employees of either general contractors/subcontractors who would otherwise recover benefits for their injuries through worker's compensation.[17] I argue that this development highlights the necessity for state statutory provisions which expressly provide that a premises owner, general contractor, and/or subcontractor is entitled to assert the exclusive remedy defense if it contractually provides, supplies, and/or makes available worker's compensation insurance under an OCIP program. The enactment of such statutes will help ensure OCIP programs remain vital and available for the insurance industry in the future.

II. CURRENT STATE STATUTES CONCERNING OCIPS

As of the date of this Article, as noted above, it appears that only 9 states have enacted statutes specifically mentioning OCIPs (not including Michigan, discussed below). Each state's statutory scheme is discussed below.

Alaska. Alaska's statute regulating OCIPs defines an owner-controlled insurance program as "an insurance program where one or more insurance policies are procured on behalf of a project owner, its agent, or its representative, by its insurance producer, as defined in AS 21.27.900 [the statute defining insurance producer], for the purpose of insuring the

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15 Indep. Ins. Agents of Okla. v. Okla. Tpk. Auth., 876 P.2d 675 (Okla. 1994).

16 State v. Alyeska Pipeline Serv. Co., 262 P.3d 593, 597 (Alaska 2011).

17 *See* Marzen, *supra* note 3, at 870.

project owner and one or more of the following: (A) the contractor; (B) a subcontractor; (C) an architect; (D) an engineer; or (E) a person performing professional services."[18] OCIPs in Alaska are limited to only "major construction projects" approved by the Director of the Division of Insurance.[19] A "major construction project" is defined as the "process of constructing a structure, building, facility, or roadway or major renovation of more than 50 percent of an existing structure, building, facility, or roadway having a contract cost of more than $ 50,000,000 of a definite term at a geographically defined project site."[20] The Alaska statute permits the use of OCIPs for property insurance and casualty insurance.[21] Worker's compensation insurance is not specifically included in the statute. Significantly, as *Alyeska Pipeline Service Co.* illustrates, the statute by its terms does not expressly forbid the use of a "non-construction OCIP."[22]

Arizona. Arizona's statute expressly allows the State Department of Administration to use an OCIP with public works projects.[23] Worker's compensation liability insurance is permitted to be included with the OCIP.[24] However, the statute only enables the State to use an OCIP when the total cost of the project is over $50 million dollars[25] and also does not prohibit a contractor or subcontractor from purchasing any additional insurance coverage beyond the coverage limits of the OCIP.[26]

California. California's OCIP statute only relates to OCIP programs used by public school districts with regard to a "construction" or "renovation" project.[27] It defines "owner-controlled or wrap-up insurance" as a "series of insurance policies issued to cover all of the contractors and subcontractors on a given project for purposes of general liability and workers' compensation."[28] The statute only provides that prospective bidding contractors and subcontractors must meet minimum

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18 ALASKA STAT. § 21.36.475(c)(2)(A)-(E) (2010).

19 *Id.* § 21.36.475(a).

20 *Id.* § 21.36.475(c)(3).

21 *Id.* § 21.36.475(a).

22 *Alyeska*, 262 P.3d at 597.

23 ARIZ. REV. STAT. ANN. § 41-621(S) (2011) (West).

24 *Id.*

25 *Id.* § 41-621(S)(1).

26 *Id.* § 41-621(S)(4).

27 CAL. GOV'T CODE § 4420.5(b) (West 2008).

28 *Id.* § 4420.5(c).

occupational safety and health qualifications established to bid on the project.[29]

Connecticut. Connecticut's OCIP statute permits the use of an OCIP for public construction and public works projects.[30] An "owner-controlled insurance program" is defined as "an insurance procurement program under which a principal provides and consolidates insurance coverage for one or more contractors on one or more construction projects."[31] There are restrictions, however – an OCIP may only be used in connection with a public construction or public works project which totals $100 million or more in cost.[32] In addition, OCIP insurance coverage for work performed and materials furnished must continue from the date all work is completed to the date all causes of action are barred under any applicable statutes of limitations.[33]

Florida. Florida's OCIP statute permits the use of OCIPs for public construction projects.[34] The statute defines an owner-controlled insurance program as "a consolidated insurance program or series of insurance policies issued to a public agency that may provide one or more of the following types of insurance coverage for any contractor or subcontractor working at specified or multiple contracted work sites of a public construction project: general liability, property damage excluding coverage for damage to real property, workers' compensation, employer's liability, or pollution liability coverage."[35]

State agencies, political subdivisions, state universities, community colleges, airport authorities, or other public agencies may only purchase an OCIP if it is in connection with a public construction project and if it is deemed "necessary and in the best interest of the public agency."[36] The estimated cost of the project must be one of the following: 1) $75 million dollars or more; 2) $30 million dollars or more (if the project is for the construction or renovation of two or more public schools during a fiscal year); or 3) $10 million dollars or more (if the project is for the construction or renovation of one public school). The program has

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29 *Id.* § 4420.5(b)(1).

30 CONN. GEN. STAT. ANN. § 49-41(e) (West 2008).

31 *Id.* § 49-41(e)(1).

32 *Id.* § 49-41(e)(2)(B).

33 *Id.* § 49-41(e)(3)(A).

34 FLA. STAT. ANN. § 255.0517 (West 2011).

35 *Id.* § 255.0517(1)(a).

36 *Id.* § 255.0517(2).

several additional statutory requirements, and leaves the public agency responsible for payment of the applicable deductibles of all claims.[37]

Kansas. The OCIP statute in Kansas addresses "controlled insurance programs," by statutory definition.[38] The statute provides that if general liability coverage is included for all participants on a project, then project participants are not required to carry general liability coverage (with the exception of liabilities not arising on the site or sites of the construction project).[39] In addition, the statute also provides that the participants shall be given the same shared limits of liability coverage as applies to the sponsoring participant under the OCIP program and that "participants shall not be required to waive rights of recovery for claims covered by the controlled insurance program against another participants in the controlled insurance program covered by general liability insurance provided by the controlled insurance program."[40]

Michigan. Michigan's statute does not specifically mention OCIPs by name, but Michigan law states that "a separate insurance policy may be issued to cover employers performing work at a specified construction site if the director finds that the liability under this act [Worker's Disability Compensation Act] of each employer to all his or her employees would at all times be fully secured and the cost of construction at the site, not including the cost of land acquisition, will exceed $65 million, and the contemplated completion period for the construction will be five years or less."[41] In addition, Michigan requires that each construction site shall have an appointed construction safety and health director who is responsible for coordination among all employers to provide a safe and healthful worksite and has the final authority for the resolution of all disputes related to construction safety and health at the worksite.[42]

Nevada. Nevada's statute expressly provides that a private company, public entity or utility may establish and administer a consolidated insurance program to provide industrial insurance coverages for employees of contractors and subcontractors who are engaged in the construction project and when the estimated total cost of the project must be equal to or greater than $150 million.[43] The OCIP program must

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37 *Id.* § 255.0517(2)(g).

38 KAN. STAT. ANN. § 40-5402(d) (West 2009).

39 *Id.* § 40-5403(b)(2).

40 *Id.* § 40-5403(b)(4)-(5).

41 MICH. COMP. LAWS ANN. § 418.621(3) (West 2011).

42 *Id.*

43 NEV. REV. STAT. ANN. § 616B.710(1)(a), (3) (West 2010).

provide for the administration of claims for industrial insurance for an employee of a contractor or subcontractor who is engaged in the construction project.[44] While the statute prohibits industrial insurance coverage for employees who do not work at the site of the construction project,[45] a contractor or subcontractor participating in the project is required to maintain separate industrial insurance coverage for its employees who 1) are not assigned to participate in the construction of the project, or 2) are not assigned to participate in the construction of the project but who do not work exclusively at the site of the project.[46]

Nevada also requires an administrator who is in charge of claims arising out of the OCIP project to file a written notice of injury or death or a written notice of an occupational disease as required by the Nevada worker's compensation statute.[47] In addition, the administrator must also file on behalf of the general contractor or subcontractor whose employees are covered an employer's report of industrial injury or occupational disease as required by the worker's compensation statute[48] and also must direct the employee(s) who are injured to a medical facility that will provide treatment to the employee under the program.[49]

New Jersey. Similar to the California OCIP statute, New Jersey's OCIP statute authorizes the use of an OCIP for "school facilities projects."[50] The statute defines "wrap-up insurance coverage" as "a single insurance and loss control program for all parties involved in the school facilities project, including the owners, administrators, contractors and all tiers of subcontractors, which is controlled and authorized by the owner or financing administrator and applicable to defined construction work sites."[51] If the State of New Jersey has a share of 100% on the project, the statute permits the development authority to mandate the use of an OCIP.[52] If the State has less than a share of 100%, then the school district is permitted to purchase wrap-up insurance coverage for the school facilities project on its own or it may enter into a joint purchasing agreement with one or more other districts.[53]

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44 *Id.* § 616B.727(1).
45 *Id.* § 616B.730(1).
46 *Id.* § 616B.730(2).
47 *Id.* § 616B.727(3)(a).
48 *Id.* § 616B.727(3)(b).
49 *Id.* § 616B.727(3)(c).
50 N.J. STAT. ANN. § 18A:7G-44(a) (West 2010).
51 *Id.* § 18A:7G-44(c).
52 *Id.* § 18A:7G-44(a).
53 *Id.* § 18A:7G-44(b).

New Mexico. New Mexico's OCIP statute does define a "controlled insurance plan."[54] It permits an owner or principal contractor of a construction project to establish and administer a controlled insurance plan, provided that the project has an aggregate construction value in excess of $150 million expended within a five-year period.[55] The statute also provides that the owner or principal contractor must provide for a safety plan for an employee who is present on the construction site.[56]

North Carolina. North Carolina's OCIP statute authorizes the use of owner-controlled insurance for the construction of state public works projects.[57] The statute defines "owner-controlled or wrap-up insurance" as a "series of insurance policies issued to cover this State and all of the construction managers, contractors, subcontractors, architects, and engineers on a specified contracted work site or work sites for the purposes of general liability, property damage, and workers' compensation."[58] The statute expressly provides that workers' compensation and general liability insurance may be purchased to cover both general contractors and subcontractors doing work on a specified contracted work site.[59] Owner-controlled insurance can only be used if the total cost of the project exceeds $50 million dollars.[60] The statute also does not forbid a contractor or subcontractor "from purchasing any additional insurance coverage that a contractor believes is necessary for protection from any liability arising out of the contract."[61]

Virginia. Virginia's OCIP statute defines an "owner-controlled insurance program" as "a consolidated insurance program or series of insurance policies issued to a public body that may provide for some or all of the following types of insurance coverage for any contractor or subcontractor working on or at a public construction contract or combination of such contracts: general liability, property damage, workers' compensation, employer's liability, pollution or environmental liability, excess or umbrella liability, builder's risk, and excess or contingent professional liability."[62] A public body may purchase an OCIP

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54 N.M. STAT. ANN. § 52-1-1.1(A) (West 2011).

55 *Id.* § 52-1-4.2(A).

56 *Id.* § 52-1-4.2(G).

57 N.C. GEN. STAT. ANN. § 58-31-65(a) (West 2010).

58 *Id.* § 58-31-65(b)(1).

59 *Id.* § 58-31-65(a).

60 *Id.* § 58-31-65(a)(1).

61 *Id.* § 58-31-65(a)(4).

62 VA. CODE ANN. § 2.2-4308.1(C) (West 2011).

in connection with any "public construction contract" where the amount of the contract or combination of contracts is more than $100 million.[63]

As outlined above, nearly each of the states provides statutory definitions for "owner-controlled insurance programs," "owner-controlled," and "wrap-up" insurance (with the exceptions of Kansas, Michigan and New Mexico). The majority of statutes also specifically address OCIPs with regard to use by public bodies or school districts: however, only Alaska, Kansas, Michigan, Nevada and New Mexico address the use of OCIPs by private entities. Two cases, one in Oklahoma in 1993, the other most recently in Alaska in 2011, highlight the importance for states to implement specific statutes concerning OCIPs.

III. THE *INDEPENDENT INSURANCE AGENTS OF OKLAHOMA* AND *ALYESKA PIPLINE SERVICE CO.* DECISIONS: THE CASE OF NECESSITY FOR STATE STATUORY GUIDANCE

A. The Independent Insurance Agents of Oklahoma Decision

In 1993, the Supreme Court of Oklahoma directly addressed the question of whether a public body could use an OCIP program for the construction of four new turnpikes in Oklahoma.[64] The Oklahoma Turnpike Authority sought to use an OCIP program for the construction of the turnpikes and received approval from the Oklahoma Risk Management Administrator of the Office of Public Affairs.[65] The OCIP provided that insurance for activities on the job site would be purchased by the Authority and that each bid-winning contractor was mandated to provide insurance coverage (general and automobile liability and worker's compensation) for off-site activities.[66]

The Independent Insurance Agents of Oklahoma sought to enjoin the Oklahoma Turnpike Authority from proceeding with the OCIP program on the basis that the program violated statutory provisions of the Oklahoma Highway Code and Public Competitive Bidding Act.[67] The Independent Insurance Agents of Oklahoma's Motion for Summary

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63 *Id.* § 2.2-4308.1(A).

64 Indep. Ins. Agents of Okla., 876 P.2d at 677 (Okla. 1994).

65 *Id.* at 676.

66 *Id.*

67 *Id.* at 676-677.

Judgment was granted.[68] The Supreme Court of Oklahoma reversed the trial court.[69]

The Independent Insurance Agents of Oklahoma argued that the contractors, not the Oklahoma Turnpike Authority, were required to provide all insurance (both on and off the job sites) pursuant to two Oklahoma statutes (*61 O.S. Supp. 1987 § 113* and *61 O.S. Supp. 1987 § 103*).[70] The first statute required that "public liability and workers' compensation insurance shall be provided by the contractor in reasonable amounts."[71]

The Oklahoma Supreme Court found the OCIP not to be violative of this section, as the Oklahoma Turnpike Authority was providing coverage for on-site activities and the contractors were providing off-site coverage and all the statute did not explicitly require that the contractors furnish *all* such insurance, only that a contractor provide insurance in reasonable amounts.[72] The Supreme Court also dismissed the Independent Insurance Agents' argument based upon the Public Competitive Bidding Act,[73] holding that the Act did not require that insurance be procured by competitive bidding.[74]

Thus, the *Independent Insurance Agents of Oklahoma* case essentially stands for the proposition that the use of OCIPs by a public body for a construction project is permissible in Oklahoma. While the Supreme Court ruled in favor of OCIPs in this case, Oklahoma has not adopted a

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68 *Id.* at 676.

69 *Id.* at 679.

70 *Id.* at 678.

71 *Id.* at 678 n.4.

72 *Id.* at 678-79.

73 *Id.* at 679. *See generally* Oklahoma Public Competitive Bidding Act of 1974, Okla. Stat. Ann. tit. 61 §§ 101-138 (West 2010). Title 61 O.S.1981 § 102 provided in relevant part:

4. "Public construction contract" or "contract" means any contract, exceeding Seven Thousand Five Hundred Dollars ($7,500.00) in amount, awarded by any public agency for the purpose of making any public improvements or constructing any public building or making repairs to the same;

5. "Public Improvement" means any beneficial or valuable change or addition, betterment, enhancement or amelioration of or upon any real property, or interest therein, belonging to a public agency, intended to enhance its value, beauty or utility or to adapt it to new or further purposes. The term does not include the direct purchase of materials, equipment or supplies by a public agency....

74 *Indep. Ins. Agents of Okla.*, 876 P.2d at 679 ("A 'public construction contract,' as expressly defined in 61 O.S. § 102, is any contract exceeding $7,500.00 awarded by a public agency for the purpose of making any beneficial change or addition upon real property, to enhance its value or utility or to adapt it to new or further purposes. Providing of insurance does not fall within this definition and is not included in those items to which the Public Competitive Bidding Act is applicable. There is thus no requirement that insurance be procured by competitive bidding under the Act.").

statute concerning OCIPs to date. And while the outcome for OCIPs in Oklahoma was favorable, it doesn't eliminate the possibility that another state without a statute permitting OCIPs might not deliver the same outcome in a future decision.

B. The Alyeska Pipeline Co. Decision

Within the past year, the *Alyeska Pipeline Co.* decision by the Alaska Supreme Court provides a cautionary example of statutory interpretation concerning an OCIP. In *Alyeska,* Alyeska Pipeline Service Company contracted with the Liberty Mutual Group for Liberty Mutual to write an OCIP including workers' compensation and general liability coverages for Alyeska Pipeline Service Co. and several contractors.[75] Six contractors enrolled in the program, providing maintenance, not construction, services including warehousing, mineral mining, security, medical and emergency response, catering, oil spill prevention, and surveying.[76]

As earlier indicated, the Alaska statute concerning OCIPs provide that an "owner-controlled insurance program" shall be allowed "only for a major construction project."[77] In 2006, the Alaska Division of Insurance issued Liberty Mutual a cease and desist order raising seven compliance issues and stating that the OCIP was in violation of Alaska's OCIP statute since it was designed to cover ongoing maintenance and not restricted to a large construction project.[78] The Deputy Director of the Division of Insurance then soon issued a final order holding that the OCIP was in violation of the Alaska statute.[79] Alyeska appealed to the trial court, which held that the deputy director's decision was "contrary to the plain language of the statute."[80]

On appeal, the Supreme Court of Alaska held that the "non-construction" OCIP was not governed by the Alaska OCIP statute.[81] The Court relied heavily upon legislative intent in this case, finding that the statute was simply not specifically drafted to govern non-construction OCIPs and that the remedy for the Division of Insurance was with the Legislature, not the Court.[82]

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75 Alyeska Pipeline Serv. Co., 262 P.3d at 594.

76 *Id.*

77 ALASKA STAT. § 21.36.475(a) (2010).

78 *Alyeska*, 262 P.3d at 595.

79 *Id.* at 596.

80 *Id.*

81 *Id.* at 597.

82 *Id* at 597-98.

The *Alyeska* decision is one once again which state legislatures should view carefully – the inclusion of a definition of construction OCIPs in a statute does not necessarily extend to a statute being read to exclude non-construction OCIPs. Under *Alyeska,* non-construction OCIPs (at least in Alaska), are permissible in the absence of a statute prohibiting them.

IV. OCIPS AND THE EXCLUSIVE REMEDY DEFENSE: THE EMERGING JURISDICTIONAL SPLIT AND THE FURTHER CASE OF NECESSITY FOR STATE STATUTORY GUIDANCE

A key emerging legal question concerning OCIPs is the emerging split of authority among jurisdictions and courts concerning whether a premises owner, general contractor, and/or subcontractor is entitled to assert status as a "statutory employer. The status of a "statutory employer" confers upon the premises owner, general contractor, and/or subcontractor the ability to successfully assert the exclusive remedy defense[83] to bar the claims of employees of either general contractors or subcontractors who would otherwise recover benefits for their injuries through workers' compensation.[84] Courts have varied on the resolution of this question.

Two recent commentators have noted that the overall resolution of this issue "hinges on each jurisdiction's specific workers' compensation law and the underlying public policies those jurisdictions may be attempting to promote."[85] The interpretation of legislative intent is key to the resolution of almost every reported case to date resolving this issue. The cases discussed below heighten the necessity for state legislatures to enact statutory provisions which expressly provide that a premises owner, general contractor, and/or subcontractor is entitled to assert the exclusive remedy defense if it contractually provides workers' compensation insurance under an OCIP program.

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[83] *See* Marzen, *supra* note 3, at 872. ("Today, each of the fifty states has its own workers' compensation system, which compensates employees who suffer injuries arising out of or in the course of employment. The advent of workers' compensation laws in the 1910s were passed largely in response to the result of many workers who were left uncompensated by the tort system following injuries sustained while inside the course of employment. The original goal of workers' compensation was to ensure compensation was provided to injured workers and to help reduce the costs related to workplace safety. In exchange for swift, real compensation, employers were granted immunity from tort actions for employee work-related injuries . . . Thus, an employee who is injured within the course and scope of his or her employment under a state workers' compensation law today is generally limited to the exclusive remedy of workers' compensation . . .").

[84] *Id.* at 870.

[85] *See* Kochenderfer and Bobotek, *supra* note 11, at 10 n.28.

Indiana: Wolf v. Kajima Int'l Inc. The Court of Appeals of Indiana first considered the above question in 1993.[86] In *Kajima,* the Plaintiff, an employee of one of the subcontractors (J.C. Rogers), sustained severe and permanent injuries while working on an automobile plant construction site.[87] The Plaintiff filed a negligence claim against both the owner of the project as well as the general contractor.[88] The owner purchased workers' compensation insurance for itself, the general contractor, and all the subcontractors on the project through an OCIP.[89]

The trial court ruled the exclusive remedy defense applied as the owner and general contractor qualified as "statutory employers" of the Plaintiff.[90] However, the Court of Appeals reversed.[91] The Court examined Indiana Worker's Compensation Statute which imposed the duty upon a general contractor to require each subcontractor obtain a certificate from the Worker's Compensation Board showing that the subcontractor is either carrying worker's compensation insurance or has the financial ability to pay compensation to an injured employee.[92] The owner of the project argued that since it did not exact a certificate of owner from any subcontractor (since it voluntarily purchased all insurance on behalf of all contractors), it would be liable to the Plaintiff in the same way the Plaintiff's employer (J.C. Rogers) would have been.[93]

Citing legislative intent and the purpose that the Indiana Worker's Compensation Statute should be liberally construed to resolve any doubts in its application in favor of the employee,[94] the Court of Appeals held the owner and general contractor could not assert the exclusive remedy defense and that "to hold otherwise would allow an owner or general contractor to voluntarily take out insurance that the law does not require and thereby secure for itself freedom from liability from negligence. We do not believe the Legislature intended such a result."[95]

Georgia: Pogue v. Oglethorpe Power Corporation. The Georgia Supreme Court encountered the question of whether a premises owner is entitled to assert the exclusive remedy defense when it provides workers'

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86 Wolf v. Kajima Int'l Inc., 621 N.E.2d 1128, 1129 (Ind. App. 1993).

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 1132.

92 *Id.* (citing IND. CODE § 22-3-2-14(b) (1977)).

93 *Id.*

94 *Id.* (citing Stump v. Commercial Union, 601 N.E.2d 327, 331-32 (Ind. 1992)).

95 *Id.*

compensation coverage through an OCIP to all contractors in the *Pogue* case in 1996.[96] In *Pogue,* the Plaintiff, who was an employee of the general contractor, incurred injuries while working as a cement finisher in a hydroelectric power facility that was under construction and filed negligence claims against the premises owner.[97] The premises owner purchased an OCIP policy to provide workers' compensation coverage to all on-site contractors.[98] The trial court held the exclusive remedy defense applied to bar the Plaintiff's negligence claims against the premises owner,[99] but the Court of Appeals certified the question and the Supreme Court reversed.[100]

The Supreme Court addressed the Georgia workers' compensation immunity statute which provided: "No employee shall be deprived of any right to bring an action against any third-party tort-feasor, *other than an employee of the same employer or any person who pursuant to a contract or agreement with an employer, provides workers' compensation benefits* to an injured employee."[101] The Court held that the contract involved in the case only required the owner to pay workers' compensation premiums and did not benefit the Plaintiff as a workers' compensation insurance contract would.[102] Therefore, the owner did not "provide" workers' compensation insurance and the exclusive remedy defense did not apply.[103] The outcome of the *Pogue* decision leaves workers' compensation insurers as the only entities outside of an employee's employer who would be enabled to assert the exclusive remedy defense under an OCIP program in Georgia. While the Court did not engage in a comprehensive legislative intent analysis, it is evident from the decision that the statutory language of the state workers' compensation immunity statute was key to its decision.

Michigan: Stevenson v. HH & N/Turner. In 2002, the Eastern District of Michigan became the first Court to rule that an owner could successfully assert the exclusive remedy defense when an OCIP program was present.[104] In part, the *Stevenson* court cited legislative intent and the

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96 Pogue v. Oglethorpe Power Corp., 477 S.E.2d 107, 108 (Ga. 1996).

97 *Pogue*, 477 S.E.2d at 108.

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* at 109.

103 *Id.*

104 *See* Stevenson v. HH & N/Turner, No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831 at *42 (E.D. Mich. Apr. 22, 2002); *see also* Marzen, *supra* note 3, at 874.

policy behind the Michigan's workers' compensation statute, which allowed an owner of a project to issue a separate workers' compensation policy to cover all employers and employees working on a project.[105] However, the decision in *Stevenson* was later overshadowed by two Midwestern courts within the next several years.

Wisconsin: Pride v. Liberty Mutual Insurance Co. In 2007, the Eastern District of Wisconsin held that the exclusive remedy defense could only be asserted by employers, not other entities (i.e., the owner who administers the OCIP) participating in an OCIP program which does not fulfill the employer role.[106] It is significant that the court in *Pride* specifically cited legislative intent in its decision – it reasoned that if the Wisconsin Legislature intended the owner of an OCIP to be able to successfully assert status as an employer of any employee working for any contract on the project, it would have specifically stated so.[107]

Nebraska: Culp v. Archer-Daniels-Midlands Co. In contrast to the decisions above, the United States District Court for the District of Nebraska did not discuss any of the policies or purposes concerning OCIPs in the *Culp* decision.[108] Nebraska law provides that an owner who requires its contractor or contractors to procure workers' compensation insurance on a project does not qualify as a statutory employer.[109] Instead of focusing heavily on legislative intent, the Court was largely faced with ascertaining the contractual meaning of two documents entered into between the owner (Archer-Daniels-Midlands Co.) and general contractor (Jacobs Fields Services North America, Inc.), a "Contractor's Agreement" and "Insurance Addendum to Contractor's Agreement," and whether the documents required the general contractor to obtain workers'

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105 *See Stevenson*, 2002 U.S. Dist. LEXIS 26831 at *42 ("It is clear that the Michigan Legislature determined that in the relatively finite number of large construction projects, as determined by the conditions expressly provided in M.C.L. § 418.621(3), the owner of the project may issue a separate worker's compensation insurance policy to cover all employers working on the construction site."); *see also* Marzen, *supra* note 3, at 875.

106 *See* Pride v. Liberty Mut. Ins. Co., No. 04-C-703, 2007 WL 1655111 (E.D. Wis. June 5, 2007); *see also* Marzen, *supra* note 3, at 876 (reviewing the court's analysis in *Pride*).

107 *Pride*, 2007 WL 1655111, at *3 ("If the legislature had truly intended to allow employers at a construction site to bundle together their worker's compensation liability, it would have been simple enough to craft a provision stating that the owner of an OCIP-insured project is deemed the sole employer of any employee of any contractor injured on that project."); *see also* Marzen, *supra* note 3, at 876 (same).

108 Culp v. Archer-Daniels-Midlands Co., No. 4:08:CV3197, 2009 WL 1035246 (D. Neb. Apr. 17, 2009); *see also* Marzen, *supra* note 3, at 878-79.

109 *Culp*, 2009 WL 1035246, at *4; *see also* Marzen, *supra* note 3, at 879-80 (reviewing the court's analysis in *Culp*).

compensation insurance.[110] The Court held that the documents required the general contractor to do so, and thus the owner (Archer-Daniels-Midlands Co.) could not be considered Plaintiff's statutory employer and the exclusive remedy defense did not apply.[111]

Texas: Funes, HCBeck Ltd., & Entergy Gulf States. The setbacks for OCIPs concerning the exclusive remedy defense have taken a different turn in Texas the past 3 years, where the courts have decided a series of cases concerning the issues surrounding legislative intent and applicability of the exclusive remedy defense for owners, general contractors, and subcontractors who participate in an OCIP program.

A series of recent cases in Texas have revolved around judicial interpretation of two statutes (Section 406.123(a) and (e) of the Texas Labor Code):

> (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.[112]
> (e) An agreement under this section makes the general contractor the employer of the subcontractor and and the subcontractor's employees only for purposes of the workers' compensation laws of this state.[113]

The statutory language of "providing" insurance under the Texas statute is very similar to the language of the Georgia statute analyzed in the *Pogue* decision. Unlike *Pogue,* however, the courts in Texas have not limited the definition of an entity that "provides" insurance to worker's compensation insurers.

In *Funes,* the Texas Court of Appeals first decided the question of whether a subcontractor can assert the exclusive remedy defense against a suit by an employee of another subcontractor when both are participating in an OCIP program.[114] The Plaintiff argued the general contractor did not "provide" coverage directly to the subcontractor (contending instead the premises owner did so through the OCIP).[115] The Texas Court of

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110 *Culp,* 2009 WL 1035246, at *4; *see also* Marzen, *supra* note 3, at 880 (same).

111 *Culp,* 2009 WL 1035246, at *4; *see also* Marzen, *supra* note 3, at 880 (same).

112 TEX. LAB. CODE ANN. § 406.123(a) (West 2011) (italics added).

113 *Id.* § 406.123(e).

114 Funes v. Eldridge Elec. Co., 270 S.W.3d 666, 667 (Tex. App. 2008).

115 *Id.* at 670.

Appeals first looked to legislative intent to construe the meaning of "provide" insurance.[116] The Court adopted the plain and ordinary meaning of the word "provide" which meant, "to supply or to make available,"[117] and found that to hold that the general contractor did not "provide" insurance would contravene the intention of the Texas Legislature to protect general contractors.[118]

The Court specifically stated that "where a general contractor and a subcontractor enter into a written agreement under which the general contractor *supplies or makes available* workers' compensation insurance coverage to the subcontractor and its employees, the general contractor is the employer of the subcontractor and its employees for purposes of the Workers' Compensation Act."[119] Since the general contractor qualified as a statutory employer for its contractors, the Court found that the exclusive remedy defense applied downstream to subcontractors as well.[120]

In *HCBeck, Ltd. v. Rice,* the Supreme Court of Texas upheld the earlier holding of the Court of Appeals in *Funes* that a general contractor who provides workers' compensation insurance by use of a written OCIP agreement is entitled to assert the exclusive remedy defense.[121] Unique to this case was a hypothetical question addressed by the Court – who would be responsible for providing workers' compensation coverage if the OCIP terminated at any point?[122] Closely examining the contractual documents

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116 *Id.* at 671.

117 *Id.* ("[T]he Legislature has not prescribed a particular definition of 'provides.' Further, we detect no apparent intent by the Legislature to stray from the plain and common meaning of the word within the language and context of the statute. Thus, we apply the plain and common meaning of the word 'provide' within its reasonable context, which we determine to be 'to supply or to make available.'").

118 *Id.* at 671-72 ("To hold to the contrary, that Clayco did *not* provide the insurance, would produce an unjust and unreasonable result. Where, as here, the premises owner has implemented an owner controlled insurance program and contractually binds its general contractor to require all subcontractors to enroll in the OCIP, to hold that the general contractor did not 'provide' the insurance would preclude protection of the general contractor, whom the Legislature clearly intended to protect under subsections 406.123(a) and (e). In that hypothetical, the general contractor would be required to procure a second compensation insurance program in order to qualify under the statute as an 'employer' who 'provides' insurance, and thereby obtain the Act's protection. *See id.* § 406.123(e). This, however, makes little sense because of its redundancy – the premises owner has already established a program in which all, including the general contractor, are required to enroll, and under which all, including the general contractor, are intended to be protected. The resulting 'double coverage' for, in effect, single protection is superfluous, and outside any reasonable intent of the Legislature.").

119 *Id.* at 671.

120 *Id.* at 672.

121 HCBeck, Ltd. v. Rice, 284 S.W.3d 349 (Tex. 2009); *see also* Marzen, *supra* note 3, at 880-81 (summarizing and discussing *HCBeck, Ltd.*).

122 *HCBeck, Ltd.*, 284 S.W.3d at 353; *see also* Marzen, *supra* note 3, at 883 (same).

at issue, the Court found that the contractual documents still placed the responsibility of obtaining workers' compensation insurance on the general contractor if the OCIP was not in force.[123]

Entergy Gulf States, Inc. v. Summers serves as an example that state statutes concerning OCIPs and the exclusive remedy defense should be specifically drafted to expressly include "premises owners" within the statutory definition of entities enabled to assert the exclusive remedy defense.[124] The Court in *HCBeck* held that the exclusive remedy defense is available in Texas for general contractors who "provide" insurance and subcontractors who participate in an OCIP program.[125] On the same date the *HCBeck* decision was delivered, the Texas Supreme Court held that premises owners, in addition to general contractors and subcontractors, were entitled to assert the exclusive remedy defense in the *Entergy Gulf States, Inc. v. Summers* decision.[126] As discussed above, Texas' statute specifically states that "general contractors" can qualify as "statutory employers" and thus are entitled to assert the exclusive remedy defense.[127] The Legislature defined a "general contractor" as a "person who undertakes to procedure the performance of work or a service."[128] Although the term "premises owner" does not appear within the definition of a "general contractor" under the Texas statute, the Court still held that a premises owner can be an entity that "undertakes" the procuring of worker's compensation insurance,[129] despite the arguments that the term "premises owner" does not appear in the statute.[130]

All of the cases, read together, stand for the proposition that a premises owner and/or general contractor which "provides" (supplies or makes available) workers' compensation insurance coverage to an employee is entitled to "statutory employer" status and is able to assert the exclusive remedy defense in cases when the entity(ies) participate in an OCIP.

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123 *HCBeck, Ltd.*, 284 S.W.3d at 353; *see also* Marzen, *supra* note 3, at 883 (same).

124 Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 435 (Tex. 2009).

125 *HCBeck, Ltd.*, 284 S.W.3d at 360.

126 *Entergy Gulf States*, 282 S.W.3d 433 at 435.

127 TEX. LAB. CODE § 406.123(a), (e) (West 2011).

128 *Id.* § 406.121(1) ("[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."); *see Entergy Gulf States*, 282 S.W.3d at 437.

129 *Energy Gulf States*, 282 S.W.3d at 437-38.

130 *Id.*

The divide among jurisdictions and courts concerning OCIPs and the exclusive remedy defense, and the significance which many courts have given to legislative intent, places state legislatures in the critical position where they can enact statutes to resolve this issue. Statutes can also produce the effect of minimizing litigation and ensure OCIPs remain vital in the future. As discussed below, there is much for state legislatures to do.

V. ANALYSIS AND RECOMMENDATIONS FOR STATE STATUTORY GUIDANCE CONCERNING OCIPS

With their cited benefits, particularly the prospect of decreased litigation costs, the use of OCIPs is on the increase today. However, as some cases indicate, such as *Independent Insurance Agents of Oklahoma*, the very existence of OCIP programs can be challenged in court and owners, general contractors, and subcontractors be left open to litigation exposure in some courts and jurisdictions for negligence claims where they cannot qualify as a "statutory employer" and successfully assert the exclusive remedy defense to bar the claims. These developments place the future use of OCIPs in the insurance industry into question. As the Supreme Court of Texas noted in a footnote in the *HCBeck* decision (which ruled that a general contractor can assert the exclusive remedy defense when it provides workers' compensation insurance coverage), a different result "would likely do away with OCIPs in Texas, along with the benefits they provide to many large-scale developers."[131] The results from cases in Indiana, Georgia, Wisconsin and Nebraska on this issue place OCIPs in jeopardy in each of these states.

State legislatures are in a position to enact legislation today to ensure OCIPs remain vital. To address the issues raised by court decisions to date, and ensure OCIPS remain vital, there are three main areas in which state legislatures can begin to address by legislation: 1) define what OCIPs *actually are*; 2) define the limitations and parameters of OCIPs and when they can be utilized; and 3) enact statutes that specifically state that premises owners and/or general contractors which "provides, supplies or makes available" worker's compensation insurance coverage be considered a "statutory employer" for the purposes of the state's worker's compensation statute. This legislation would ensure premises owners, general contractors, and/or all subcontractors on a project where OCIP

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[131] HCBeck, Ltd. v. Rice, 284 S.W.3d at 360.

coverage is present are protected from additional liability exposure which is not contemplated by participation in the OCIP.

A. Defining OCIPs – What OCIPs Actually Are

The lack of state statutory guidance concerning OCIPs is alarming. Only 9 states have statutes in effect concerning "owner controlled insurance programs," "wrap-up insurance," or "controlled insurance." *Independent Insurance Agents of Oklahoma* is a reminder that the absence of a definition and express authority to utilize owner controlled insurance programs may result in a challenge to their utilization.

The first threshold matter states should address is establishing a statutory definition for an owner controlled insurance program. The main characteristic of an owner controlled insurance program is that it bundles a number of insurance coverages for general contractors and subcontractors on a project, typically including worker's compensation, into a consolidated program.[132] This feature is the most distinctive and needs to be a part of any definition. The Florida statute refers to an owner controlled insurance program as a "consolidated insurance program,"[133] and although does not include private entities, does state that an OCIP "may provide one or more of the following types of insurance coverage for any contractor or subcontractor working at specified or multiple contracted work sites of a public construction project: general liability, property damage excluding coverage for damage to real property, workers' compensation, employer's liability, or pollution liability coverage."[134] This definition not only specifically states the OCIP is a "consolidated insurance program," but includes specific coverages that are available through the OCIP.

However, the Florida definition refers only to a "public construction project." In contrast, the Nevada statute expressly provides that a "private company" may utilize an OCIP.[135] To ensure private entities are permitted to utilize OCIPs, affirmative language in incorporating "private entity(ies)" and/or "private company(ies) should be included.

States legislatures should adopt language closely resembling the following to fully define an OCIP:

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132 *See* Marzen, *supra* note 3, at 867-68; *see also* Wichern, *supra* note 4, at 47-49.

133 FLA. STAT. ANN. § 255.0517(1)(a) (West 2011).

134 *Id.*

135 *See* NEV. REV. STAT. ANN. § 616B.710 (West 2010).

> An owner controlled insurance program is a consolidated insurance program or series of insurance policies issued by a premises owner, general contractor, and/or any other public entity or private entity which provides one or more of the following types of insurance coverage for all contractor(s) or subcontractor(s) working at specified or multiple contracted work sites of either a public or private construction project: general liability, property damage excluding coverage for damage to real property, workers' compensation, employer's liability, or pollution liability coverage. The utilization of an owner controlled insurance program by (a) public company(ies) and/or private entity(ies) is expressly permissible.

The model statutory language above defines an OCIP, expressly permits the use of an OCIP, incorporates both public and private entities, and outlines the insurance coverages (most significantly, workers' compensation), which are included for either a public or private construction project. This language addresses the concerns raised by the *Independent Insurance Agents of Oklahoma* decision, where Oklahoma did not have a statute in effect governing OCIPs.

B. Defining the Limitations and Parameters of OCIPs

The second major issue state statutes should address after defining OCIPs is to delineate the limitations and parameters of OCIP programs. Several questions arise: Should OCIPs be limited to "construction" projects? How can OCIPs promote occupational safety? Finally, how can the use of OCIPs address claims arising out of activities on a project?

Each of these unique questions can be addressed by OCIPs and states should and can ensure all of these concerns are addressed in their respective state statutes.

1. OCIPs and "Construction" Projects.

OCIPs typically are utilized for "construction" related activities on or at a particular project site(s).[136] However, as seen in *Alyeska*, Liberty

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[136] *See* Zeitoun v. Orleans Parish Sch. Bd., 2009-1130 (La. App. 4 Cir. 3/3/10); 33 So. 3d 361 (finding that an OCIP policy issued to a school board by an insurer did not provide coverage for the injuries in question, since coverage was restricted to liability out of "construction" related incidents and the injuries incurred did not concern construction on the insured's premises).

Mutual utilized an OCIP where the contractors provided "maintenance," "not construction," services.[137] The Alaska statute provided that OCIPs could be used for "major construction projects," but striking was an absence of any prohibition for use of a "non-construction" OCIP.

States must address this very issue – should OCIPs be limited to construction projects? The lesson of *Alyeska* is that states which wish to prohibit "non-construction OCIPs" should explicitly state so, or run the risk that the absence of any statutory prohibition infers their permissibility. A model statute might state the following:

> An owner controlled insurance program shall be utilized only for a public or private construction project.

2. OCIPs and Occupational Safety.

Owner controlled insurance programs typically will include a safety program for all employees which work on the construction project site.[138] To date, only four states, California, Michigan, Nevada and New Mexico, regulate this aspect of an OCIP program. As discussed earlier, California's statute only states that prospective bidding contractors and subcontractors must meet minimum occupational safety and health qualifications established to bid on an OCIP project.[139] Nevada requires that an OCIP administrator of claims must assist an employee with filing a written notice of injury or death, or a written notice of occupation disease,[140] and an employer's report of industrial injury or occupational disease on behalf of the general contractor and any and all subcontractor(s) as required by the Nevada workers' compensation statute.[141] Furthermore, Nevada also requires the administrator to direct employees who are injured to a medical facility that will provide treatment to that employee under the program.[142] New Mexico also requires each owner or principal contractor to provide for a safety plan for employees.[143]

Finally, Michigan requires either the premises owner, construction manager, general contractor, or insurance carrier for the construction

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137 State v. Alyeska Pipeline Serv. Co., 262 P.3d 593, 594 (Alaska 2011).

138 *See* Marzen, *supra* note 3, at 868; *see also* U.S. GEN. ACCT. OFF., *supra* note 5, at 7.

139 CAL. GOV'T CODE § 4420.5(b)(1) (West 2008).

140 NEV. REV. STAT. ANN. § 616B.727(3)(a) (West 2010).

141 *Id.* § 616B.727(3)(b).

142 *Id.* § 616B.727(3)(c).

143 N.M. STAT. ANN. § 52-1-4.2(G) (West 2011).

project to appoint a construction safety and health director.[144] The director is also given the authority to resolve all disputes related to construction safety and health at the worksite.[145]

For a state considering an OCIP statute and employee safety, each of the above-mentioned states provide a diversity of approaches to promote health and occupational safety.

3. OCIPs and the Central Administration of Claims

Another often cited advantage of OCIPs is that the program typically streamlines all claims through a central OCIP administrator for handling.[146] Nonetheless, only one state to date, Nevada, has statutorily required central administration of claims to be a feature of an OCIP. The Nevada statute states the following:

> The owner or principal contractor of the construction project shall hire or contract with a with a person to serve as the administrator of claims for industrial insurance for the construction project. Such a person must not serve as an administrator of claims for industrial insurance for another construction project that is covered by a different consolidated insurance program.[147]

The Nevada statute is well-drafted and ensures an OCIP administrator is retained to manage claims, in addition to prohibiting any conflicts of interests between multiple OCIPs in forbidding any individual to serve as an administrator for another project. States enacting a statute concerning administration of claims should also enumerate all of the insurance coverages at issue (particularly workers' compensation). A model statute might read as follows, closely following the Nevada statute:

> The premises owner or general contractor of the construction project shall hire or contract with a person to serve as the administrator of claims arising under and/or concerning the following coverage(s): general liability, property damage excluding coverage for damage to real property, workers'

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144 MICH. COMP. LAWS ANN. § 418.621(3) (West 2011).

145 *Id.*

146 *See* Marzen, *supra* note 3, at 867-68; *see also* Wichern, *supra* note 4, at 47-49.

147 NEV. REV. STAT. ANN. § 616B.727(2) (West 2010).

compensation, employer's liability, or pollution liability. Such a person must not serve as an administrator of claims for another construction project that is covered by a different owner controlled insurance program.

4. Other Considerations

North Carolina's statute includes a provision that the utilization of an OCIP program "does not prohibit a contractor or subcontractor from purchasing any additional insurance coverage that a contractor believes is necessary for protection from any liability arising out of the contract."[148] Arizona has a similar provision.[149] On occasion, insurance coverage questions will arise as to whose policy (owner's, general contractor's, and/or a subcontractor's) policy will primarily respond to a claim.[150] In addition, indemnification issues may arise concerning the coverage which may be available under an OCIP and indemnity provisions set forth in the owner's, contractor's and subcontractor's construction contracts.[151] Statutes in Arizona and North Carolina work to expressly permit entities working on the project to purchase any additional insurance above and beyond the limits of the OCIP policy for additional security. States should also consider enacting legislation similar to North Carolina's expressly permitting entities covered under an OCIP program to purchase additional insurance.

C. Statutory Employer Status and the Exclusive Remedy Defense

Finally, there is an emerging split of authority among court decisions as to whether a premises owner, general contractor and subcontractors on a construction project can assert statutory employer status if it participates

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148 N.C. GEN. STAT. ANN. § 58-31-65(a)(4) (West 2010).

149 ARIZ. REV. STAT. ANN. § 41-621(S)(4) (West 2011).

150 *See* Kochenderfer and Bobotek, *supra* note 11.

151 *See id.* at 22-23 ("An issue not resolved by the use of wrap-up programs is the interplay between coverage that may be available under the program and indemnity provisions set forth in the owner's, contractor's, and subcontractors' construction contracts. Frequently, indemnification clauses in construction contracts (whether those between the owner and general contractor, and subcontractors) are broader than the insurance coverage provided by a wrap-up program. A contractor or subcontractor may well find that its contractual indemnity obligations make it liable for losses not included within the wrap-up liability coverage, such as pollution liability, professional errors or omissions associated with preparing shop drawings and other design-related submittals, or the contractor's or subcontractors' employment practices.").

in an owner controlled insurance program where the premises owner and or general contractor "provides, supplies, or makes available" worker's compensation insurance. For states and jurisdictions which hold that an entity cannot claim statutory employer status when they participate in an OCIP, and are not directly the employer of the employee bringing the tort claims, the entities are open to the liability exposure of negligence claims which are not anticipated by participation in the OCIP.

One of the main arguments against application of the exclusive remedy defense is that it will effectively permit "blanket immunity" to all entities working on a construction project by allowing the entities to enter into contracts to limit tort liability for all entities from personal injury claims. This argument, for example, was advanced by the Plaintiff in the *Stevenson* case.[152] Ultimately, the *Stevenson* court applied the exclusive remedy defense.[153]

The "blanket immunity" argument does not take into consideration any of the policies concerning OCIPs, nor the concern that the worker's compensation system allows for a trade-off or bargain between entities working on the construction project and employees. OCIPs benefit both entities working on the project and all employees. The *Stevenson* court astutely cited this tradeoff in observing that the Plaintiff receives a benefit of guaranteed compensation through her employer participating in the OCIP[154] and the owner receiving the benefit of coordinated risk management.[155]

Significantly, premises owners, general contractors, and subcontractors who enter into an OCIP intend to not only provide for central administration of insurance coverages, *but a streamlined process to handle all claims*. Adoption of the rule allowing application of the exclusive

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152 Stevenson v. HH & N/Turner, No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831, at *17-18 (E.D. Mich. Apr. 22, 2002) ("Finally, Plaintiff asserts that her claims are not barred by the exclusive remedy provision of the WDCA. Plaintiff maintains that providing Defendants immunity in this case will allow all entities working on a construction project to enter into contracts that effectively limit all tort liability for personal injury for all entities on the project. Plaintiff maintains that allowing the OCIP to provide blanket immunity to the owner and all contractors on the worksite flies in the face of established worker's compensation and construction site liability law in Michigan.").

153 *Id.* at *43-45.

154 *Id.* at *43-45 ("When Motor City enrolled in the OCIP and accepted the Owner's payment of its worker's compensation premium, Plaintiff received the benefit of guaranteed compensation by the Owner for any personal injury sustained while working on the Project (*quid*)."); *see also* Marzen, *supra* note 3, at 875.

155 *Stevenson*, 2002 U.S. Dist. LEXIS 26831, at *43 ("In return, the Owner sought to coordinate its risk management by implementing the OCIP and thus avoid the inherent danger and crippling effect that perpetual litigation can pose to timely completion of a large construction project such as the one at issue (*quo*)."); *see also* Marzen, *supra* note 3, at 875.

remedy defense also upholds a cardinal principle of insurance law – to preserve the intention of the parties to the contract (OCIP program).[156]

Courts which have resolved this issue to date have placed arguably the most emphasis on legislative intent in analyzing this question – in particular, the Eastern District of Wisconsin in the *Pride* decision specifically noted that if the Wisconsin Legislature intended premises owners to assert the exclusive remedy defense if it administers an OCIP, it would have explicitly done so.[157] The divided case law to date emphasizes the necessity for state legislatures to enact statutory provisions that provide if a premises owner or general contractor "provides, supplies, or makes available" worker's compensation insurance, then a premises owner, general contractor and subcontractors on a construction project can assert status as a "statutory employer."

To ensure the intentions of the parties in an OCIP are maintained, the following model statutory provision should be adopted by states:

> A premises owner, general contractor, or subcontractor which participates in an owner controlled insurance program shall be considered to be the statutory employer of any employee working on the construction project when the premises owner or general contractor provides, supplies or makes available worker's compensation insurance coverage to the employee working on the construction project through the owner controlled insurance program.

The above model statute not only evinces an intent for the exclusive remedy defense to apply when a premises owner, general contractor, or subcontractor participates in an OCIP, but also addresses the Texas case of *Funes* and ensures the meaning of "provides" insurance is construed as "supplies or makes available."

VI. CONCLUSION

The future utilization of OCIPs in the insurance industry may depend upon the actions of state legislatures. As there are only a limited

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156 *See* Eric Mills Holmes & Mark S. Rhodes, 2D HOLMES'S APPLEMAN ON INSURANCE § 5.1, at 10 (Eric Mills Holmes et al. eds., 1996) ("[In construing insurance contracts] the primary objective of policy interpretation is to determine the objectives of the parties and ascribe plain and ordinary meaning to the language of the policy wherever possible to effect their intent.").

157 Pride v. Liberty Mut. Ins. Co., No. 04-C-703, 2007 WL 1655111, at *3 (E.D. Wis. June 5, 2007).

number of states which have passed statutes concerning OCIPs and use of OCIPs by private entities, and a limited number of reported cases to date, in many states OCIPs remain in a "no man's land" of legal uncertainty and confusion.

However, the lack of state statutory regimes also provide an opportunity for state legislatures closely examine OCIPs. States can enact legislation to define OCIPs, ensure private entities can utilize them, encourage occupational safety on construction projects, and also promote coordinated risk management and confer statutory "employer" status to all entities who participate in a project. In an area where there is a fair amount of legal uncertainty and increasing litigation, state legislatures can provide more guidance to uphold the policies and purposes of OCIPs.