

WORKERS' COMPENSATION SUBROGATION IN CONSTRUCTION SETTINGS: IN ALL 50 STATES

American workers' compensation carriers are preoccupied with preventing occupational injuries and deaths - and for good reason and with palpable results. The National Institute for Occupational Safety and Health (NIOSH), the Center for Disease Controls' occupational arm which monitors occupational injuries and deaths in the American workplace, reports that over the last 20 years, occupational injuries and deaths are on the decline. However, accidents do happen. For more than 90 years, American insurers have depended, relied, and calculated premiums on the expectation that if a third party other than the worker's employer is responsible for the employee's injuries, the compensation carrier will be able to subrogate the loss and shift the ultimate responsibility for paying the loss onto the party responsible for causing the loss in the first place. Employers also rely on subrogation in occupational settings in order to help keep the experience modification factors and in retrospective ratings, and consequently their premiums, low. Employers with retrospective rating plans or retention plans literally depend on subrogation to help reflect their true loss history. Unfortunately, our industry has not done enough to sing the praises and designed social benefits of subrogation. Courts and legislatures across our country have begun whittling away at workers' compensation carriers' subrogation rights. Sometimes this is done in the name of "reducing needless litigation" and sometimes it results literally from an ignorance of the philosophical and legal concept underlying subrogation. Perhaps the greatest irony, however, is the fact that states appear to be limiting third-party subrogation most severely in construction settings - the area of workers' compensation in which the average level of injury compensation payments is nearly double the level for all other industries combined.

In a noble effort to ensure that construction workers are covered by workers' compensation insurance, one way or the other, courts and legislatures are dangerously close to throwing out the baby with the bath water. Efforts to guarantee workers' compensation coverage in construction settings have resulted in a snowballing expansion of the Exclusive Remedy Rule and a marked diminution in third-party subrogation opportunities in construction settings. This is most amazing when you consider the fact that the construction industries' share of workers' compensation costs is disproportionately high - nearly three times that of the non-farm-private-sector labor force.¹ Not only does this strange anomaly result in higher premiums and a higher cost of doing business for employers, it has some states moving to monopolistic coverage or state-created workers' compensation insurance, which ultimately affects you and I, the American taxpayer. Until the wheels are put back on the proverbial cart, however, it is important for subrogation professionals, underwriters, and claims handlers to understand a carrier's subrogation rights in all 50 states. This article will present a quick overview of current workers' compensation subrogation in construction settings. Questions may be directed to Gary Wickert at gwickert@mwl-law.com.

Many states have begun passing laws which declare that an owner or contractor who contracts any part of a construction project to a subcontractor is liable for workers' compensation benefits to the employees of any such contractor or subcontractor. These laws then go on to conclude that the owner or contractor who ultimately provides workers' compensation coverage or benefits to the workers of such subcontractor may take advantage of the Exclusive Remedy Rule and is immune from any suit filed by the worker. While this may appease

¹ *Workers' Compensation and Other Costs of Injuries and Illnesses in Construction*, § 49 of the Construction Chart Book, Third Edition, Sept. 2002.

conservative business owners, it has an extremely squelching effect on the ability of businesses and insurance to subrogate and ultimately shift the liability for injuries to the party which actually is responsible for causing them.

With increasing frequency, construction projects are being insured through vehicles known as Consolidated Insurance Programs. A Consolidated Insurance Program (CIP) is commonly known as “wrap-around insurance”. A controlled insurance program means that the project owner or general contractor buys one policy to cover the entire project. All subcontractors are usually enrolled in the project. If the owner purchases the program, it is known as an Owner-Controlled Insurance Program (OCIP). With an OCIP, everyone working at the project site is covered under one master liability insurance policy. When the project is bid, each contractor subtracts out its line item for liability insurance and the owner receives a portion of the cost of the OCIP premium back in the form of lower construction costs. OCIPs typically provide coverage through substantial completion of construction plus a period of years thereafter, typically ten years. The benefits to the owner are significant because they guarantee that they will have coverage and force the limits they selected for the applicable statute, and they can be comfortable that any contractor setting foot on the site is covered.

OCIPs do pose some difficulties. All policy forms are manuscripted and heavily negotiated, which can be expensive and time consuming. OCIPs are complicated policies with extremely long time horizons, and each participant (usually contractors) must be enrolled into the policy. This can be time consuming and occasionally confusing. One area of coverage which may or may not be included into OCIP is workers’ compensation. Frequently, workers’ compensation is included in the OCIP. When workers’ compensation is rolled into an OCIP, it is recommended that each party to the project waive their rights of subrogation against the other parties on the project. OCIPs have been around since the turn of the century. The American Institute of Architects took a stand against additional insured statuses when it revised its General Conditions form in 1997 and pushed a policy somewhat comparable to the OCIP policy known as the Project Management Protective Liability policy (PMPL). However, as of 2000, only one insurer was providing the PMPL policy and that is CNA Insurance Company.²

The idea behind an OCIP policy is to provide exclusive remedy immunity to certain contractors and subcontractors on the construction site. Nevada is one of the few states which actually has legislated the effect which an OCIP will have on third-party workers’ compensation subrogation. More are sure to follow, however, and a closer look is called for.

Under Nevada law, when an employer accepts the Industrial Insurance Act and an employee receives compensation there under, the employer is fully and completely insulated from all other liability accounts of the injury.³ In theory, if an employer is a participating employer within the Industrial Insurance Act, it is relieved from tort liability to an employee who is injured in the course and scope of his employment on a construction project.⁴ Notwithstanding other Nevada statutes which deal with the subject of “statutory employers” and “statutory employees,” it may be argued that the principal contractor, and any other subcontractors or entities who are included in the OCIP, are “in the same employ” as a worker injured on a construction site, and therefore cannot be sued because the employee’s exclusive remedy is the benefits he received under the OCIP workers’ compensation policy.⁵

A principal contractor is not liable for payment of any benefits to any injured worker if the contract between the principal contractor and the independent contractor provides that the independent contractor will maintain such coverage, proof of such coverage is provided to the principal contractor, the principal contractor is not engaged in any construction project, and the independent contractor is not “*in the same trade, profession, or occupation as the principal contractor.*”⁶ However, in an OCIP, the principal contractor has agreed to provide coverage and will

² *OCIP Coverage -- Confusion Still Reigns*, by Donald Malecki, *Rough Notes Magazine*, Oct. 2000.

³ *Santisteven v. Dow Chemical Co.*, 362 F. Supp. 646 (D.C. Nev. 1973), *aff'd*, 506 F.2d 1216; *Lipps v. Southern Nevada Paving*, 998 P.2d 1183 (Nev. 2000).

⁴ *Corrao Constr. Co., Inc. v. Curtis*, 584 P.2d 1303 (Nev. 1978).

⁵ *Tucker v. Action Equip. & Scaffold Co., Inc.*, 951 P.2d 1027 (Nev. 1997).

⁶ N.R.S. § 616B.639(1)(A-D).

be liable for such compensation benefits. The term “contractor” is synonymous with “builder”.⁷ A “contractor” is defined under Arizona law as follows:

“A contractor is any person, except a registered architect or a licensed professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, offers to undertake to, purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, instruct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, developmental improvements, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project must be accompanied by the Board or any court of this state is prima facie evidence that the person securing that permit or employing any person on a construction project is acting in the capacity of a contractor pursuant to the provisions of this Chapter.”⁸

A contractor includes a subcontractor or specialty contractor, but does not include anyone who merely furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of a contractor. A contractor includes a construction manager who performs management and counseling services on a construction project for a professional fee.⁹ A contractor is required to obtain a license from the State of Nevada, which evidences a degree of experience, financial responsibility, and general knowledge of the building, safety, health and lien laws of the State of Nevada.¹⁰ A principal contractor who is unlicensed still qualifies as a statutory employer of an independent contractor and its employees, so long as it is in the same trade, business, profession or occupation as the independent enterprise.¹¹

The Exclusive Remedy Rule in Nevada appears to be set forth in two separate statutes.¹² N.R.S. § 616A.020 provides in subsection (1) that workers’ compensation is the exclusive remedy for an injured worker, except as set forth in Chapters 616A to 616D. The Exclusive Remedy Statute also appears to extend the Exclusive Remedy Rule which is provided to a principal contractor, with respect to any injury sustained by an employee of any contractor in the performance of the construction contract, to every architect, land surveyor or engineer who performs services for the contractor, the owner, or any “such beneficiary interested persons”.¹³ This statute also specifically says that the exclusive remedy provided by this section applies to the owner of a construction project who provides an OCIP pursuant to § 616B.710, *to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project.*¹⁴ In Nevada, all employers, including principal contractors, may take advantage of the Exclusive Remedy Rule. However, § 616B.603 provides an exception to the general rule that principal contractors are statutory employers.¹⁵ This section sets forth that a person is not an employer if he enters into a contract with another person or business which is an independent enterprise, and he is not in the same trade, business, profession or occupation as the independent contractor.¹⁶ This exception does not apply when the principal contractor is licensed pursuant to Chapter 624.¹⁷

There is also a presumption of the existence of an employer/employee relationship which must be overcome.¹⁸ It appears that an owner of a project who does not assume an additional status of being a principal employer or

⁷ N.R.S. § 624.020(1).

⁸ N.R.S. § 624.020(2).

⁹ N.R.S. § 624.020(4).

¹⁰ N.R.S. § 624.260(1).

¹¹ *Oliver v. Barrick Goldstrike Minds*, 905 P.2d 168 (Nev. 1995).

¹² N.R.S. § 616A.020; N.R.S. § 616B.612(4).

¹³ N.R.S. § 616A.020(3).

¹⁴ N.R.S. § 616A.020(4).

¹⁵ N.R.S. § 616B.603(1).

¹⁶ *Billmeyer v. Newmont Gold Co.*, 963 F. Supp. 938 (D. Nev. 1996).

¹⁷ *Id.*

¹⁸ *Id.*

contractor, but is simply the owner, can be liable as a third party.¹⁹ However, the Exclusive Remedy Rule does apply to the owner of a construction project who provides workers' compensation coverage for the project by establishing and administering a consolidated insurance program pursuant to § 616B.710, *to the extent that the program covers* the employees of the contractors and subcontractors who are engaged in the construction of the project.²⁰ Also, where an owner functions as his own principal contractor, he will be deemed an "employer" under the Industrial Insurance Act.²¹ Notwithstanding that, merely being an owner is not sufficient to grant immunity. Such immunity attaches to an employer of labor, not simply the owners of construction projects.²² However, it appears that if the owner does provide OCIP workers' compensation coverage, the owner will be considered an employer and the Exclusive Remedy Rule will apply, at least to the extent that the program covers the employees of the contractors and subcontractors engaged in the construction of the project.²³ It should be argued by us that the architect, who is not covered under the OCIP workers' compensation coverage, is not "an employer" because he didn't provide workers' compensation benefits through this program, and it cannot be considered an "employee" under the Act either.

Arizona subcontractors, independent contractors, and their employees are deemed to be employees of the principal contractor.²⁴ However, this is expressly limited by § 616B.603 if an independent enterprise is not in the "same trade, business, profession or occupation as the independent enterprise".²⁵ However, this may be limited to non-construction injury cases.²⁶

Because no other area of insurance subrogation is more dependent on the vagaries of each state's laws than workers' compensation, it is important to have a basic understanding of how your subrogation rights may or may not be limited within each state, in construction settings.

ALABAMA. Alabama remains one of the minority states who have maintained a sensible approach to the Exclusivity Rule in construction settings. In order for contractor or subcontractor to have their liability limits limited to benefits paid under workers' compensation, it is essential that the person seeking to limit the remedy of the injured party be in an actual employer/employee relationship with that party.²⁷ The Exclusive Remedy Rule does not preclude a suit against an owner or general contractor, even though the compensation benefits were paid by the insurer for the owner or general contractor.²⁸

ALASKA. An owner or contractor is liable for workers' compensation benefits to the employee of subcontractors, unless the subcontractor secures the payments of benefits as a result of a work-related injury.²⁹ If an owner or contractor pays benefits under this "contractor-under" provision, the owner or contractor may still be sued as a third party and are not immune from suit under the Exclusive Remedy Rule.³⁰ The owner or contractor will have the right of indemnification against the uninsured contractor and will also be able to set-off from any third-party award the amount of compensation benefits previously paid to the subcontractor's employee.³¹

ARIZONA. If an employer procures work to be done by a contractor over whose work the employer retains supervision or control, and the work is a part or process in the trade or business of the employer, then the employees of such subcontractors are deemed to be statutory employees of the original employer.³² Such

¹⁹ *Simon Services, Inc. v. Mitchell*, 307 P.2d 110 (Nev. 1957).

²⁰ N.R.S. § 616A.020(4).

²¹ *Hosvepian v. Hilton Hotels Corp.*, 587 P.2d 1313 (Nev. 1978); *Frith v. Harrah South Shore Corp.*, 552 P.2d 337 (Nev. 1976).

²² *Ortolano v. Las Vegas Convention Services*, 608 P.2d 1103 (Nev. 1980).

²³ N.R.S. § 616A.020(4).

²⁴ N.R.S. § 616A.210.

²⁵ N.R.S. § 616B.603.

²⁶ *Tucker v. Action Equip. & Scaffold Co., Inc.*, 951 P.2d 1027 (Nev. 1997).

²⁷ *Kilgore v. C.G. Canter*, 396 So.2d 60 (Ala. 1981); Ala. Stats. § 25-5-51, 25-5-53.

²⁸ *Kilgore*, *supra*.

²⁹ Alaska Stat. § 23.30.045 (1982).

³⁰ *Miller v. Northside Danzi Constr. Co.*, 629 P.2d 1389 (Alaska 1981).

³¹ Alaska Stat. § 23.30.015(g); *Miller*, *supra*.

³² A.R.S. § 23-902(B) (2003).

“statutory employers” are entitled to immunity to third-party actions under the Exclusive Remedy Rule.³³ However, in order to become a statutory employer, the worker’s labor must be supervised or controlled by the statutory employer and it must be part or process of the statutory employer’s trade or business.³⁴

ARKANSAS. Arkansas law requires a general contractor (prime contractor) to be liable for workers’ compensation benefits to the employee of a subcontractor, where the subcontractor fails to secure such workers’ compensation coverage.³⁵ Effective April 8, 2005, an amendment to § 11-9-402 provides an exception to this rule. The “prime contractor” will not be liable for compensation benefits to the employees of the subcontractor where there is an “intermediate contractor” who has workers’ compensation coverage.³⁶ Any prime contractor or intermediate contractor who becomes liable for compensation benefits may recover such benefits from the subcontractor, and any such claim for reimbursement constitutes a lien against any amount due in owing to the subcontractor from the prime contractor.³⁷ The issue of whether or not an entity is a general or prime contractor is one within the exclusive and original jurisdiction of the Workers’ Compensation Commission.³⁸ While a general contractor may be sued directly by an injured employee of a subcontractor,³⁹ in 1993 the Arkansas General Assembly amended § 11-9-105, clearly intending to extend tort immunity to a contractor regardless of whether the subcontractor had paid workers’ compensation benefits to its injured employee.⁴⁰

CALIFORNIA. In construction settings, any company which hires a contractor for a job requiring a license is the statutory employer of any unlicensed contractor.⁴¹ This statute can make a valid contractor’s license prerequisite for independent contractor status and can create a dual employment relationship whereby the worker may be the employee of both the general contractor and the subcontractor.⁴² In construction settings, any company who hires a contractor for a job requiring a license is the statutory employer of any unlicensed contractor. Section 2750.5 provides in part as follows:

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor...

This statute can make a valid contractor’s license prerequisite for independent contractor status and create a dual employment relationship whereby the worker may be the employee of both the general contractor and subcontractor. Likewise, in employee leasing and/or temporary employment services situations, both the employee leasing firm and its client are considered to have made workers’ compensation insurance premium payments, and both are immune from third-party suits, provided an employee leasing agreement has been executed and insurance coverage for the worker remained in effect throughout the length of his employment. The term “peculiar risk,” for purposes of the Peculiar Risk Doctrine, does not mean risk that is abnormal to the type of work done nor a risk that is abnormally great. It simply means a special, recognizable danger arising out of the work itself. Even when work performed by an independent contractor poses a special or peculiar risk of harm, the person who hired the contractor will not be liable for the injury, if the injury arises from the contractor’s collateral or casual negligence. For this reason, the Peculiar Risk Doctrine is all but dead in the context of workers’ compensation subrogation.

³³ *Word v. Motorola, Inc.*, 662 P.2d 1031 (Ariz. App. 1982), *rev’d on other grounds*, 662 P.2d 1024; *Livingston v. Citizen’s Utility, Inc.*, 481 P.2d 855 (Ariz. 1971).

³⁴ *Word*, *supra*.

³⁵ A.C.A. § 11-9-402(a).

³⁶ A.R. Legis. 1917 (2005).

³⁷ A.C.A. § 11-9-402(b)(2).

³⁸ *Angle v. Alexander*, 945 S.W.2d 933 (1997).

³⁹ *Axson v. Apartment Home Builders, Inc.*, 298 Ark. 408 (Ark. 1989).

⁴⁰ *Stapleton v. M.D. Limbaugh Constr. Co.*, 969 S.W.2d 648 (Ark. 1998); A.C.A. § 11-9-105 (1993) (applicable to injuries occurring after July 1, 1993).

⁴¹ *Cedillo v. W.C.A.B.*, 130 Cal. Rptr.2d 581 (Cal. App. 2003); Ann. Cal. Labor Code § 275.5 (1979).

⁴² *Hernandez v. Chavez Roofing, Inc.*, 286 Cal. Rptr. 919 (Cal. App. 1991).

COLORADO. Section 8-41-401 covers situations where a company leases or subcontracts a portion of work to a lessee, contractor or subcontractor.⁴³ If Company A contracts with Company B to perform any part or the entire project, Company A is deemed to be the employer and is liable for workers' compensation benefits for employees of Company B, unless:

- (1) Company B falls under the exclusion set forth in § 8-40-202(2)(b) (Company B is in an independent trade and is free from control of Company A);
- (2) The potential plaintiff/injured worker from Company B is actually a general partner or sole proprietor of Company B and is not covered under workers' compensation insurance; or
- (3) The potential plaintiff/injured worker from Company B is a corporate officer or member and has filed an election to reject coverage.⁴⁴

In any event, if Company B provides workers' compensation for its employees under the situation above, § 8-41-401 makes it difficult for them to pursue a third-party action against Company A, the contractor or owner of the project, by deeming them to be "statutory employers". The determination as to whether a person or entity is a "statutory employer" is a question of fact.⁴⁵ Company B's "independence" (status of being an independent contractor rather than an employee), may be shown by a written document or other evidence establishing that Company B is free from control and direction in the performance of the service, both under the contract for performance of service and in fact, and that Company B is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.⁴⁶ Section 8-40-202 sets out nine criteria of "independence".⁴⁷

Colorado law requires that any owner or contractor who conducts business by leasing or contracting out any part of his work, is to be considered an "employer" and liable to pay compensation for injuries to employees of lessees, sublessees, contractors, subcontractors and their employees.⁴⁸ The exclusive remedy against such "statutory employers" is workers' compensation benefits.⁴⁹

CONNECTICUT. In Connecticut, any owner or contractor who procures work to be done for him by another contractor or subcontractor, and where the work is a part or process in the trade or business of such owner or contractor, to be performed on or about the premises under his control, who will be liable to pay all workers' compensation benefits to employees of such contractors or subcontractors.⁵⁰ If an owner or contractor becomes a "statutory employer" (known in Connecticut as a "principal employer"), such statutory employer is entitled to immunity under the Exclusive Remedy Rule.⁵¹ The purpose of § 31-291 is to protect the employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer, who has general control of the business in hand, liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on.¹ However, the owner/contractor can seek protection of the Exclusive Remedy Rule only if it actually paid workers' compensation benefits.

DELAWARE. If an owner or contractor contracts to perform work, an employee's right to recover workers' compensation subrogation is against his immediate employer only.⁵² Therefore, only the direct employer of an

⁴³ C.R.S. § 8-41-401.

⁴⁴ C.R.S. § 8-41-401.

⁴⁵ *Newsom v. Frank M. Hall & Co.*, 101 P.3d 1107 (Colo. App. 2004).

⁴⁶ *Id.*; C.R.S. § 8-40-202(2)(a).

⁴⁷ These include, among other things, that the person for whom services are performed does not: require the individual to work exclusively for him or her; establish a quality standard, "accept that the person may provide plans and specifications regarding the work"; pay a salary or at an hourly rate instead at a fixed or contract rate; provide more than minimal training; provide tools or benefits; or dictate the time of performance. § 8-40-202(2)(b)(II).

⁴⁸ *Id.*

⁴⁹ *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221 (Colo. 2001).

⁵⁰ C.G.S.A. § 31-291 (1988).

⁵¹ *Farrell v. DeFelice & Son, Inc.*, 42 A.2d 697 (Conn. 1945); *Sgueglia v. Milme Constr. Co.*, 562 A.2d 505 (Conn. 1989); *Esposito v. PGP Indus., Inc.*, 1990 WL 283963 (Conn. Super. 1990) (*unreported decision*).

¹ *Germaine v. Thygeron*, 2006 WL 280259 (Conn. Super. 2006).

⁵² 19 Del. C. § 2311.

injured worker can claim the Exclusive Remedy Rule as a defense to a third-party action, and no other employer on a job site.⁵³

DISTRICT OF COLUMBIA. D.C. Superior Courts are divided on how to treat the Exclusive Remedy Rule in Construction Settings. After all, it's Washington. In one case, the Court found that a general contractor that did not obtain compensation from an injured worker was immune from tort liability when the subcontractor that directly employed the worker did meet its statutory obligation to provide compensation.⁵⁴

Alternatively, another Court found that a general contractor is not an "employer" immune from tort liability in a suit brought by an injured employee and subcontractor where subcontractor had secured payment of workers' compensation to employee.⁵⁵

FLORIDA. Florida Statute § 440.10 provides that if a contractor subcontracts for any part of his contract work to a subcontractor, all of the employees of the contractor and the subcontractor shall be deemed to be employed in one and the same business or establishment, and the contractor is liable for the payment of workers' compensation insurance to all such employees, with the exception of employees of a subcontractor who have secured such payment.⁵⁶ Therefore, when the general employer secures workers' compensation coverage for its subcontractor's employees, by either providing coverage or requiring the subcontractor to do so, the statutory employer is immune from suit for the employee's personal injuries under the Florida Exclusive Remedy Doctrine.⁵⁷ This rule must be reasonably construed to make statutory fellow servants of all employees engaged in a common enterprise under the general contractor, who is then known as the statutory employer.⁵⁸

GEORGIA. Georgia law holds that a principal, intermediate, or subcontractor is liable for workers' compensation benefits to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer.⁵⁹ This law ensures that employees in construction and other industries are covered by workers' compensation. However, it also provides that such other entities are considered "employers" under the workers' compensation act, and may not be sued as third parties.⁶⁰

HAWAII. The Hawaii Supreme Court has held that a premise owner who hires an independent contractor to do work on the premises is vicariously liable for the negligence of the independent contractor and/or the independent contractor's employees, where the injury arose from dangers which the owner contemplated and should have contemplated at the time the independent contractor was hired.⁶¹

When an independent contractor undertakes to perform work for another person pursuant to contract, express or implied, oral or written, such independent contractor is deemed the employer of all employees of the independent contractor's subcontractors and their subcontractors, performing work in the execution of the contract.⁶² If the common law employer pays for benefits, and the owner or general contractor do not, then the owner and general contractor may be sued as third parties under § 386-8.⁶³ However, if the common law employer/subcontractor fails to furnish workers' compensation benefits pursuant to Hawaii law, and the general

⁵³ *Dickinson v. Eastern R.R. Builders, Inc.*, 403 A.2d 717 (Del. 1979).

⁵⁴ *Estep v. Constr. General, Inc.*, 546 A.2d 376 (D.C. 1988).

⁵⁵ *Meiggs v. Assoc. Builders, Inc.*, 545 A.2d 631 (D.C. 1988), *cert. denied*, 109 S. Ct. 3178.

⁵⁶ F.S.A. § 440.10.

⁵⁷ *Broward County v. Rodrigues*, 686 So.2d 774 (Fla. App. 1997), *cause dismissed*, 697 So.2d 1300, *rehearing denied*.

⁵⁸ *Carter v. Sims Crane Service, Inc.*, 198 So.2d 25 (Fla. 1967).

⁵⁹ O.C.G.A. § 34-9-8.

⁶⁰ *Georgia Power Co. v. Diamond*, 202 S.E.2d 704 (Ga. App. 1973); *England v. Bers Constr. Co.*, 479 S.E.2d 420 (Ga. App. 1996); *Warden v. Hoar Constr. Co.*, 507 S.E.2d 428 (Ga. 1998); *Wright Assoc. v. Raider*, 277 S.E.2d 41 (Ga. 1981); *Holton v. Georgia Power Co.*, 491 S.E.2d 207 (Ga. App. 1997).

⁶¹ *Makaneole v. Gampon*, 777 P.2d 1183 (Hi. 1989), *rev'd in part and aff'd in part*, 776 P.2d 402 (1989).

⁶² Haw. Rev. Stat. § 386-1 (under definition of "employee").

⁶³ *Fonseca v. Pacific Constr. Co., Ltd.*, 513 P.2d 156 (Haw. 1973).

contractor assumes responsibility for providing such benefits, the general contractor will be able to take advantage of the Exclusive Remedy Rule and cannot be sued as a third party.⁶⁴

IDAHO. Idaho deems any party responsible or liable for workers' compensation benefits to be immune from third-party liability.⁶⁵ A "statutory employer" is anyone who, by contracting or subcontracting out services, is liable to pay workers' compensation benefits if the direct employer does not pay those benefits.⁶⁶ Because § 72-216 requires the general contractor to be responsible for workers' compensation benefits to an employee of a contractor or subcontractor who has not complied with the provisions of § 72-301, a general contractor may be considered a statutory employer, while an owner of property or a project may not.⁶⁷ To find a person or business to be a statutory employer, the work being carried out by the independent contractor on the owner or proprietor's premises must have been the type that could have been carried out by the employees of the owner or proprietor in the course of its usual trade or business.⁶⁸

Idaho requires every employer to maintain workers' compensation coverage for their employees. However, Idaho defines "employer" more broadly than common law. "Employer" not only includes an employee's direct employer, but also any contractors or subcontractors as well.⁶⁹ Therefore, under this expanded definition of "employer", an employee may have more than one employer.⁷⁰

ILLINOIS. An owner or contractor who contracts any part of work to a subcontractor is liable for workers' compensation benefits to the employees of any such contractor or subcontractor, unless the direct employer has provided benefits under the Illinois Act.⁷¹ Nonetheless, the owner or contractor who provides workers' compensation benefits to the employees of an uninsured subcontractor, cannot claim immunity under the Exclusive Remedy Rule as a "statutory employer".⁷²

INDIANA. Unlike a majority of states, Indiana does not put a statutory duty on its general contractors to secure workers' compensation coverage for each subcontractor.⁷³ To the contrary, the only statutory obligation a contractor has is to obtain a Certificate of Insurance from the Workers' Compensation Board showing that each subcontractor has complied with Indiana law which requires the obtaining of such certificates for each employer.⁷⁴ Therefore, in Indiana an owner or general contractor may not alter its status with regard to potential third-party tort liability to employees of contractors or subcontractors by directly purchasing workers' compensation insurance on behalf of the subcontractors through an Owners Controlled Insurance Program (also known as "wrap-up insurance").⁷⁵ If the owner or general contractor fails to obtain a certificate as required by Indiana law, some case law indicates that the owner or general contractor may take advantage of the Exclusive Remedy Rule,⁷⁶ while more recent cases indicate that the owner and/or general contractor is not immune from third-party suit.⁷⁷

⁶⁴ *Jordan v. Rita*, 670 P.2d 457 (Haw. 1983); *Makaneole*, *supra* (stating owner will not be able to take advantage of the Exclusive Remedy Rule).

⁶⁵ Idaho Code §§ 72-102, 72-123; *Robison v. Bateman-Hall, Inc.*, 76 P.3d 951 (Idaho 2003).

⁶⁶ Idaho Code § 72-216(1), (2); *Struhs v. Protection Technologies, Inc.*, 992 P.2d 164 (Idaho 1999).

⁶⁷ *Robison supra*.

⁶⁸ *Harpole v. State*, 958 P.2d 594 (Idaho 1998).

⁶⁹ Idaho Code § 72-102(12)(a) (2004).

⁷⁰ *Runcorn v. Shearer Lumber Products, Inc.*, 690 P.2d 324 (Idaho 1984).

⁷¹ 820 I.L.C.S. 305/1(a)(3) (1988).

⁷² *Laffoon v. Bell & Zoller Coal Co.*, 359 N.E.2d 125 (Ill. 1976).

⁷³ I.C. § 22-3-2-14(c) (2001).

⁷⁴ I.C. § 22-3-2-5 (1993).

⁷⁵ *Wolf v. Kajima Int'l, Inc.*, 621 N.E.2d 1128 (Ind. App. 1993).

⁷⁶ *Lackey v. Buhadway Co.*, 560 N.E.2d 671 (Ind. App. 1990) (disapproved of by *Wolf v. Kajima Int'l, Inc.*, 629 N.E.2d 1237 (Ind. 1994); *Rausch v. Reinhold*, 716 N.E.2d 993 (Ind. App. 1999).

⁷⁷ *Rausch, supra*.

IOWA. Unlike most states, Iowa does not appear to have any legislation which requires a general contractor to be responsible for workers' compensation benefits for an uninsured subcontractor. Therefore, a general contractor is not entitled to the protection Exclusive Remedy Rule unless it is directly an employer of an injured worker.⁷⁸

KANSAS. Kansas has taken steps to protect the employees of a subcontractor, and make sure that they are covered by workers' compensation while working on a construction project. Section 44-503 provides as follows:

*Where any person (in this section referred to principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the Workers' Compensation Act, which the principal would have liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the Workers' Compensation Act, references to the principals shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.*⁷⁹

This means that the principal, whether an owner or a general contractor, will be responsible for workers' compensation payments to any injured employee on the job, even if that employee is employed by a subcontractor. Such employees are referred to "statutory employees".⁸⁰ If the principal has to pay workers' compensation benefits to any person on the job, they are entitled to indemnity from any person who would have been liable to pay compensation to the worker independent of § 44.503, and will have a cause of action under the Workers' Compensation Act for such indemnification.⁸¹ This, in its self, provides a source of recovery for workers' compensation carriers who become obligated to pay benefits under this and similar statutes, even though there is no third party liable for the injury. The significant point for workers' compensation subrogation purposes here is that the general contractor (principal) responsible for payments under § 44-503 becomes the worker's special employer and the worker's exclusive remedy against such principal is for workers' compensation benefits.⁸²

The legislature recently amended § 44-503(g), which now provides, in part, that if applicable to the subject employment:

- (a) the principal shall not be liable for any compensation ... for any person for which the contractor has secured the payment of compensation.*
- (b) the injured worker shall have no right to file a claim or proceed against the principal for compensation.*
- (c) the principal may not be charged a premium for any liability for which the subcontractor has secured the payment of compensation.*

Prior to 1994, the principal contractor would qualify as a "statutory employer" and *could be* liable for compensation for injuries to the subcontractors' employee. Since the principal would be liable for compensation, any common law action by the employee against the principal was barred by the Exclusive Remedy Doctrine. This is because, in Kansas, as in most states, a worker may not maintain a third-party action for damages against a party from whom he or she could have recovered workers' compensation benefits.⁸³ However, the Kansas Supreme Court has held that a statutory employer is immune from third-party liability, even though the subcontractor, and not the principal, had secured the workers' compensation benefits for the employee.⁸⁴ Prior to the 1994 amendment to § 44-503(g), a principal would be liable to pay workers' compensation benefits to the

⁷⁸ *Farris v. General Growth Dev. Corp.*, 354 N.W.2d 251 (Iowa App. 1984).

⁷⁹ K.S.A. § 44-503(a).

⁸⁰ *Durril v. Grant*, 356 P.2d 872 (Kan. 1960); *Schafer v. Kansas Soya Products Co.*, 358 P.2d 737 (Kan. 1961).

⁸¹ K.S.A. § 44-503(b).

⁸² *Stortz v. Martin K. Eby Constr. Co.*, 535 P.2d 908 (Kan. 1975).

⁸³ K.S.A. § 44-503(b).

⁸⁴ *Robinett v. Haskell Co.*, 12 P.3d 411 (Kan. 2000).

injured worker of the subcontractor as if the worker were a direct employee.⁸⁵ The worker could have claimed benefits from the principal or the subcontractor, if the subcontractor provided such benefits.⁸⁶ Therefore, both the principal and the contractor would be immune from third-party liability under the exclusive remedy provisions of the Kansas Workers' Compensation Act.⁸⁷ When § 44-503(g) was amended in 1944, the principal was no longer liable for compensation if the contractor had secured the payment of compensation. Instead, the principal would be only secondarily liable for payment of benefits in the event that the subcontractor failed to provide benefits.⁸⁸ The Kansas Supreme Court held that even when a principal is only secondarily liable for workers' compensation benefits, it is still immune from third-party liability.⁸⁹

KENTUCKY. In construction settings, Kentucky law provides that a contractor who subcontracts all or any part of a contract, that contractor and his workers' compensation carrier, will be liable for the payment of compensation benefits to the employees of the subcontractor, unless the subcontractor has secured workers' compensation coverage on its own.⁹⁰ A "contractor" is defined as a person who engages another person to perform part of the work which is a recurrent part of the contractor's business, trade or occupation.⁹¹ If such a contractor becomes liable for workers' compensation benefits, it may take advantage of the Exclusive Remedy Rule and claim immunity from tort actions filed by employees of subcontractors.⁹² In order to obtain the exclusive remedy provision, a "contractor" under § 342.610 must contract with another to do work of a kind which is a recurrent part of the work of the trade or occupation of such person.⁹³ This has been interpreted to mean that a person who engages another to perform a part of the work which is a recurrent part of his business, trade, or occupation is a "contractor", even though he may never perform that particular job with his own employees. He is still a contractor if the job is one that is usually a regular or recurrent part of his trade or occupation.⁹⁴

LOUISIANA. Louisiana law does not have any specific restrictions with regard to suits against subcontractors or other related companies in third-party actions. However, a third party will be immune from suit by either the employee, the employer, or the workers' compensation carrier under the Borrowed Servant and Statutory Employer Doctrines, if the worker is, in fact, a borrowed servant at the time of the injury.⁹⁵ The Borrowed Servant Doctrine provides that in certain circumstances a borrowing employer will be immune from suit from the employee if he meets certain requirements. The most important factor is that the borrowing employer must have control over the employee and the work he is performing, beyond mere suggestion of details or cooperation.⁹⁶ Other relevant factors include whose work is being performed, whether there was any agreement between the original and borrowing employers, whether the employee acquiesced in the new work situation, whether the original employer terminated its relationship with the employee, who provided the tools in place of performance, the length of the employment, who had the right to discharge the employee, and who had the obligation to pay the employee.

The Statutory Employer Doctrine grants immunity whenever the services or work provided by the immediate employer is contemplated by or included in a contract between the principal and any person or entity other than the employee's immediate employer. For example, if any contractor is hired to build a house and hires a subcontractor to complete the roof, and one of the subcontractor's employees fall from the roof and is injured,

⁸⁵ K.S.A. § 44-503(a).

⁸⁶ K.S.A. § 44-503(a)(c).

⁸⁷ *Woods v. Cessna Aircraft Co.*, 553 P.2d 900 (Kan. 1976).

⁸⁸ K.S.A. § 44-503(g).

⁸⁹ *Robinett v. Haskell Co.*, *supra*; *Butera v. Fluor Daniel Constr. Corp.*, 61 P.3d 95 (Kan. App. 2003).

⁹⁰ K.R.S. § 342.610.

⁹¹ *Firemen's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986).

⁹² *Id.*; K.R.S. § 342.691(1) (stating that for purposes of Exclusive Remedy Rule, the term "employer" shall include a "contractor" covered by Subsection 2 of § 342.610).

⁹³ K.R.S. § 342.610.

⁹⁴ *Firemen's Fund Ins. Co. v. Sherman & Fletcher*, *supra*.

⁹⁵ La. R.S. § 23:1032 and § 23:1061.

⁹⁶ *Stephens v. Witco Corp.*, 198 F.3d 539 (5th Cir. 1999); *Richard v. Teague*, 636 So.2d 1160 (La. App. 1994).

the employee cannot sue the contractor.⁹⁷ A written contract must exist in order for the Statutory Employer Doctrine to apply.

MAINE. Any owner or contractor contracting for any work which is part of its usual trade, occupation, profession or business, is deemed to be an employer for purposes of providing workers' compensation benefits to each employee of any contractor or subcontractor underneath it.⁹⁸ Nonetheless, the owner or general contractor provides such workers' compensation benefits will not be immune from a third-party action due to the Exclusive Remedy Rule.⁹⁹

MARYLAND. Maryland law requires a principal contractor to provide and pay workers' compensation benefits to the employee of any contractor or subcontractor, provided that the work undertaken is part of the business, occupation, or trade of the principal contractor.¹⁰⁰ Therefore, when certain conditions are met, the Maryland Workers' Compensation Act broadens the definition of "employer" to cover principal contractors that ordinarily would not be considered employers under common law.¹⁰¹ To have immunity under the Exclusive Remedy Rule in Maryland, a principal contractor must:

- (1) *have contracted to perform the work;*
- (2) *which is a part of his trade, business, or occupation; and*
- (3) *must have contracted with a subcontractor for the execution by or under the subcontractor of the whole or any part of such work.*¹⁰²

Principal contractors who do not meet the requirements of § 9-508 are not considered "statutory employers" and can be sued as third parties.¹⁰³

MASSACHUSETTS. Where a subcontractor or independent contractor failed to have workers' compensation coverage and an employee of theirs is injured, the employee may seek benefits through the general contractor and the worker's compensation carrier for the general contractor would have a lien against and be able to seek recovery either from the third-party tortfeasor or from the uninsured subcontractor.¹⁰⁴ However, if the general contractor has paid benefits because the subcontractor is uninsured, the employee may not sue the general contractor as a third party.¹⁰⁵ The general contractor or owner thus responsible for workers' compensation benefits to employees of subcontractors will be immune from a third-party action under the Exclusive Remedy Rule.¹⁰⁶ For many years, Massachusetts followed the Minority Rule by employing the Common Employment Doctrine, which holds that the plaintiff and the defendant's employer and every other workman on the job, including subcontractors and general contractors and their employees, regardless of position, where engaged in a common employment and having workers' compensation benefits, are all immune from third-party suit.¹⁰⁷ This theory was, and still is, the Minority Rule in the country, because instead of protection flowing up hill to general contractors and owners, it also flowed down hill to subcontractors.¹⁰⁸ However, Massachusetts abolished the *Common Employment Doctrine* by statute in 1972.¹⁰⁹

MICHIGAN. In Michigan, a contractor who contracts with a subcontractor for the whole or any part of any work undertaken by the contractor, is liable to pay workers' compensation benefits for all employees of the subcontractor.¹¹⁰ If the contractor must pay benefits to the employee of a subcontractor, because the

⁹⁷ *Benoit v. Hunt Tool Co.*, 53 So.2d 137 (La. 1951).

⁹⁸ Me. Rev. Stat. Ann. Tit. 26, § 1043(10) (2003).

⁹⁹ Me. Rev. Stat. Ann. Tit. 39-A, § 906 (1993).

¹⁰⁰ Md. Labor & Empl § 9-508 (2002).

¹⁰¹ *Rodriguez Novo v. Recchi America, Inc.*, 846 A.2d 1048 (Md. Ct. App. 2004).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ M.G.L.A. 152 § 18 (2000).

¹⁰⁵ *Russell v. Dommell*, 806 N.E.2d 128 (Mass App. 2004) (*unpublished decision*).

¹⁰⁶ *Cozzo v. Atlantic Refining Co.*, 12 N.E.2d 744 (Mass. 1938).

¹⁰⁷ *Dresser v. New Hampshire Structural Steel Co.*, 4 N.E.2d 1012 (Mass. 1936).

¹⁰⁸ *See Thompson v. Mehlhaff*, 698 N.W.2d 512 (S.D. 2005) (regarding the application of this Minority Rule).

¹⁰⁹ M.G.L.A. 152 § 15 (2003).

¹¹⁰ M.C.L.A. § 418.171 (1985).

subcontractor failed to provide for workers' compensation coverage, then the contractor will be deemed to be a "statutory employer" and subject to the Exclusive Remedy Rule within Michigan.¹¹¹

MINNESOTA. Minnesota makes a distinction in construction situations with regard to a general contractor who is engaged in a "common enterprise" with the subcontractor. In such situations, an injured employee of a subcontractor who elects to receive workers' compensation benefits from a subcontractor or its insurer, may not sue the general contractor as a third party where the contractor and subcontractor are engaged in a "common enterprise".¹¹² When a subcontractor fails to properly insure its employees, the general or intermediate contractor becomes liable for all benefits due to the subcontractor's injured employee, via Minnesota statute.¹¹³ Unlike a majority of states, which regard a contractor under similar statutes to be "statutory employer" and its third-party liability subject to the Exclusive Remedy Rule, a general contractor liable to pay workers' compensation benefits to the employee of a subcontractor will not be immune from tort liability via the Exclusive Remedy Rule, and can be sued as a third party by the injured employee of the subcontractor.¹¹⁴ The same is true for a contractor who "elects" to provide coverage to employees of an independent contractor under § 176.041.¹¹⁵

MISSISSIPPI. Mississippi statutorily requires a contractor to secure payment of compensation to employees of subcontractors, unless the subcontractor has secured such coverage.¹¹⁶ Where a contractor secures such coverage, it is to be considered a "statutory employer" of the subcontractors' employees and immune from third-party suits under the Mississippi Exclusive Remedy Rule.¹¹⁷ Recent case law indicates that a contractor can avoid third-party liability and take advantage of the Exclusive Remedy Rule simply by "securing" such compensation, including simply requiring the subcontractor to provide such benefits to its employees via the construction contract.¹¹⁸ The legal fiction of the "statutory employer" defense in Mississippi is paper thin. To grant a contractor "statutory employer" status simply because it requires its subcontractors to obtain workers' compensation insurance seems contrary to the intent and purpose of the Act, and is likely to be overruled with a proper set of facts, despite its longstanding precedent.

MISSOURI. In *Quinn*, an employee brought a negligence action against two employees of the construction site's general contractor for injuries he sustained when the general contractor's employees threw a piece of steel off of the roof of a three-story building.¹¹⁹ The Court held that Quinn could not maintain his claim against the co-employees because their apparent negligence was merely a failure to provide a safe place working environment.¹²⁰ "Co-employees cannot be held personally liable for their negligence in carrying out their employer's non-delegable duties, whether it is the employer's duty to provide its employees with a reasonable safe place to work, or any other non-delegable duty."¹²¹ The employee must show that the co-employee had a personal duty of care separate and apart from the employer's non-delegable duties.¹²²

MONTANA. Montana requires that an employer who contracts with an independent contractor to perform work of a kind which is a regular or recurrent part of the work of such employer, is liable for payment of the workers' compensation benefits to the employees of the subcontractor if such subcontractor has not complied with coverage requirements for the Workers' Compensation Act.¹²³ The employer/general contractor, however, is not entitled to immunity under the Exclusive Remedy Rule as a "statutory employer", even though he is compelled to

¹¹¹ *Dagenhardt v. Special Mach. & Eng'g, Inc.*, 345 N.W.2d 164 (Mich. 1984), *reh'g denied*, 362 N.W.2d 217.

¹¹² *O'Malley v. Ulland Bros.*, 549 N.W.2d 889 (Minn. 1996).

¹¹³ M.S.A. § 176.215 (1995).

¹¹⁴ *Hallas v. Maegele Outdoor Advertising, Inc.*, 541 N.W.2d 594 (Minn. App. 1995).

¹¹⁵ *Id.*

¹¹⁶ M.C.A. § 71-3-7 (1990).

¹¹⁷ *Mosley v. Jones*, 80 So.2d 819 (Miss. 1955).

¹¹⁸ *Doubleday v. Boyd Constr. Co.*, 418 So.2d 823 (Miss. 1982); *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60 (Miss. 1997).

¹¹⁹ *Quinn v. Clayton Constr. Co., Inc.*, 111 S.W.3d 428 (Mo. App. 2003).

¹²⁰ *Id.* at 433.

¹²¹ *Id.* at 432.

¹²² *Id.*

¹²³ Mont. Stat. § 39-71-405 (1979).

provide workers' compensation benefits.¹²⁴ Only an "immediate employer" who hired the injured worker and who provides coverage is able to take advantage of the Exclusive Remedy Rule.¹²⁵

NEBRASKA. In Nebraska, if an owner contracts with a contractor or a contractor, in turn with a subcontractor, the contract may require the contractor or subcontractor to obtain workers' compensation insurance for injured workers on the project.¹²⁶ If an owner hires an independent contractor, but fails to require the independent contractor to procure workers' compensation insurance, that owner is liable as the "statutory employer" of an injured worker on the project.¹²⁷ The actual employer remains primarily liable for benefits, but the owner becomes secondarily liable to pay such benefits to employees of the contractor or subcontractor.¹²⁸ Such a statutory employer is entitled to indemnity from the actual employer for all amounts it is required to pay in compensation benefits.¹²⁹ Where the owner or contractor actually procures workers' compensation insurance for the injured worker, that owner or contractor is considered to be an "employer" under the protection of the Exclusive Remedy Rule in Nebraska.¹³⁰

NEVADA. Subrogating in construction settings in Arizona is the most complicated of all states and can be very difficult to accomplish. In any construction setting, any subcontractor, independent contractor, or employee of either, is deemed to the employer of an injured employee of another contractor or subcontractor, if they are performing the type of work for which the principal contractor is licensed.

Section 616A.210 (formerly § 616.085) states in part that all "*subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for ...*" Therefore, the Nevada Industrial Insurance Act (NIIA) confers the exclusive remedy obstacle on any employee of a subcontractor injured as the result of the negligence of another subcontractor's employee working for the same principal contractor because they are considered to be working in "the same employ", and are therefore considered "statutory co-employees".¹³¹ Because all of the employees of any subcontractor for a principal contractor shall be considered statutory employees, the questions arose whether a sub-subcontractor is also a statutory employee under NIIA. Nevada courts held that it was.¹³²

The immunity afforded to all subcontractors and their employees was held by later courts to not be absolute.¹³³ The Court in *Meers* employed the "normal work" test to determine whether the type of work a subcontractor was doing entitled it to NIIA immunity:

*"The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors."*¹³⁴

There was a good deal of confusion in Nevada with regard to which test applied when determining who was "in the same employ" for NIIA immunity purposes,¹³⁵ which provided in part:

(1) A person is not an employer for the purposes of this Chapter if:

¹²⁴ *Webb v. Montana Masonry Constr. Co.*, 761 P.2d 343 (Mont. 1988); *Trankel v. State, Dept. of Military Affairs*, 938 P.2d 614 (Mont. 1997).

¹²⁵ *Trankel, supra*.

¹²⁶ Neb. Rev. Stat. § 48-116 (1986).

¹²⁷ *Rogers v. Hansen*, 317 N.W.2d 905 (Neb. 1982).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Jones v. Rossbach Coal Co.*, 264 N.W. 877 (Neb. 1936).

¹³¹ *Aragonez v. Taylor Steel Co.*, 462 P.2d 754 (Nev. 1969).

¹³² *Stolte, Inc. v. District Court*, 510 P.2d 870 (Nev. 1973) (holding that the overall scheme of NIIA is to provide coverage for all employees working for, or under, the principal contractor).

¹³³ *Meers v. Haughton Elevator*, 701 P.2d 1006 (Nev. 1985).

¹³⁴ *Meers*, 701 P.2d at 1007 (quoting *Bassett Furniture Indus. v. McReynolds*, 224 S.E.2d 323 (Va. 1976)).

¹³⁵ See *Leslie v. J.A. Tiberti Constr.*, 664 P.2d 963 (Nev. 1983), in which a five-factor fact-intensive "control test" was applied in a construction case. However, this test was then applied in some non-construction cases as well. *Sins v. General Tel. Ambers & Electronics*, 815 P.2d 151 (Nev. 1991).

- (a) He enters into contract with another person or business which is an independent enterprise; and
 - (b) He's not in the same trade, business, profession and occupation as the independent enterprise...;
- (3) The provisions of this section do not apply to a principal contractor who is licensed pursuant to Chapter 624 of N.R.S.

In 1991, Nevada enacted in N.R.S. § 616.262.¹³⁶ Section 616.262(1)(b) merely codified the *Meers* test.¹³⁷ A Nevada Court further stated that:

"If a principal contractor is a licensed contractor pursuant to Chapter 624, the principal contractor will be the "statutory employer" of the independent contractors (or subcontractors) and their employees. If a principal contractor is not a licensed contractor, it will be the statutory employer only if it can show that it is in the "same trade" under the Meers test.¹³⁸ From that point on, construction cases and non-construction cases must be differentiated. If the situation is a non-construction case, the Meers test is to be applied to ascertain whether the defendant is immune from suit under NIIA or may be sued on common law principals."¹³⁹

In constructions cases, however, if the defendant is not a principal contractor¹⁴⁰ licensed pursuant to N.R.S. Chapter 624, or is not working pursuant to a construction agreement with such a licensed principal contractor, the *Meers* test must be applied to determine immunity. If the defendant in a third-party action is a principal contractor, however, and is licensed pursuant to N.R.S. § 624 or is a licensed contractor working pursuant to a construction agreement with a licensed principal contractor, and is performing part of the construction work for which it is licensed when the injury occurs, that defendant is immune from further suit as a matter of law.¹⁴¹ Since 1991, after the enactment of § 616.262¹⁴² the classic "control test" is no longer the primary standard used to determine whether one is an employer and immune from suit under NIIA. Rather, the issue of control is only one fact that is to be considered in resolving "normal work" issues under *Meers*.

If the defendant in a construction case is not a principal contractor licensed pursuant to N.R.S. Chapter 24, or is not working pursuant to a construction agreement with such a licensed principal contractor, the *Meers* test must be applied to determine immunity. On the other hand, if the defendant in a construction case is a principal contractor licensed pursuant to N.R.S. Chapter 624, or is a licensed contractor working pursuant to a construction agreement with a licensed principal contractor, and the defendant is performing part of the construction work for which is licensed when the injury occurs, that contractor is immune from further suit as a matter of law. No further factual analysis is necessary.¹⁴³

In summary, see the following flow chart that can be used to determine whether or not an entity is immune from third-party suit under Nevada law, in a construction setting.

¹³⁶ Later re-codified as N.R.S. § 616B.603.

¹³⁷ *Oliver v. Barrick Goldstrike Mines*, 905 P.2d 168 (Nev. 1995) (holding that the "same trade" language used in N.R.S. § 616.262(1)(b) referred to the "normal work" test stated in *Meers*).

¹³⁸ *Oliver*, 905 P.2d at 174-175.

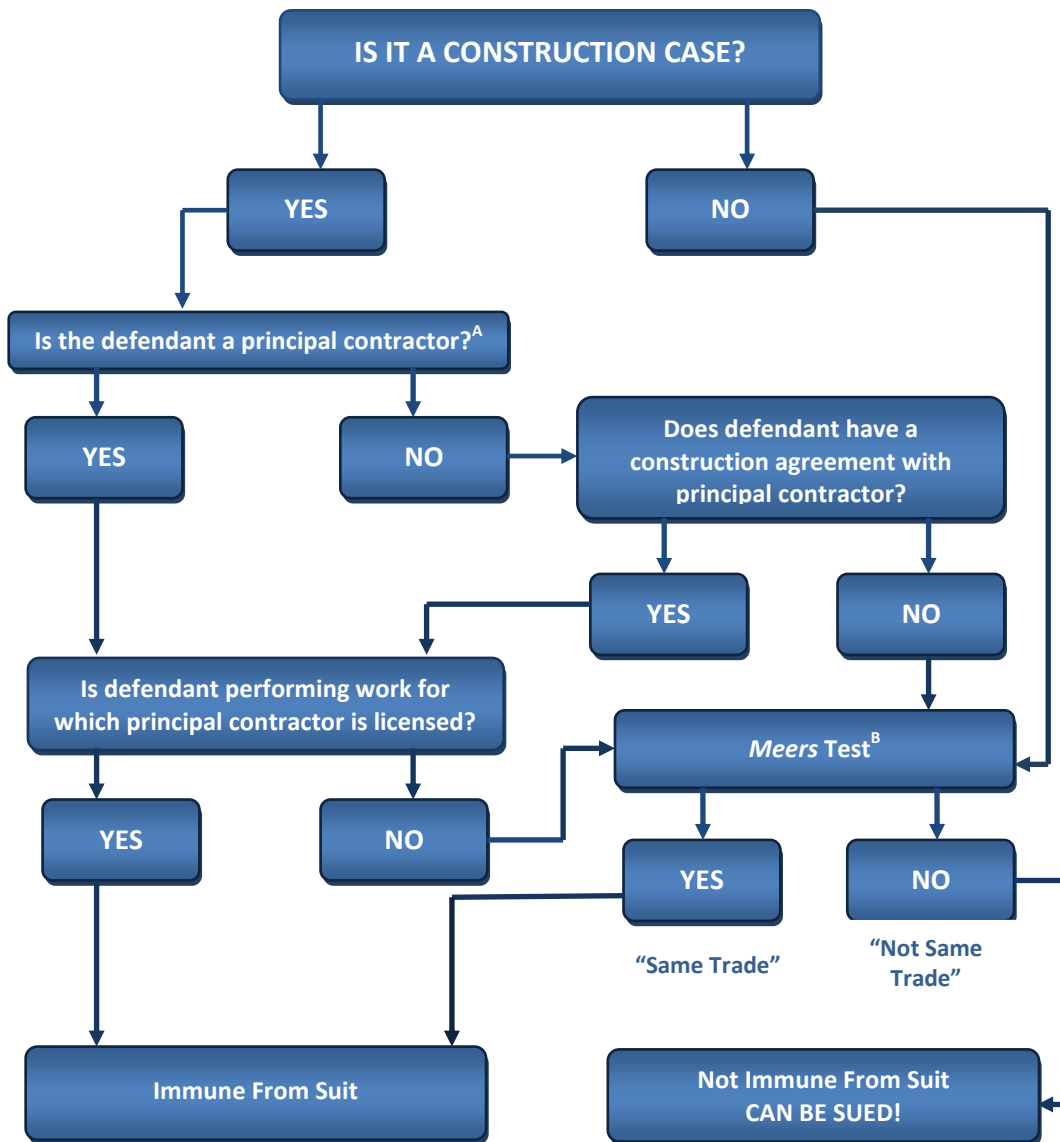
¹³⁹ *Sins v. General Tel. & Electronics*, 815 P.2d 151 (Nev. 1991) (janitor working at GTE manufacturing plant killed by chemical toxins, the issue was whether janitor was a statutory employee of GTE); *Meers v. Haughton Elevator*, supra; *Quick v. Freeman Decorating Co.*, 2003 WL187106 (9th Cir. Nev. 2003) (employee of firm engaged in assembly and disassembly of convention booths brought state-law negligence suit against independent contractor hired by his employer to transport and store equipment during convention).

¹⁴⁰ N.R.S. § 616.115 (re-codified as N.R.S. § 616A.285) (defines "principal contractor" as a person who: (1) coordinates all the work on an entire project; (2) contracts to complete an entire project; (3) contracts for services of any subcontractor or independent contractor; or (4) is responsible for payment to any contracted subcontractors or independent contractors).

¹⁴¹ *Tucker v. Action Equip. & Scaffold Co.*, 951 P.2d 1027 (Nev. 1997) (holding that for immunity purposes, the term "principal contractor" encompasses subcontractors, sub-subcontractors and independent contractors).

¹⁴² Re-codified as § 616B.603.

¹⁴³ *Harris v. Rio Hotel & Casino, Inc.*, supra. (holding where land owners who are not themselves contractors, but who hire licensed general contractors to construct improvements are sued as third parties, and are automatically considered to be statutory employers and it is not necessary to conduct *Meers* test).



^A See N.R.S. § 616B.603 – Includes Subcontractors and Independent Contractors. N.R.S. 616A.28 (Tucker).

^B See N.R.S. § 616B.603 – Fact Specific Approach Normal Work Test “In The Same Employ?” “Same Trade” N.R.S. § 616B.603.

However, Nevada wasn't quite finished making it difficult for workers' compensation carriers to subrogate in construction settings. Every Nevada employer within the provision of Chapter 616A-616D or 617 of N.R.S., must provide and secure workers' compensation for any personal injuries by accidents sustained by an employee which occurs and arises out of and in the course of employment.¹⁴⁶ For purposes of this requirement, a contractor or subcontractor is deemed to have provided and secured compensation for their employees as required by § 616B.612(1) *to the extent that* those employees are covered by a consolidated insurance program.¹⁴⁷ A Consolidated Insurance Program (CIP) is commonly known as "wrap-around insurance". A Owner-Controlled Insurance Program (OCIP) means that the project owner, or general contractor buys one policy to cover the entire project. All subcontractors are usually enrolled in the project. If the owner purchases the program, as in this case, it is known as OCIP. With an OCIP, everyone working at the project sight is covered under one master liability insurance policy. When the project is bid, each contractor subtracts out its lined item for liability insurance and the owner receives a portion of the cost of the OCIP premium back in the form of lower construction costs. OCIPs typically provide coverage through substantial completion of construction plus a period of years thereafter, typically 10 years. The benefits to the owner are significant because they guarantee they will have coverage and force the limits they selected for the applicable statute, and they can be comfortable that any contractor setting foot on the site is covered.

NEW HAMPSHIRE. An owner or subcontractor who subcontracts all or any part of a contract is liable for workers' compensation benefits to the employees of subcontractors.¹⁴⁸ Although case law is sparse on this issue, it can be argued that the owner or contractor responsible for benefits to the employee of a subcontractor can claim immunity under the Exclusive Remedy Rule in New Hampshire.

NEW JERSEY. Under the New Jersey Compensation Act, a general contractor is liable for payment of compensation benefits to employees of a subcontractor only in the event that the subcontractor has failed to secure workers' compensation insurance.¹⁴⁹ If the general contractor becomes liable for compensation benefits to the employee of a subcontractor, he is granted a right of reimbursement from the derelict subcontractor. But where the subcontractor takes out compensation insurance, the general contractor may be treated as a third party and is not granted immunity from a third-party action filed by the employee of the subcontractor.¹⁵⁰

NEW MEXICO. In a construction setting, New Mexico law requires that if an employer procures any work to be done wholly or in part for him by a contractor other than an independent contractor, and the work to be done is a part or process in the trade or business or undertaking of such employer, then such employer shall be liable to pay all compensation benefits to employees of such subcontractor, just as if the work was done without the use of the subcontractor.¹⁵¹ A general contractor who pays benefits pursuant to § 52-1-22 may take advantage of the Exclusive Remedy Rule if sued by an employee of the subcontractor, provided that it shows that the subcontractor is not an independent contractor and that "the work so procured to be done as a part or process in the trade or business or undertaking of the general contractor."¹⁵² A subcontractor is not an independent contractor when the principal contractor has the "right to control" the subcontractor.¹⁵³ Immunity only applies when the contractor is liable to pay benefits to employees of subcontractors.¹⁵⁴ They are not entitled to immunity simply because they contractually assure insurance coverage to employees of their subcontractors.¹⁵⁵

NEW YORK. In the context of construction litigation, New York law requires a contractor who subcontracts all or parts of a contract to be liable and pay workers' compensation benefits to any employee and subcontractor who

¹⁴⁶ N.R.S. § 616B.612(1).

¹⁴⁷ N.R.S. § 616B.612(2) (Emphasis added).

¹⁴⁸ N.H. Rev. Stat. Ann. § 281-A:18 (1989).

¹⁴⁹ *Wilson v. Faull*, 141 A.2d 768 (N.J. 1958).

¹⁵⁰ *Id.*

¹⁵¹ N.M.S.A. § 52-1-22 (1965) (the work procured shall not be construed to be "casual employment").

¹⁵² *Chavez v. Sundt Corp.*, 920 P.2d 1032 (N.M. 1996).

¹⁵³ *Harger v. Structural Services, Inc.*, 916 P.2d 1324 (N.M. 1996).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; N.M.S.A. § 52-1-6.

is injured on the job.¹⁵⁶ Nonetheless, New York has held that an employee of a subcontractor may pursue a third-party action against the contractor, even if the contractor is responsible for paying workers' compensation benefits under § 56.¹⁵⁷ The courts have rationalized that a situation where a worker receives compensation benefits from the same party with whom he has a common law third-party action is not of his making, and it was within the power of the contractor to require that the plaintiff's direct employer provide compensation for the employee, but he chose not to do so. In addition, New York also concludes that the contractor is a better position than the worker to select a responsible subcontractor and to see to it that the subcontractor secures compensation.

NORTH CAROLINA. North Carolina has legislated that any contractor who sublets any contract for the performance of any work without requiring for such contractor a Certificate of Insurance indicating that he has obtained workers' compensation insurance for the subcontractor's employee, will be liable for workers' compensation benefits to the employees of the subcontractor.¹⁵⁸

NORTH DAKOTA. An owner or general contractor is liable to pay workers' compensation benefits to the employee of a subcontractor, where the subcontractor or independent contractor has failed to provide same.¹⁵⁹ It can then be argued by the owner or general contractor that it is an employer immune from third-party actions under the Exclusive Remedy Rule.¹⁶⁰ It should be noted that any person or company which provides on-the-job or other similar training to a worker's compensation worker as a result of a rehabilitation contract without establishing an employment relationship, is exempt from all civil liability.

OHIO. Workers' compensation subrogation in Ohio is all but nonexistent. A new statute replaced Ohio's old statute which was declared unconstitutional.¹⁶¹ A "third party" is defined under the new statute as "*an individual, private insurer, public or private entity, or public or private program that is or maybe liable to make payments to a person without regard to any statutory duty contained in this chapter ...*"¹⁶² This definition appears somewhat broad, and the issue of whether or not a general contractor may claim the exclusive remedy protection and under what circumstances, is not entirely clear at this time.

OKLAHOMA. Oklahoma law requires that an owner or contractor is liable for workers' compensation benefits to employees of subcontractors, if an employer/employee relationship is found by the Workers' Compensation Court, but not if the owner/general contractor relies on good faith on proof of valid workers' compensation insurance held by the subcontractor.¹⁶³ Such owner or general contractor may claim immunity under the Exclusive Remedy Rule if the owner or general contractor is an "intermediate or principal employer to the immediate employer" of the injured worker.¹⁶⁴ An owner/general contractor is only secondarily liable to employees of its subcontractors or independent contractors if the later failed to secure workers' compensation coverage, but such owners and general contractors are also able to claim the defense of the Exclusive Remedy Rule and may not be sued as a third party.¹⁶⁵ Oklahoma case law appears to indicate that this immunity to third-party actions will exist only where the direct employer has failed to obtain workers' compensation coverage as required by the owner/general contractor.¹⁶⁶ The Majority Rule in this country is that liability for workers' compensation benefits

¹⁵⁶ N.Y. Work Comp. § 56 (2003).

¹⁵⁷ *Utillo v. Emory Housing Corp.*, 190 N.Y.S.2d 502 (N.Y. Sup. 1959).

¹⁵⁸ N.C.G.S.A. § 97-19 (1996); N.C.G.S.A. § 97-19.1 (2003) (same as § 97-19, except that it deals with individuals in interstate or intrastate trucking who operates a truck licensed by a governmental motor vehicle regulatory agency).

¹⁵⁹ N.D.C.C. § 65-01-02(16)(c) (2003).

¹⁶⁰ *Fleck v. Ang Coal Gasification Co.*, 522 N.W.2d 445 (N.D. 1994).

¹⁶¹ R.C. § 4123.931.

¹⁶² R.C. § 4123.93(C).

¹⁶³ 85 Okla. Stat. Ann. § 11 (2003) (effective Nov. 1, 2003).

¹⁶⁴ 85 Okla. Stat. Ann. § 12 (1984).

¹⁶⁵ *Baker v. Hunn Roofing, Inc.*, 399 F. Supp. 628 (D.C. Okla. 1975); *Baldwin v. Big X Drilling Co.*, 322 P.2d 647 (Okla. 1958); *Sumpter v. Lawton Coop. Ass'n*, 384 P.2d 908 (Okla. 1963).

¹⁶⁶ *Harper v. Stroud*, 108 F. Supp. 436 (Okla. 1952); *Fox v. National Carrier*, 709 P.2d 1050 (Okla. 1985); *Mid-Continent Pipe Line Co. v. Wilkerson*, 193 P.2d 586 (Okla. 1948).

only runs up the ladder, not down.¹⁶⁷ Usually, the general contractor receives immunity because the general contractor is the “back-up” provider of workers’ compensation coverage.¹⁶⁸ The opposite, however, is not true. When the positions are reversed, and an employee of the general contractor or the general contractor as subrogee, sues the subcontractor in negligence, the great majority of jurisdictions have held that the subcontractor is a third party amenable to suit. The reason for the difference in result is forthright: the general contractor has a statutory liability to the subcontractor’s employee, actual or potential, while the subcontractor has no comparable statutory liability to the general contractor’s employee. Oklahoma follows the Minority Rule in holding that a general contractor’s employee who is injured by a subcontractor could not sue a subcontractor because he was in the “same employment” as the subcontractors.¹⁶⁹ This Minority Rule is followed by other states, including Virginia.¹⁷⁰

OREGON. An owner or contractor who contracts for performance of labor where such labor is a normal and customary part or process of that entity’s or person’s trade or business, is responsible for providing workers’ compensation coverage to all individuals who perform labor under the contract, unless the subcontractor provides such coverage before labor under the contract commences.¹⁷¹ Such an injured worker would be considered a “subject worker” of the owner or contractor, and the owner or contractor would be protected from the Exclusive Remedy Rule and would not be considered a third person whom the injured worker could sue.¹⁷²

PENNSYLVANIA. Pennsylvania law requires a general contractor to be liable for benefits in a “reserved status” if a subcontractor defaults on his obligation.¹⁷³ In order to be liable for workers’ compensation benefits as a “statutory employer”, five elements must be present:

- (1) *an employer who is under contract with an owner or one in the position of an owner;*
- (2) *premises occupied by or under the control of such employer;*
- (3) *a subcontract made by such employer;*
- (4) *part of the employer’s regular business entrusted to such subcontractor; and*
- (5) *the injured worker is an employee of such subcontractor.*¹⁷⁴

When a third party attempts to defend an action based on the “statutory employer” defense, it has the burden of proving that there is a contract, that its regular business consists of the work which is the subject of the contract, and that it entrusted part of its regular business to the subcontractor/employer of the injured employee.¹⁷⁵ It should be remembered that the statutory employer defense is a legal fiction, based on entirely upon a statute passed in the early part of this century and created to assist the Pennsylvania worker by assuring coverage for that worker under the Workers’ Compensation Act.¹⁷⁶ Although not apparent from the terms of the statute, the language of the statute confers upon the statutory employer immunity from suit. This is because § 303(a) of the Act¹⁷⁷ makes workers’ compensation benefits the exclusive remedy for an injured worker seeking redress from an

¹⁶⁷ 6 Larsen, *Worker’s Compensation Law*, § 111.04[1][e] (2004).

¹⁶⁸ 6 Larsen, *Worker’s Compensation Law*, § 111.04[1][b] (2004).

¹⁶⁹ *Alvis v. Bill Jackson Rig Co., Inc.*, 636 P.2d 910 (Okla. App. 1981).

¹⁷⁰ *Cast v. PPG Industries, Inc.*, 664 F.Supp. 237 (W.D. Va. 1987).

¹⁷¹ O.R.S. § 656.029 (1995).

¹⁷² *Love v. Northwest Exploration Co.*, 678 P.2d 754 (Or. App. 1984); *see Liberty Northwest Ins. Corp. v. Sparks*, 14 P.3d 624 (Or. App. 2000) (word “provide” in the statute means “supply” workers’ compensation coverage rather than simply “certified” the existence of such coverage).

¹⁷³ 77 P.S. § 462 (also known as § 302(b) of the Pennsylvania Workers’ Compensation Act); *Fonner v. Shandon, Inc.*, 724 A.2d 903 (Pa. 1999); *O’Boyle v. J.C.A. Corp.*, 538 A.2d 915 (Pa. Super. 1988).

¹⁷⁴ *McDonald v. Levinson Steel Co.*, 153 A. 424 (Pa. 1930); *Peck*, *supra*.

¹⁷⁵ *Peck*, *supra*; *Cranshaw Constr., Inc. v. Ghrist*, 434 A.2d 756 (Pa. Super. 1981).

¹⁷⁶ The Act provides that “an employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer’s regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employee.” 77 P.S. § 52 (1939).

¹⁷⁷ 77 P.S. § 481(a) (1939).

actual employer¹⁷⁸ or from a statutory employer.¹⁷⁹ In determining whether a party is a statutory employer, courts should construe the elements of the “McDonald Test” strictly, and find a statutory employer status only when the facts clearly warrant it.¹⁸⁰ Under the Pennsylvania Workers’ Compensation Act, the general contractor is substituted for a subcontractor for compensation purposes and is deemed to enter into an employer-employee relationship with employees of the subcontractor who are working on premises under the general contractor’s control. The general contractor, as such statutory employer, then becomes absolutely liable for payment of compensation benefits to subcontractor’s employees, and in return is granted employer’s immunity from common-law liability for negligence, which immunity continues even in event a subcontractor expressly consents to assume compensation liability. *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (N.J. 1958) (construing Pennsylvania law).

RHODE ISLAND. Still, a general contractor who enters into a contract with a subcontractor for work to be performed in Rhode Island must maintain written documentation evidencing that the subcontractor carries workers’ compensation insurance. If he doesn’t, he will be deemed to be the employer under Rhode Island law.¹⁸¹ The general contractor’s status as “statutory employer” will not prevent a third-party action from being filed against it by the injured worker.¹⁸²

SOUTH CAROLINA. In South Carolina, the subcontractor’s employee may look to a prime contractor or owner for workers’ compensation benefits regardless of whether the subcontractor is covered by a worker’s compensation insurance policy.¹⁸³ An employer who contracts with another entity to perform or execute any work which is a part of his trade, business or occupation, whether an owner, prime contractor or subcontractor, is liable for workers’ compensation benefits to any employee of subcontractors beneath it.¹⁸⁴

SOUTH DAKOTA. A principal, intermediate, or subcontractor is liable to pay workers’ compensation benefits to any employee injured while in the employ any one of his subcontractors.¹⁸⁵ In that situation, however, the principal contractor was immune from third-party actions under the Exclusive Remedy Rule.¹⁸⁶ In 2005, the South Dakota Supreme Court decided a case of first impression.¹⁸⁷ For the first time, the Court was asked to adopt the Minority Rule that workers’ compensation is the sole remedy of an employee of a general contractor who is injured by the negligence of an employee of a subcontractor. Citing the underlying philosophy of workers’ compensation which the courts of so many states have forgotten - that the inherit trade-off is that the employee is guaranteed compensation if injured on the job but the employer’s liability is limited in exchange for this certainty - the Court adopted the Majority Rule and held that an employee of a general contractor may collect workers’ compensation from the worker’s compensation carrier of his employer, and may also sue a negligent subcontractor or sue a subcontractor for the negligence of an employee of that subcontractor.¹⁸⁸ The Supreme Court rejected the opportunity to adopt the *common employment theory* which holds that the general contractor’s and all subcontractor’s employees on the job, regardless of position, when engaged in a common employment and had the benefits of workers’ compensation, are all immune from being sued.

¹⁷⁸ Also known as the “contractual” or “common law” employer.

¹⁷⁹ *Peck, supra*.

¹⁸⁰ *Id*; *McDonald v. Levinson Steel Co.*, 153 A. 424 (Pa. 1930).

¹⁸¹ R.I.G.L § 29-29-6.1 (2003) (citing § 28-29-6).

¹⁸² *Busdy v. Perimi Corp.*, 290 A.2d 210 (R.I. 1972).

¹⁸³ *Freeman Mech., Inc. v. J.W. Bateson Co., Inc.*, 447 S.E.2d 197 (S.C. 1994).

¹⁸⁴ S.C. St. § 42-1-400 (1962) (liability of owner to subcontractor); S.C. St. § 42-1-410 (1962) (liability of contractor to subcontractor); S.C. St. § 42-1-420 (1962) (liability of subcontractor to another subcontractor); S.C. St. § 42-1-440 (1962) (indemnity of prime contractor).

¹⁸⁵ S.D.C.L. § 62-3-10 (1939).

¹⁸⁶ *Metzger v. J.F. Brunken & Son, Inc.*, 169 N.W.2d 261 (S.D. 1969).

¹⁸⁷ *Thompson v. Mehlhaff*, 698 N.W.2d 512 (S.D. 2005).

¹⁸⁸ *Id*.

TENNESSEE. Tennessee law has expanded the responsibility to provide workers' compensation benefits to principal and intermediate contractors and subcontractors.¹⁸⁹ It says that a principal, or intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer. In analyzing whether a relationship is that of an employer/employee or that of an independent contractor, Tennessee courts have held that the following six factors are to be considered with no one factor being necessarily dispositive:

- (1) right to control the conduct of the work;
- (2) right of termination;
- (3) method of payment;
- (4) whether alleged employee furnishes his own help;
- (5) whether alleged employee furnishes his own tools; and
- (6) whether one is doing "work for another".¹⁹⁰

An independent contractor who is considered to be a statutory employer of an injured employee, may not be sued as third party.¹⁹¹

TEXAS. Texas is still the only state that allows private employers to choose whether or not to maintain workers' compensation insurance. The general rule in Texas is that independent contractors can sue a general contractor in a third-party action. However, the Texas law authorizes a contractor to provide workers' compensation coverage for subcontractors and a subcontractors' employees.¹⁹² An agreement to provide such coverage makes the general contractor the "the employer of the subcontractor and the subcontractor's employees", for purposes of Texas workers' compensation law.¹⁹³ This would make the general contractor immune from a third-party suit brought by an injured employee of a subcontractor.¹⁹⁴ Therefore, independent contractors may, in certain circumstances, be considered "employees" despite not meeting the definition of an "employee" under Texas law.¹⁹⁵ It is true that Texas is moving in the direction of declaring that the Exclusive Remedy Rule applies to more than one employer.¹⁹⁶ However, if any of the employers declined to provide workers' compensation coverage, then they should be subject to third-party liability. If all employers provide coverage, then none should be subject to common law liability.¹⁹⁷ Texas now deems all subcontractors and lower tier subcontractors who are collectively covered by workers' compensation insurance to be immune from suit, and that the "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.¹⁹⁸ Participating employees are "fellow servants", also entitled to workers' compensation benefits and also immune from suit in such situations. If a subcontractor retains his status as an independent contractor by choosing not to participate in workers' compensation coverage, it may be sued as a third party.¹⁹⁹ Texas thereby has extended the statutory

¹⁸⁹ T.C.A. § 50-6-113 (1999).

¹⁹⁰ *Stratton v. United Inter-Mountain Tele. Co.*, 695 S.W.2d 947 (Tenn. 1985) (the Court further held that no single test is necessarily dispositive, the importance of the right to control the conduct of the work is paramount, not whether the right to control was exercised).

¹⁹¹ *Slaughter v. Duck River Elec. Membership Corp.*, 2002 WL 870316 (Tenn. Ct. App. 2002).

¹⁹² V.T.C.A. Labor Code § 406.123(a) (2004).

¹⁹³ V.T.C.A. Labor Code § 406.123(e).

¹⁹⁴ *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex. App. Houston [1st Dist.] 2004).

¹⁹⁵ V.T.C.A. Labor Code § 401.012(b)(2).

¹⁹⁶ *Wingfoot Enter. v. Alvarado*, 111 S.W.3d 134 (Tex. 2003).

¹⁹⁷ *Etie*, *supra*.

¹⁹⁸ *Id.* This situation might typically appear when the general contractor has purchased "wrap-up insurance", also known as Owner Controlled Insurance Program. This means that the project owner, or the general contractor, buys one policy to cover the entire project and all subcontractors are enrolled in the program.

¹⁹⁹ *Id.*

employer/employee relationship to lure tier subcontractors when they are covered by workers' compensation insurance.

Owner-Controlled Insurance Programs (OCIP) have recently entered the subrogation picture in Texas. Also known as Owner-Provided Insurance Programs (OPIP) or "wrap-up insurance", an OCIP allows coverages for multiple insureds to be bundled together, or "wrapped up" in to one consolidated insurance coverage. The "Owner" (or Developer, General Contractor, whatever the case may be), purchases it to cover the entire project including all contractors and subcontractors. The Owner then either requires that the contractor lower his bid by deducting the estimated cost for insurance the contractor would normally pay for a job, or the Owner requires them to itemize their bid to show how much of the bid is estimated as insurance costs, which the Owner then deducts from the bid. Most commonly, OCIP policies focus on General Liability, but they can easily be tailored to cover; Workers' Compensation, Employers' Liability and Excess or Umbrella Liability. In addition, an OCIP can include Builder's Risk, Professional Liability for design professionals, and Environmental Liability insurance coverages.

In 2009, the Texas Supreme Court decided the case of *Entergy Gulf States v. Summers*.²⁰⁰ It stretched the bounds of the Exclusive Remedy Rule by providing extraordinary exclusive remedy protection to a property owner (Entergy) who provided workers' compensation for an on-site independent contractor (IMC) through an OCIP. Entergy contracted with IMC to assist in the performance of certain maintenance, repair and other technical services at its various facilities. The parties agreed that Entergy would provide, at its own cost, workers' compensation insurance for IMC's employees through an owner provided insurance program, or OCIP, in exchange for IMC's lower contract price, complied with its obligation under the agreement by purchasing workers' compensation insurance covering IMC's employees. John Summers, an IMC employee, was injured while working at Entergy's Sabine Station plant. He applied for, and received, benefits under the workers' compensation policy purchased by Entergy. He then sued Entergy for negligence. Entergy moved for and was granted summary judgment on the grounds that it was a statutory employer immune from common-law tort suits. The Supreme Court ultimately held that property owners who purchase OCIP insurance on their projects may benefit from the exclusive remedy protection usually reserved only for employers, rendering them immune from suit by employees of an independent contractor who has collected workers' compensation benefits under the program.

UTAH. Any employer or general contractor who procures any work to be done by a subcontractor over whose work the employer retains supervision or control, is liable for workers' compensation benefits to employees of subcontractors, provided that the work is a part or process in the trade or business of the original employer.²⁰¹ Despite this, the injured worker, although precluded from suing his direct or "common law" employer due to the Exclusive Remedy Rule, may sue the statutory employer in addition to recovering workers' compensation benefits which such statutory employer provides.²⁰² While it is clear that an employee may have two employers for purposes of the Workers' Compensation Act, it appears that the Exclusive Remedy Rule will apply even if the statutory employer does not actually provide the workers' compensation benefits - it merely is obligated to if the worker made a claim against it.²⁰³

VERMONT. An owner or general contractor is contingently liable to employees of subcontractors for workers' compensation benefits.²⁰⁴ Nonetheless, the owner or contractor can still be sued as a third party by an employee of the subcontractor.²⁰⁵

VIRGINIA. In Virginia, when an "owner" contracts with a subcontractor to perform work, the "owner" is liable for compensation benefits to employees of the subcontractor.²⁰⁶ Likewise, a "contractor" is also responsible for compensation benefits to any subcontractors down the chain, provided that the work undertaken or contracted

²⁰⁰ *Entergy Gulf States v. Summers*, 282 S.W.3d 433 (Tex. 2009).

²⁰¹ U.C.A. § 34A-2-103 (2001).

²⁰² *Tate v. Marathon Steel Co.*, 777 P.2d 428 (Utah 1989).

²⁰³ *Gherzi v. Salazar*, 883 P.2d 1352 (Utah 1994).

²⁰⁴ Vt. Stat. Ann. Tit. 21, § 601(3) (1999).

²⁰⁵ *Ryan v. New Bedford Cordage Co.*, 421 F. Supp. 794 (D.C. Vt. 1976).

²⁰⁶ Va. St. § 65.2-302(A) (1999).

for is not part of the trade, business or occupation of the “contractor”.²⁰⁷ Any such “statutory employer” has a right of indemnity over any party who would have been liable to pay compensation to the worker.²⁰⁸ Each party responsible for compensation benefits pursuant to this law becomes a “statutory employer”, and may not be sued as third parties via the Exclusive Remedy Rule.²⁰⁹ In addition, where the defendant in a suit brought by an injured employee of a general contractor was a subcontractor engaged in an essential part of the work which the general contractor had to do, such that the defendant was no stranger to the work to which the plaintiff’s employer was engaged, the defendant is not considered a third party who could be sued in a third-party action.²¹⁰

Generally, an employee of one subcontractor cannot sue an employee of another subcontractor because they are considered statutory co-employees.²¹¹ However, another subcontractor is an “other party” and a tort action is not barred against it, when the subcontractor is merely delivering concrete to a job site and it is not considered “work which is a part of the trade, business or occupation” of the general contractor.²¹² The status of being a “statutory employer” is governed by § 65.2-302, which reads as follows:

§ 65.2-302. Statutory Employer.

(A) When any person (referred to in this section as “owner”) undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as “subcontractor”) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

(B) When any person (referred to in this section as “contractor”) contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as “subcontractor”) for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

(C) When the subcontractor in turn contracts with still another person (also referred to as “subcontractor”) for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

(D)(1) Liability for compensation pursuant to this section may not be imposed against any person who, at the time of an injury sustained by a worker engaged in the maintenance or repair of real property managed by such person, and for which injury compensation is sought: (a) Was engaged in the business of property management on behalf of the owners of such property and was acting merely as an agent of the owner; (b) Did not engage in and had no employees engaged in the same trade, business or occupation as the worker seeking compensation; and (c) Did not seek or obtain from such property’s owners, or from any other property owners for whom such person rendered property management services, profit from the services performed by individuals engaged in the same trade, business or occupation as the worker seeking compensation.

²⁰⁷ Va. St. § 65.2-302(B) (1999).

²⁰⁸ Va. St. § 65.2-304.

²⁰⁹ *Jones v. Commw. of Va.*, 591 S.E.2d 72 (Va. 2004); Va. St. § 65.2-303.

²¹⁰ *Whalen v. Dean Steel Erection Co.*, 327 S.E.2d 102 (Va. 1985), *appeal dismissed*, 106 S.Ct. 33 (1985); *Clean Sweep Prof'l Parking v. Talley*, 591 S.E.2d 79 (Va. 2004).

²¹¹ *Pfeifer v. Krauss Constr. Co. of Virginia, Inc.*, 546 S.E.2d 717 (Va. 2001).

²¹² *Hipp v. Sadler Materials Corp.*, 180 S.E.2d 501 (Va. 1971).

(2) For purposes of this subsection, “the business of property management” means the oversight, supervision, and care of real property or improvements to real property, on behalf of such property’s owners.

(3) For purposes of this subsection, “property owners” or “property’s owners” means (i) owners in fee of such property or (ii) persons having legal entitlement to the use or occupation of such property at the time of the injury for which liability is sought to be imposed pursuant to this section.²¹³

WASHINGTON. Although Washington has not specifically set forth its position on this issue, it appears that the State of Washington will declare project owners and general contractors not to be “employers” for purposes of the Exclusive Remedy Rule.²¹⁴

WEST VIRGINIA. Until recently, West Virginia appeared to allow an injured employee of a subcontractor to pursue a third-party action against a general contractor in construction settings.²¹⁵ However, on May 7, 2009, the legislature enacted § 23-2-1(d) dealing with the liability of prime contractors and subcontractors in construction settings.²¹⁶ Section 23-2-1(d) amended the term “employer” to include any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor’s own contract, provided that the subcontractor does not provide goods rather than services. In short, if a subcontractor employer fails to make workers’ compensation benefit payments to its employee, the primary contractor is now responsible for making those payments. The new statute applies only to contracts which last longer than 60 days, and apply only to those contracts entered into or extended on or after January 1, 1994. In addition, a subcontractor itself can become a “primary contractor” if it subcontracts any or all of its responsibilities to another sub-subcontractor. This is a clear departure from previous West Virginia law which did not provide that a prime contractor could be considered a statutory employer. While there is no case law to guide us at this time, it certainly appears that prime contractors, as well as any subcontractors who fit the new definition of “employer” under § 23-2-1(d), are “employers” protected by the Exclusive Remedy Rule under § 23-3-6. It is unclear whether such “statutory employers” will have the benefit of such immunity by virtue of being contingently liable for compensation benefits or only if and when they are actually called on to make benefit payments in lieu of the true employer.

WISCONSIN. Wisconsin law requires that an owner or contractor be responsible for workers’ compensation benefits to the employee of a contractor or subcontractor where the common law employer has failed to provide such coverage.²¹⁷ For more than 75 years, however, Wisconsin has also maintained that an injured employee of such contractor or subcontractor may sue the owner as a third party, even if it was the insurer of workers’ compensation benefits under § 102.06.²¹⁸ If such owner or contractor who becomes the statutory employer under § 102.06 is required to pay workers’ compensation benefits and also becomes a third-party defendant, it is entitled to offset the benefits paid against the amount awarded in the tort action.²¹⁹

WYOMING. Wyoming does not appear to have specific legislation which classifies owners or general contractors as “employers” or otherwise gives them the ability to claim exclusive rule protection in construction settings.²²⁰ However, a Wyoming statute does provide that the owner is the “surety” for payments that are not made by the

²¹³ Va. St. § 65.2-302.

²¹⁴ *Hildahl v. Bringolf*, 5 P.3d 38 (Wash. App. 2000).

²¹⁵ *Goodwin v. Hale*, 482 S.E.2d 172 (W. Va. 1996).

²¹⁶ W. Va. Code § 23-2-1(d) (2009).

²¹⁷ Wis. Stat. § 102.06 (1999).

²¹⁸ *Cermak v. Milwaukee Air Power Pump Co.*, 211 N.W. 354 (Wis. 1927); *Colbertson v. Kieckhefer Container Co.*, 222 N.W. 249 (Wis. 1928).

²¹⁹ *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835 (Wis. 1988).

²²⁰ *Bence v. Pacific Power and Light Co.*, 631 P.2d 13 (Wyo. 1981).

immediate employer.²²¹ This statute does not provide that the owner is to be deemed the original employer of the worker nor does it in anyway grant the owner or general contractor immunity from a third-party suit.²²²

SUMMARY

As can be seen, the trend toward providing “statutory employer” or “contractor-under” statutes (statutes which provide that the general contractor or owner is liable for compensation to the employee of a subcontractor under him) among the 50 states is not a new one. However, the dangerous trend of also providing blanket immunity to all contractors and subcontractors within a chain of contracts within a construction setting is. Destroying subrogation opportunities in a struggling market is unnecessary to achieving the underlying objective of making sure that workers’ compensation coverage is available for injured workers. It is the author’s speculation that such a trend is simply a misguided effort to limit subrogation lawsuits, which will have an extremely negative impact on the cost of insurance and the cost of doing business in America. Subrogation professionals should be familiar with the various states’ laws as they relate to this issue. Knowing when you can and when you can’t subrogate in a constructive setting can mean the difference between recovering millions of dollars and recovering nothing at all.

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²²¹ Wyo. Stat. § 27-60(B).

²²² *Id.*