Opinion No. 50-5319

September 8, 1950

BY: JOE L. MARTINEZ, Attorney General

TO: State Corporation Commission Santa Fe, New Mexico

*{*176}* I am in receipt of your letter requesting an official opinion as to whether it is possible for a foreign bank or trust company, or 'foreign corporation', to purchase obligations insured under the National Housing Act (FHA), to appoint a local agent to service these mortgages and to foreclose upon these mortgages in the event of default without violating our statutes prohibiting 'doing business' in the State by foreign corporations without first qualifying under our laws.

The pertinent statutes are Sections 54-804 and 807, New Mexico Statutes Annotated, which state:

54-804: "Every foreign corporation, except banking, insurance and railroad corporations, before transacting any business in this state, shall file in the office of the state corporation commission a copy of its charter, or certificate of incorporation, certified by the proper authority of the state, territory or country of its creation, and a statement of the amount of its capital stock authorized and the amount actually issued and outstanding, the character of business which it is to transact in this state, and designating its principal office in this state and its agent who shall be a domestic corporation or a natural person of full age actually resident in this state, together with his place of abode, upon which agent process against said corporation may be served and the agency so designated shall continue until the substitution, by writing, of another agent; upon the filing of such copy and statement, the state corporation commission shall issue to such corporation a certificate authorizing it to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and said commission shall keep a record of all such certificates issued."

54-807: "Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this state, without having first obtained authority therefor, as hereinabove provided, shall for each offense forfeit to the state the sum of two hundred dollars ($ 200), to be recovered with costs in an action prosecuted by the attorney-general in the name of the state."

Your request for an opinion raises a difficult question which has not yet been decided by our Supreme Court and which, all of the courts throughout the United States agree, cannot be answered with one general principle but each case must be determined on the facts presented.

At the outset it is well to note *{*177}* that there is a distinction between 'doing business' for the purpose of obtaining legal processes and 'doing business' for the purpose of

obtaining a license. See Liquid Veneer Corporation v. Smuckler, 90 F (2) 196. In the case of Wills vs. National Mineral Co., 55 P.2d 449, at page 452, the Court states:

"A great deal of confusion has been caused by failing to distinguish between cases where the question is the necessity of domesticating before bringing suit, and cases where the question is whether the foreign corporation is amendable to legal process. The standards are not the same, and the quality, character, and quantity of business conducted within the state may be sufficient to subject a foreign corporation to process and yet be insufficient to require it to take out a license. Thompson on Corporations (3d Ed.) vol. 8, p. 845; 21 R.C.L. 1342; 14A C.J. 1372, and cases cited."

Reading further from said case, at page 452, it states as follows:

"As illustrative of the fact that what is 'doing business' for the purpose of acquiring jurisdiction is not necessarily such' doing business' or transacting business' as makes it necessary for the foreign corporation to domesticate before suing a resident, we have this situation before us: Out of ten decisions of this court which are called to our attention, four of them involve the former question and six of them involve the latter question; with one exception, the four cases held the activities of the foreign corporation sufficient for the purpose of process, and the six cases involving necessity of license precedent to maintenance of action analyzed the situation to be not that kind of 'doing business' necessitating the taking out of a license. The cases do not point out a distinction, but the results amply imply it."

An interesting discussion on the reason for the above distinction can be found in Westor Theatres, Inc., et al. v. Warner Bros. Pictures, Inc., 41 F. Supp. 757, which is a case involving treble damages under the Sherman Anti-Trust and Clayton Acts and it was important to determine where the venue was in which suit could be filed. On page 761, the court states as follows:

"Although the phrase 'transacting business' has never been defined, one fundamental principle seems to be recognized. The acts done and which amount to transacting business must constitute some substantial part of the ordinary business of the corporation and must be continuous or at least of some duration. The courts in reaching decisions as to what shall constitute 'ordinary business' and sufficient continuity to bring a corporation within the terms of a statute which imposes restrictions on the transaction of business by foreign corporations, are inclined to a narrow construction because severe penalties are frequently provided for non-compliance with the statutes which impose restrictions, but they have assigned a broad meaning to the term 'ordinary business' and have adopted as narrow standard as to what volume of business transactions shall be necessary to bring it within the term 'doing business' when a question the sufficiency of process is raised. They have been influenced undoubtedly by the hardship which might result from a failure to uphold *{*178}* the jurisdiction, thus forcing a citizen of the state to resort to another sovereign."

In Hutchinson vs. Chase and Gilbert, 45 P.2d 193, Justice L. Hand, in reviewing the cases as to what constitutes 'doing business' came to this conclusion: "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."

A general rule as to what constitutes 'doing business' may be stated as follows: "The acts done and which amount to transacting business must constitute some substantial part of the ordinary business of the corporation and must be continuous or a least of some duration." Weston Theatres, Inc., et al. v. Warner Bros. Pictures, supra. Murray Tool and Supply Co. vs. State, 159 SW 2d 71, 203 Ark. 874. Newell Contracting Co. vs. State Highway Commission, 15 S.2d 700, 195 Miss. 395.

In examining cases in which mortgages have been purchased by a foreign corporation, we find in the case of Continental Assurance Co. vs. Ihler, that the facts showed that Ihler had purchased land from Conant who had previously given a note and a mortgage to Harry S. Cowling, who was in the process of making loans to various persons in Idaho and taking mortgages to secure the payment thereof. It was contended by the Ihlers that the Continental Assur. Co. was engaged in loaning money in Idaho and based it on the thirty odd number of notes acquired by said company and the mortgages to secure the same on Idaho property. The facts showed that Cowling loaned the money and not the Continental Assur. Co. All that the Continental Assur. Co. did was to buy these mortgages. At page 793, the Court said:

"The purchase, beyond the borders of Idaho, by a foreign corporation, of promissory notes, the payment of which is secured by mortgages on lands within this state; the collection of interest accruing on indebtedness evidenced and secured thereby and the commencement and maintainance of suits to collect said indebtedness is not 'doing business' in Idaho within the meaning of the statute above referred to."

It is well to note that the facts in your request for an opinion are similar to the facts in the Continental Assur. Co. vs. Ihler case, 26 P.2d 792, since there was a purchase of notes, collection of interest, and the commencement and maintenance of suits to collect said indebtedness in case of default. In a later Idaho case, John Hancock Mutual Life Ins. Co. vs. Girard, 64 P.(2d) 254, also somewhat similar to the facts in the instant case, the Court distinguished said case from the Continental Assur. Co. case on its facts. On page 256, the Court said:

"If the facts of this case (John Hancock) were similar or parallel to the facts of that case (Continental Assur. Co.), we would not hesitate to hold that there was not 'doing business' in this state in the case at bar."

There are two distinguishing features between the above cited cases and the first is, that in the Hancock case, the foreign corporation did not buy the mortgages from the Security Company until after the foreign corporation approved the negotiated loan, which the Court construed was in effect the Hancock Company loaning the money

through its agent, the Security Company, and was thereby in the business of loaning money in the state of Idaho and not merely buying mortgages.

*{*179}* The second distinguishing feature can be summed up in the following quote in the John Hancock case supra, at page 259:

"While a single transaction such as the purchase of negotiable paper outside of the state (Continental Assurance Co. v. Ihler, 53 Idaho, 612, 26 P.(2d) 792), or the prosecution or defense of a suit to protect lawfully acquired property interests (War Eagle Consol. Min. Co. v. Dickie, 14 Idaho, property in this state, through legal proceedings in the collection of a debt incurred in interstate commerce (Foore v. Simon Piano Co., 18 Idaho, 167, 108 P. 1038; Ann Cas. 1912A, 555; Ann. Cas. 1914A, 706), alone is not doing business in the state; nevertheless, an accumulation of the fruits of such transactions may very well involve or result in the doing of business. Even if it were conceded that this, as an isolated transaction, did not amount to doing business, it seems self-evident that repeated similar transactions, amounting to a $ 267,000 investment in farm lands of the state, which a foreign corporation is and has been leasing, is clearly doing business in the state. People's-Pittsburg Trust Co. V. Diebolt, supra. To exempt such a corporation from a compliance with the foreign corporation laws of the state would be a clear violation of that part of section 10, article 11 of the Constitution, which provides that: "No company or corporation formed under the laws of any other country, state, or territory, shall have or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state. A domestic corporation, conducting an investment business, would have to make regular annual statements, pay corporation taxes, and be subject to all the other regulations provided by state law. Sections 29-601 to 29-603, I.C.A."

The John Hancock case was also distinguished from the Mortgage Bond Co. vs. Stephens, 72 P.(2d) 831. In this case, an Oklahoma case, the question was raised whether the Mortgage Security Co. was doing business in Oklahoma in contravention of the laws of this state? On page 840, the Court states:

"The question of 'doing business' is a controversial question. Of necessity the question must be determined upon the facts in each particular case. Again, we are constrained to adhere to the decisions of this court, rather than to follow the decisions of the courts of other jurisdictions. "First, we desire to comment upon some of the authorities submitted in the briefs filed herein. A strong case in support of defendants' contention is John Hancock Mutual Life Ins. Co. v. Girard (Idaho) 64 P.(2d) 254, 257. This decision tends to support defendants' contention. It is to be observed, however, that in that case the Supreme Court of Idaho had under consideration a constitutional provision more drastic than sections 43 and 44, supra, of the Oklahoma Constitution. In the Hancock Case, supra, the court refers to the fact that the Constitution of Idaho on the question of doing business provides: 'Any business in this state.' That court asserts that this provision in the Idaho Constitution is identical with the provision in the Alabama Constitution *{*180}* to which defendants frequently refer in their briefs. The decisions of the various courts

place considerable emphasis upon the word 'any' contained in the Constitution of a number of the states. Under provisions such as is contained in the Idaho and Alabama Constitutions and statutes, it might be more seriously contended that the facts in the case at bar would come within the constitutional and statutory prohibitions. However, the provision in the Oklahoma Constitution against 'doing business' is not so restrictive."

It will be noted in the Mortgage Bond Co. Case that some of the business activities are similar to those in the instant case. The Court held in the Mortgage Bond Co. Case that the foreign corporation was not 'doing business'.

Also in the case of Proctor vs. Pope, 12 So.2d 724, the plaintiff acquired from a mortgage company some fifty notes of various persons in Louisiana which were secured by mortgages on real estate in Louisiana. Through fore-closure proceedings, the plaintiff became the owner of about 15,000 acres of mortgaged lands. The plaintiff employed an agent who was vested with authority to effect needed repairs or improvements to the cultivated portions of the land, lease, collect and remit rents, negotiate sales, collect interests and principal on the notes, etc. In addition, the plaintiff annually paid taxes on the Louisiana property, had benefit of Louisiana counsel, freely invoked the aid of the Courts, and the above activities extended for a period of ten years. The Court in the above case held that the above activities constituted 'doing business'. On page 727, the Court said:

"In any determination of a case, whether a foreign corporation is 'doing business' in the state, the fact that none of the several acts or transactions, considered separately, constitute 'doing business' is not conclusive. As stated by Mr. Justice Holmes, the Court 'cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be charged as a whole'".

In the case of the United Mercantile Agencies vs. Jackson et al., 173 SW 2d 881, the Court, at page 885, states as follows:

"In the case at bar, nothing in the stipulation of facts is indicatory that the plaintiff corporation had the purpose to continue to engage within this state in the 'buying' of property or in the transaction of any of the other ordinary business for which it was incorporated. It is agreed that plaintiff sent its agents who took lodging at a hotel at Marchfield for several weeks; but these agents, it stipulated, were engaged in 'collecting * * * and compromising' the obligations purchased. The transaction, the buying, was not of the nature which necessitated a continuity of activity for a considerable period of time. It was stipulated that the note 'herein sued upon, along with many, others * * * was struck off and sold to the plaintiff, at a sale or public auction held on the 29th day of October, 1940 -- we infer that the 'buying' was done within the course of that one day. We rule that the buying of the notes and judgments was not a doing or a transacting of business within the meaning of the statute."

After reviewing the above quoted and cited cases as to what *{*181}* constitutes 'doing business', I must use the words of Justice L. Hand, in the Hutchinson Case, supra, that

"it is quite impossible to establish any rule from the decided cases; and we must step from tuft to tuft across the morass."

It is, therefore, my opinion that from the facts that you have set forth in your request for an opinion those facts more closely follow the facts in the Continental Assurance Co. vs. Ihler Case, supra, than the facts in the John Hancock Mutual Life Insurance Co. Case and, under such a situation, would not constitute 'doing business' that would require a license under our law.