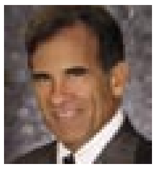
THE LAW

• Philip G. Kircher



Keeping It 'All In The Family'

The West Virginia mine tragedies reminded me of a nasty personal injury case in which I recently served as an outside consultant for a Fortune 1000 company. The company, understandably, wanted a pair of eyes and ears to look after its uninsured interests. (Names have been changed and facts simplified to protect those involved).

As you will see, what was thought to be clever business planning turned out to be financially painful for the company and its insurer.

There was a company, we'll call it ParentCo, with several wholly-owned subsidiary factories. One of them, FactoryCo, included employees who worked the line and handled plant safety inspections and equipment maintenance to ensure compliance with federal safety regulations. ParentCo decided that it could save some tax dollars and maximize financial returns by creating an independent safety and maintenance company separate from FactoryCo, a wholly-owned subsidiary we'll call InspectCo, which could hire FactoryCo's safety, maintenance and repair workers.

FactoryCo could then outsource its safety duties and hire InspectCo to provide the services. InspectCo would also handle safety and maintenance work for all of ParentCo's process factories, charging these plants only enough to cover costs.

One day, a young but experienced crane operator at FactoryCo slipped and fell into a vat of boiling liquid on the factory floor. No one saw how it happened. He died two weeks later.

After the death, Bill Jones' wife and estate sued FactoryCo for recklessness. But they also filed a suit against InspectCo for negligence.

Here's why ParentCo's business structure created some problems.

FactoryCo and ParentCo were insulated from liability because of the workers' compensation bar—an employee generally cannot sue his employer for work-related injuries unless the employer lacks workers' comp insurance or was intentionally negligent. ParentCo had plenty of insurance for its subsidiaries and there was no evidence to suggest deliberate misconduct. However—and this is the rub—InspectCo did not employ Billy Bob and, therefore, could be sued directly for ordinary negligence. Located in a notorious, plaintiff-friendly venue, the case settled for millions on the eve of the trial. In the absence of this strategic corporate tax planning, there would have been no claim, outside the workers' comp exposure.

The case highlights what may be pennywise but pound-foolish corporate decisions. A lifetime of corporate tax savings created by this restructuring was wiped out by a single incident.

For companies engaged in high-risk operations such as coal mining and heavy industrial processes, careful consideration should be given to preserving the workers' comp immunity by remaining old-fashioned—all operations under one roof. Risk manager and corporate management need to communicate with each other about their respective concerns and find solutions satisfactory to all. Here, had FactoryCo exercised sufficient control over InspectCo's employees , it is possible that under the state's "borrowed servant" doctrine those employees would be considered FactoryCo employees for workers' comp purposes, thereby preventing liability claims.

Archie and Edith Bunker opened and closed their weekly TV show "All in the Family," wildly popular in the 1970's, with "Those Were The Days," a nostalgic ditty recounting Glen Miller and Herbert Hoover. I am sure ParentCo and its insurer, who paid the ultimate tab here, share the sentiment of "those were the days," when all operations were under one roof.

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