Miller v. Northside Danzi Construction Company: Immunity, the Contractor-Under Clause and Alaska's Workers' Compensation Act

In *Miller v. Northside Danzi Construction Co.*,[1] the Alaska Supreme Court held that a general contractor,[2] required by Alaska's Workers' Compensation Act[3] to pay compensation to an uninsured subcontractor's injured employee, is not immune from liability at common law for the same injuries. Interpreting narrowly the Act's "employer" definition,[4] the court prohibited the

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1. 629 P.2d 1389 (Alaska 1981).

2. ALASKA STAT. § 23.30.045(f) (1981) defines "contractor": "[A] person who undertakes by contract performance of certain work for another . . . ." The party this definition identifies is the general contractor in the typical general contractor-subcontractor relationship. Thorsheim v. State, 469 P.2d 383 (Alaska 1970). The Alaska Workers' Compensation Act defines a "subcontractor" as "a person to whom a contractor sublets all or part of his initial undertaking." ALASKA STAT. § 23.30.045(f) (1981). The *Thorsheim* court, attempting to give substance to these skeletal definitions, stated:

> From these definitions it follows that a person who has not incurred a contractual duty cannot properly be deemed a contractor under our statute. Similarly, if a person enters into a contract to perform work, he cannot be construed to be a subcontractor unless the duty which he undertakes is at the same time part of a contractual duty of the party with whom he contracted.

Thorsheim, 469 P.2d at 389.

The general contractor may occupy any position in a hierarchy of contractors, yet remain within the parameters of the Act's definitions. For example, where a building project consists of a general or "prime" contractor, a subcontractor, and a sub-subcontractor, the subcontractor acts as general contractor over the sub-subcontractor. *See Preface: Traditional Relationships On the Building Project*, 23 ST. LOUIS U.L.J. 205, 212 (1979). The existence of this hierarchy has no effect on the liability examined in this casenote provided that, wherever the contractor stands in that hierarchy, he has (1) incurred a contractual duty and (2) has sublet all or part of that work to another. Of course, where such a hierarchy exists, and the injured employee's primary employer is uninsured, courts generally limit compensation liability examined herein to the first insured contractor above the primary employer whose employee is injured. *See In re* Van Bibber's Case, 343 Mass. 433, 448, 179 N.E.2d 253, 257 (1962); 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 49.11, 44.11, at 9-13 (1980). Therefore, for purposes of this casenote, the party incurring the contractual obligation is referred to as the general contractor and the party to whom the general contractor sublets all or part of his work is referred to as the subcontractor. Moreover, two additional assumptions are that a general contractor-subcontractor relationship exists, and that an employer-employee relationship exists between the injured worker and the subcontractor.

3. ALASKA STAT. §§ 23.30.005-.270 (1981 & Supp. 1981).

4. ALASKA STAT. § 23.30.265 (1981) defines "employer" and "employee":

> In this chapter
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> . . . .

general contractor from asserting the exclusive liability defense[5] granted to the primary employer who pays compensation to its injured employee, and thus permitted the injured worker to claim awards under the Act and independently at common law. By allowing the injured employee recovery from the contractor on both statutory no fault[6] and negligence grounds the court upset the balance created by the Act's compensation scheme, created internal inconsistencies in the Act's wording, and forced

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(11) "employee" means an employee employed by an employer as defined in paragraph (12);

(12) "employer" means a state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;

This casenote distinguishes between two types of employers. First, the primary employer is the party with whom the worker's direct beneficial employment relationship exists. The primary employer is generally the wage payer and the person who determines the scope of the worker's duties and the method of their performance. Depending upon the jurisdiction, the determination that a primary employment relationship exists may rely on tests looking to control of the worker or the nature of the work performed. The relationship, however, is only created by a contract for hire, either express or implied. Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 250 (Alaska 1976); Selid Constr. Co. v. Guarantee Ins. Co., 355 P.2d 389 (Alaska 1960). That contract is the touchstone for responsibility to secure compensation insurance. ALASKA STAT. § 23.30.020 (1981). In this casenote the relationship of subcontractor to the injured worker is that of primary employer to employee.

The second type of employer is the "statutory employer." A statutory employer is one who assumes the primary employer's responsibility to secure compensation coverage because of a statutorily imposed duty, not by virtue of an employment relationship or a contract for hire. The Alaska Workers' Compensation Act's contractor-under clause imposes this type of duty. *See infra* notes 14-18 and accompanying text. Liability under that clause results from the general contractor-subcontractor relationship. Thorsheim v. State, 469 P.2d 383, 389 (Alaska 1970). For purposes of this casenote, the general contractor is a statutory employer.

5. The Act provides:

Exclusiveness of Liability. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or his legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

ALASKA STAT. § 23.30.055 (1981).

6. ALASKA STAT. § 23.30.045(b) (1981) provides: "Compensation is payable irrespective of fault as a cause for the injury."

distinction between parties who, for purposes of compensation payments, should be equals.

Douglas Miller was an employee of Sweet & Sour Construction Company, a subcontractor of defendant general contractor, Northside Danzi Construction Company. In the course of his employment, Miller was electrocuted. Discovering that Sweet & Sour had failed to secure workers' compensation coverage, decedent's personal representative sought and received compensation from Danzi pursuant to the Alaska Workers' Compensation Act.[7] Miller's representative later instituted a negligence action,[8] asserting that the compensation award did not preclude his pursuit of Danzi as a third-party tort feasor.[9] The superior court granted Danzi's motion for summary judgment, holding that the general contractor's liability for the compensation award rendered it immune from tort liability under the Act's exclusive liability clause.[10] On appeal, the supreme court reversed, finding Danzi was potentially liable to the employee under both the Workers' Compensation Act and in tort. The court reasoned that the Act's history and language did not manifest a legislative intent to include a "contractor" within the scope of the "employer" definition merely by virtue of its duty to pay compensation benefits to the subcontractor's injured employee. And, since the Act explicitly grants exclusive liability only to "employers,"[11] a general contractor cannot assert the exclusive liability provision in defense of the injured worker's tort claim.[12]

Danzi's liability to pay Miller's compensation benefits arose

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7. ALASKA STAT. § 23.30.045(a) (1981) provides:

> An employer is liable for and shall secure the payment to his employee of the compensation payable under AS 23.30.050, 23.30.095, 23.30.145, and 23.30.180-23.30.215. *If the employer is a subcontractor, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor unless the subcontractor secures the payment.*

(emphasis added). Since Miller's primary employer, Sweet & Sour Construction Company, was also an uninsured subcontractor, the Act required Danzi, the general contractor, to pay Miller's compensation benefits.

8. Plaintiff relied on ALASKA STAT. § 23.30.015(a) (1981) that provides:

> If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, he need not elect whether to receive compensation or to recover from the third person.

9. 629 P.2d at 1390.

10. *Id.*

11. ALASKA STAT. § 23.30.055 (1981). *See supra* note 5.

12. 629 P.2d at 1391.

from the contractor-under clause of Alaska's Workers' Compensation Act.[13] Contractor-under clauses require a general contractor to pay workers' compensation benefits to an uninsured subcontractor's injured employee.[14] Two theories support these provisions. First, the clause provides incentive for the general contractor (the party in the best position to police the relationship) to insist that the subcontractor secure compensation coverage for its employees.[15] Second, the clause prevents evasion of the responsibility to provide compensation by those who would subdivide their regular operations among smaller subcontractors to escape primary employment relationships.[16] The goal is to assure that all eligible workers enjoy coverage under the Act's compensation scheme. The effect is to place the general contractor in the shoes of the workers' primary employer for purposes of providing workers' compensation coverage,[17] even though the employment contract that activates the responsibility to secure that coverage is nonexistent. The general contractor, instead, becomes the worker's "statutory employer." Thus, in *Miller* the injured worker received compensation, though his primary employer was uninsured. Because Danzi conceded its liability to pay Miller's compensation according to the Act, that liability was not in issue.[18] At issue was whether Danzi's status as Miller's statutory employer rendered Danzi immune from additional liability in tort.

Alaska's Workers' Compensation Act provides tort immunity for the employer who secures compensation payments for his injured employee.[19] Because liability for the payments arises

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13. ALASKA STAT. § 23.30.045(a) (1981). *See supra* note 7.

14. Forty-three states have contractor-under statutes. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.31, at 14-47 & n.46 (1976). The contractor-under provisions fall into essentially three categories: those that place the sole or primary obligation to provide compensation coverage on the general contractor, regardless of the subcontractor's ability to provide for it; those that impose joint primary responsibility on both general contractor and subcontractor, but permit the worker to seek compensation from only one; and those that impose a secondary obligation on the general contractor which arises only if the subcontractor fails to provide coverage. *See* 1C *id.* § 49.11, at 9-2 (1980); McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEX. L. REV. 389, 407-08 (1959). Alaska's contractor-under provision is of the third type.

15. Thorsheim v. State, 469 P.2d 383, 386-87 (Alaska 1970) (citing 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 49.11, 9-12 to -16 (1980).

16. *Thorsheim*, 469 P.2d at 387.

17. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.31, at 14-47 (1976).

18. 629 P.2d at 1390.

19. ALASKA STAT. § 23.30.055 (1981). *See supra* note 5.

regardless of fault, immunity from tort liability serves as a counter-balance.[20] On one hand, the employee gains swift and sure compensation for injuries suffered in the course of employment irrespective of fault; on the other, the employer receives immunity from further damage liability at law regardless of whether his negligence caused the injury.[21] A third party, not subject to the no fault liability, has no tort immunity even though the worker previously recovered compensation under the Act.[22] By restricting the exclusive liability provision to primary employers, the *Miller* court held that a statutory employer, also subjected to the Act's absolute liability, can nonetheless be sued independently in tort.[23] The holding allows the injured worker to pursue the general contractor as both an employer and a third-party, a result, the court reasoned, consistent with the Act's history.

Alaska's first state legislature revised the workers' compensation laws in 1959.[24] The pre-1959 Act contained no contractor-under clause, placing the general contractor in the same position as a third party under the Act.[25] The prior act included the employer's insurance carrier within the definition of "employer,"

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20. Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 413 (1969); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932); State v. Purdy, 601 P.2d 258, 259 (Alaska 1979). Aside from its offsetting benefits—the employee's certainty of compensation and the employer's freedom from the hazards of litigation—workers' compensation laws are frequently justified on an additional ground: they provide a simple and inexpensive remedy usually free from the litigation process. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 435 (Alaska 1979); A. MILLUS & W. GENTILE, WORKERS' COMPENSATION LAW AND INSURANCE 23 (1976); *cf.* H.R. REP. No. 1441, 92d Cong., 2d Sess. 8, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698 (substantial increase in litigation following court's application of Longshoremen's and Harbor Workers' Compensation Act's exclusive liability provision was one cause of 1972 amendments to that act). No fault liability is one way of providing a remedy free from the litigation process.

21. State v. Purdy, 601 P.2d 258, 259 (Alaska 1979).

22. ALASKA STAT. § 23.30.015 (1981 & Supp. 1981) sets out the scheme for third-party liability. Under that scheme the injured employee need not elect to accept compensation from his employer or pursue a third-party action. If the employee accepts compensation, however, he must institute action against the third party within one year. If he fails to bring an action, the Act automatically assigns the cause to the compensation paying employer. Where the employee's third-party action is successful, the employer retains the right to set-off (reimbursement) to the extent of the compensation the employee received. Litigation expenses and other costs are also subject to the set-off. *Id.* § 23.30.015(g).

23. 629 P.2d at 1390-91.

24. For a discussion of the full scope of the 1959 amendments, see generally Miller v. Northside Danzi Constr. Co., 629 P.2d 1389 (Alaska 1981), and Gordon v. Burgess Constr. Co., 425 P.2d 602 (Alaska 1967).

25. *Miller*, 629 P.2d at 1390.

rendering the carrier immune to the worker's tort claims.[26] Most significantly, however, it stated the limitation on the employer's liability in terms of the employee's exclusive remedies.[27] By stating the immunity in this way, the pre-statehood Act protected the employer from tort actions by the compensated employee. Because the Act also permitted the employee to pursue a third-party action, where the third party and the employer were joint tort feasors, the third party could potentially recover the amount of his liability from the employer via an indemnification action. The 1959 amendments changed each of these elements in the Act.

The legislature patterned the new Act after the Federal Longshoremen's and Harbor Worker's Compensation Act.[28] The revisions set out the immunities in terms of the employer's exclusive liabilities, rather than the employee's remedies. A subsequent revision also brought the injured worker's co-employee within the immunity.[29] Moreover, the legislature removed the employer's insurance carrier from the "employer" classification.[30] Finally, the legislature enacted the contractor-under clause, imposing contractor liability when the subcontractor fails to provide the required compensation coverage.[31] The revisions also expanded the employer's immunity by prohibiting employee's tort claims and third-party indemnity actions.[32] By expanding the immunity to the worker's employer and fellow

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26. *Id.*

27. *Id.*

28. 33 U.S.C. §§ 901-950 (1976 & Supp. III 1979). In Gordon v. Burgess Constr. Co., 425 P.2d 602, 603-04 (Alaska 1967), the court stated: "[The legislature] repealed the [pre-1959] Workmen's Compensation Act in its entirety and enacted a new Workmen's Compensation Act patterned after the Federal Longshoremen's and Harbor Workers' Compensation Act." Wright v. Action Vending Co., 544 P.2d 82, 84 (Alaska 1975). *Accord* Thorsheim v. State, 469 P.2d 383 (Alaska 1970) (contractor-under statute taken from Federal Longshoreman's and Harbor Workers' Compensation Act (FLHWCA)); Fischback & Moore of Alaska, Inc. v. Lynn, 453 P.2d 478 (Alaska 1969) (persuasive authority found from federal court decisions interpreting similar modification-of-awards statute in FLHWCA).

29. The current exclusive liability provision, ALASKA STAT. § 23.30.055 (1981), continues to reflect these revisions.

30. The Act now subjects the employer's compensation insurance carrier to statutory penalties for failure to make compensation payments. *Id.* § 23.30.155(e),(f) (Supp. 1981). The penalties provided are not, however, exclusive. Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974), *overruled on other grounds,* Cooper v. Argonaut Ins. Cos., 556 P.2d 525 (Alaska 1976).

31. ALASKA STAT. § 23.30.045 (1981).

32. *See* State v. Wien Air Alaska, Inc., 619 P.2d 719 (Alaska 1980); Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979).

employees and removing the insurance carrier from the "employer" status, the legislature altered the immunity coverage to include only claims arising out of the common employment.[33] The revised Act does not specifically define the position of the general contractor, as statutory employer, regarding the immunity.

The *Miller* court looked primarily to the nature of the Act's revisions to determine the scope of the immunity clause.[34] The court reasoned that because the legislature, at the time of the revisions, considered both the "employer" definition and the exclusive liability clause without specifically including the general contractor in either, the omission evidenced the legislature's intent to exclude it from both.[35] The court read the statute as including only the primary employer within the "employer" definition. Since the immunity provision covered only the "employer" and the injured worker's fellow employees, the court prohibited the general contractor from asserting the immunity in defense of the worker's independent action in tort.

By construing the Act only in light of the legislative revisions the court ignored its previously recognized policy of looking to the Act's purpose and policy for guidance when interpreting the Act's terms.[36] Moreover, the court failed to interpret the

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33. Professor Larson somewhat halfheartedly recognizes the consistency of the fellow employee immunity rule set out in many compensation acts. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.20 (1976). The justification, he states, is based on a compromise of rights. Since the employee has given up his right to common law claims, he should receive freedom from such claims where he is at fault. *Id.* § 72.20, at 14-39. The theory, however, does not rest comfortably with the vertical hierarchy where immunity follows liability, such that those in a collateral position not required to provide compensation coverage are not in the same position as those, such as employers, who are so required. *Id.* § 72.33, at 14-81. *See generally Id.* §§ 72.20-.34 (discussing immunity and the "common employment" concept). Granting immunity without concurrent liability would not further one of compensation act's ultimate goals: to provide a safe workplace. Immunity without liability would only encourage recklessness.

34. 629 P.2d at 1391. The court stated: "In light of the history of the Alaska Workers' Compensation Act, we see no manifest intent to include general contractors such as Danzi within the scope of the exclusive liability provision of [ALASKA STAT. § 23.30.055 (1981)]." *Id.*

35. 629 P.2d at 1391.

36. In Searfus v. Northern Gas Co., 472 P.2d 966 (Alaska 1970), the court properly exercised its judicial responsibility to interpret the Act in light of the purpose and policy underlying it. The court, faced with construing the "employee" definition, stated: "Alaska's present compensation act treats some persons as 'employees' who are not servants and excludes some servants from the category of employee." *Id.* at 968. After considering the social philosophy responsible for the Act, the court determined that the traditional common law definition of "servant" was too narrow to accord with the ration-

Act's separate provisions *in pari materia* with its total compensation scheme. The result—permitting the injured worker to institute actions against the contractor both under the Act and in tort—upsets the balances the Act strikes between the employee's interests and the employer's liability. Considering these factors, the soundness of the *Miller* decision is questionable.

First, the court's decision contradicts the Act's underlying policy. The Act's keystone is the balance struck between the employer and the injured worker:[37] the employee exchanges his right to actions at law for the guarantee of certain compensation by his employer regardless of fault.[38] Because the liability to pay compensation is absolute, irrespective of fault, courts perceive the exclusive liability provision as a method of assuring that the burdens, imposed to carry out the Act's social goals,[39] do not fall

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ale of compensation acts. The court instead broadened the scope of that classification and adopted the "relative nature of the work" test for determining employee status. *Id.* at 969. The court, recognizing the limits of its holding and the need for continual judicial shaping of the terms of the Act, stated further: "Designation of the precise boundaries of, and the relevant factors involved in, the 'nature of the work test' must, absent legislative definition, await further development through judicial decision." *Id.* at 969-70. *See also* Thorsheim v. State, 469 P.2d 383 (Alaska 1970) (court looked to purpose of Act to determine definition of "contractor" and "subcontractor").

37. *See supra* notes 20-23 and accompanying text.

38. The liability that the employer is freed from includes statutory as well as common law liability. *See, e.g.*, Wright v. Action Vending Co., 544 P.2d 82 (Alaska 1975) (Act bars claim by spouse for loss of consortium); Haman v. Allied Concrete Prods., Inc., 495 P.2d 531 (Alaska 1972) (Act bars claim under Defective Machinery Act [ALASKA STAT. §§ 23.25.010-.040 (1981 & Supp. 1981)]). *But cf.* Elliott v. Brown, 569 P.2d 1323 (Alaska 1977) (intentional torts outside purview of Act).

39. *See supra* note 20 and accompanying text. Broadly speaking, courts uphold the constitutionality of workers' compensation legislation as a valid exercise of a state's police powers to protect society against accidental loss and to spread the cost of that loss over society as a whole. *See* Cudahy Co. v. Parramore, 263 U.S. 418, 422-23 (1923); Mountain Timber Co. v. Washington, 243 U.S. 219, 239 (1916).

Though beyond the scope of this casenote, it is important to note the possibility that courts may find the immunity provision to be not only a major element, but a critical element in the constitutional validity of the compensation act. In New York Cent. R.R. v. White, 243 U.S. 188 (1917), the Supreme Court stated:

> Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

Id. at 205. In an earlier decision the Court had stated:

> While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed [by the compensation act] . . . yet it is evident that the employer's exemption from liability . . . is

on only one class of individuals. Consequently, courts generally deny relief where a claim seeks to override the statutory immunity, and tip the balance to favor one side in the Act's application.[40]

Second, the *Miller* holding applies the employer definition inconsistently. The Act provides the employer with the right to set off, out of a third-party award, any compensation it paid to the injured employee.[41] The right, however, like the exclusive liability provision, is in the "employer" as defined by the Act.

> an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers.

Mountain Timber, 243 U.S. at 234. *Accord* Madera Sugar Pine Co. v. Industrial Accident Comm'n, 262 U.S. 499, 502 (1923); Middleton v. Texas Power & Light Co., 249 U.S. 152, 163 (1919). *See also* Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 437-38 (Alaska 1979); Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (quoting State v. Wylie, 516 P.2d 142, 145 (Alaska 1973)). If the balance struck by the Act's provisions for absolute and exclusive liability is essential to the validity of the Act, then the *Miller* court's decision denying the compensation paying general contractor the benefit of the immunity is not only unsound, but impermissible.

40. *See, e.g.*, State v. Purdy, 601 P.2d 258 (Alaska 1979) (exclusive liability provision bars action for separate tort under "dual capacity" doctrine); Wright v. Action Vending Co., 544 P.2d 82 (Alaska 1975) (exclusive liability provision bars action by wife of injured employee for loss of consortium); Gordon v. Burgess Constr. Co., 425 P.2d 602 (Alaska 1967) (exclusive liability provision precludes recovery under Defective Machinery Act [ALASKA STAT. §§ 23.25.010-.040 (1981 & Supp. 1981)]). *But cf.* Reed v. The Yaka, 373 U.S. 410 (1963) (where injured worker's employer is also shipowner, worker is not barred from seeking damages under seaworthiness doctrine in addition to compensation under FLHWCA); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (shipowner who is assessed damages under seaworthiness doctrine's absolute liability rule is not barred from seeking indemnification from concurrently negligent stevedore under FLHWCA); Manson-Osberg Co. v. State, 552 P.2d 654 (Alaska 1976) (subcontractor may waive exclusive liability defense by express contractual agreement to indemnify general contractor). In *Reed* and *Ryan*, the Supreme Court was compelled to invade the FLHWCA's exclusive liability provision because of the inequity resulting from the shipowners' absolute liability under the seaworthiness doctrine. The majority in *Ryan* stressed the fact that "the [FLHWCA] prescribes no quid pro quo for a shipowner that is compelled to pay a judgment against it" by virtue of its absolute liability. *Ryan*, 330 U.S. at 129. Before 1972, courts uniformly limited both *Reed* and *Ryan* to cases arising within the context of the seaworthiness doctrine. *See* Haman v. Allied Concrete Prods., Inc., 495 P.2d 531 (Alaska 1972); Proudfoot, *"The Tar Baby": Maritime Personal-Injury Indemnity Actions*, 20 STAN. L. REV. 423 (1968). In 1972, Congress responded to the criticism of these decisions and to the inequity giving rise to them by altering the FLHWCA's exclusive liability provision. *See* H.R. REP. No. 1441, 92d Cong., 2d Sess. 8, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698. Under the new provisions the vessel is held to a negligence standard and the shipowner is barred from seeking indemnification from a concurrently negligent employer. 33 U.S.C. § 905(b) (1976). For another expression of support for exclusive liability provisions, see NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 52 (1972).

41. ALASKA STAT. § 23.30.015(g) (1981).

Nonetheless, the court stated that, though the general contractor is not an employer for purposes of the immunity provision, it is an employer for purposes of the set-off clause.[42] Because the court's justification for excluding the general contractor from the "employer" definition is broadly based on finding legislative intent to exclude him from that general category, any reasoning that denies "employer" status for purposes of the immunity provision yet finds that status for purposes of set-off is inconsistent and questionable.[43] Applying the court's limited definition consistently, however, results in the employee's collecting and keeping a double recovery.[44]

The *Miller* court used the contractor-under clause as a "big stick" to penalize the inattentive contractor for failing to require his subcontractor to carry compensation coverage. The court's decision implies that granting tort immunity to the general contractor would not only cause fewer subcontractors to insure,[45] but would also reward general contractors for failure to police their subcontractors by freeing them from tort liability on account of the injury.[46] Such a result would be contrary to the policy of the contractor-under clause.[47]

This reasoning, however, fails in two respects. First, the the-

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42. The court stated: "If the general contractor is found liable for damages at common law, he may also set-off from that award the amount of compensation benefits he has previously paid to the subcontractor's employee." 629 P.2d at 1391.

43. Other provisions of the Act rely on the employer status. For example, the Act imposes sanctions on the employer who fails to insure, and keep insured, employees covered by the Act. ALASKA STAT. § 23.30.075(b) (1981). Because the Act only provides for the noncomplying employer, under the *Miller* holding no sanctions exist against the noncomplying general contractor.

44. All jurisdictions allowing third-party actions unanimously prohibit double recovery. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.21, at 14-4 (1976). However unlikely it is that the Alaska court will allow that result, the court will only have equity at the price of additional confusion. *See generally* 2A *id.* § 71.

45. This argument has particular appeal where the relative financial positions of the general contractor and subcontractor are considered. If the subcontractor is undercapitalized or financially weak (i.e., judgment proof) the general contractor could easily discourage the subcontractor from providing compensation coverage. Since the subcontractor has no incentive to carry compensation coverage, the general contractor could assume the responsibility for coverage and thereby render himself immune from common law actions. Faced with pursuing a judgment proof employer or accepting compensation, the employee would likely accept the swift and sure compensation. As discussed below, however, the argument relies on questionable assumptions. *See infra* notes 49-52 and accompanying text.

46. *See* Laffoon v. Bell & Zoller Coal Co., 65 Ill.2d 437, 359 N.E.2d 125 (1976); 2A A. LARSON, WORKMEN'S COMPENSATION LAW 146-47 (Supp. 1981).

47. *See* 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 49.11, at 9-12 (1980).

ory erroneously assumes that the general contractor is in a better financial or legal position with compensation liability and the immunity provision than without them. The assumption ignores the balancing interests underlying compensation acts in general, for where an act burdens the employer with liability regardless of fault, it benefits the employee with swift and certain compensation. And where an act benefits the employer with immunity, it burdens the employee with the abrogation of potentially greater recovery in an independent action.[48] If the balance is tipped, imposing liability too onerous on the employer, or providing insignificant compensation to the employee, the validity of the Act becomes doubtful.[49] Thus, the balance struck neither favors nor substantially benefits either side.

Second, it is unreasonable to assume that a contractor will find incentive to elect absolute liability in all cases simply to protect himself from the remote possibility of a personal injury award.[50] The liability the general contractor assumes under the Act when employing an uninsured subcontractor arises in all work related injury cases, not merely those in which the contractor negligently caused the worker's injury.[51] The general contractor effectively assumes liability for the negligence of all individuals, including the employee, though relieving himself from liability only for his own negligence. While that choice may benefit the contractor in the context of a single case, over time the benefits and burdens balance.[52] Therefore, the court's implicit

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48. Generally, a contractor is not liable for either the negligence of the subcontractor or injury to the subcontractor's employee and does not assume a duty of care to the latter. Everette v. Alyeska Pipeline Serv. Co., 614 P.2d 1341 (Alaska 1980); Morris v. City of Soldotna, 553 P.2d 474 (Alaska 1976). The major exception to this rule is where the contractor retains control over the work. The contractor is liable for the harmful consequences following from negligent exercise of that responsibility. *Everette*, 614 P.2d at 1347.

49. *See* Arizona Employers' Liability Cases, 250 U.S. 400, 452-53 (1918) (McReynolds, J., dissenting); New York Cent. R.R. v. White, 243 U.S. 188, 205 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1916).

50. In Laffoon v. Bell & Zoller Coal Co., 65 Ill.2d 437, 359 N.E.2d 125 (1976), a strong dissent stated:

> Under the above-mentioned rule, however, the contractor does not exchange immunity from a single personal injury action for responsibility for a single compensation claim. Rather, the general contractor is required to accept absolute compensation liability for all injuries of all employees of the uninsured subcontractor in order to gain this immunity.

Id. at 449, 359 N.E.2d at 131 (Ryan, J., dissenting).

51. ALASKA STAT. § 23.30.045(b) (1981).

52. In a recent study, the National Commission on State Workmen's Compensation

reasoning—that allowing immunity concurrent with applying the contractor-under clause would undermine the effectiveness of the clause—is unfounded.

With the *Miller* ruling, the Alaska court aligns itself against the majority of jurisdictions whose workers' compensation acts contain contractor-under clauses.[53] The majority of states hold the general contractor immune when he is, under the existing facts, subject to liability for compensation.[54] The majority rule recognizes that the contractor assuming primary responsibility for paying compensation stands in the employer's shoes for purposes of the Act.[55] The minority trend within the majority rule is towards broadening the existing grant of immunity to cover contractors that are merely potentially liable for compensation.[56] Courts support this latter rule on the practical theory that, in the end, the contractor bears the cost of compensation and should realize the benefit of the expenditure.[57]

Perry v. Baltimore Contractors, Inc.[58] provides an approach

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Laws indicated that failing to impose a workers' compensation scheme and instead subjecting the employer to negligence actions is an inferior alternative for *employees*. The Commission recognized that, though negligence suits may be more attractive than they were 50 years ago, most studies indicate that a substantial proportion of work related injuries consist of the intermingled responsibility of both employer and employee. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 119-20 (1972). *See also supra* note 49.

53. 629 P.2d at 1390.

54. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.31 (1976).

55. *See, e.g.*, Clements v. Georgia Power Co., 148 Ga. App. 745, 252 S.E.2d 635 (1979); Fonesca v. Pacific Constr. Co., 54 Hawaii 578, 513 P.2d 156 (1973); Mosely v. Jones, 224 Miss. 725, 80 So. 2d 819 (1955); Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980). In accordance with these decisions, where the general contractor's liability to provide compensation never attaches, e.g. when the subcontractor provides compensation coverage for his employees, courts do not apply the acts' exclusive liability provision. *See* Kozoidek v. Gearbulk, Ltd., 471 F. Supp. 401 (D. Md. 1979); Thomas v. George Hyman Constr. Co., 173 F. Supp. 381 (D.D.C. 1959); Great W. Sugar Co. v. Erbes, 148 Colo. 566, 367 P.2d 329 (1961); DiNicola v. George Hyman Constr. Co., 407 A.2d 670 (D.C. 1979).

56. Courts following the minority trend apply the immunity provision to tort actions against the general contractor regardless of whether the general contractor has actually paid the injured worker's compensation or even provided insurance coverage. *See, e.g.*, Downing v. Dondlinger & Sons Constr. Co., 294 F. Supp. 104 (W.D. Mo. 1968); Lopez-Correa v. Marine Nav. Co., 289 F. Supp. 993 (D.P.R. 1968); Hart v. National Airlines, Inc., 217 So. 2d 900 (Fla. Dist. Ct. App.), *cert. denied*, 225 So. 2d 533 (1969); Thibodaux v. Sun Oil Co., 40 So. 2d 761 (La. Ct. App. 1949), *aff'd*, 218 La. 453, 49 So. 2d 852 (1950).

57. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.31 at 14-55 to -56 (1976).

58. 202 So. 2d 694 (La. Ct. App.), *cert. denied*, 251 La. 405, 204 So. 2d 579 (1967), *cert. denied*, 390 U.S. 1028 (1968). *Cf.* Probst v. Southern Stevedoring Co., 379 F.2d 763 (5th Cir. 1967). In *Probst* the court of appeals specifically declined to address the issue of whether the general contractor can assert the FLHWCA's exclusive liability provision

consistent with both the purpose of the Compensation Act and the purpose of the contractor-under provision. In *Perry* the Louisiana Court of Appeals applied the Federal Longshoremen's and Harbor Workers' Compensation Act (FLHWCA) to an injured worker of an uninsured subcontractor working in navigable waters.[59] The negligent general contractor asserted that the employee's exclusive remedy was to seek compensation from the general contractor under the FLHWCA.[60] The court rejected the argument, finding that immunity arose only after the general contractor became liable for the compensation required by the FLHWCA.[61] The court interpreted the FLHWCA[62] to allow the injured worker to pursue one of two courses: either seek workers' compensation benefits from his uninsured employer; or seek compensation from the general contractor under the Act's contractor-under provision and pursue the employer independently in tort. If the injured worker elected to seek workers' compensation from his employer, he then would have the option to pursue a third-party claim against the general contractor.[63] The immunity, in other words, follows the liability to pay workers' compensation benefits.

The *Perry* rule provides the most workable option under Alaska's Compensation Act as well. Under the *Perry* rule,

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where he has in fact paid compensation benefits to the uninsured subcontractor's injured employee. 379 F.2d at 767. The *Probst* court, however, did identify the options available to the injured worker where his uninsured employer negligently caused his injuries. Consistent with *Perry*, the *Probst* court said the employee had three available options: assert a tort claim against the employer, demand compensation payment from the employer, or demand compensation payment from the general contractor. *Id.* at 766-67.

59. Plaintiff was the employee of a subcontractor that provided underwater construction services. The subcontractor was engaged by the contractor/defendant to assist in constructing an underwater tunnel across a navigable river. While under water, plaintiff was scooped up by defendant's crane and dropped back into the water. Plaintiff's employer had secured compensation coverage but it did not become effective until two days after the injury. 202 So. 2d at 695-97.

60. *Id.* at 699.

61. *Id.* at 702. In a recent decision the Florida Court of Appeals interpreted the FLHWCA's immunity clause contrary to the *Perry* interpretation. Fiore v. Royal Painting Co., 398 So. 2d 863 (Fla. Dist. Ct. App. 1981). The *Fiore* court found that the design of the FLHWCA is to protect the injured employee, not the general contractor. *Id.* at 865. Therefore, the court held that the general contractor who paid compensation to the subcontractor's injured employee is not immune from subsequent claims against him as a third party. *Id.* Because the reasoning in *Fiore* is substantially the same as that in *Miller*, detailed discussion of the Florida decision is not provided in this casenote. However, the analysis applied to *Miller* is applicable to *Fiore*.

62. 33 U.S.C. § 905(A) (1976).

63. *Id.*

Alaska's Act, like the FLHWCA, could provide two preliminary options to the uninsured subcontractor's employee. First, the employee could elect to pursue the subcontractor, his primary employer, for compensation under the Act.[64] If the employee elects this option, the primary employer would be able to assert the exclusive liability defense as a bar to any subsequent actions by the employee on account of the same injuries. If the general contractor was a party to causing the injury, the injured worker would be free to pursue him as a third-party tort feasor.[65] Since the contractor was not required to pay compensation under the Act, he could not claim immunity under the exclusive liability provision.[66]

Second, the employee could elect to claim compensation from the general contractor as statutory employer according to the Act's contractor-under provision. Assuming the worker's primary employer was negligent, the injured worker would claim damages from him in an independent tort action. The general contractor, made liable as the statutory employer for the worker's compensation benefits, could avail itself of the Act's exclusive liability provision. The primary employer, having failed to secure the compensation and not being subjected to liability for it, relinquishes the exclusive liability defense and potentially faces judgment in tort.[67]

The *Perry* rule has many advantages. First, the rule puts all parties on an equal footing. It subjects neither the subcontractor nor the general contractor to both compensation payment under the Act and independent liability for damages. Moreover, under

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64. ALASKA STAT. § 23.30.055 (1981). *See supra* note 7.

65. ALASKA STAT. § 23.30.015 (1981 & Supp. 1981).

66. The rule in *Perry* is consistent with those decisions interpreting the general contractor's ability to assert the FLHWCA's exclusive liability provision in defense of a claim by an injured worker of an *insured* subcontractor. Here, the general contractor faces only a potential for compensation liability. Courts addressing the issue hold that, since the subcontractor met the statutory obligation to secure compensation coverage for his employees, the general contractor's mere potential liability under the FLHWCA is not a sufficient burden to justify conferring the full benefit of the Act's immunity provision. As with the *Perry* rule, where liability does not in fact exist, the immunity provision cannot be asserted. The injured employee is, therefore, free to assert a third party action against the general contractor. Kozoidek v. Gearbulk, Ltd., 471 F. Supp. 401 (D. Md. 1979); Thomas v. George Hyman Constr. Co., 173 F. Supp. 381 (D.D.C. 1959); Liberty Mut. Ins. Co. v. Goode Constr. Co., 97 F. Supp. 316 (E.D. Va. 1951); DiNicola v. George Hyman Constr. Co., 407 A.2d 670 (D.C. 1979). These applications of the exclusive liability provision are also consistent with the majority of courts interpreting state workers' compensation acts. *See supra* notes 54-58 and accompanying text.

67. ALASKA STAT. § 23.30.055 (1981).

the *Perry* rule the injured worker can choose the path most likely to produce fruitful results. The path would normally lead to seeking a tort judgment against the deepest pocket providing the greatest potential for recovery, and seeking worker's compensation benefits from the other party.[68]

Second, the *Perry* rule furthers the Act's underlying policy. Only the party assuming the Act's absolute liability for compensation receives the benefit of the exclusive liability provision. This benefit attaches without eliminating the general contractor's incentive to police the subcontractor to assure that the subcontractor provides compensation coverage. The contractor still faces the possibility of absolute liability for compensation payment irrespective of his own culpability.

Finally, the *Perry* rule accomplishes these results without straining the words of the Act. Under this rule the court must read the Act's exclusive liability provision *in pari materia* with the Act's overall compensation scheme. For immunity purposes, the rule requires finding that the key element in the "employer" definition is the duty to pay worker's compensation benefits, rather than participation in the primary employment relationship. Then, when the general contractor must pay those benefits, the immunity provision attaches to bar further liability.

In *Miller* the Alaska Supreme Court incorrectly refused to read the "employer" definition broadly enough to encompass the compensation paying general contractor, unfairly subjecting the contractor to both statutory and tort liability. The court disregarded its previously acknowledged responsibility to construe the terms of the Act in light of the Act's underlying policy. The court rested its summary conclusion on the questionable finding that the legislature, through the Act's words and history, did not manifest an intent to include the general contractor, liable

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68. Where the injury to the employee results from the negligence of only one party, the injured employee more likely will choose to pursue that party on a tort theory, thus having the potential for providing the largest award. He will pursue the other party to recover the compensation payments. Where both the contractor and the subcontractor are joint tort feasors, the employee most likely will seek the "deep pocket" for the damages claim. Thus, the contractor and subcontractor are in no worse position vis-a-vis each other while the injured employee has the benefit of choice in determining where his remedies lie. The rule, however, breaks down where either the contractor or subcontractor is insolvent or otherwise judgment proof. The injured worker is then faced with the dilemma of accepting the certain but smaller compensation award from the solvent party or pursuing a damage claim against that party, with the potential risk of no recovery. One possible solution is to read the Act as not precluding a claim for compensation following an unsuccessful claim for damages from the solvent party.

according to the contractor-under clause, within the Act's exclusive liability provision. The result is treatment regardless of the equities, and construction of the Act's provisions in a manner that adds confusion. A more equitable approach would allow the "employer" status to follow the obligation to make compensation payments. Under this approach the injured worker is assured the compensation benefits without abrogating his third-party cause of action. At the same time neither the general contractor nor the subcontractor bears the burden of both claims. The result is a proper allocation of the burdens and benefits of the compensation scheme.

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